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Message of the Chief Commissioner

From the outset, let me congratulate you on behalf of the Ethiopian Human Rights Commission for bringing to reality the *Ethiopian Journal of Human Rights*. It gives me an immense pleasure to congratulate you not simply because the Commission took part in this program but also because the publication is a good beginning that assists the fulfillment of the Commission's mandate. The necessity to establish the Ethiopian Human Rights Commission emanates from the immense sacrifices paid by the people of Ethiopia, in the protracted struggle, to bring about a democratic order and enhance their socio-economic development paving the way for protection of human rights which is cemented by the adoption of the FDRE Constitution. The establishing law of the Commission bestows in it powers and responsibilities necessary to achieve its mandate.

Human rights research is one of the programs undertaken by the Ethiopian Human Rights Commission with a view to achieve its objective of ensuring respect for human rights in Ethiopia. The research mandate of the Commission basically stems from its establishment proclamation. Research and publication is indispensable for the informed action of the Commission to fulfill its mandate, whether it is in the form of legislative auditing or forwarding opinions on matters of human rights. Ensuring the protection of human rights is a task which cannot successfully be achieved single-handedly. Accordingly the Commission partners with institutions having identical vision towards the attainment of full protection and promotion of human rights.

The Commission has been partnering with the Center for Human Rights in many areas including in the promotion of human rights and provision of legal aid. This current partnership resulting in the launching of the Journal which is the first of its kind in Ethiopia is another example of the same. The Ethiopian Journal of Human Rights series is believed to contribute to the promotion of human rights principles and values, initiate debate and further research on issues that are crucial for the advancement of human rights culture. It is believed that the Journal articles incorporated in this particular issue will be useful tools for students, researchers, policy makers and other interested parties and enrich and provide ideas for debate on human rights issues. The

Commission wishes to seize this opportunity to thank the Center for this initiative and making the Journal a reality. The Commission hopes that the Center will strive to work on the quality, continuity and regularity of the Journal. The Commission would like to reiterate that it will continue to work with the Center in this and other endeavors geared towards the promotion and protection of human rights in Ethiopia.

Teruneh Zenna
Ethiopian Human Rights Commission
Chief Commissioner

Editor's Note

As a graduate school of human rights, it is the responsibility of the Center to engage (and encourage others too) in researching the ever-increasing fields of human rights. The Center has already begun discharging its responsibility. With university resources and, where necessary, in collaboration with local and international partners, it has produced several research outputs including student researches. For dissemination of such research outcomes, the Center plans to use various channels, one of which is the Ethiopian Journal of Human Rights (EJHRs), which, the Center hopes will become the standard bearer for publication of its research activities.

The EJHRs is now out with its first issue. The process of launching has taken some time: preparation of editorial rules, securing funds, organizing editorial staff, calling for contributions, reviewing, editing and finalization. Content-wise, the EJHRs is guided by academic freedom suiting higher educational institutions. Its objectives as outlined in editorial rules are advancement of knowledge and dialogue on issues of human rights (as multidisciplinary subject) and promotion of human rights values including understanding, tolerance, and participation. The EJHRs as its principal audience has policy makers, practitioners and academics. Those are the fundamentals which have guided and will guide the present and future publications of the EJHRs.

Other than ensuring compliance with methods in human rights research through peer-reviews and editorial scrutiny, contributors for the EJHRs are allowed to express their opinion in light of freedom of expression. Hence the materials appearing in this issue (as will be for future issues) are substantially as finalized and presented to us by contributors. For any errors in the methods used, assumptions held, findings presented, and so on in the contributions therefore it is the responsibility of contributors. Serious comments and reflections on articles, notes and reviews appearing in the EJHRs including rebuttals are assured of their appearance in subsequent issues of the EJHRs.

I would like to indicate to our audience that the Center's programs such as the MA (Master of Arts in Human Rights) are multidisciplinary. Likewise, the EJHRs, which is among the core programs, is committed to multidisciplinary study of human rights; hence researches and notes from

various disciplines, particularly empirical studies in human rights are welcome in our publication. Hence, on behalf of the Center and editorial team, I would like to extend my invitation to the academic community and practitioners from all fields of study to contribute to the dialogue in human rights through the EJHRs. I would also like to indicate that in collaboration with concerned institutions, future volumes will have briefs and analysis of major activities and developments of human rights by governmental, intergovernmental and other institutions such as law/policy reviews and submissions of human rights reports.

Finally, on behalf of the Center, I would like to thank the Ethiopian Human Rights Commission – with whom we have had various fruitful areas of cooperation – for sponsoring the publication of this and subsequent issues of the EJHRs. My gratitude also goes to the editorial team (including our student associate editors) that made the launching of the EJHRs possible. Special thanks are due to the former Head of the Center, Dr Girmachew Alemu, for his unreserved efforts in initiating the EJHRs and securing funds for the EJHRs in addition to being part of the editorial team.

Wondemagegn Tadesse Goshu
Center for Human Rights

JUSTICIABILITY OF DIRECTIVE PRINCIPLES OF STATE POLICY IN AFRICA: THE EXPERIENCES OF ETHIOPIA AND GHANA

By ABDI JIBRIL ALI[*] and KWADWO APPIAGYEI-ATUA[**]

ABSTRACT

Directive Principles of State Policy were incorporated in some African constitutions in lieu of justiciable economic, social and cultural rights. A growing trend in international and comparative law shows that human rights are indivisible and that economic, social and cultural rights are justiciable. However, the artificial division of constitutional rights between economic, social and cultural rights, and civil and political rights seems to continue until constitutional reforms or revisions take place. Until such a time, constitutional interpretation provides a provisional solution. Like some other constitutions, Ethiopian and Ghanaian constitutions have chapters on Directive Principles of State Policy containing duties that flow from recognising economic, social and cultural rights. It is not clear from the text of both constitutions whether these principles can be enforced in courts. The Supreme Court of Ghana has held that they are justiciable although the Court has not gone further to determine some outstanding issues such as jurisdiction, standing and remedy for their violations. The Ethiopian House of Federation so far has not come up with similar temporary solution. Therefore, Ethiopia as well as other African countries can draw lessons from the Ghanaian experience to abolish the artificial distinction between constitutional rights and increase horizontal accountability of government branches.

I. INTRODUCTION

Directive Principles of State Policy (DPSPs or directive principles) entrench a State's economic, social and cultural objectives in a constitution. They are a collection of constitutional provisions that require a state to carry out certain obligations in fulfilment of its mandate for the citizenry. Some of these

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obligations can be understood as conferring rights on individuals in the same way as guaranteeing human rights of individuals implies obligations of states. In most cases, DPSPs contain Economic, Social and Cultural (ESC) rights framed in terms of state duties instead of individual entitlements together with other principles and objectives that are not directly related to ESC rights.
At international level, arguments against justiciability of ESC rights underlie the division of human rights into civil and political rights, and ESC rights.[1] The result was two separate treaties: International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] At domestic level, the arguments resulted in two separate chapters within some national constitutions: one on justiciable bill of rights containing civil and political rights, and the other on non-justiciable DPSPs containing state duties corollary to ESC rights. Among countries of the world, only a small number of them have included justiciable ESC rights in their constitutions because of 'slow progress of these rights at the UN and their negligible education.'[3]

The arguments seem to have lost their vigour now. The African Charter on Human and Peoples' Rights (African Charter) emphasised that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality.'[4] A decade later, the Vienna Declaration and Programme of Action announced that all human rights are 'universal, indivisible and interdependent and inter-related.'[5] Therefore, placing ESC rights beyond the reach of the courts is arbitrary and incompatible

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1 See M. Ssenyonjo *Economic, Social and Cultural Rights in International Law* Hart Publishing (2009), p. 12. The "real driving force behind the distinction was based not on legal or empirical rationality but rather on Cold War politics."

2 *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, United Nations, Treaty Series, vol. 999, p. 171; *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 196616 December 1966, United Nations, Treaty Series, vol. 993, p. 3,

3 A. G. Ravlich, *Freedom from Our Social Prisons: The Rise of Economic, Social, and Cultural Rights*, Lexington Books (2008), p.

4 African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nirobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), preamble.

5 Vienna Declaration and Programme of Action, adopted by the 171 countries participating in the World Conference on Human Rights, held in Vienna from 14 June until 25 June 1993, para 5.

with the principle that human rights are indivisible and interdependent.[6] It is 'a bit hypocritical to deny justiciability and at the same time insist on indivisibility.'[7]

Moreover, developments both at international and domestic level decreased relevance of arguments against justiciability of ESC rights. The Committee on Economic Social and Cultural Rights considered ESC rights 'to possess at least some significant justiciable dimensions' under the ICESCR.[8] The Optional Protocol to the ICESCR has been adopted to provide for international quasi-judicial procedures to enforce ESC rights.[9] Since civil and political rights and ESC rights treated without distinction under the African Charter, ESC rights are justiciable.[10] Under European Convention on Human Rights,[11] it has been argued that ESC rights are justiciable.[12] Domestic courts have also been enforcing ESC rights.[13] Even in countries such as US and Canada that provide the bedrock of traditional libertarian constitutions, economic and social rights have been protected on the basis of 'fair process norms and equality provisions.'[14]

In Africa, some constitutions do not contain justiciable ESC rights while others contain State obligations corresponding to ESC rights in DPSP. In some constitutions, DPSP are non-justiciable while their justiciability is not clear in other constitutions. Constitutional reforms that consider developments in international and comparative law would solve the problem. Until such

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6 Committee on Economic Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. DOC. E/C.12/1998/24 (1998), para 10.

7 I. E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights,* Martinus Nijhoff Publishers (2009), p. 324.

8 General Comment No. 9, *supra* note 5.

9 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* adopted by the General Assembly, 5 March 2009, A/RES/63/117.

10 F. Viljoen, *International Human Rights Law in Africa,* Oxford University Press (2007), p. 237.

11 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

12 Koch, *supra* note 7.

13 See M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press (2008).

14 E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act,* Hart Publishing (2007), p. 36.

reforms take place, interpretation of constitutional texts may provide an interim solution. Although judicial enforcement is not the sole mechanism of implementing ESC rights, justiciability of DPSPs (together with ESC rights implied therein) can be used as a strategy to hold branches of government accountable.[15]

The Ethiopian Constitution (1994) and the Ghanaian Constitution (1992) contain directive principles although they do not contain clear provisions on their justiciability.[16] Both constitutions also contain few justiciable ESC rights. However, it has been argued, both in Ghana and Ethiopia, that directive principles are not justiciable.[17] In Ghana, the Supreme Court, using its power to interpret the Constitution[18] has clearly held that DPSPs are justiciable for the purpose of enforcing ESC rights although the Court has not gone further to provide guiding rules on jurisdiction, standing and remedies for violation of these rights.[19] In Ethiopia, the House of Federation and its advisory body, the Council of Constitutional Inquiry, has not come up yet with clear rules on justiciability or otherwise of directive principles.[20]

The present article represents a comparative analysis of justiciability of directive principles in Ghana and Ethiopia with the intention to contribute to mutual learning. It explores the experience of the Ghanaian Supreme Court

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15 See Viljoen, *supra* note 10, p. 570.

16 Directive principles are called National Policy Principles and Objectives. See Chapter 10, the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 1st Year No. 1 Addis Ababa, 21 August, 1995.

17 See S.Y. Bimpong-Buta, *The Role of the Supreme Court in the Development of Constitutional Law of Ghana,* Advanced Legal Publications (2007), pp. 364-365; Sisay Alemahu 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', 22 (2) *Journal of Ethiopian Law* (2008): 135-154, at 141-142.

18 The Constitution of the Republic of Ghana (1992) confers exclusive original jurisdiction to enforce and interpret the Constitution on the Supreme Court under article 130(1)(a).

19 *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority* [2008] 4 Ghana Monthly Judgments 171.

20 The power to interpret the Ethiopian Constitution is vested in the House of Federation, the upper chamber of the Ethiopian Parliament. It receives expert opinions from the Council of Constitutional Inquiry which considers constitutional disputes in the first instance. The Council of Constitutional Inquiry is chaired by the President of the Federal Supreme Court and consists of six legal experts to be appointed by the President of the Republic, three members of the House of Federation and the President and Vice-President of the Federal Supreme Court. Ordinary courts do not have the power to interpret the Constitution.

and its relevance to Ethiopia and other African states. It contains seven sections beside this introduction. The second section traces the origin of directive principles in Irish Constitution and discusses its expansion into India and other countries. As a reminder, the third section revisits arguments for and against justiciability of ESC rights which are the same with arguments for and against justiciability of DPSP although the latter contain principles and objectives that are not directly related to ESC rights. To provide an overview of DPSP, the fourth and fifth sections restate their contents under both constitutions with few attempts to relate them to ESC rights. The sixth section deals with justiciability of directive principles in both countries. It presents the experience of the Supreme Court of Ghana. The last section provides conclusions.

II. ORIGIN OF DIRECTIVE PRINCIPLES OF STATE POLICY

Directive principles trace their origins to the Constitution of Ireland of 1937. Under the title 'Directive Principles of Social Policy,' article 45 of the Irish Constitution sets forth principles of social policy.[21] Article 45(1) requires the State to 'strive to promote the welfare of the whole people.' Article 45(2) requires the State to 'direct its policy towards securing certain things.' On the top of recognizing the rights of citizens to adequate livelihood, it requires the State to pursue a policy that enables citizens to make 'reasonable provision for their domestic needs.' Furthermore, it provides direction regarding the ownership, control and distribution of material resources of the State and requires the State to regulate the operation of free competition to prevent 'the concentration of the ownership or control of essential commodities in a few individuals.' The aim of the policy that 'pertains to the control of credit' is 'the welfare of the people as a whole.' Article 45(3) requires the State to encourage 'private initiatives in industry and commerce.' It also requires the State to ensure that private enterprises achieve efficiency in production and avoid public exploitation. Under article 45(4) the State is required to safeguard 'the economic interest of the weaker sections of the community' and ensure 'the strength and health of workers.'

The Irish Constitution puts the directive principles beyond the reach of the courts. Article 45 provides that the 'principles of social policy set forth in this Article are intended for the general guidance' of Irish National Parliament. The article further provides that the 'application of those principles in the making

[21] See article 45 of Constitution of Ireland, enacted by the People on 1 July 1937, available at <http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf> (accessed 24 October 2011).

of laws shall be the care of the [National Parliament] exclusively, and shall not be cognisable by any Court.' In one of the debates preceding the adoption of the Irish Constitution, it was stated that the directive principles were meant to serve 'as a constant headline' by which the people judge their progress and the progress of their representatives in the legislature towards ideals, aims and objectives set forth in the directive principles.[22]

The directive principles in the 1937 Constitution of Ireland highly influenced the Indian Constitution whose framers followed the model of the former.[23] Irish nationalist movement has had ties with Indian nationalists since the nineteenth century.[24] As the framers of Indian Constitution were part of that nationalist movement, they took 'the concept of a constitutionally entrenched chapter on directive principles for state policy from the Irish Constitution.'[25] Directive principles were compared with *Raja Dharma* which spelt out the duties of the kings in ancient India towards the weaker sections of the society such us the infirm, the dying, the affected and the helpless and described as a 'little more than a reformulation of ancient *Raja Dharma*.'[26] Given the similarities between *Raja Dharma* and directive principles, it must have been easy for the members of Indian Constitutional Assembly to embrace the idea of directive principles.

Like its Irish counterpart, article 37 of the Indian Constitution provides that the provisions on the directive principles are not enforceable by any court. The directive principles were designed to play fundamental role in the governance of the Indian State. Article 37 requires the State to apply directive principles in making laws.[27] They were enshrined in the Constitution to serve as 'an instruction to all government agencies as to what socio-economic state had to be created.'[28] They were meant to provide 'a code of conduct according

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[22] Dáil debates *Dáil Éireann* Vol 67, 11 May 1937, available at <http://www.oireachtas-debates.gov.ie/D/0067/D.0067.193705110029.html> (accessed on 24 February 2012).

[23] B.K. Sharma, *Introduction to the Constitution of India,* Prentice Hall India Pvt. Limited (2007), p. 125.

[24] G.J. Jacobsohn, *Constitutional Identity,* Harvard University Press (2010), p. 146.

[25] B. de Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience', 8 *South African Journal on Human Rights* (1992):29-49, at 30.

[26] *Ibid*, at 30, citing K. J. Reddy 'Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution' 1980 *Journal of the Indian Law Institute* 403.

[27] The term 'state' as defined under article 36 and article 12 does not include the judiciary.

[28] De Villiers, *supra* note 25, at 32.

to which the governance of the country should take place.'[29] They impose 'an obligation on the State to act positively by providing finance, administration, manpower, and technological support to address the socio-economic needs of the population.'[30]

Given the function of any Constitution 'to entrench certain norms beyond the reach of change through the ordinary legislative process,'[31] the framers of the Indian Constitution insulated the directive principles from transient electoral majority. It was observed that the 'political, social and economic ideology expressed in the directive principles imparts continuity to the nation's policy and makes it comparatively free from the vicissitudes of the ideology of political parties that might come into force from time to time.[32]

In the Irish Constitution, the directive principles were limited to few issues when compared to the Constitution of India. It was said that the Irish people did not derive much benefit from their directive principles although they are the source of the idea.[33] On the other hand, Indians expanded and customised the directive principles to the context of their society. The jurisprudence surrounding the directive principles has developed further than it has in Ireland.[34] The directive principles are more detailed and cover wider ranges of issues. They are generally categorised under five principles, namely; socialist principles, Gandhian principles, general welfare principles, International principles, and nature conservation principles.'[35]

Although the idea of directive principles was originated in Ireland, it was expanded and developed in India. In turn, the Constitution of India has influenced many constitutions in Africa as well as elsewhere in the world.[36]

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29 *Ibid*.

30 De Villiers, *supra* note 25, at 39.

31 J. Usman 'Non-justiciable Directive Principles: A Constitutional Design Defect', 15 *Michigan State Journal of International* Law (2007): 643-696, at 645.

32 De Villiers, *supra* note 25, at 32, quoting .A.S. Chaundhri, *Constitutional rights and Limitations,* Wadhwa (1955), p. 223.

33 Jacobsohn, *supra* note 24, p. 147, citing B. de Villiers 'social and economic rights' in D. Van Wyk, J. Dugard, B. De Villiers & D. Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995), p. 618.

34 *Ibid*.

35 De Villiers, *supra* note 25, at 35-36, citing Chhabra *The Indian Constitutional System* (1984), pp. 44-45. See also Usman, *supra* note 31, at 43-44. Usman refers to three categories instead of five: socialistic principles, liberal intellectualist principles, and Gandhian principles.

36 Examples from Africa include the following: the Nigerian Constitution (Chapter 2), the 1997 Eritrean Constitution (chapter 2), the 1995 Constitution of Ethiopia (chapter 10), the 1992 Constitution of Ghana (Chapter 6), the 1993 Constitution of

III. JUSTICIABILITY OF DPSP AND ESC RIGHTS

DPSPs are identified set of goals that are entrenched in a constitution to be achieved by a State. They are the embodiment of a national consensus on certain critical issues which have to be addressed by the State.[37] In other words, they represent a list of instructions on the governance of the country. They place positive obligations on a State to achieve objectives identified in a constitution.[38] Although their content differs across constitutions, directive principles usually contain objectives on economic, social and cultural domains that contain duties assumed by states through recognising ESC rights.

ESC rights on the other hand refer to a group of rights recognised in international human rights instruments and national constitutions. ESC rights, unlike civil and political rights, do not set individuals against the State but make them allies to achieve the rights in question. They require the State to act and give the individual the material support needed to enjoy them effectively.[39] They are said to have been espoused and championed by the Socialist states led by the then Soviet Union. Examples of economic rights include 'the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights;' examples of social rights include the right 'to health, shelter, food, social care, and the right to education;' and examples of cultural rights include 'the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production.'[40]

Lesotho (Chapter 3), the 1984 Constitution of Liberia (chapter 2), the 1994 Constitution of Malawi (Section 13 & 14), the 2004 Constitution of Mozambique (article 11), the 1990 Constitution of Namibia (chapter 11), the 1991 Constitution of Sierra Leon (Chapter 2), the 1998 Constitution of Sudan (part 1), the 2005 Constitution of Swaziland (chapter 5), the 1997 Constitution of the United Republic of Tanzania (part 2), the 1997 Constitution of The Gambia (chapter 20), the 1995 Constitution of Uganda, the 1996 Constitution of Zambia (Articles 110-112). Spain and Portugal could be good examples from Europe.

37 De Villiers, *supra* note 25, at 29.

38 De Villiers, *supra* note 25, at 31.

39 Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, para 8.

40 See M. Sepúlveda et al *Human Rights: Reference Handbook,* University for Peace (2004), p. 9. The International Covenant on Economic, Social and Cultural Rights treats ESC rights in the same document as one group. It does not make distinction within the groups.

Justiciability on its part refers to the 'quality or state of being appropriate or suitable for review by a court.'[41] The justiciability of directive principles and ESC rights refers to their capability to be enforced by a judicial or quasi-judicial organ. It presupposes 'the existence of procedures to contest and redress violations of rights.[42] Since incorporation of directive principles in constitutional texts is based on the assumption that ESC rights are non-justiciable, arguments against justiciability of ESC rights and directive principles are almost the same. For example, it has been argued that fundamental rights, mainly civil and political rights, can be 'enforced immediately without any serious economic or administrative action by the state,' while directive principles require 'extensive state action and resources and could not be implemented as easily as fundamental rights;' they only impose 'economic, administrative, technological, and manpower obligations' on a State.[43]

There are objections to the inclusion of ESC rights in justiciable bills of rights.[44] Such objections influenced some States to leave out ESC rights from their constitutions and led others to put them in the directive principles.[45] States that do not provide justiciable catalogue of ESC rights usually provide non-justiciable directive principles in their constitutions.[46] Examples of such African states include Lesotho, Nigeria, Namibia, Zambia and Sierra Leone.[47] The constitutions of these States contain first generation (civil and political) rights in their catalogues of fundamental rights and freedoms which can be directly enforced by the courts by means of sanctions.'[48] On the other hand, these constitutions expressly prohibit judicial enforcement of directive principles.[49] Rather, the enforcement of directive principles is left to future

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41 *Black's Law Dictionary* (2000), p. 698.

42 Sisay Alemahu Yeshanew 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia' 8 (2) *African Human Rights Law Journal* (2008): 273-293, at 273.

43 De Villiers, *supra* note 25, at 32-33, discussing directive principles of state policy in India.

44 Sisay, *supra* note 17, at 137.

45 *Ibid,* at 138.

46 Viljoen, *supra* note 10, p. 576.

47 *Ibid*.

48 De Villiers, *supra* note 25, at 40. See the 1993 Constitution of Lesotho (article 22), the 1990 Constitution of Namibia (article 25), the 1999 Constitution of Nigeria (sec 46), and the 1991 Constitution of Sierra Leon (article 28).

49 See Constitution of Lesotho (article 25), Namibian Constitution (article 101), Nigerian Constitution (sec 6(6)(c)), and Constitution of Sierra Leon (article 14).

elections and public opinion which would exert political and moral pressure on the government.[50]

Several arguments against justiciable directive principles emphasise non-justiciability of ESC rights.[51] One of these arguments is centred on the type of obligations implied in ESC rights and the resources required to carry out the obligations. It has been argued that ESC rights impose positive obligations 'requiring the state to expend resources to provide a remedy' while civil and political rights require the state to refrain from unjust interference in the enjoyment of the latter rights.[52] This argument is dismissed on the ground that some ESC rights require the State to refrain from interfering in their enjoyment and civil and political rights impose positive obligations on the State.[53]

The holding of the African Commission on Human and Peoples' Rights that all rights generate four levels of duties refutes the classification of rights on the basis of duties that they impose on a State and arguments of non-justiciability based on that classification. In a communication brought against Nigeria, the African Commission dealt with the alleged violation of some economic and social rights including the right to property and the right to health.[54] The Commission held that:[55]

> Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a

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50 De Villiers, *supra* note 25, at 33 & 40.

51 C. Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice,* Pretoria University Law Press (2009), pp. 15-50. Mbazira identifies two dimensions of these arguments: legitimacy dimension and institutional competence dimension.

52 E. Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights In National Law' 22 *American University International Law Review* (2006):35-64, at 45.

53 Ssenyonjo, *supra* note, p. 12. The African Commission also recognized that ESC rights are justiciable and enforceable in the *Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, available at <http://www.communitylawcentre.org.za/achpr/files-for-achpr/draft-pcpl-guidelines.pdf > (accessed 14 April 2012). The Commission referred to *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign (TAC)*(2002) 5 SA 721 (CC), *Uganda Land Alliance v Uganda Wildlife Authority and the Attorney General*, *Morebishe v Lagos State House of Assembly* [2000] 3 WRN 134 as evidence.

54 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001)* AHRLR 60 (ACHPR 2001), para 10. The African Commission seems to have used the term 'duty' and 'obligation' interchangeably.

55 *Ibid*, para 44.

state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights.

Civil and political rights may also involve positive duties and they have budgetary implications.[56] For example, the right to fair trial requires investment of huge amount of resources in improving the courts system and access to justice. On the other hand, adjudication of ESC rights does not necessarily require 'the determination of a particular level of resources to be spent by a State or the exact way they are to be spent.'[57] For example, issuing an injunctive order requiring a State to abstain from destroying or contaminating food sources of its citizens does not require resources. Even when ESC rights do require resources, their budgetary implication cannot prohibit their justiciability.[58] However, it is conceded that the amount of resources required for the realisation of ESC rights is greater than the amount required to realise the enjoyment of civil and political rights.[59]

ESC rights are said to pose a threat to 'traditional notions of democracy and the separation of powers.'[60] For example, it has been argued that 'since socio-economic rights are political, legislative matters involving primary issues of resource distribution, the judicial review of legislative or executive decisions concerning their implementation and enforcement constitutes an illegitimate intrusion into the policy affairs of the elected branches of government and a breach of the traditional doctrine of the separation of powers.' [61]

Stated otherwise, ESC rights are choice-sensitive issues.[62] The outcome of choice-sensitive decisions depends on the 'character and distribution of preferences within the community.'[63] For example, a decision to use public resources to build a hospital or a school building is a choice-sensitive issue while a decision to imprison a convict is choice-insensitive. As ESC rights are choice-sensitive issues and constitute the core of political policy, they are the realm of elected representatives who are best able to deal with them rather than an unelected judiciary.[64] In addition, their judicial enforcement results in

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56 *Ex parte Chairman of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa* (1996) (10) BCLR 1253 (CC).

57 Wiles, *supra* note 52, at 47.

58 *Certification* case, *supra* note 40.

59 Mbazira, *supra* note 51, p. 21.

60 Wiles, *supra* note 52, at 41.

61 Palmer, *supra* note 14, pp. 26-27.

62 D. M. Davis, 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles', 8 *South African Journal on Human Rights* (1992): 475-490, at 478.

63 *Ibid*.

64 Davis, *supra* note 62, p. 479; Wiles, *supra* note 52, at 42-43.

'a piecemeal and short-term approach to social policy' as courts decide rights claims on a case-by-case basis.[65]

The arguments that justiciable ESC rights breach the doctrine of separation of powers are based on 'a rigid formalistic conception of the balance of powers.'[66] Such arguments presuppose 'the wrong assumption that there is bright line separating the mandates of the legislative, executive and judicial branches of government from one another, and fail to heed to the modern conception of separation of powers that allows "checks and balance".'[67]Similar arguments also apply to civil and political rights.[68] In addition, without breaching the separation of powers doctrine, courts can 'place the state in the difficult position of having to explain why it cannot afford to expend resources on a particular public priority.'[69] In such a case, 'the State is expected to justify its actions and come up with plausible explanations for budgetary allocations instead of simply being allowed to plead poverty.'[70] Rather, judicial enforcement of ESC rights increases horizontal accountability of government branches. The practice of Brazilian courts that realization of social rights 'by means of legal action does not infringe the separation of powers' supplements this assertion.[71]

Vagueness, indeterminacy, open-endedness and lack of conceptual clarity have been raised as a barrier to judicial enforcement of ESC rights.[72] ESC rights are said to be 'imprecise, unenforceable in domestic law, and unsuitable for supranational adjudication.'[73] This argument is not tenable since 'similar

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65 Wiles, *supra* note 52, at 43-44.

66 Palmer, *supra* note 14, p. 27.

67 Sisay, *supra* note 17, at 138.

68 Wiles, *supra* note 52, at 43.

69 J. Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in V. Gauri & D. M. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World,* Cambridge University Press (2008): 38-99, at 75.

70 *Ibid*.

71 F.F. Hoffmann & F.R.N.M. Bentes 'Accountability for social and economic rights in Brazil' in V Gauri & D M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World,* Cambridge University Press (2008): 100-145, at 120.

72 Mbazira, *supra* note 51, p. 26; Wiles, *supra* note 52, at 50.

73 M.J. Dennis & D.P. Stewart 'Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', 98 *American Journal of International Law* (2004): 462-515, at 473. See also Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International

criticisms of conceptual clarity were levelled at civil and political rights before their jurisprudential development through practice and scholarship.'[74] Thus, a 'lack of volume of precedent case law in global terms is no reason to denounce the principle that enforceable rights should exist.'[75]

The Justiciability of ESC rights has also been denounced on the ground that these 'rights are too complex for judges to analyze adequately as the social and economic issues they raise tend to be embedded in a complex web of causes and effects.'[76] ESC rights cases have 'polycentric repercussions which makes them unfit for judicial adjudication.'[77] However, such argument is 'inconsistent with developments in public law adjudication, where domestic and regional courts have increasingly become fora for the resolution of complex polycentric public interest disputes.'[78] There are simple cases which are capable of being handled by courts.

Another argument is that ESC rights should not be justiciable since remedies for their violation involve 'social changes that are not capable of immediate implementation.'[79] Although it is conceded that a remedy for some ESC rights may be less straightforward, and involve time consuming implementation process, the Committee on Economic Social and Cultural Rights 'has emphasized that many socio-economic rights are instantly realizable, and has listed a series of such rights in its General Comment.[80]

It has also been argued that the poor would not benefit from justiciability of ESC rights as they cannot afford bringing cases to courts. They do not have 'the knowledge, ability, or resources to be able to voice their claims.'[81] Like the cases of civil and political rights, 'cases are brought only by the most articulate,

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Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2004/44, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement> (accessed 27 October 2011). Comments of delegations, typically representing the majority of states that do not provide for domestic adjudication of economic, social, and cultural rights.

74 Wiles, *supra* note 52, at 53.

75 *Ibid*.

76 *Ibid*, at 53.

77 Mbazira, *supra* note 51, p. 41.

78 Palmer, *supra* note 14, p. 27.

79 Wiles, *supra* note 52, at 55.

80 See Committee on Economic Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations, P 5, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990). Wiles, *supra* note 52, at 55.

81 Wiles, *supra* note 52, at 55.

assertive, and wealthy individuals.'[82] Nevertheless, such argument is made on the assumption that legal enforcement is 'the only way human rights standards can be set and attained.'[83] ESC rights are a 'means to achieve a just form of democracy, because they are instruments designed to help minority groups and the most disadvantaged members of society improve their situations through affirmative action, thereby redressing the "tyranny of the majority" that results from a democracy without such safeguards.'[84] Denying ESC rights as non-justiciable while guaranteeing civil and political rights as justiciable rights is engraving 'a distorted notion of democracy' into a society.[85] These actions will also neglect the role of civil society organisations.

Above all, 'the real driving force behind the distinction between' civil and political rights on one hand and ESC rights on the other hand 'was based not on legal or empirical rationality but rather on Cold War politics.'[86] The US and other western countries advocated for the civil and political rights while socialist countries emphasised the ESC rights.[87]

Even when economic social and cultural rights were included as non-justiciable directive principles, courts should not ignore them. In India, for example, although courts cannot 'nullify legislation on the grounds that it is contrary to the directive principles', they use directive principles as an instrument of interpretation to uphold the validity of legislation that may have been nullified otherwise.[88] They should interpret fundamental rights according to 'the vision formulated in the directive principles.'[89] Using the directive principles, they can 'uphold legislation which in other circumstances would have been declared void' due to this legislation's violation of civil and political rights.[90]

The Indian Supreme Court and High Courts went further and enforced ESC rights 'as extensions of justiciable fundamental rights through various forms of litigation.'[91] The Supreme Court made ESC rights justiciable 'through an expansion of the fundamental rights in Part III of the Constitution,

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82 *Ibid*.

83 *Ibid*, at 58.

84 *Ibid*, at 49.

85 Davis, *supra* note 62, p. 476.

86 Ssenyonjo, *supra* note 1, p. 12.

87 *Ibid*.

88 De Villiers, *supra* note 25, at 33.

89 *Ibid*.

90 *Ibid*, at 39.

91 J. Kothari, 'Social Rights Litigation in India: Developments of the Last Decade' in D. Barak-Erez & A. M. Gross (eds), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing (2007): 171-193, at 171.

particularly the right to life.'[92] Right to life has been expanded to include 'the right to a clean environment, food, clean working conditions, emergency medical treatment, free legal aid and release from bonded labour.'[93]

IV. THE NATIONAL POLICY PRINCIPLES AND OBJECTIVES IN ETHIOPIA

The Ethiopian Constitution identifies economic, social, cultural, environmental and political objectives as well as principles for external relations and national defence.[94] The principles and objectives were laid down in the Constitution to guide the legislative, executive, and judicial branches of both the state and federal governments.[95]

A. Economic objectives

The Ethiopian Constitution provides for a list of economic objectives that should be achieved by the government.[96] These objectives only touch on duties of the State to realise economic rights such as the right to work and the right to property. As recognised under the ICESCR (to which Ethiopia is a party), the right to work includes 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.'[97] The duty of the State to fulfil this right requires Ethiopia to formulate and implement 'an employment policy with a view to "stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming

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92 *Ibid*, at 175.

93 *Ibid*. Kothari refers to several cases including *Subhash Kumar v Bihar* (1991) 1 SCC 598; *AP Pollution Control Board v MV Nayudu* (1999) 2 SCC 718; *MC Mehta v Union of India* (1987) 4 SCC 463; *Peoples Union for Civil Liberties (PUCL) v Union of India & Others* WP (Civil) No 196 /2001, 23 July 2001, unreported; *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42; *Parmanand Katara v Union of India* (1989) 4 SCC 248; *Khatri v State of Bihar* (1981) 1 SCC 623; and *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

94 Ethiopian Constitution, arts 86-92 (chapter 10).

95 Ethiopian Constitution, arts 85 & 50(2). Art 50(2) provides that both state and federal governments have legislative, executive and the judicial powers.

96 *Ibid*, art 89.

97 ICESCR, art 6(1); The Constitution guarantees this right under article 41(1) & (2) in a broader phrasing.

unemployment and underemployment".'[98] The Constitution provides for similar duty 'to increase opportunities for citizens to find gainful employment.'[99]

Although the economic objectives do not emphasis positive duty of the government to implement the right to work, they provide for the principle of non-discrimination since the Constitution requires the government to create 'equal opportunity for all Ethiopians to improve their economic conditions.'[100] Economic conditions of a person can be improved through gainful employment or through other means of livelihood. As the salaried work is 'the principal way of distributing the national income among members of society,'[101] the economic objectives under the Constitution require the government to promote equitable distribution of wealth.[102]

Ethiopia had already recognised the right of every one to 'just and favourable conditions of work' to protect the working population before the adoption of the Constitution. When the Constitution was adopted, it recognised part of this right under article 42. Duties of the State as a consequence of recognising the right to just and favourable conditions of work has been reiterated under the economic objectives. The Constitution requires the government to 'protect and promote the health, welfare and living standard of the working population.'[103] The health of workers can be protected by providing safe conditions of work. The welfare of the workers can be ensured by providing job security, social security and other schemes. Their living standard can be raised by providing fair wages that enables them to afford decent living for themselves and their families. Given that labour is an important factor of production, any sound policy for economic development cannot ignore the working population. A healthy labour force is a prerequisite for economic growth.

The right to property as has been recognised under article 40 of the Constitution although it does not seem to categorise under economic social and cultural rights. The economic objectives do not specify duties of the government regarding enjoyment of property including land. They only

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98 Committee on Economic Social and Cultural Rights, General Comment No. 18, Right to work, Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 6 February 2006, para 26.

99 Ethiopian Constitution, art 41(7).

100 *Ibid*, art 89(2).

101 K. Källström & A. Eide, "Article 23", in G. Alfredsson & A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999) p. 490.

102 *Ibid*.

103 Ethiopian Constitution, art 89(8).

reiterate the duty of the government to hold land and other natural resources and deploy them for common benefits and development.[104] The position of Ethiopia on land ownership did not change with the overthrow of military regime in 1991. The Ethiopian Constitution continued state ownership of land. Under article 40(3), the Constitution declares that land and other natural resources belong to the nation, nationalities, and peoples.

Apart from duties of the State corollary to economic rights, the economic objectives also include other objectives that are related to cultural rights and the right to development. The Constitution provides for duty of the government 'to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources.'[105] Since reference is made to 'the country's legacy' implying its inheritance, such policies could have been better categorised under the cultural objectives.

The Constitution enshrines the right to development under article 43. It guarantees the right of nationals 'to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.'[106] Duties of government reminiscent of the right to development with particular emphasis on participation are incorporated under economic objectives. The Constitution requires the government to 'promote the participation of the People in the formulation of national development policies and programmes.'[107] The government should also 'ensure the participation of women in equality with men in all economic and social development endeavours.'[108]

The right to development is understood as both instrumental and constitutive under the African Charter on Human and Peoples' Rights.[109] It also requires that development must be 'equitable, non-discriminatory, participatory, accountable, and transparent.'[110] Viewed from these five criteria, the Constitution seems to recognise only one criterion: development must be participatory. The other criteria of development are not reflected in the Constitution as duty of the State.

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104 *Ibid*, art 89(5).

105 *Ibid*, art 89(1).

106 *Ibid*, art 43(2).

107 *Ibid*, art 89(6).

108 Ibid, art 89(7).

109 See the holding of the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), para 277. Ethiopia ratified the African Charter in 1998.

110 *Ibid*.

The Ethiopian Constitution enshrines affirmative action for the least advantaged ethnic groups in economic objectives. It requires the government to provide special assistance to disadvantaged nations, nationalities and peoples not only in economic development but also in social development.[111] Given the past policy of exclusion and marginalisation of ethnic groups, such assistance reverses the previous policy.[112]

The government's duty to prevent any natural and man-made disasters and to provide assistance when they occur is included as an economic objective.[113] This obligation of the government corresponds to the human rights duty to provide for economic social and cultural rights under regional and international human rights instruments. The provision is necessitated by Ethiopia's 'tragic cyclic history of droughts, wars, migrations, and famine.'[114]

B. Social objectives

Social objectives are framed in such a way that the obligations of the State are limited.[115] The Constitution provides that to 'the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.'[116] The focus of the provision is on the aim of social policy. So far as policies aimed at providing access to education, health services, clean water, housing, food, and social security are in place the government may argue that it has carried out its obligation. The Constitution deals with provision of 'access' to socio-economic services instead of the provision of the services themselves. It could be said that the obligation of the State is limited to the obligation to facilitate and does not impose obligation to provide socio-economic services on the State. Even the provision of access to socio-economic services is subject to the availability of resources.

Social objectives do not contain all duties that social rights (such as the right to health, the right to education, the right to food, the right to water, the right to housing and the right to social security) impose on the State as they are

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111 Ethiopian Constitution, art 89(4).

112 Fasil Nahum *Constitution for a nation of nations: the Ethiopian prospect,* Red Sea Press Inc Ltd (1997), p. 187.

113 Ethiopian Constitution, art 89(3).

114 Fasil, *supra* note 112, p. 187.

115 Ethiopian Constitution, art 90(1).

116 The Amharic version of article 90(1) does not mention the policy. It provides that all Ethiopians should be provided with education, health services, clean water, housing, food, and social services.

formulated in very general terms. As the Constitution lacks specificity, obligations of the State regarding any social right are not clear. For example, it is not clear from the Constitution whether the State has the obligation to provide free primary education although Ethiopia has assumed such obligation under the ICESCR.[117] The emphasis on policies seems to neglect other obligations of the State.

Social objectives, therefore, are not much different from obligation of the State to allocate resources to provide health, education, and other social services under article 41. Although article 41 is provided under the chapter on fundamental rights and freedom, it is not framed in terms of rights of an individual. It is formulated in terms of state duties. The State complies with the text of the Constitution if it allocates budget for provision of public health, education, and other social services irrespective of whether the budget actually results in enjoyment of social rights.

C. Cultural objectives

Cultural objectives in the Constitution contain some positive duties of the State to realise cultural rights. The government has the duty to support growth and enrichment of cultures and traditions.[118] The Constitution denotes state duties corollary to collective right of groups to enjoy their culture. This duty is more akin to the right of every nation, nationality and people to 'develop and promote its culture.'[119] In carrying out its duty to support, the government should treat all cultures and traditions equally. The Constitution tries to remedy Ethiopian history since previously the cultures and traditions of nations, nationalities and peoples did not enjoy equal state support.

Culture understood in a wider anthropological sense refers to the '*sum total of the material and spiritual activities and products of a given social group which distinguishes it from other social groups*.'[120] Nations, nationalities and peoples in Ethiopia have their own specific cultures. These cultures maintain a handful of traditional practices that are harmful, particularly to women and children. Thus, the Constitution allows the growth and enrichment of cultures and traditions only if they are compatible with 'fundamental rights, human dignity,

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[117] ICESCR, art 13(2)(a).

[118] Ethiopian Constitution, art 91(1).

[119] *Ibid*, art 39(2).

[120] R. Stavenhagen "Cultural Rights and Universal Human Rights" in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights,* Martinus Nijhoff Publishers (1995) p. 66.

democratic norms and ideals, and the provisions of the Constitution.'[121] For example, cultures and traditions that uphold the superiority of men over women do not qualify for governmental support. Accordingly, such harmful traditional practices have already been outlawed by the Criminal Code.[122]

Culture also means 'the accumulated spiritual and material heritage of humankind.'[123] In this sense it includes cultural properties such as monuments and artefacts. The Constitution provides for the protection of cultural properties and natural heritage. It provides that the government and the citizens have the duty to protect 'natural endowments, historical sites, and objects.'[124] This duty is in line with Ethiopia's obligation under the ICESCR to respect and protect cultural heritage on all its forms which include 'the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.'[125] Ethiopia's natural endowments, such as the forest, have been dwindling.[126] Given that the majority of Ethiopians depend on agriculture for their survival the protection of natural endowment is necessary. As most of Ethiopia's historical sites and objects are in the possession of religious institutions, the Constitution rightly imposes obligation both on the government and the citizens to protect them.[127]

A component of cultural rights also includes the right to 'enjoy the benefits of scientific progress and its application.'[128] Although Ethiopia ratified the ICESCR before the adoption of the Constitution, the latter does not expressly guarantee the right to enjoy the benefits of scientific progress and its application. The Constitution, however, includes a part of state duties corresponding to this right under cultural objectives. It requires the government to support 'the development of arts, science and technology.'[129] If such support is provided, it can be understood as positive steps taken by

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121 Ethiopian Constitution, art 90(1).

122 See Criminal Code of the Federal Republic of Ethiopia, Proclamation No. 414/2004, 9 May 2005, art 561-570.

123 R. Adalsteinsson & P. Thórhallson "Article 27" in G. Alfredsson & A. Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999) p. 576.

124 Ethiopian Constitution, art 90(2).

125 ICESCR, art 15(1)(a); Committee on Economic Social and Cultural Rights, General Comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, para 50(a).

126 Fasil, *supra* note 112, p. 192.

127 *Ibid*.

128 ICESCR, art 15(1)(c).

129 Ethiopian Constitution, art 90(3).

Ethiopia towards the realisation of the cultural right. The support is provided in the Constitution as they are means for raising standard of living of the peoples.[130] Unlike other cultural objectives, the duty to support the development of arts, science and technology are made to depend on the extent of available resources. The duty of the State to contribute to promotion of arts and sports are not dependent on the availability of resources.[131]

D. Political objectives

The Constitution requires both the State and the federal governments to promote and support self-rule at all levels under article 88(1). Self-rule is desirable because it is 'the best system to advance liberty.'[132] The Constitution advances ethnic self-rule as it emphasises sovereignty of ethnic groups and their right to self-determination including the right to secession.[133] The constitutional requirement for the promotion of ethnic self-rule is a response to past ethnic oppression.[134]

In promoting self-rule the government is expected to be guided by democratic principles which require promotion of self-government to be based on the consent of the people expressed through periodic elections. A government formed through the freely expressed will of the people should protect the interests of its electorate and be accountable to them. Democratic principles require any government to respect the human rights of individuals and minority groups particularly their freedom of expression, freedom of association, freedom of assembly, and other democratic rights.[135] The

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130 Fasil, *supra* note 112, p. 192.

131 Ethiopian Constitution, art 41(9).

132 A. Przeworski, *Democracy and the Limits of Self-Government*, Cambridge University Press (2010), p. 17.

133 Article 8, article 39(1) and article 47 of the Ethiopian Constitution. Article 8 recognises sovereignty of nation, nationalities and peoples while article 39(1) guarantees their right to self-determination. Article 47 defines constituent units of Ethiopia on the basis of ethnicity.

134 See Solomon Negussie 'Ethiopia's fiscal federalism: A constitutional overview' in Assefa Fiseha & Getachew. Assefa, *Institutionalising Constitutionalism and the Rule of Law: towards a Constitutional Practice in Ethiopia,* Addis Ababa University press 3 *Ethiopian Constitutional Law Series* (2010) 85-86. Before introduction of federalism *de facto* in 1992 and *de jure* in 1995, While Ethiopia's problem was characterised as colonial experience by some, others characterised it as ethnic oppression. The Constitution adopted the latter view.

135 Protection of human rights is used as one of the criteria to measure level of democracy in a state. See 'Democracy index 2011: Democracy under stress' A report

commitment of the Constitution to democracy is also evident from article 1 which declares formation of democratic state and article 52(2) which requires regional states to establish democratic order.

Under political objective both the federal and State governments should respect the identity of nations, nationalities and peoples.[136] The Constitution was drafted in the aftermath of victories won by ethnic-based liberation organisations which fought for recognition and equality of their ethnic groups. Wars of liberation were fought to overthrow linguistic, cultural, and political domination by the ruling elite and the exclusion and marginalisation of the other ethnic groups under the banner of unity. Thus, respect for the identity of ethnic groups avoids liberation wars such as those fought before 1991. The government has a constitutional duty to uproot ethnic domination through strengthening 'ties of equality, unity and fraternity' among different ethnic groups.[137]

E. Environmental objectives

The Ethiopian Constitution provides for environmental objectives under article 92. It reinforces the right to a clean and healthy environment under article 44(1). While the right of all persons to a clean and healthy environment under article 44(1) implies obligation on the State to protect the environment, the Ethiopian Constitution expressly requires the government to 'ensure that all Ethiopians live in a clean and healthy environment under article 92(1). Article 92(4) reiterates obligation of the government to protect the environment and extend similar obligations to citizens. For that purpose the government has taken some legislative measures which include laws relating to the establishment of institutions concerned with protection of the environment, pollution control, and environmental impact assessment.[138]

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from the Economist Intelligence Unit, available at <http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2011> (accessed on 25 February 2012). It uses civil liberties as one of the five criteria used to rank level of democracy in countries of the world.

136 Ethiopian Constitution, art 88(2).

137 *Ibid*.

138 See Environmental Protection Authority Establishment Proclamation No. 9/1995 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 1st year No. 9 Addis Ababa, 24 August 1995; Environmental Impact Assessment Proclamation No. 299/2002 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 9th year No. 11 Addis Ababa, 3 December 2002; Environmental Pollution Control Proclamation No. 300/2002 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 9th year No. 12 Addis Ababa, 3 December 2002.

Consistent with the rights of every Ethiopian to take part in government under article 38, the Ethiopian Constitution guarantees the rights of people to participate in environmental decision-making.[139] People should be consulted on 'the planning and implementation of environmental policies and projects.' However, the Ethiopian Constitution limits consultation of the people to projects and policies that directly affect them.

F. Principles for international relations and national defence

The principles of external relation were copied from the United Nations Charter and the Charter of Organisation of African Unity.[140] The Constitution reiterates the principle of equality of states and non-interference in domestic affairs of other states in line with the UN Charter and the Constitutive Act of the African Union.[141] The Constitution requires the government to promote foreign relations that respect Ethiopia's interest and sovereignty. Thus, international agreements are concluded and observed if they protect the interest of Ethiopia and that of its peoples. Once again, article 86(6) affirms peaceful resolution of international disputes as stipulated in the UN Charter and the Constitutive Acts of the African Union.[142] The Constitution specifically provides for the promotion of economic union and fraternal relationship with African countries.[143]

The principles of national defence under the Ethiopian Constitution clearly identify the responsibilities of the military as protecting the sovereignty of the State and administering a state of emergency.[144] In this regard, the Constitution attempts to remedy the defect in previous regimes where the main responsibility of the military was domestic control as in any other non-democratic regimes.[145] The Constitution requires equitable representation of ethnic groups in the national defence forces.[146] As a response to the domination

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139 Ethiopian Constitution, art 92(3).

140 Fasil, *supra* note 112, p. 180.

141 Compare article 86(2) of the Ethiopian Constitution with article 2(1), UN Charter; article 4(a) & (g), Constitutive Act of African Union.

142 Article 2(3) of UN Charter; article 4(e) of Constitutive Act of AU.

143 Ethiopian Constitution, art 86(5).

144 *Ibid*, art 87(3).

145 See T. C. Bruneau & S. T. D. Tollefson, *Who Guards the Guardians and How: Democratic Civil-Military Relations*, University of Texas Press (2006), p. 75.

146 Ethiopian Constitution, art 87(1).

of defence forces by few ethnic groups in the past, such equitable representation has some advantages. It builds national unity by giving equal opportunity and a sense of ownership to all nations, nationalities, and peoples.

The Ethiopian Constitution enshrines civilian control of the military by requiring the Minister of Defence to be a civilian.[147] Of course, the mere presence of a civilian Minister of Defence or a Ministry of Defence does not guarantee effective civilian control.[148] In established democracies it is observed that 'civilians exercise control over the armed forces in order to maximize military effectiveness in response to political objectives and to enhance the efficiency and accountability in the use of resources.'[149] The requirement of the Ethiopian Constitutions that the Minister of Defence should be a civilian can be seen as an effort to follow the models of established democracies.

Under the principles of national defence, the Ethiopian Constitution entrenches civilian control of the military and keeps the military out of politics in two other respects. First, it requires the military to respect the Constitution.[150] If the military respects the Constitution, it will not usurp power from civil government through *coup d'état* since the Constitution lays down election as the only means of assuming state power. As a result, the Constitution tries to avoid the repetition of the 1974 experience which resulted in seventeen years of military rule. Second, the Constitution eliminates the possibility of alliance between the military and a political party by requiring the military services to be non-partisan.[151] Rendition of non-partisan military services avoids a puppet civil government manipulated by the military. It also avoids the use of the military to maintain certain political organisations in power.

V. DIRECTIVE PRINCIPLES IN GHANA

The DPSPs provided under chapter six of the Ghanaian Constitution are more detailed than the National Policy Objectives and Principles under chapter ten of the Ethiopian Constitution. They include economic, social, educational, cultural and political objectives. The following subsections describe these objectives.

A. Economic objectives

147 *Ibid*, art 87(2).
148 Bruneau & Tollefson, *supra* note 145, p. 76.
149 *Ibid*.
150 Ethiopian Constitution, art 87(4).
151 *Ibid*, art 87(5).

The Ghanaian Constitution provides detailed economic objectives under article 36. The State has an obligation to take all necessary action to achieve maximum rate of economic development.[152] The Constitution focuses on economic development rather than economic growth. Since economic growth is only 'one aspect of the process of economic development,'[153] high economic growth rate does not necessarily mean high rate of economic development for Ghana. The economic development should be equitable since the Constitution requires 'even and balanced development of all regions', and urban and rural areas.[154] Economic development is also equitable when benefits derived from development are equally distributed.[155] Thus, the Constitution prohibits exploitation by requiring payment of 'fair and realistic remuneration for production and productivities.'[156] This safeguard is particularly important for farmers who do not usually obtain fair prices for their produce.

The Constitution requires the State to take necessary action 'to secure maximum welfare, freedom and happiness of every person in Ghana.'[157] It recognises the fundamental duty of the State to assure 'basic necessities of life for its people.'[158] To carry out this fundamental duty, the State is expected to take necessary action 'to provide adequate means of livelihood' through creating suitable employment. The State is also to address cases of persons that cannot take up employment and provide for their basic necessities. Such persons who lack means of their livelihood due to such factors as unemployment, sickness, disability, widowhood and old age could be regarded as needy persons. The State is supposed to provide public assistance to the needy in the form of social security.[159]

Like economies of many African countries, the Ghanaian economy depends on primary economic activities. An attempt to achieve economic development should not ignore the roles of agriculture and mining. These fields should be modernised so as to increase their productivity. In addition, the economy should be diversified and industrialised. Thus, the role of the State, among others, is to promote the development of agriculture and industry.[160]

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[152] Ghanaian Constitution, art 36(1).

[153] A. Sen, 'Development: Which Way Now?' 93 (372) *The Economic Journal* (1983): 745-762, at 748.

[154] Article 36(2)(d) of the Ghanaian Constitution.

[155] C. Baldwin & C. Morel, 'Group Rights' In M. Evans & R. Murray (Eds) *The African Charter On Human And Peoples' Rights: The System in Practice 1986–2006,* (2008) 272.

[156] Ghanaian Constitution, art 36(2)(a).

[157] *Ibid*, art 36.

[158] *Ibid*, art 36(2)(e).

[159] *Ibid*, art 36(1).

[160] *Ibid*, art 36(3).

Promotion of mining is equally important though the Constitution does not clearly refer to mining. Encouraging foreign investment could be one form of promoting the economy.[161]

All kinds of development (economic, social, or cultural development) should be non-discriminatory.[162] In this regard, the Ghanaian Constitution requires the State to 'afford equality of economic opportunity to all citizens.'[163] Since women have been subjected to discrimination throughout history, it is not enough to treat them as equal with men in affording women equality of economic opportunity. Since additional measures should be taken in favour of women, the Constitution requires the State to 'take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.'[164] Such steps may include providing facilities for 'the care of children below school-going age' to allow women to have time to engage in economic activities.[165]

Recognition of private property rights plays an important role in economic development. The Constitution of Ghana expressly protects property rights.[166] It reiterates recognition of ownership of property and rights of inheritance as economic objectives.[167] Land, as property and as an important factor of production, should be properly managed in order to score sound economic development. Unlike Ethiopia, Ghana does not maintain state ownership of land. Still, the Constitution recognises that possession and ownership of land should serve the larger community. In particular, it specifies that the managers of land are accountable as fiduciaries.[168]

The labour force is another factor of production that should be properly managed and protected. Obviously, the success of every nation's economy depends on the quality and quantity of its labour forces. In this regard, the Constitution requires the state to 'safeguard the health, safety, and welfare of all persons in employment.'[169] In addition, workers are entitled to satisfactory, safe, and healthy conditions of work.[170] They are also entitled to rest and leisure and limited working hours. To protect their rights they can organise themselves into trade unions. The State is obligated to encourage the

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161 *Ibid*, art 36(4).
162 Baldwin & Morel, *supra* note 155.
163 Ghanaian Constitution, art 36(6).
164 *Ibid*, art 36(6).
165 *Ibid*, art 27(2).
166 *Ibid*, art 20.
167 *Ibid*, art 36(7).
168 *Ibid*, art 36(8).
169 *Ibid*, art 36(10).
170 *Ibid*, art 24.

participation of workers in decision-making at work place. The workers may participate in decision-making individually or through their trade unions.[171]

Environmental objectives are considered under economic objectives. The Constitution requires the state to take appropriate measures to safeguard the national and international environment.[172] The Constitution also imposes similar duty on the citizens of Ghana to protect and safeguard the environment.[173]

B. Social objectives

The Constitution lays down the social objectives of Ghana.[174] It focuses on building a social order 'founded on the ideals and principles of freedom, equality, justice, probity and accountability.'[175] These ideals and principles are enshrined in fundamental human rights and freedoms of the Constitution. The Constitution requires the state to adopt policies directed towards ensuring that Ghanaians have 'equality of rights, obligations and opportunities before the law.'[176] Article 37(1) of the Constitution reinforces the right to equality under article 17 which envisages substantive equality by providing that policies and programmes for addressing social, economic and educational imbalance are not in violation of the right to equality. The state may take affirmative measures for integration of women, persons with disabilities, young persons and relatively less developed regions of Ghana. Without such affirmative measures, persons would not have equality of rights, obligation, and opportunities because 'uniform treatment of unequals is as bad as unequal treatment of equals.'[177]

As part of its social objectives, the Constitution emphasises the importance of the right to participate in the development process.[178] It requires the State to enact laws for ensuring 'enjoyment of rights of effective participation in development processes' in line with the right to participate in economic, social, cultural and political development recognised in Declaration on the Right to

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171 *Ibid*, art 36(11).
172 *Ibid*, art 36(9).
173 *Ibid*, art 41(k).
174 *Ibid*, art 37.
175 *Ibid.*
176 *Ibid*, art 37(1). Article 37(1) is similar with article 28 of the Universal Declaration of Human Rights according to which everyone is entitled to social order in which rights and freedoms are realised.
177 M. P. Singh *V N Shukla's Constitution of India* (2001) 38.
178 Ghanaian Constitution, art 37(2).

Development.[179] The right to participate in development process includes the right to form association, the right of access to agencies and officials of the State, freedom to form organisations and the freedom to raise funds.[180] The Constitution requires the state to enact laws to ensure the promotion and protection of all basic human rights and freedoms in development process.[181] It mentions the right of vulnerable groups including the right of the disabled, the aged, and children. While enacting these laws the state should be guided by international human rights instruments.[182]

The Constitution requires the State to ensure institution and maintenance of contributory schemes to guarantee economic security of the self-employed and other Ghanaians.[183] The State is to require employers and employees to contribute to funds such as pension. Although it is limited to old age, the Constitution requires the State to provide social security payments.[184]

The Constitution also lays down objectives relating to population and sports. The state has the obligation to adopt and maintain population policy that is consistent with the development needs and objectives of Ghana.[185] Regarding sports, the state has the obligation to ensure provision of adequate facilities for sports throughout Ghana.[186] The purpose of sports is also stated as the promotion of national integration, health, discipline, and international friendship and understanding.

C. Educational objectives

Educational objectives of the Constitution are similar in essence with educational rights.[187] Educational rights are framed in terms of individual entitlement while educational objectives are framed in terms of duties the State. All persons have 'the right to equal educational opportunities and facilities' while the state should provide those facilities at all levels and in all regions.[188] To fully realise the right to education, 'basic education shall be free,

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179 Article 1, Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986.

180 Ghanaian Constitution, 37(2)(a).

181 *Ibid*, art 37(2)(b).

182 *Ibid*, art 37(3).

183 *Ibid*, art 37(6)(a).

184 *Ibid*, art 37(6)(b).

185 *Ibid*, art 37(4).

186 *Ibid*, art 37(5).

187 Compare Article 38 with article 25 of the Ghanaian Constitution.

188 Ghanaian Constitution, art 38(1) & art 25.

compulsory and available to all.'[189] Thus, it is the objective of the state to draw programmes for provisions of 'free, compulsory and universal basic education.'[190]

Since secondary and higher education should be available and accessible to all, the State is expected to provide equal access to secondary and university education.[191] The Constitution envisages the progressive introduction of free secondary and university education under article 25 as a right while there is no corresponding provision under article 38. The state should focus on science and technology.[192] In addition, the state should provide free adult literacy programme and life-long education.

D. Cultural objectives

The Constitution addresses culture as rights of individual and objectives of the state. It is the right of every person to 'enjoy, practice, profess, maintain and promote any culture, language, tradition or religion.'[193] The State has the responsibility to integrate customary values into national life through education.[194] The Constitution requires the State to adopt and develop customary and cultural values as part of growing needs of the society.[195] It is not that every customary value should be integrated, adopted or developed. A customary value should be appropriate. In particular, the Constitution prohibits traditional or customary practices that are injurious to physical and mental health or well-being of a person.[196] The State has the duty to 'foster the development of Ghanaian languages and pride in Ghanaian culture.' The State should also 'preserve and protect places of 'historical interest and artifacts.'[197]

E. Political objectives

The Constitution deals with several issues concerning fundamental human rights and freedoms.[198] The Constitution requires the state to 'cultivate among

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189 *Ibid*, art 25(1)(a).
190 *Ibid*, art 38(2).
191 *Ibid*, art 25(1)(b) & art 38(3).
192 *Ibid*, art 38(3).
193 *Ibid*, art 26.
194 *Ibid*, art 39(1).
195 *Ibid*, art 39(2).
196 Compare Article 26 with article 39 of the Ghanaian Constitution.
197 Ghanaian Constitution, art 39(3).
198 *Ibid*, art 35.

all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person.'[199] This provision focuses on building a culture of respect for human rights through different measures including education, awareness creation, and others. The political objectives specifically refer to non-discrimination. The Constitution prohibits discrimination and prejudice on certain grounds including 'place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs' and requires the state to promote integration of the peoples of Ghana.[200]

For the purpose of integration, the Constitution requires the State to take measures directed towards ensuring loyalty to Ghana, regional and gender balance in appointment and recruitment, free movement of persons, goods and services, decentralisation of administrative and financial machinery of government, and distribution of location of institutions offering services.[201] Although the Constitution does not require equality of access to public services like some human rights instruments, it requires the state to 'promote just and reasonable access by all citizens to public facilities and services.'[202]

The political objectives also deal with form of government, sovereignty of the people and territorial integrity of Ghana. The Constitution provides for a democratic form of government, with sovereignty residing in the people of Ghana.[203] In terms of democracy, Ghana has shown better score than many African countries, including Ethiopia.[204] As political tolerance is one of the hall marks of democracy, the Constitution requires the State to promote 'a culture of political tolerance' among the people of Ghana.[205] The Constitution requires the State to 'safeguard the independence, unity and territorial integrity of Ghana.'[206] Thus, the State should maintain defence forces that are capable of reversing any foreign aggression and suppressing secessionist groups.

The Constitution incorporates the principles of good governance as it requires the state to 'eradicate corrupt practices and the abuse of power.'[207] The

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[199] *Ibid*, art 35(4).

[200] *Ibid*, art 35(5).

[201] *Ibid*, art 35(6).

[202] Compare Article 35(3) of the Ghanaian Constitution with article 13 of the African Charter on Human and Peoples' Rights.

[203] Ghanaian Constitution, art 35(1).

[204] Regarding governance performance, Ghana stood seventh out of 53 African Countries according to 2011 Ibrahim Index of African Governance, available at <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index> (accessed on 25 February 2012).

[205] Ghanaian Constitution, art 35(9).

[206] *Ibid*, art 35(2).

[207] *Ibid*, art 35(8).

eradication of corrupt practices requires the state to put in place accountability and transparency mechanisms.

VI. THE JUSTICIABILITY OF DIRECTIVE PRINCIPLES IN ETHIOPIA AND GHANA

Constitutions of African states in general may be classified into four categories based on the way they treat ESC rights. The first category does not deal with economic social and cultural rights at all.[208] The second category includes ESC rights in directive principles and provides that they are not enforceable by any courts.[209] The third category incorporates economic social and cultural rights both in fundamental rights and freedoms and in directive principles.[210] The fourth category does not have directive principles. Constitutions in this category incorporate economic social and cultural rights along with civil and political rights in their bill of rights.[211] Under these constitutions economic, social and cultural rights are legally enforceable by courts.

The constitutions of Ethiopia and Ghana fall under the third category which contains economic, social and cultural rights in chapters dealing with fundamental rights and directive principles. The Ethiopian Constitution does not frame ESC rights in terms of individual rights while the Ghanaian Constitution provides them in terms of individual entitlements.[212] Both Constitutions do not contain provisions that specifically prohibit the courts from enforcing directive principles.

A. Justiciability of directive principles in Ethiopia

The Ethiopian Constitution does not contain a clear provision on justiciability of national policy objectives and principles unlike the constitutions of India

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[208] See Constitution of Botswana (1966).

[209] See article 101, Constitution of Namibia, 1990; sec 6(c), Constitution of Nigeria, 1999; article 111, Constitution of Zambia. The provisions of these constitutions are similar with Irish Constitution (article 45) which provides that 'The principles of social policy... shall not be cognizable by any court' and the Indian Constitution (article 37) which provides that directive principles of state policy 'shall not be enforceable by any court.'

[210] See Constitution of Uganda (1995), Constitution of Eritrea (1997).

[211] See Constitution of South Africa (1996); Constitution of Angola (1992); Constitution of Algeria (1976); Constitution of Kenya (2010).

[212] For example, see article 41, Ethiopian Constitution; articles 24-26, Ghanaian Constitution.

and Ireland.[213] Apart from specifying that duties of government organs to be guided by national policy objectives and principles, article 85 does not make specific references to enforceability of ESC rights by courts or by quasi-judicial organs.[214] So far cases concerning their justiciability have not been brought to the courts or quasi-judicial organs, such as the House of Federation.[215] Despite the absence of such clear provisions or decisions, it has been argued that 'they are not justiciable' because article 85 is silent on their justiciability and it requires the government to be guided by them instead.[216]

Such arguments seem to have been based on the experience of states whose constitutions expressly provide that directive principles are non-justiciable. However, this contention is very weak for at least two reasons. First, the silence of article 85 on justiciability of national policy objectives and principles does not make them non-justiciable because the Constitution as a whole is a justiciable document like any other law. Since all laws are meant to be justiciable, it is not necessary to include a provision on their enforceability in courts. Reading silence of the Constitution as a prohibition of its enforcement will lead to an absurd conclusion: all laws that do not make reference to their enforcement in courts or before quasi-judicial organs would be non-justiciable. Second, since all laws are made to guide the government and the citizens, the provisions that the government shall be guided by chapter 10 of the Constitution cannot be understood as prohibiting their enforcement.

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[213] Article 45 of the Irish Constitution provides that:
The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and *shall not be cognisable by any Court* under any of the provisions of this Constitution. (Italics added).
Article 37 of the Indian Constitution provide that:
The provisions contained in this Part *shall not be enforceable by any court*, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. (Italics added).

[214] Article 85 of the Ethiopian Constitution provides that:
(1) Any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter. (2) The term "Government" in this Chapter shall mean a Federal or State government as the case may be.

[215] See Ethiopian Constitution, arts 62(1) & 82—84. The House of Federation is the Upper House vested with the power to interpret the Constitution. It obtains recommendation from Council of Constitutional Inquiry, a body that mainly consists of legal experts.

[216] Sisay, *supra* note 17, at 142.

Let alone justiciability of national policy objectives and principles, there is some confusion regarding justiciability of fundamental rights and freedoms in Ethiopia. Such confusion is prevalent among judges and lawyers as they 'tend to avoid invoking and applying human rights provisions in the Constitution' and international human rights treaties.[217] Judges of federal and regional courts 'think that they have little or no role in interpreting the provisions' of fundamental rights and freedoms of the Constitution.[218] Thus, the Constitution has been described as 'museum material' because of lack of court decisions referring to provisions of fundamental rights and freedoms in the Constitution.[219]

One source of confusion seems to originate from lack of clear provisions on the jurisdiction of courts. Unlike the Constitution of Ghana which clearly grants jurisdiction over fundamental human rights and freedom to the High Court under article 33(1), the Ethiopian Constitution is not clear on the jurisdiction of courts over fundamental rights and freedoms apart from stipulating the duty of the judiciary as a whole to enforce them under article 13. Legislation issued after promulgation of the Constitution hints jurisdiction over fundamental rights and freedoms although they do not comprehensively regulate it. The Federal Courts Proclamation (as amended) provides that federal courts have jurisdiction over 'cases arising under the Constitution.'[220] Since violations of fundamental rights and freedoms are violations of the Constitution or arise under the Constitution, federal courts have jurisdiction over fundamental rights and freedoms. The Proclamation establishing the Ethiopian Human Rights Commission and the Institution of the Ombudsman also implies that courts have power over the violation of fundamental rights and freedoms.[221]

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[217] Sisay, *supra* note 42, at 273.

[218] Assefa Fiseha, 'The Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia' in Assefa Fiseha & Getachew Assefa, *supra* note 134, at 25.

[219] Yonatan Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', 14 *African Journal of International and Comparative Law* (2006):53-82, at 81.

[220] Federal Courts Proclamation No. 25/1996 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 2nd year No. 13 Addis Ababa, 15 February 1996, art 3.

[221] See Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 6th year No. 40 Addis Ababa, 4 July 2000, article 6 & 7. Article 6(4) empowers the Commission to undertake investigation of human rights violations while article 7 prohibits Commission from investigating complaints on human rights violations when they are brought before courts of law at any level. See Institution of the Ombudsman Establishment Proclamation No. 211/2000 *Federal Negarit Gazeta of the*

B. Justiciability of directive principles in Ghana

The Constitution of Ghana (1992) does not contain a provision similar to article 45 of the Irish Constitution or article 37 of the Indian Constitution. Under Article 34(1), it provides that:

> The Directive Principles of State Policy contained in [Chapter six] shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

It is not clear from the text of the Constitution whether the directive principles are justiciable or not. This issue was raised before the Supreme Court of Ghana in *New Patriotic Party v Attorney-General* (The 31st December Case) as early as the first year of the coming into force of the Constitution.[222]

The plaintiff, a political party, requested the Supreme Court to prohibit the government from celebrating the 31st December as public holiday. The 31st December marked the date when the military *coup d'état* overthrew a constitutionally established government in 1981. Since then the Provisional National Defence Council, a government which came to power through military *coup d'état*, had celebrated 31st December as public holiday for 11 years until 7 January 1993. The plaintiff submitted that such celebration was inconsistent with the system of government established by the Constitution. The plaintiff based its argument, among others, on article 35 and 41 of the Constitution which fall under 'Directive Principles of State Policy' in Chapter Six of the Constitution.

Adade, JSC, writing for the majority held that Directive Principles of State Policy are justiciable for three reasons:[223]

> First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable...Secondly, notice that article 1(2) of the Constitution, 1992 speaks of inconsistency

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Federal Democratic Republic of Ethiopia 6th year No. 41 Addis Ababa, 4 July 2000. Article 7(2) prohibits Institution of the Ombudsman from investigating 'cases pending in courts of law of any level.'

222 *New Patriotic Party v Attorney-General* [1993-94] 2 Ghana Law Reports 35. The Constitution of Ghana (1992) came into force on 7 January 1993 while the case was filed in December of the same year.

223 *The 31st December Case,* at 66.

> with "*any provision of this Constitution, 1992*"; and article 2(1) of the Constitution, 1992 makes reference to inconsistency with a contravention of "*a provision of this Constitution*." None of these articles expresses an exception in favour of chapter 6. ...
> Thirdly, the very tenor of chapter 6 of the Constitution, 1992 supports the view that the chapter is justiciable [according to article 34].

Adade, JSC, dealt with the argument that the directive principles were not intended to be justiciable since the Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana provides that '[b]y tradition Directive Principles are not justiciable.' Adade JSC was of the opinion that the Consultative Assembly had different views and that the intention of the Committee of Experts was not carried into the Constitution.[224]

Later, the Supreme Court handed down contradictory judgement in *New Patriotic Party v Attorney-General* (CIBA Case).[225] The same plaintiff as the previous case invoked the original jurisdiction of the Supreme Court for a declaration that the Council of Indigenous Business Association (CIBA) Law, 1993 (PNDCL 312) is inconsistent with the Constitution. Again, the plaintiff's arguments were based on, among others, provisions under the Directive Principles of State Policy, article 35(1) and article 37(2)(a) and (3). In their memorandum of agreed issues, the plaintiff and the defendant submitted for determination 'whether or not articles 35(1) and 37(2)(a) and (3) which fall under chapter 6 of the Constitution are justiciable.'[226]

In the *CIBA* Case, the Supreme Court followed the position adopted in India although there is no express provision in the Ghanaian Constitution that prohibits the courts from enforcing the directive principles. Bamford-Addo, JSC, held that:

> As stated by the Drafters of the 1992 Constitution, the Directive Principles have no separate existence; they are measures by which laws are judged for constitutionality and they afford a yardstick by which policy decisions are to be taken and implemented for the establishment of a just and free society. This means that until they are read and applied in conjunction with any substantive guaranteed human rights and freedoms set out in chapter 5, they remain guidelines only and are not enforceable rights by themselves.

Bamford-Addo, JSC, made two exceptions to the general principle that directive principles 'are not of and by themselves legally enforceable by any

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[224] *Ibid*, at 69.

[225] *New Patriotic Party v Attorney-General* [1996-97] Supreme Court of Ghana Law Reports.

[226] *CIBA* Case, at 743.

court.'[227] First, the directive principles become enforceable 'when they are read together or in conjunction with other enforceable parts of the Constitution.'[228] Second, they are enforceable when 'there are particular instances where some provisions of the directive principles form an integral part of some of the enforceable rights.'[229] In such a case, the directive principles qualify as enforceable rights 'or can be held to be rights in themselves.'[230]

The holding of the Supreme Court in *CIBA* case was based on interpretation of the Constitution according to the intention of its framers. Bamford-Addo, JSC, referred to quotation from the Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana which clearly provided that 'Directive Principles are not justiciable.'[231] She also referred to another quote from the Report which provided that '[t]he [Directive] Principles should not of and by themselves be legally enforceable by any court.'[232] Thus, she established the intention of Constitution framers from the Report.

Since there was conflict between *The 31st December* and the *CIBA* case, there had been no binding precedent on justiciability of directive principles until the Supreme Court adopted another rule in *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority*.[233] In this case, the Supreme Court departed from the intention of the framers for two reasons. First, since specific language proposed by the Committee provided that 'the principles shall not of and by themselves be legally enforceable by any court' was not adopted by the Consultative Assembly in the final version of the 1992 Constitution, there was 'a significant departure' from the intention of the framers.[234] Second, the original intent of the framers is not necessarily determinative of an interpretation of a certain provision.[235]

In interpreting the Constitution, according to the Court, it is not safe to 'exclusively or even predominantly' rely on the intent of the framers.[236] Dr Date-Bah, JSC, delivering the judgment of the Court, held that:[237]

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[227] *Ibid*, at 745.
[228] *Ibid*.
[229] *Ibid*.
[230] *Ibid*.
[231] *Ibid*, at 744.
[232] *Ibid*.
[233] *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority* [2008] 4 Ghana Monthly Judgments 171.
[234] *Ibid*, at 186.
[235] *Ibid*, at 186-187.
[236] *Ibid*, at 188.
[237] *Ibid*, at 188-189. The Supreme Court distinguished between subjective and objective purpose. It held that '[t]he subjective purpose of a Constitution or statute is that

> A more modern approach would be to see the [Constitution] as a living organism. As the problems of the nation change, so too must the interpretation of the Constitution by the judiciary. Interpreting the Constitution as a living organism implies that sometimes there may be a departure from the subjective intention of the framers of it. The objective purpose of the Constitution may require an interpretation different from that of the original framers of it.

The Court identified 'strengthening of the enforcement of fundamental human rights' as a core value of the Ghanaian legal and constitutional system.[238] The Court interpreted article 34 of the Constitution with the 'purpose of achieving an expansion of the range of enforceable human rights in Ghana.'[239] The Court held that:[240]

> The rights set out in chapter 6, which are predominantly the so-called ESC rights, or economic, social and cultural rights, are becoming, by international practice and the domestic practice in many jurisdictions, just as fundamental as the rights in chapter 5. The enforceability of these ESC rights is a legitimate purpose for this court to seek to achieve through appropriate purposive interpretation.

The Court adopted 'presumption of justiciability in relation to the provisions' of directive principles. That presumption can be rebutted if those provisions, by their nature, do not lend themselves to enforcement by a court. The implication is that the burden of demonstrating such nature of provisions lies with a defendant. However, the Court did not go further to distinguish between provisions that lend themselves to enforcement by the court and those which do not.

The Supreme Court takes heed of two concerns. First, it emphasises that ESC rights 'need not be implemented in the same way as civil and political

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actual intent that the authors of it, namely, the framers of the Constitution or the legislature, respectively, had at the time of the making of the Constitution' while '[t]he objective purpose is not what the author actually intended but rather what hypothetical reasonable author would have intended, given the context of the underlying legal system, history, value, etc of the society for which he is making law.'

238 *Ibid*, at 191.

239 *Ibid*, at 189.

240 *Ibid*, at 189. Chapter 6 of the Ghanaian Constitution is entitled 'Directive Principles of State Policy' and contains objectives that have been discussed above. Chapter 5 is entitled 'Fundamental Human Rights and Freedoms' and predominantly contains civil and political rights as well as some economic, social and cultural rights.

rights.'[241] Although it does not expressly provide in its decision, the Court seems to endorse the concept of progressive realisation of ESC rights. The Court recognises that the implementation of ESC rights require more resources than civil and political rights. Such understanding is in line with Ghana's obligation under the International Covenant on Economic Social and Cultural Rights.[242]

Second, the Court stresses that the directive principles should be liberally interpreted 'in order not to interfere with the democratic mandate of successive governments.'[243] The Court has taken an activist role in upholding human rights and expanding their scope. Yet, it cautions that cases arising under the directive principles should be examined with circumspection. In other words, the Court calls for some form of judicial restraint.

The decision of the Supreme Court in the *Ghana Lotto Operators Association* case is progressive and the bench needs to be applauded for taking the bold step of recognising the presumption of justiciability of directive principles and more importantly placing the burden on the duty-bearer to prove otherwise in case it is claimed by an individual. Thus, the Court, by its decision, has affirmed the country's commitment to meeting some of the key demands in the African Charter. Yet, it does not settle some important issues including the relationship of directive principles with fundamental human rights. Are directive principles assimilated to the fundamental rights and freedoms for all purposes? Who can claim a violation of ESC rights under the directive principles? Which Court has the jurisdiction to grant the appropriate remedies?

The High Court has jurisdiction to enforce fundamental human rights and freedoms under article 140(2) and 33(1) of the Ghanaian Constitution. Since the Supreme Court has original jurisdiction to invalidate enactments or decisions as unconstitutional under article 2(1) and 130(1), the High Court does not have the power to invalidate them on the basis of violating fundamental human rights and freedoms. The decision of the Supreme Court is not clear as to whether the power of the High Court extends to the enforcement of ESC rights under the directive principles.

The Ghana Lotto Operators Association case is also silent on the types of remedies to be ordered when ESC rights are violated. Article 33(2) provides that the High Court may 'issue such direction or orders or writs including

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[241] *Ibid*, at 192.

[242] See article 2 of International Covenant on Economic, Social and Cultural Rights. Ghana ratified the Covenant on 7 September 2000 available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> accessed on 8 January 2012.

[243] *Ibid*, at 199.

writs or orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, *prohibition*, and *quo warranto* as it considers appropriate.' Given that such remedies have also been adopted in India where the Directive Principles are not justiciable, one may argue that they do not fully address violation of ESC rights.

Article 33(1) adopts restrictive standing rule as it requires a person to allege a violation of his or her rights.[244] Should the same standing rule be adopted for ESC rights under directive principles? It is the poor who usually suffer violation of ESC rights and they are not capable of using courts to enforce their rights. Justiciability of ESC rights would not deliver much to the poor if others are not allowed to represent them.

Finally, apart from a caution that ESC rights are not enforced in the same way as civil and political rights and that care should be taken so as not to interfere in the 'democratic mandate' of government, *The Ghana Lotto Operators Association* case does not lay down detailed rules regarding implementation of ESC rights; it is limited to justiciability of directive principles.

VII. CONCLUSION

Many constitutions of African states contain directive principles following Irish and Indian model of constitutional design. Some of them expressly provide that directive principles are not justiciable while others are silent. In particular, the constitutions of Ghana and Ethiopia are silent on justiciability of directive principles. The absence of clear provision has created confusion in both countries.

In Ethiopia, it has been argued that the National Policy Principles and Objectives are not justiciable although the issue has not been submitted to courts or to other organs with the power of interpreting the Ethiopian Constitution, the Council of Constitutional Inquiry and the House of Federation. Such argument puts ESC rights provided in the National Policy Principles and Objectives beyond the reach of courts.

In Ghana, the Supreme Court has cleared the confusions in the *Ghana Lotto Operators Association* case in that it set aside two conflicting judgments. With the purpose of strengthening the enforcement of ESC rights, the Court unequivocally declared that directive principles are justiciable. The Court has taken an active role and made a ground-breaking judgement as it has decided to break with the tradition of non-justiciable directive principles and expanded the scope of fundamental human rights under the Constitution of Ghana. Therefore, Ghana provides excellent lessons not only to Ethiopia but also to

[244] Compare a broad approach adopted in sec 38 of the South African Constitution (1996) where a person need not allege contravention of his or her rights.

other countries such as Uganda and Eritrea, whose constitutions are silent on justiciability of directive principles.

For the enforcement of ESC rights recognition of their justiciability alone is not enough. Courts and any other organ with the power of interpreting constitutions should provide further guidance on issues relating to standing, jurisdiction, and remedies for violation of ESC rights. In particular, the Supreme Court of Ghana should go beyond declaring justiciability of directive principles and provide clarification on standing to bring cases for violation of ESC rights to the High Court. It should also provide remedies that can be ordered in cases of violation.

BEYOND UNIVERSALISM-CULTURAL RELATIVISM DEBATE: POTENTIALS OF THE *GADA* SYSTEM FOR LEGITIMIZING HUMAN RIGHTS OF WOMEN*

By Bona Legesse Geshe **

1. Introduction

The notion of human rights was not a common topic until the 1940s. It was only with the conclusion of World War II that human rights took shape as a distinct and coherent set of ideas and eventually found expression within the legal and institutional framework of the United Nations.[1] The holocaust of the World War II resulted in the incorporation of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"[2] as one of the major aims of the United Nations (UN) within its Charter. Accordingly, the UN organized a working commission to prepare what came to be the Universal Declaration of Human Rights (UDHR) and adopted in 1948 by the General Assembly of the UN.[3] After this, a number of human rights documents have been adopted under the auspices of the UN.[4]

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[1]Roger Normand and Sarah Zaidi (2008), Human Rights at the UN: The Political History of Universal Justice. Bloomington: Indiana University Press. p. 27

[2] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. Art 3(3)

[3] In 1966 the UN adopted the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which came to constitute, together with the UDHR, the International Bill of Human Rights.

[4] Six human rights documents, i.e. the Covenant on Economic, Cultural, and Social Rights (ICESCR), the Covenant on Civil and Political Rights (ICCPR), the Covenant against Racial Discrimination, the Convention against Torture, the Convention on the Rights of the Child (CRC) and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), are the most widely ratified documents and make up the core of the UN human rights system.

International Human Rights so adopted at the UN level claim to have a universal application. This has been met with challenges since the Draft of the Universal Declaration of Human Rights. It has been claimed that the documents are of 'western' origin and grounded on a liberal philosophy which puts the individual at the center of human rights protection. This debate of the universality or cultural relativity has persisted to this day. The debate has usually involved the role of 'culture' in the protection of individual rights. There is an argument that international human rights documents and considering the debate of universalism and cultural relativism debate as antagonistic positions has resulted in demonization of culture. The positive role of culture in the advancement of human rights through the search for cross-cultural universals has been overlooked.

The human rights of women make the central issue of the debate of universalism and cultural relativism. This is because of the general claim that violation of the human rights of women are embedded in cultural practices which resulted in the consideration of culture as an obstacle for the enjoyment of the human rights of women. Human rights documents recognizing the human rights of women seem to take this approach. They usually talk of culture from the perspective of the harm they pose on women. The African Charter on Human and People's Rights, however, seems to have taken a distinct approach in this regard from the UN human rights documents and the European and Inter-American Human Rights Systems through the imposition of duties on individuals and protecting collective human rights. Ethiopia being home for a diverse population mostly leading a traditional life requires the examination of how we shall employ the already established cultural values and institutions for better protection and creating local legitimacy of international human rights norms. In this article, the author attempts to explore the values and customary norms of Gada system that have the potential to advance the human rights of women.*

1. Universalism-Cultural Relativism Debate

Human Rights norms incorporated within international human rights documents are, *inter alia*, characterized as inalienable, indivisible and universal by nature.[5] Among these features of human rights this article is based on the

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* With an attempt to examine whether *Gada* system has potentials for the protection of the human rights of women and whether it could help to advance better protection of the human rights of women and create a cultural legitimacy of norms of international human rights within the Oromo people, triangulation of research methods was used with the purpose of

'universality' feature and the discussion that follows will also be based on the debate surrounding it. Indicating their universal nature enumerations of rights within international human rights documents typically begin with phrases like "every human being …, everyone has the right …, no one shall be …, or everyone is entitled to …" etc. Of course, the international human rights documents and the United Nations Charter (UN Charter) claim to base the protection they give and the purpose of their establishment on "the dignity and worth of the human person"[6] or in the words of the Universal Declaration of Human Rights "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" implying the application of the norms incorporated in the documents to every human being.[7]

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strengthening the findings obtained from a qualitative inquiry by cross-checking information. First, various published and unpublished documents have been analyzed. Especially, the *Gada* system of Arsi Oromo is almost totally based on such written accounts because of a better written account on women under *Gada* system of the Arsi Oromo. Secondly, observation method has been adopted in which the author employed an active observer technique. The author have spent about a month in *Ya'aballo*, *Dire* and *Arero* Districts of *Borana Zone* of Oromia Regional State where *Gada* system is still active, observing the way women are generally treated under *Gada* system. Thirdly, an interview method has also been employed in which the informants, from both men and women, were selected purposively based on their knowledge of *Gada* system. As such, one former *Abba Gada*, two women known for their knowledge of *Gada* system, three persons known as *Argaa Dhageettii* (persons who had served as experts in keeping the knowledge, decisions, etc. of the System), as well as former head of Borana Zone Culture and Tourism Bureau who has worked on the system for several years, and one person from Borana Zone Women and Children Affairs, totally seven individuals took part in the interview. Semi-structured interview technique was employed in which the informants replied to open ended list of questions on the subject area.

[5]Vienna Declaration and Programme of Action, United Nations World Conference on Human Rights, 25 June 1993, UN Doc A/CONF 157/23. Para 5 of the Vienna Declaration reads in full: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

[6] UN Charter, Supra note 2. Preamble, Para. 2.

[7] Universal Declaration of Human Rights (UDHR), G.A. res 217A (III), U.N. Doc A/810 at 71 1948, Preamble, Para.1

However, the 'universal' character of the rights declared in the major international human rights instruments has been a source of debate from the start of the human rights movement.[8] For instance, the American Anthropological Association (AAA) had submitted a statement opposing the proposed UDHR to the United Nations.[9] The statement asked how the proposed Declaration be applicable to all human beings, and not be a statement of right conceived only in terms of the values prevalent in countries of western Europe and America.[10] The basic problem raised by that AAA statement is that approaches to determining the content of human rights norms, or selecting the most effective ways of implementing them, necessarily reflect specific cultural, philosophical, or ideological perspectives.[11] Of course, this argument has been at the centre of the debate of whether universal human rights are universally applicable to all human beings or are enforced in a culturally relative manner.

The generally antagonistic positions of universalism and cultural relativism debate have borne a number of descriptions. While universalism is described as 'absolute rights and/or imperialism in imposing rights', cultural relativism has been described as 'contingent rights and/or self – determination of peoples'.[12] These understandings of the character of human rights have sometimes been casted as alternatives, as polar visions with no neutral ground between them, and sometimes as allowing for a more complex view that understands some norms as universal, some as relative to context and culture.

2.1. Universalism

As stated above, international human rights documents are framed in a way to show their universal nature. Everyone is entitled to these rights for the sheer fact of being human, without distinction as to race, religion, language, etc. Universalists emphasize in the fact that human rights are special entitlements of all persons and are grounded in human nature which makes them inalienable and universal by application. To have human rights, one does not

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[8] Steiner et al, (2007) International Human Rights in Context: Law, Politics, Morals. New York: Oxford University Press, pp.517-518

[9] American Anthropological Association (1947), Statement on Human Rights.

[10] Ibid.

[11] Abdullahi A. An-Na'im. ''Area Expressions'' and the Universality of Human Rights: Mediating a Contingent Relationship. In David P. Forsythe and Patrice C. McMahon. (eds.) (2003) Human Rights and Diversity: Area Studies Revisited. University of Nebraska Press/Lincoln. p.4

[12] Steiner et al, Supra note 8. p. 517

have to be anything other than a human being nor must one do anything than being born as a human being. Jack Donnely makes a distinction between conceptual and substantive universality of human rights.[13] Conceptual universality of human rights means that they are by definition, equal and inalienable. Human rights are held equally or universally by all for the mere fact of being human. Whereas, the substantive universality of human rights is concerned with the universality of norms incorporated within international human rights, which make it the central theme of the relativism-universalism debate of human rights.[14]

1.2. Cultural Relativism

Cultural relativism basically considers international human rights to be of a western origin which makes its application relative to the culture of the society to whom it alleges to apply. Cultural relativists see human rights norms incorporated in international human rights documents as enumerating rights and freedoms which are culturally, ideologically and politically non-universal. The norms of the Universal Declaration and other international human rights instruments are presented as having no normative force in the face of divergent cultural traditions. Cultural relativism seems to have developed because of the problem of finding valid cross-cultural norms. According to Elvin Hatch, in every case where criteria to evaluate the ways of different people have been proposed, in no matter what aspect of culture, the question has at once posed itself: 'Whose standards?'.[15] Practice is to be evaluated entirely by the standards of the culture in question.[16]

As the Statement on Human Rights of the American Anthropological Association puts it, 'man is free only when he lives as his society defines

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[13] Jack Donnelly. (2008) Human Rights: Both Universal and Relative. Human Rights Quarterly, Volume 30, Number 1. pp. 194-204. Jack Donnely discusses the universality of human rights by classifying it into conceptual and substantive universality; universal possession vis-à-vis universal enforcement; historical vis-à-vis anthropological universality; functional universality; international legal universality; etc. Also See, Jack Donnelly. (2006) The Relative Universality of Human Rights. (working paper no. 33) (http://www.du.edu/gsis/hrhw/working) Accessed on November 1, 2011.

[14] Jack Donnelly. (2006) The Relative Universality of Human Rights. (working paper no. 33) (http://www.du.edu/gsis/hrhw/working). Accessed on November 1, 2011. Pp.2-3.

[15] Elvin Hatch. (1981) Culture and Morality: The Relativity of Values in Anthropology. New York/Columbia University Press. P.8

[16] Donnelly, Supra note 14. P.17

freedom'.[17] Cultural relativism denies the possibility of truth in ethics by relativizing all moral judgments about social behavior to each culture's prevailing beliefs about them. Cultural relativists accordingly reason that all assessments of the conduct of others could only be tied to idiosyncratic standards of measurement.[18]

The debate for the cultural relativity of international human rights comes from different sources. Some even depend on the level of relevance of norms incorporated in the international human rights documents for the right holders. For instance, most developing states have argued that the focus on civil and political rights has created a hierarchy of human rights that prioritizes civil and political rights over more pressing concerns such as the right to food, and therefore is less relevant to the vast majority of persons in the south who suffer from poverty and underdevelopment.[19] But now there seems to be a general consensus among the international community on the interdependence and indivisibility of all human rights as it is made clear by the Vienna Declaration on the program of Action.[20] The main sources, however, are based on the very foundation and development of international human rights. These later arguments are also based on the role of 'culture' in formulating the international human rights norms and as such seek a brief discussion here.

1.2.1. Western Origin of Human Rights Movement

The first argument is based on claim that human rights movement started in the West and as such is the reflection of the western culture. Human rights are seen as irretrievably part of Western triumphalism that reached its apogee in colonial ideology.[21] They argue that current human rights norms possess a distinctively western or Judeo-Christian bias, and hence are ethnocentric construct with limited applicability.[22] These allegations of ethnocentrism are sometimes bundled with a denunciation of the colonial syndrome, or the continued measurement of all cultures and civilizations against the standards,

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[17] American Anthropological Association. Supra note 8. P.543

[18] Grace Y. Kao. (2011) Grounding Human Rights in a Pluralist World. Washington, D.C.: Georgetown University Press. Pp.11-12

[19] Fareda Benda. (2005) Women, law and Human Rights: An African Perspective. Hart Publishing: Oxford. P.41

[20] Vienna Declaration and Programme of Action. Supra note 5.

[21] Helen M. Stancy. (2009) Human Rights for the 21st C: Sovereignty, Civil Society, Culture. Stanford University Press: Stanford. P.11

[22] Ann-Bellinda S. Preis, (1996), Human Rights as Cultural Practices: An Anthropological Critique. The John Hopkins University Press: Baltimore. p.288

achievements, and theoretical constructs of the West.[23] The fear is that the legal framework and conceptual apparatus of human rights will continue to intrude hegemonically, whether by intent or inevitable consequence, upon all the peoples of the world.

The argument that human rights are western can be understood from two perspectives.[24] The first is through narrative, or by locating the genesis and development of the idea of human rights within and among Western soil. It is argued that the socio philosophical precursors of human rights are to be found in Western natural rights doctrines of the seventeenth and eighteenth centuries or even earlier, in the christianized and classical theories of natural law that preceded them.[25] The international human rights instruments resemble the natural law and natural rights talk of the Enlightenment and earlier periods in their stipulation of humanity-at-large as the relevant moral community, placement of normative constraints upon the workings of positive law, and use of analogous language.[26] Mutua also asserts that the fundamental texts of the international human rights law are derived from bodies of domestic jurisprudence developed over several centuries in Western Europe and United States.[27] According to him, the dominant influence of the western liberal thought and philosophies are unmistakable. Its emphasis on the individual egoist as the center of the moral universe underlines its European orientation.

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[23] Kao, Supra note 18. pp.18-19

[24] Ibid

[25] Ibid

[26] In illustrating this view with respect to UDHR Kao discusses some similarities with western rights tradition. The first clause of the preamble recognizes the "inherent dignity" and "equal and inalienable rights" of all members of the human family as the "foundation of freedom, justice and peace in the world," and the third clause contains a submerged right of rebellion – a right demanded and historically won by various Europeans and North Americans when attempting to overthrow their non representative forms of government. Article 1 of the UDHR also echoes the U.S. Declaration of Independence and the French declarations of the Droits de l'Homme et du Citoyen in its assertion that humans are "born free and equal in dignity and rights," and Article 16 conceives of the family as the "natural" unit in society. That the UDHR intentionally as opposed to coincidentally contains these traces of Western philosophy is supported further by the fact that many African and Asian nations did not have a voice in the drafting period of 1946–48 because they had yet to won their independence from their Western colonizers. See, Kao, Supra note 18

[27] Makau Mutua. The Complexity of Universalism in Human Rights. In Andras Sajo (ed), (2004) Human Rights with Modest: The Problem of Universalism. Koninklijke Brill NV: Netherlands. P.61

The basic human rights texts drew heavily from the American Bill of Rights[28] and the French Declaration of the Rights of Man.[29] But for Jack Donnelly, human rights ideas and practices arose not from any deep Western cultural roots but from the social, economic, and political transformations of modernity.[30] Thus, they have relevance wherever those transformations have occurred, irrespective of the pre-existing culture of the place. The second is through content, or by identifying Western bias in contemporary human rights formulations or standards. The rights incorporated under most international human rights instruments are coined in liberal tones protecting individual rights. Collective rights are not generally considered to fall within the ambit of human rights within the West tradition. On the contrary most non-west societies consider collective rights as the most important right to protect. Mutua argues that even if he doesn't think the human rights movement is a western conspiracy to deepen its cultural stranglehold over the globe, its abstraction and apoliticization obscure the political character of the norms that it seeks to universalize since the 'universal' is at its core and in many of its details, liberal and European.[31]

1.2.1. Multiculturalism and Protection of Individual and Collective Human Rights

Besides the origin of international human rights movement, the challenge to the concept of universality of human rights usually has to do with the debate over collective and individual human rights. The western world's concept of human rights surrounds the rights of individuals, which is, of course, at the heart of Liberalism.[32] The liberal ideology/culture of Western countries tends to hold that economic, social, and cultural benefits or services should be provided for through the normal political process. Because of its emphasis on individual autonomy and privacy, liberal ideology/culture finds it difficult to

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[28] The American Bill of Rights is the collective name given for the first Ten Amendments to the 1789 Constitution of the United States of America.

[29] The French Declaration of the Rights of Man and the Citizen is the result of the French Revolution which was adopted by the National Constituent Assembly in 1789 and has its foundation on the thoughts of the enlightenment age such as individualism, social contract, etc.

[30] Donnelly, Supra note 14. p.7

[31] Mutua, Supra note 27. P.54

[32] Will Kymlicka (1995), Multi-Cultural Citizenship: A Liberal Theory Of Minority Right. Clarendon Press: Oxford. Pp.34-35

conceive of collective entities or groups as bearers of rights.[33] The basic principles of liberalism, of course, are principles of individual freedom. Liberals can only endorse 'collective rights' in so far as they are consistent with respect for the freedom or autonomy of individuals.[34] International human rights instruments are drafted in an individualistic tone, reflecting their endorsement of liberal ideology. Individuals are the main subjects of international bill of human rights. Pointing out individual members and not minorities are the main subjects of Art 27 of the ICCPR; Jack Donnely also argues that, groups do not appear as right holders in international human rights instruments even where one might expect them to.[35]

The relevance of liberal theory, however, is generally criticized as inefficient in most multicultural societies.[36] Liberalism, so the claim goes, does not grant enough attention to phenomena such as multiculturalism and nationalism, and thus it downplays the problem of how belonging to identity groups affects individual autonomy and equality. For instance, discriminations perpetrated against individuals on the ground of their group identity usually target the group rather than the individual person. Such technical violation of rights is common in plural societies necessitating protection of collective rights for the sake of both individual members and solidarity of the group.

According to Mutua, as a philosophy that seeks the diffusion of liberalism and its primacy around the globe, the human rights corpus can be said to be favorable to political and cultural homogenization while hostile to diversity.[37] He continues, strangely many human rights instruments explicitly encourage diversity through the norm of equal protection. According to him, the paradox of the corpus is that it seeks to foster diversity and difference and does so only under the rubric of Western political democracy. In other words, it says that diversity is good so long as it is exercised within the liberal paradigm, a

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[33]An-Na'im. Supra note 11. p.7
[34]Kymlicka, Supra note 32, P.75
[35] Jack Donnelly. In Defense of the Universal Declaration Model. In Gene M. Lyons and James Mayall (eds) (2003), International Human Rights in the 21st Century: Protecting the Rights of Groups. Maryland: Rowman & Littlefield Publishers Inc. P.21
[36] Neus Torbisco Casals (2006), Group rights as human rights: A Liberal Approach to Multiculturalism. Dordrecht: Springer.
[37] Mutua, Supra note 27. P.54

construct that for the purposes of the corpus is not negotiable. The door to difference appears to be open while in reality it is closed shut.[38]

Unlike western culture, in most multicultural societies, individual's rights are usually seen from the perspectives of the community at large. In states with high levels of cultural pluralism group rights are generally seen as an instrument of legitimizing wide range of claims.[39] Individuals have duties towards the community besides their individual rights. Taking Africa as an example, Cobbah asserts that as a people Africans emphasize groupness, sameness, and commonality,[40] rather than the survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility. The African Charter on Human and Peoples' Right[41] (also known as African Charter or Banjul Charter) seems to be informed by this view when it captures peoples' rights and emphasized duties one owes to communities.[42] The African Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals.[43]

Considering groups/collectivities as human rights holders, however, is usually criticized as an obstacle to the enjoyment of individual human rights, the traditionally main subjects of human rights. The concern is individuals could be trapped within the group and may become unable to exercise their rights since the conflict of individual and group rights is inevitable. The main critics come from the stand point of the human rights of women. The critics tend to dismiss multiculturalism as bad for women or as an excuse for bad behavior.[44]

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[38] Ibid. Pp.54-55

[39]Casals, Supra note 36. P.1

[40] Josiah A. M. Cobbah (1987) African Values and the Human Rights Debate: An African Perspective. Baltimore: The John Hopkins University Press. P.320

[41] The African Charter on Human and Peoples' Right, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in I.L.M. 59 (1982). The Charter entered into force on October 21, 1986, upon ratification by a simple majority of member states of the Organization of African Unity (OAU).

[42] According to Art 27 (1) of the African Charter, individuals owe duties to the family and society, the state and other legally recognized communities.

[43] Makau Mutua (2000), The African Human Rights System: A Critical Evaluation. New York: United Nations Development Programme. P.8

[44] Siobhán Mullally. Gender Equality and Group Rights: Negotiating Just Multicultural Arrangements. In Koen De Feyter and George Pavlakos (eds), (2008) The Tension

The fear is that multicultural policies might shore up the power base of the older men within the community and encourage the public authorities to tolerate practices that undermine women's equality.[45]

Protecting group rights, however, is not necessarily incompatible with individual rights. According to Kymlicka, collective rights involve two basic claims made by the group: internal restrictions and external protections.[46] The former claim is intended to protect the group from the impact of internal individual choices, whereas the later is intended to protect the group from the impact of external decisions. Internal restrictions may raise the question of individual oppression since they have the potential of restricting individual liberty in the name of protecting group solidarity. In this case while protecting the collective right to keep their internal solidarity, it would be necessary to protect individual's liberty where they choose to act otherwise. However, external protection of the group also protects individual rights since the human rights of members of a certain ethnic or religious group is usually violated on the ground of their group identity. Protection of individual rights only is not adequate to protect the individual where the violation is based on such grounds.[47] Moreover, most group differentiated rights are in fact exercised by individuals.[48] Therefore, dismissing multiculturalism as an oppositional force denies the possibility of arriving at just multicultural arrangements that both define the limits of reasonable pluralism and recognize the significance of cultural differences.

Generally, the way international human rights instruments are crafted focusing on the protection of the individual has served as one reason to advance the debate of cultural relativism. The inadequacy of liberal tradition to protect collective human rights and individuals in plural societies has been reiterated.

1.2. Cross-Cultural Universals

Critics of the Cultural Relativism debate maintain that through endorsement of international human rights instruments, States have accepted the universality

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between Group Rights and Human Rights: A Multidisciplinary Approach to human Rights law. Hart Publishing: Oxford and Portland P.107

[45] Anne Phillips (2007), Multiculturalism without Culture. Princeton University Press: Princeton and Oxford. P.12

[46] Kymlicka, Supra note 32. pp.35-44

[47] Donnely, Supra note 35. P.3

[48] Kymlicka, Supra note 32. p.45

of the norms incorporated in it which renders the debate irrelevant. The conception of human rights, as proclaimed in the Universal Declaration of 1948 and developed in subsequent treaties and institutions, was undoubtedly Western in its initial formulation. But, according to the critics, that does not necessarily mean that it is alien or irrelevant to non-Western societies.[49] The frequent endorsement of norms of international human rights documents in regional human rights treaties and national constitutions indicates the fact that the human rights concept has transcended and needs to transcend further the limitation of its initial western formulation. However, Mutua argues that the fact that human rights became the central norm of civilization does not vindicate their universality.[50] This is rather a telling testament to the conceptual, cultural, economic, military and philosophical domination of the European peoples and traditions. Therefore, in line of this later argument the political consensus over international human rights does not entail a global cultural consensus.[51] Like Jack Donnelly rightly stated, 'the claim of 'universal' human rights is that all human beings ought to be treated equally in the enjoyment of human rights, not that they are or have been or these norms are accepted everywhere'.[52] Moreover, such universal endorsement was not without cost since most States have made reservations on grounds such as culture and religion while ratifying the international human rights documents which has a significant impact on the universal application of human rights. Another formulation, which is more progressive than the above assertion to disregard the existence of the problem, is an attempt made to negotiate for cross-cultural universals across various societies of our world

The universalism-cultural relativism debate is usually depicted as antagonistic ideologies, as if one has to either fully accept or completely reject the universality of certain rights for all human beings. On one end of this purported dichotomy are said to be countries that claim cultural/religious relativity or contextual specificity to justify rejecting or qualifying certain universal human rights norms, and on the other side are those that are supposed to fully accept the universality of all human rights. This binary view is misleading in assuming either that human rights can be culturally and contextually neutral or that a conception of human rights emerging within one

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[49] An-Na'im, Supra note 11. P.3
[50] Mutua, in Sajo (ed) Supra note 27. Pp.60-61
[51]Xiaorong Li. (2006), Ethics, Human Rights and Culture: Beyond Relativism and Universalism. Palgrave macmillan : New York. P.6
[52] Donnelly, Supra note 35, P.21

culture or context can be accepted by other cultures for application in their context.[53]

According to Mutua, although cultural relativism in human rights as an anti-imperial device is admirable, it is a misunderstanding inspired by cultural nationalism.[54] What its proponents see as radically distinctive, irreconcilable traditions also possess ideals which are universal. He also notes that most critiques of cultural relativism are ethnocentric and symptomatic of the moral imperialism of the West.[55] Both extremes only serve to detain the development of a universal jurisprudence of human rights. Proponents of the need to come up with cross-cultural universal human rights norms through constant negotiations argue that the core of the relativist argument ought to be whether or not it is possible to establish cross-cultural universals. Consensus-based approaches to human rights more commonly refer to Rawls's idea of obtaining an "overlapping consensus"[56] on political principles of justice.[57] Just as Rawls argued for the legitimacy of liberal democratic values in a modern constitutional democracy in spite of the diverse and even mutually incompatible beliefs about them among its citizenry, so consensus-seekers defend the universal validity of human rights even in the absence of global agreement on their theoretical foundations by those who would nonetheless be bound by them.[58] Rawls developed the notion to understand how there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines. According to Jack Donnelly, the idea has obvious extensions to a culturally and politically diverse international society.[59]

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[53] An-Na'im, Supra note 11.p.3

[54]Makau Mutua. (1995), The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties. 35 Va. J. Int'l L. 339. P.1

[55] Although taking a strict Universalism approach in a way that seems to generally disregard even the valid claims asserted by cultural relativists Mizanie discusses the possible challenges of cultural relativism by pointing out how it exposes women's vulnerability to HIV/AIDS. See, Mizanie Abate, The Human Rights Discourse in Perspective: Cultural Relativism and Women's Vulnerability to HIV/AIDS. Jimma University Law Journal

[56] John Rawls (1996). Political Liberalism. Columbia University Press: New York

[57] See, Charles Taylor, Conditions of an Unforced Consensus on Human Rights. In Joanne R. Bauer and Daniel A. Bell (eds) (1999), The East Asian Challenge for Human Rights; and, Kao, Supra note 18

[58]Kao, Supra note 18, pp.77-78

[59]Donnelly, Supra note 14. p.11

Accordingly, the aim of cross-cultural approach is to enhance the credibility of national and international standards by developing more effective approaches of promoting and implementing those rights.[60] In illustrating how the lack of cultural legitimacy of international human rights norms in non-western cultures might affect the protection and promotion of human rights, An-Na'im asserts that:

> … human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. In so far as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance. While cultural legitimacy might not be the sole or primary determinant of compliance with human right standards, it is … an extremely significant one. Thus the underlying causes of any lack or weakness of legitimacy of human rights standards must be addressed in order to enhance the promotion and protection of human rights in that society.[61]

If meaningful and lasting changes in attitudes and practices are to be achieved, the proposed reinterpretation has to be undertaken from within the culture by those who, while promoting universal norms, are sensitive to the integrity and authenticity of the local cultures.[62]

Richard Shwartz affirms this point of view by reiterating the necessity of a cross fertilization of cultures if a universal human rights corpus is to emerge.[63] According to him every culture will have its distinctive ways of formulating and supporting human rights. While honoring the diversity of cultures, we can also build toward common principles that all can support. As agreement is reached on the substance, we may begin to trust international law to provide a salutary and acceptable safeguard to ensure that all people can count on a minimum standard of human rights.

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[60] Steiner, supra note 8, p.532.

[61] Ibid.

[62] Francis Deng; In William Twining (ed) (2009), Human Rights: Southern Voices. Cambridge University Press: Cambridge. P.37

[63] Richard D. Schwartz, "Human Rights in an Evolving Culture," in Abdullahi Ahmed An- Na'im and M. Deng, (eds) (1990), Human Rights In Africa: Cross-Cultural Perspectives. Brookings Institution: Washington, D.C. Pp.368-382

The universality of human rights is to be realized through the confluence of internal societal responses to injustice and oppression, instead of attempting to transplant a fully developed and conclusive concept and its implementation mechanisms from one society to another.[64] The way to get universal idea accepted locally is to present it in local terms, which can best be done by local people. Conversely local acceptance enriches the universal idea by giving it meaning and relevance to people's lives. In other words, all countries need to engage in constant negotiation about which claims to accept as human rights and how they can be implemented in practice.

This negotiation should, by definition, include the widest possible range of perspectives and priorities of different human societies for the outcome to be accepted as truly universal. Different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behavior.[65] Therefore, each would have its own way of justifying this from out of its profound background conception. We would agree on the norms while disagreeing on why they were the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.

Human rights are not a static concept. Our understanding of human rights is constantly evolving as we come to know more about the human condition. The quest for universality must continue because that is in the immediate self-interest of all human societies under present conditions of global interdependence as well as the moral imperative for the protection of universal standards of human rights everywhere.[66] Universality of human rights is crucial since they are necessary for securing freedom and social justice for all individual persons and communities against the excess or abuse of power by the state. Besides the legitimate question of non-representativeness of the values of international human rights norms claimed by relativists, some states only raise relativity questions only to shield their own human rights violations.

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[64] Abdulahi An-Na'im (ed) (2002), Cultural Transformation and Human Rights in Africa. Zed Books Ltd: London. p.16

[65] Charles Taylor, Conditions of an Unforced Consensus on Human Rights. In Joanne R. Bauer and Daniel A. Bell (eds) (1999), The East Asian Challenge for Human Rights P.124

[66] An-Na'Im, Supra note 11. p.9

This makes the universality of international human rights crucial to protect individuals and communities from excesses of government power.

As such it would be necessary to deliberate strategies to mediate the apparent conflict or tension between the cultural and contextual specificity of human rights norms and claims that certain norms have universal validity regardless of culture or context. An-Na'im suggests that this mediation is critically important because universality of human rights is both imperative and difficult to achieve out of genuine consensus throughout the world.[67] Since the inherent and permanent diversity of the world precludes founding the universality of human rights on the normative claims of any single tradition or context, it is necessary to explore which possible foundation or justification is more likely to work in different settings and under which circumstances. Mutua also asserts that the human rights movement must not be closed to the idea of change.[68] Because, considering those who reopen or continue the debate about the cultural nature of the human rights regime as outsiders or even enemies of the movement is the greatest obstacle to the efforts to bring about true universal human rights.

The apparently antagonistic positions taken by the universalism and cultural relativism debate has also reflected negatively on 'culture' which resulted in its consideration as an obstacle for the protection of human rights in general and the human rights of women in particular. Merry argues that we need to consider the universalism and cultural relativism debate as part of the continuous process of negotiating ever-changing and interrelated global and local human rights norms instead of choosing one side.[69] Culture in this sense does not serve as a barrier to human rights mobilization but as a context that defines relationships and meanings and constructs the possibilities of action. Seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change.

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[67] Ibid

[68] Mutua, Supra note 27. Pp.53-54

[69] Sally Engle Merry (2006), Human Rights and Gender Violence: Translating International Law into Local Justice. The University of Chicago Press: Chicago and London. P.9

1.2. The Centrality of 'Culture' within the Universalism-Cultural Relativism Debate and Its Impact on the Application of Human Rights

The universalism-cultural relativism debate is based on various grounds as discussed above. The core of the debate, however, is the difference in the 'culture' of generally the west and non-western societies. The term 'culture' has many meanings in the contemporary world.[70] It is often seen as the basis of national, ethnic, or religious identities. Culture is sometimes romanticized as the opposite of globalization, resolutely local and distinct.[71] The less controversial textbook definition of culture is probably which defines 'culture' as 'an inherited body of informal knowledge embodied in traditions, transmitted through social learning in a community, and incorporated in practices'.[72]

For the purpose of this Article, however, 'culture' is understood as, what Kymlicka calls 'societal culture', i.e. a culture which provides for its members meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.[73] These cultures tend to be territorially concentrated, and based on a shared language. Yet, it would be important to note that 'culture' as used in the universalism-cultural relativism debate of human rights is criticized for presenting culture as an almost physically concrete, quantitatively measurable entity. Culture is implicitly defined as a homogenous bounded unit almost as if it was a 'thing'.[74] Moreover, some argue that 'culture' as used in the debate and defending multiculturalism exaggerates the internal unity of cultures, solidifies differences that are currently more fluid, and makes people from other cultures seem more exotic and distinct than they really are.[75]

Relativists mainly base their argument on the fact that international human rights are traced back to liberal ideologies and Christianity which of course is

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[70] See, Merry, Supra note 69; Li, Supra note 51; Kymlicka, Supra note 32; and, Yvonne M. Donders (2002), Towards a Right to Cultural Identity. Intersentia: Antwerpen
[71] Merry, Supra note 69.
[72]Li, Supra note 51.
[73] Kymlicka, Supra note 32. p.76
[74] Preis, Supra note 22. 293-294)
[75]Phillips. Supra note 45. P.14

not representative of the diverse culture of most non-western societies.[76] The centrality of culture within the debate, therefore, could be seen in two ways. First, the origin and development of international human rights norms is traced to western cultures, which is at the center of arguments forwarded by relativists. Secondly, culture is vital in the understanding and practice of human rights by the right holders as such. Not only the groups but individuals freedom will also be enlarged through protection of group rights because 'freedom is intimately related and dependent on culture'.[77]

As a normative system that seeks to influence people's behavior and the political and social institutions that regulate their lives, human rights could only be the product of culture, to be interpreted for practical application in a specific context.[78] The idea of human rights is founded on the belief in the possibility of universal rights due to all human beings everywhere to ensure equal respect for human dignity throughout the world. But such norms can neither be imagined nor understood in the abstract, without reference to the concrete daily experience of the people who are supposed to implement them. Since any conception of human rights as a normative system is the product of some culture(s), a given set of these rights can be perceived as alien or unacceptable to other cultures. In order for human rights ideas to be effective, however, they need to be translated into local terms and situated within local contexts of power and meaning. They need, as Merry puts it, to be remade in the vernacular.[79]

Culture plays a vital role in understanding and enjoyment of human rights. Ali Mazrui identifies various functions of culture which includes the following.[80] First, it helps to provide lenses of perception and cognition. How people view the world is greatly conditioned by one or more cultural paradigms to which they have been exposed. Second, it motivates human behavior, whereby people tend to respond behaviorally in a particular manner. Third, culture provides criteria of evaluation of what is deemed better or worse, ugly or beautiful, moral or immoral, attractive or repulsive. Fourth, it is the basis of people's identity, as can be seen from how religion and race are often a basis for solidarity or a cause of hostility. Culture gives individuals and the community

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[76] Preis, Supra note 22. pp. 293-294
[77] Kymlicka, Supra note 32.p.75
[78] An-Na'Im, Supra note 11.
[79] Merry, Supra note 69.
[80]Ali A. Mazrui, (1990), Cultural Forces in World Politics. Heinemann: Portsmouth. P.7

with a particular cultural identity a lens through which to define a 'dignified life' which is, of course, the basic foundation of human rights. As Kymlicka puts it, people make choices about the social practices around them, based on their beliefs about the value of these practices. And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture. Our societal culture not only provides options but also makes them meaningful to us.[81]

Despite the relevance of culture in the making and understanding of human rights, however, it is usually depicted as a challenge to the exercise of individual human rights which is partly attributed to the debate of universalism and cultural relativism of human rights. Recognizing the universality of human rights was seen to entail a denial, rejection or overriding of culture; conversely, recognizing culture was seen to prohibit, at least potentially and in some cases, the pursuit of universal individual rights.[82] For instance, critics forwarded against cultures as the main reason for the violation of the human rights of women is the common one.[83] This discourse is animated by a fundamental tension between, on the one hand, the desire to establish universal rights and, on the other, the awareness of cultural differences, which seems to negate the possibility of finding common ground on which to base such rights.

Misreading of culture as totally antagonistic to human rights hinders the global spread and local appropriation of human rights concepts. International human right norms can build upon culture rather than only resist it and this would foster its expansion and use by local activities.[84] When culture is thus viewed as an externalized impediment to the struggle towards human rights, rather than as an integral part of the struggle itself, we are prevented from seeing the various inbuilt potentials of the culture for application of fundamental human rights in general and the human rights of women in particular.[85] Rather than rejecting cultural values as obstacles to the enjoyment of individual human rights it would be important to look for potentials within the culture which

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[81] Kymlicka, Supra note 32. pp.82-84

[82]Jane K. Cowan, et al. (eds) (2001), Culture and Rights: Anthropological Perspectives. Cambridge University Press: Cambridge. P.4

[83] Sally Engle Merry (2003) Human Rights Law and Demonization of Culture. American Anthropological Association: Wellesley.

[84] Merry, Supra Note 83

[85] Preis, Supra note 22. pp.295-296

might be helpful to promote fundamental human rights. Established cultural values and institutions of a given society could effectively be used to create local cultural legitimacy of the rights which could have been resisted as outside norms. Rather than resisting them as alien norms, they will embrace them as part of their culture. Taking these premises as a basis, in the following sections whether the Universalism-Cultural Relativism debate is relevant for discussion of the human rights of women in Ethiopia, and whether the Gada system provides values and norms which have a potential for the better protection of human rights of women in the Oromo peoples' context will be discussed.

3. The Relevance of Universalism-Cultural Relativism Debate for Protection of the Human Rights of Women in Ethiopia

Ethiopia is a plural society home for more than eighty ethnic groups. These highly diverse ethnic groups of the country have been denied recognition of their diversity by the Imperial and the Derg regimes, which were committed to create a nation state.[86] This had served as one of the causes for the long civil war that resulted in a paradigm shift from these assimilationist regimes and adoption of the 1995 Constitution of the Federal Democratic Republic of the Ethiopia (FDRE Constitution) that gave recognition, *inter alia*, for the diversity of the various ethnic groups found in the Country.[87] In this context examination of the debate of universalism- cultural relativism from the perspective of the human rights of women in the current federal Ethiopia becomes relevant for various reasons among which are the following.

Firstly, the FDRE Constitution has dedicated various provisions for the recognition of human rights. Besides its Chapter Three which exclusively deal with fundamental human and democratic rights,[88] the constitution also makes 'International Treaties ratified by the country an integral part of the law of the land'.[89] Ethiopia has ratified most of international human rights instruments relevant for the protection of the human rights of women, including CEDAW.

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[86] See, Assefa Fiseha (2007), Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study .Wolf Legal Publishers: Netherlands.

[87] Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Federal Negarit Gazeta, Proclamation No. 1/1995, August 1995.

[88] The FDRE constitution classifies Chapter Three, entitled 'fundamental rights and freedoms', into two parts: 'human rights' and 'democratic rights'. Looking at the norms under the chapter and the effects of the provisions, the division doesn't seem to make any difference.

[89] FDRE Constitution, Supra note 87. Art 9(4)

It has also signed, but did not ratify it yet, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Therefore, one may be eager to know how these instruments are applied domestically in protecting the human rights of women.

Secondly, Ethiopia is a multicultural country and the FDRE constitution declares that the Nation, Nationalities and Peoples (NNPs) of the country are the sovereign power holders of government power and the constitution is an expression of their sovereignty.[90] Constitutionally speaking, this power extends from making the government to breaking it which includes the right to self-determination up to secession.[91] As an expression of this power, therefore, the constitution has recognized the collective right of each NNPs to 'express, to develop and to promote its culture and to preserve its history'.[92] Recognition of customary and religious laws as a legitimate ways of dispute resolution in personal law areas is also one of the manifestation of the right to self determination of the NNPs of the country. To this effect, Art 34(5) of the FDRE Constitution states that the "Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute". Hence, it will be the duty of the State to make sure that the NNPs right to the exercise of this right is guaranteed while at the same time ensuring the fundamental human rights of individual members of the society is guaranteed against possible infringements.[93]

Considering the above factors, therefore, the apparently conflicting interest of protecting the cultural integrity of groups, in this case the NNPs of Ethiopia, and protecting the human rights of individual women from possible human rights violation embedded within cultural practices of the people needs to be

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[90] FDRE Constitution, Supra note 87. Art 8(1) cum (2)
[91] FDRE Constitution, Supra note 87. Art 39(1)
[92] FDRE Constitution, Supra note 87. Art 39(2)
[93] While assessing the settlement of homicide cases through customary practices among the Shawa Amhara, Somali and Gumuz people Donovan and Getachew discuss the challenges of legal pluralism in the protection of the fundamental human rights of individual members of these societies. They, *inter alia*, question whether the difference of treatment of the crime of homicide among various NNPs of the Country could be at odds with the right to equal protection of law and the duty of the State in guaranteeing fundamental human right to life. See, Dolores A. Donovan and Getachew Assefa, Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism. The American Journal of Comparative Law, Vol. 51, No. 3 (Summer, 2003), pp. 507-508 and 532-533

examined. Whether the universalist approach of 'demonizing the role of culture'[94] in advancing and protecting the human rights of women has to be the rule or whether we need to consider approaches that try to accommodate cultural values and norms in the protection of the human rights of women in Ethiopia should be addressed.

The FDRE constitution has given a wider recognition for the human rights of women. Besides incorporating international human rights protecting women as an integral part of the law of the land,[95] the Constitution itself has dedicated certain provisions for guaranteeing the fundamental rights of women.[96] Especially, Art 35 deals with the human rights of women in a detailed manner. Concerning the status of culture the FDRE Constitution under Art 35(4) states that: "[t]he State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited".[97] However, this provision also seems to reiterate the individualistic international human rights instruments approach of considering 'culture' solely from the perspective of being an obstacle for the enjoyment of the human rights of women by harboring 'harmful customs'. It doesn't consider the possibility that culture could also be a better starting point for the better protection of the human rights of women.

Although diversity is celebrated in Ethiopia because of the status accorded to the NNPs by the Constitution, when it comes to the right of women the culture of the NNPs is usually depicted as an impediment.[98] Rather than searching for possible cultural values of the NNPs that could better be exploited to advance the human rights of women and protect them from harmful cultural practices, policies and literatures on the area focus on the challenges they pose on the rights of women. One of such cultures of the NNPs of Ethiopia includes the *Gada* System of the Oromo people. The theme of the next chapter, therefore,

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[94] Merry, Supra note 69

[95] FDRE Constitution, Supra note 87. Art 9(4) cum 13(2)

[96] FDRE Constitution, Supra note 87. Art 34 and 35

[97] Based on this constitutional provision various legislations both at the federal and regional levels, mainly in criminal and family laws, have been adopted. For more discussion on this matter see: Mizanie, Supra note 55.

[98] For instance, the theme of most researches sponsored by the Ethiopian Women Lawyers Association or EWLA (a domestic Non-Governmental Organization engaged generally in the protection of the human rights of women in the country), is harmful traditional practices embedded within the culture of the NNPs of the country.

will be examining whether the Gada system has potentials that positively contribute for the advancement of the human rights of women within the Oromo people.

4. Potentials of the Gada System for Legitimizing the Human Rights of Women

4.1. The *Gada* System: A Brief Introduction

Gada system[99] is a system of classes (*luba*) that succeed each other every eight years in assuming military, economic, political, and ritual responsibilities.[100] It is a system of social organization based on age-grade classes of the 'male' population.[101] The male members of the society pass from one stage of development to the other assuming different rights and responsibilities from birth to death. The members belong to five different parties (*misseensa*) which assume power in turn every eight years.[102] Jatani and Dire[103] describe *Gada*

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[99] Some writers consider Gada system as one form of a republican government. See, Baissa Lemu (1994), Gada values: The Building Blocks of a Democratic Polity, The Journal of Oromo Studies, Vol. 1 no. 2. Tennessee: Tennessee University. P.48. Herbert S. Lewis (1994), Aspects of Oromo Political Culture, The Journal of Oromo Studies, Vol. 1 no. 2. Tennessee: Tennessee University. P.53

[100] See, Asmarom Legesse (2006), Oromo Democracy: An Indigenous African Political System. Trenton/Asmara: The Red Sea Press, Inc. p.8; and, Alemayehu Haile (2009), Gada System: The Politics of Tulama Oromo. Finfinnee: Oromiya Culture and Tourism Bureau. Pp.48-50

[101] B. van Koppen, M. Giordano and J. Butterworth, (eds), (2007), Indigenous Systems of Conflict Resolution in Oromiya. Butterworth: CAB International. P. 149

[102] Gada system divided the society into five parties (*misseensa*) and each of these *misseensa* has different roles to function in five stages of eight years until power is transferred from one *misseensa* to the other. The stages are itimako (ilma gaammee) which is an initiation stage, daballee in which the socialization continues and military training begins, follee (kuussa) which conducts a military service, qondaalla or raabaa stage which has a dual task of military service and preparation for leadership and the fifth stage is lubba which assumes a full political leadership for the next eight years. See, Baissa, Supra note 99, p.48. The five parties are known by different names. According to Haile; Birmajjii, Horata, Duulloo, Michillee and Rooballee are fathers' parties whereas Halchisa, Bahara, Kiilolee, Biifollee and Meelbaa are son's Gada parties in Tulama Oromo. Among the Borana Oromo (Sabbo and Goona) the parties are known as Fullas, Daraara, Makuula, Sabbooqa and Moggisa. See, Haile, Supra note 100, Pp.52-53

[103] Jatani Dida, Borana Zone Culture and Tourism Bureau, Interview conducted on December 12, 2011. Dire Guyo, Borana Zone, Yabalo District, Interview conducted on December 14, 2011.

system as a comprehensive system which tends to govern economic, political, religious and other social relationships of the society. Discussing the complexity of *Gada* system, Legesse asserts:

> The *Gada* system is an institution that represents an extreme development of a type of social structure known to anthropologists as age-sets. … it is one of the most astonishing and instructive turns the evolution of human evolution has taken. Historically the *Gada* system probably started out of a system of age-sets.[104] Today it is organized along radically different lines: it is a system of temporal differentiation of society having little to do with ages. Among the [Oromo] of Ethiopia the institution has reached a most remarkable level of complexity. … here we find a society that is stratified into two distinct but cross-cutting systems of peer group structures. One is a system in which the members of each class are recruited strictly on the basis of chronological age. The other is a system in which the members are recruited equally strictly on the basis of genealogical generations. The first has nothing to do with genealogical ties. The second has nothing to do with age. Both types of social groups are formed every eight years. Both sets of groups pass from one stage of development to the next every eight years. All [Oromo] males have a position in both systems.[105]

The foundation of the *Gada* system is rooted in the informal or customary Oromo institutions of *aadaa* (custom and tradition), *seera* (laws), *safuu* (the oromo concept of ethics) and *heera* (justice).[106] The *Gada* system organized the Oromo social life around series of generation grades that assign obligations

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[104] According to Borbor Gada system is first started by a man called *Alii Gurraacha Yaayyaa Muunyoo*. Borbor Bullee, Borana Zone, Diree District, Interview on December 15, 2011. Whereas according to Haile, Gada laws were passed down from prior Oromo generations by Makko Billi who was a raji (people who know the future and help others to abide by *waaqa*'s laws). Haile, Supra note 100, p.157 On the other hand Demissei notes that Gada was not started at one time by one person. Rather it developed through the cumulative experiences gained from experiments, practices and lessons of many generations of the Oromo people. See, Diribi Demisse (2011), Oromo Wisdom in Black Civilization. Finfinnee: Finfinne Printing and Publishing S.C. pp. 207-208

[105] Asmarom Legesse (1973), Gada: Three Approaches to the Study of African Society. New York: The Free Press. Pp. 50-51

[106] Koppen et al (eds), Supra note 101, p.152.

and as well as rights to all the males in the society. Each man born to or adopted by Oromo parents is automatically placed for life into a readymade pattern of positions and moved through it, performing various services for the public and also receiving certain privileges.[107]

This indigenous institution is an egalitarian institution embracing most of the principles of modern democratic polity. One of the basic values of *Gada* system is the principle of 'kite' or equality which is a notion that all participants in a group are to be considered and treated as equals.[108] The participation and input of all are permitted and expected. Everyone involved have equal responsibilities to the group. Baissa and Lewis, list various values of *Gada* system which, *inter alia*, includes: establishment of institutions for self rule at central or regional and local levels; the right to participate in democratic self rule at all levels; the respect for basic rights and liberties including freedom of speech, the right to own private property, and the right to debate public issues and reach compromise issues; the procedures for selection and peaceful change of leaders of rulers every eight years; the accountability of leaders and the right to recall (*buqqisuu*)[109] those who fail to discharge their responsibilities; the concept of rule of law (*seera tumma Caffee*), a balanced representation of clans and lineages in *Gada* offices; the right to make laws and regulations through their own elected officials; the settlement of disputes according to the law through neutral and impartial bodies; and, the concept of pluralism in participating in public affairs through five parties called *miseenssa*.[110] The system was based on elaborate institutional checks and balances to safeguard the liberty of the people.[111]

The *Gada* system tries to strike balance between members of the society through various values and principles stated above. Yet, various features of the

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[107] Koppen et al (eds), Supra note 101, p.150
[108] Lewis, Supra note 99, p.54
[109] *Buqqisuu* literally means 'to uproot'. As Legesse described it 'at no point does the Oromo people under Gada system wholly transfers authority to any group of people on power. The society delegates limited kinds of powers to the leaders of a *luba*, for a limited period of time, but that power is always subject to the higher authority of the *Gumi* (Assembly of multitudes) which is the multitude of all the Gada councils and Assemblies. See, Legesse, Supra note 100, pp. 125-126.
[110] Lemu, Supra note 99, P.50; Lewis, Supra note 99, p.54; Legesse, Supra note 100, pp.197-238
[111] Legesse, Supra note 105, P.68

system are criticized as limiting the role of women in the political, social and cultural relationships of the people. According to Legesse, the major weakness of *Gada* system as a political democratic institution is the fact that it excludes women from formal political participation and leadership.[112] These critics, however, fail to see other aspects of the System which accommodate women within the political, socio-economic and spiritual life of the people which are significant to understand how the system operates. In the following sections, therefore, how women are perceived under *Gada* system, whether they have any role within the system and whether there are any mechanisms integrated within the system to protect women from the triumph of male members of the society will be discussed.

4.2. Women under *Gada* System

As briefly discussed above, *Gada* is a male oriented socio-political and cultural system. As such women are not integrated in the age-set classification of the system which gives the members the right to political participation. This excluded Oromo women from the formal politico-military structures.[113] The exclusion of Oromo women from formal politico-military structures of *Gada* system, however, has been wrongly interpreted to designate the system as highly patriarchal and male exclusive.[114] As it will be shortly discussed, such arrangements have their own justifications and the system is inherently an egalitarian system with various integrated customary laws, values and women centered institutions meant to protect women from male centered politico-military structure. Most of the critics against *Gada* system in connection with the human rights of women are concerned about political participation, property ownership and inheritance. Hence, it will be appropriate to discuss these criticisms in order to point out the justifications given by the system and

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[112] Legesse lists exclusion of women from political participation, rigidity of its political structures, possibility of corruption in its electoral process and the fear that it might not efficiently serve the large Oromo population as it is today since it was developed at times where the Oromo people were less populated and dispersed as the weaknesses of Gada system as a democratic political institution. See, Legesse Supra note 100, Pp.255-259.

[113] See, Legesse Supra note 100, p.19; Demisse, Supra note 104, pp.344-345; and, Kuwe Kumsa (1997), The Siiqee Institution of the Oromo Women, The Journal of Oromo Studies, vol. 4, no 1 and 2. Tenessee: Tenessee University. P.119. Demissei notes that there was a time when women used to control the political power before men took over political power and excluded women. See, Demisse, Supra note 104, pp. 197-206

[114] Yohannes Dibaba (2005), Cultural Responses to Violence against Women: the Role of the Siiqee Institution of Arsi Oromo Women. Jimma University: OSSREA. P.31

tackle them where necessary before considering potentials of the *Gada* system for better protection and entrenchment of the human rights of women.

4.2.1. Political Participation

The age-set structure only includes the male members of the society. Only male Children of the society are initiated to the *Gada* system, which is called '*itti makkoo*', and join the *Gada* cycle which gives them the right to take part in the political life of the people.[115] Only men are entitled to engage in warfare and take part in the election of leaders of camps or of age-sets and *Gada* classes. [116] According to Borbor, in the old days of Gada system where the Oromo people were mostly pastoralists the exclusion of women from the political structure was necessitated on the one hand by natural attributes of women which required protecting them from the responsibilities of taking part in the politics of the system and on the other hand by the belief related with life giving role of women.[117] Among other things, when a person participates in *Gada* cycle there was a responsibility of taking part in a military service. However, the very old, the very young and all women, in the *Gada* system are considered innocent and peace-loving.[118] Women were considered sources of life and for them taking life were considered a taboo.[119] As such Borbor notes that, for reasons that don not hold true anymore, women were not integrated in the political structure basically for their own protection from the hardships of the responsibilities attached with the power.

According to Jatani the status of women as 'an outsider' and their role of tying different clans (*gosa)* of the people through marriage is also another reason relied on to exclude women from holding political power.[120] Under *Gada* system marriage could only be conducted between members of different clans. Women as such are given a peculiar role of bonding families and different clans of the society. They are considered as belonging to a clan (moiety) to which their husband to be belongs to which is referred to as *soda* (in-laws).[121] Women are considered as 'outsiders' (*halagaa*) and are never considered within

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[115] Borbor, Supra note 104
[116] Legesse, Supra note 105, p.19
[117] Borbor, Supra note 103
[118] Kumsa, Supra note 113, p.113
[119] Kumsa, Supra note 113, p.113
[120] Jatani, Supra note 103
[121] Legesse, Supra note 105, pp. 22-24

the family.[122] They rather serve as a bridge through whom they are linked with other families and groups. Once they are married and gave birth to or adopted a 'male' child they will assume the clan of their husband.[123] Accordingly, a woman is married to a different clan and the idea is if she is allowed to hold political power she will take it with her to her new clan which would contradict the whole idea behind power sharing principle of *Gada* system. This is because one of the main purposes of *Gada* system is striking balance among various clans and lineages of the people through a balanced representation of the clans as a collectivity in *Gada* offices.[124]

Despite the apparent exclusion of women from the formal political power my informants noted that women have a crucial role within the politics of *Gada* system both directly and indirectly. First, women usually have the power to oppose decisions passed by various *Gada* assemblies where it is against their interest.[125] Secondly, the wives of the men with power also have the same status as their husbands. For instance, the wife of *Abba Gada* is also considered as having the powers of her husband. In the absence of her husband, the wife represents and acts on his behalf.[126] If they appear on their own behalf, however, they take part as witnesses and not as participants.[127] Legesse also notes that, in case the meeting is conducted indoors, the participation of women will be more active even if the men are still in control.[128] Thirdly, according to Dire, the *Gada* system is not complete without women. Among the

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[122] Kumsa, Supra note 113, p.126

[123] Dima Arero, Borana Zone, Arero District, December 13, 2011; and, Borbor, Supra note 18

[124] Lemu, Supra note 99, P.50

[125] Jatani, Supra note 103. Endessa, in his Masters Thesis, notes that Gada Council in Arsi Oromo used to include women members who represent interests of women members of the society. These representatives include *Urjii Dubartii* (which literally means 'star of women') who represents the interest of every female members of the Arsi Oromo; *Haadha Siiqee* (which literally means mother of *Siiqee*) who represents interests of married women; and, *Haadha Nagayyaa* (which literally means mother of peace) who served in making sure that parties to a dispute adhere to decisions passed by *Gada* council mainly because of the respect involved with being women. See, Hussein Endessa (2011), Gada System among the Arsi Oromo: Continuities and Changes. MA Thesis Submitted to College of Social Science of Addis Ababa University. Pp. 48-56

[126] Borbor, Supra note 104

[127] Legesse, Supra note 105, p. 21

[128] Legesse, Supra note 105, p. 21

various roles of women within the *Gada* system the first and basic requirement for a man to hold political power is to conclude marriage.[129] Fourthly, *Gada* relies on the knowledge of laws and decisions passed down orally from generation to generation. Knowledge of *Gada* history is essential for political activity.[130] Legesse notes that a considerable amount of ritual and historical knowledge is invoked in the course of the men's daily deliberations. Even if such knowledge is generally possessed by men who serve as ritual experts and advisors to the councils, women usually have a crucial role in this regard.[131]

4.2.2. Ownership of Property and the Right to Inheritance

Before the 16th C, the Oromos were mixed agriculturalists practicing both farming and herding.[132] Land was a communal property whereas other properties were owned at an individual or family level.[133] For pastoralist Oromos, community livestock and grazing land for their livestock are still the most important properties.[134] For instance, in Borana Oromo, land is still commonly owned by clans (*gosa)* and livestock is owned by individual families.[135] Matters concerning land ownership are dealt with at clan level whereas decisions concerning family properties are done by the participation and consent of the family members, especially the *abbaa warraa* and *the haadha*

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[129] Dire notes that, sometimes the marriage is conducted just for the sake of fulfilling the formality requirement even if the spouses are not mature enough to conclude marriage. Dire, Supra note 103

[130] Legesse, Supra note 105, p.21

[131] Explaining the crucial role played by women Borbor cited a popular practice in Borana Oromo of adjourning decisions where the power holder fails to remember previous decisions, laws, order of ritual practices, etc to enable him discuss with his wife. It is generally believed that women partners of the office holder usually know crucial information like decisions, laws, order of ritual practices, etc. Borbor, Supra note 104. See also, Legesse, Supra note 105, p.21

[132] The Oromo people primarily reared cattle and sheep and grew barley and used this production for economic and ritualistic purposes. After they expanded and settled, most Oromos continued their practices of cultivating barley and other crops on the highlands and herding cattle on the lowlands. Asafa Jalata (1993), Oromia and Ethiopia: State Formation and Ethno-national Conflict, 1868-1992. Boulder & London: Lynne Rienner Publishers. Pp.18-19

[133]Jalata, Supra note 132, pp.18-19; and, Haile, Supra note 100, pp. 54-55

[134] Borbor, Supra note 104

[135] Borbor, Supra note 104; and, Jatani, Supra note 103

warraa (the husband and the wife). Individual decisions on family property are not common for both the husband and the wife.[136]

Gada system prescribes different roles of men and women which have to be followed strictly since there are powerful taboos to keep the roles distinct. Even if men are in control of military and political activities, women have *de facto* control over domestic scene and important resources.[137] According to Legesse, the most important of these prerogatives is the exclusive right and duty of married women to build huts. They not only build huts but also own them and are largely in control of the activities that go on inside them.[138] Women also individually own properties, for instance, livestock they get as a gift from their parents, husband and relatives when they get married or give birth to a child, etc. On such properties, women have exclusive ownership rights and could demand non-interference in the exercise of this right.

As regards inheritance rights, Gada system prescribes the right to be exercised only by the male descendants of the parents. Two basic reasons seem to underlie the exclusion of women from exercising the right to inherit. The first reason is connected with the collective ownership rights both at *gosa* and family level described above. Women are regarded as '*halagaa*' and function as bridges among different families. Accordingly, if the right to inherit is given for women they will take the property of their parents to the *gosa* of their husband which might result in unnecessary conflict.[139] Secondly, the inheritance right doesn't result in an immediate liquidation of the estate. The eldest son will assume the responsibility of administering the property on behalf of the inheriting sons and gives them their share when they get married.

Examining the underlying justifications of *Gada* system provided for the limited political participation and inheritance rights of women reveals that such treatment emanated from the collective nature of ownership rights and at times for the sake of protecting women from hardships. As such these factors are not attributed, as some writers argue, to the inherent patriarchal nature of the system. Whatever the justifications are exclusion of women from

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[136] Mrs. Hinsene Gufu and Mrs. Godana Doyo, Borana Zone, Yabalo District, Interview conducted on December 13.
[137] Legesse, Supra note 105, p.20
[138] Legesse, Supra note 105, p.20
[139] Borbor, Supra note 104; and, Jatani, Supra note 103

participation might result in violations of the rights of women by male members of the society. Fortunately, this vulnerability of women to abuse by men members of the community seems to have been perceived by the system. Dibaba notes that *Gada* system is a uniquely egalitarian institution since the two sex domains had a strong functional interdependence and one was not valued any less than the other.[140] As such various mechanisms were designed as a check and balance to the power of men under the *Gada* system. For instance, *siiqee* institution, which will be discussed in the following section, is such mechanism meant to balance the power of men and protect women.

4.3. *Gada* Laws, Values and Institutions with a potential to Protect the Human Rights of Women

Being an egalitarian and democratic institution, *Gada* system has various principles and values to offer for the protection of the rights of women. *Gada* system is not just a political institution. It is rather a comprehensive system governing the social, economic, religious and other aspects of the Oromo people. This requires examining these aspects to identify possible potentials of the system that could help in protecting women members of the society from violation and at the same time creating local cultural legitimacy of human rights of women as recognized under international human rights instruments. Hence, in the following sub-sections, the customary laws, values and inbuilt women centered institutions of *Gada* system relevant for the purpose of this aim will be discussed.

4.3.1. *Waaqeeffannaa*

Gada system has a spiritual aspect which has helped the system to keep its integrity for centuries until the spread of other religions, i.e. Christianity and Islam, have endangered its existence.[141] The religious and political institutions within the *Gada* system are interwoven and usually implementation of one of the laws is at the same time implementation of the other.[142] The traditional Oromo religion (*waaqeeffannaa),* which means the way of *waaqa*,[143] dictates that

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[140] Dibaba, Supra note 114, p.32

[141] Gadaa Melbaa (1988) Oromia: An Introduction, Khartoum, Sudan. Pp.19-22. Jalata, Supra note 132

[142] Haile, Supra note 100, P.108

[143] Thomas ZItelmann (2005), Oromo Religion, Ayyaana and the Possibility of a Sufi Legacy. The Journal of Oromo Studies, Vol. 12 No. 1 and 2. Michigan: University of Michigan. Pp.80-99

'*waaqa*'[144] (God) is the one Supreme Being which exists in everybody and everything in the Universe.[145] *Waaqa* is both the creator and the creation. Its existence is confirmed by the very existence of heaven and earth and by the orderly movement that takes place within them.[146] The Oromo world-view, as Megerssa calls it, [147] could be understood by examining *ayyaana,*[148] *uummaa*[149] and *saffuu.*[150] According to him these three concepts are interrelated aspects of the whole through which the Oromo perceives the Universe. *Saffuu* penetrates all actions as it sets the measure of what constitutes an appropriate act.[151]

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[144] *Waaqa* is commonly known as '*waaqa gurraacha*' in the Oromo people. While *waaqa* is an old Cushitic name for 'God', '*gurraacha*' is an Oromo term for black, which represents the notions of purity, truth, originality and divine mystery. See, Mohammed Hassen (2005), Pilgrimage to the Abbaa Muudaa. The Journal of Oromo Studies, Vol. 12 no. 1 and 2. Michigan: University of Michigan. P.142. According to Bartels, however, '*waaqa*' represents more than 'God' as understood in the 'West' as the 'supreme being, creator and ruler of the universe'. It rather comprises more, since it includes countless particular manifestations of waaqa in this world, particularizations of his creative work which are conceived as beings. Hence, the word 'divinity' will often be a better translation than 'God'. See, Lambert Bartels (1990), Oromo Religion: Myths and Rites of the Western Oromo of Ethiopia – An Attempt to Understand. Berlin: Dietrich Reimer Verlag. P.89

[145] Borbor, Supra note 104

[146] Gemechu Megerssa, (2005), The Oromo World-View. The Journal of Oromo Studies, Vol. 12 no. 1 and 2. Michigan: University of Michigan. P.74

[147] Megerssa, Supra note 146, p.69

[148] The core meaning of *ayyaana* refers to that by and through which *Waaqa* creates anything and everything. *Ayyaana* is in fact both that which causes something to come into being and becomes that which it has caused. *Ayyaana* is, therefore, that which exists before and after, that which it causes to come into existence. Megerssa, Supra note 146, p.69 Hence, every creature, people, animals and plants, have their own *ayyaana*. Bartels, Supra note 144, Pp.112-123

[149] *Uumaa* refers to the entire physical world and the living things and divine beings contained within it. The nominal form of *uumaa,* therefore, refers to everything that is created. in short, God's creation. Megerssa, Supra note 146, p.70

[150] *Saffuu* is a moral category which constitutes the ethical basis upon which all human action should be founded; it is that which directs one on the right path; it shows the way in which life can be best lived within the context of Oromo world. Megerssa, Supra note 146, p.70. The Borana Oromo refers to this concept of *saffuu* as *ceerra fokoo*. Despite the difference in naming the concept of both *saffuu* and *ceerra fokoo* is similar. Jatani, Supra note 103; and, Dima, Supra note 123

[151] Megerssa, Supra note 146, pp.70-71

Saffuu refers to the knowledge of natural laws as recognized by the ancestors of the Oromo which has to be observed to keep the cosmic order.[152]

Accordingly, *waaqa* created and regulates the existence of all animate and inanimate as well as material and non-material nature placing them in a well balanced cosmic order.[153] As an extension of this phenomenon, the Oromo believed under *waaqeefannaa* that society collapses unless a balance is struck between the power of male and female and everything that surrounds them in the cosmic order of *waaqa*.[154] The Oromo usually say '*saffuun kan waaqaaf lafaatti*' which literally means *safuu* comes from *waaqa* and earth. The interdependence of men and women is considered a precondition for peace and prosperity in the metaphysical as well as the practical sense.[155] The concept of this peace and order of *Waaqa (safuu)* is extremely important in Oromo religious and political thought. If the balance is disturbed, it is said that *safuu* is lost and the loss of *safuu* is the loss of *Seera Waaqa* (*Waaqa's* law and order) which signals the reign of chaos and disaster.[156] Because, when *safuu* disappears nothing is left.[157]

The need to keep the balance of nature, therefore, requires members of the society to be aware of *saffuu* and respect them. Men and women are part of *uumaa* (nature) and have to respect the balance of nature. Megerssa asserts that in the Oromo world-view, *saffuu* provides the moral and ethical code according to which events, whether at personal, social or cosmic level takes place. It is by living in harmony with these laws, following the path of *waaqa* that a full and happy life can be achieved.[158] It is to keep this balance that woman exclusive solidarity institutions like '*siiqee*', which will be discussed in the following section, were designed to serve as a check and balance to the male exclusive political aspect of *Gada* system.

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[152]The laws of the ancestors are divided into two categories. The first consists of the laws given by *waaqa*. These laws are the laws of nature. The second comprises of the laws made by man. See, Megerssa, Supra note 146; and, Demisse, Supra note 104, p.75

[153] Bartels, Supra note 144, Pp.330-341. Kumsa, Supra note 113, p.120

[154] Kumsa, Supra note 113, p.120

[155] Kumsa, Supra note 113, p.120

[156] Kumsa, Supra note 113, p.120

[157] Bartels, Supra note 144, p.333

[158] Megerssa, Supra note 146, p.76

4.3.2. Muka Laaftuu

Women hold a peculiar position within the Oromo people under *Gada* system. They have respect (*ulfinna*) and this respect is manifested in various ways. *Gada* system considers women as *muka laaftuu* (which literary means 'soft wood') showing their vulnerability to violations and the need to give them a priority to address their case where their rights are violated.[159] Moreover, where a woman alleged that her rights have been violated, her case will be settled without the need for additional evidence. Her words are taken as a conclusive proof of the commission of the alleged transgression of her rights.[160] Especially, where the violence is a sexual violence committed against a girl who is not married yet (*durba*),[161] the punishment is severe. The transgressor is considered as if he had committed a murder and is referred to as *caphana* (an outcast) and will be punished accordingly.[162]

Gada laws could be broadly categorized into cardinal and supplementary laws.[163] One of the cardinal laws of *Gada* system is *seera haadhaa* (the laws of the mother), which provides that mothers and generally females have a special place in the society and they have to be respected, protected and served.[164] *Gada* system also provides for laws of marriage known as *seera rakoo*[165]. These laws determine the relationship that has to exist between the married couples and the social, economic and other rights of children. The logic behind these laws is that a person who is able to respect *seera rakoo* could also respect and protect *Gada* laws in the society. Therefore, failure to respect *seera rakoo* might

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[159] Hinsene Supra note 136; Borbor, Supra note 104; and, Jatani, Supra note 103

[160] Borbor, Supra note 104; and, Dire, Supra note 103

[161] Under Gada system unmarried women are called *durba* inferring their purity since they have never involved in a sexual intercourse. They are only allowed to do so when they are married. Destroying the virginity of unmarried women, therefore, is considered as a serious crime resulting in the outcast of the offender from the society.

[162] Borbor, Supra note 104; and, Jatani, Supra note 103

[163] Cardinal laws are fundamental laws which are not susceptible to amendment or annulment. The major cardinal laws include *seera waaqa* (the law of God), *seera laffaa* (the law of the earth), *seera abbaa* (the law of the father), and *seera haadhaa* (the law of the mother). On the other hand, supplementary laws were enacted as a response to new changes in social, economic and political life of the people every eight years. Haile, Supra note 100, pp.109-110

[164] Haile, Supra Note 100, p.111

[165] The word *rakoo* refers to promise between husband and wife that occurred during marriage. Haile, Supra note 100, p.112

result in losing the right to take part in *Gada* social, religious, political and economic roles.[166]

4.3.3. Siiqee

Siiqee is a stick (*ulee*)[167] symbolizing a socially sanctioned set of rights exercised by married Oromo women.[168] The two types of *ulee* that are cut and fashioned for marriage sticks are called *siiqee* and *horooroo.*[169] *Siiqee* is given for the bride and *horooroo* for the bridegroom on the day of their marriage, which they will hold for the rest of their life. Upon the death of the owners the function of both *siiqee* and *horooroo* also come to an end when they are broken into halves and placed on the graves of the deceased.[170] For an observer *siiqee* might seem just a stick symbolizing the married status of Oromo women and used only for ritual purposes. According to Kumsa and my informants,[171] however, *siiqee* is not just a stick symbolizing the married status of women and is not only used for ritual purposes. Rather it is used to represent far richer values.

According to Kumsa, *Siiqee* was a weapon by which Oromo women fought for their rights. The *siiqee* institution functioned hand in hand with *Gada* system as one of its inbuilt mechanism of check and balances. *Gada* customary laws provided for them and society honored it.[172] *Siiqee* was recognized as a peaceful way through which married Oromo women defended their rights. The foundation of the siiqee institution is the ideology behind the traditional

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[166] Haile, Supra note 100, pp. 111-114

[167] *Ulee* is a collective term the Oromo used to refer to those sticks that are purposely cut and fashioned for specific social, cultural and religious functions. Gemechu Megerssa (1993), Knowledge, Identity and the Colonizing Structure: The Case of the Oromo in the East and North East Africa. PhD Thesis Submitted to the Department of Anthropology, University of London, School of Oriental and African Studies.

[168] See, Kumsa, Supra note 113, p.115; and, Demisse, Supra note 146, p.173

[169] Borbor, Supra note 104; and, Jatani, Supra note 103. Both types of *ulee* are made out of a tree called *harooressa*. The name of this tree is a compound noun made of '*hara*' and '*horeessa*'. *Hara* means a body of water. In Oromo society water is symbolically regarded as the source of all life. A human being deprived of *hara* is deprived of all the basic rights including the right to his/her life. Therefore, *harooreessa* signifies the basic rights to which an individual is entitled for as long as he/she lives. See, Kumsa, Supra note 113; and, Dibaba, Supra note 114, pp.61-62

[170] Kumsa, Supra note 113, pp.120-121

[171] Kumsa, Supra note 113; Borbor, Supra note 103; and, Jatani, Supra note 103

[172] Kumsa, Supra note 113, p.119

belief of the Oromo people, *waaqefannaa*, which is an integral part of the *Gada* system. According to *waqeefanaa, waaqa* created and regulates the existence of all animate and inanimate as well as material and non material nature placing them in a well balanced cosmic order. However, *Gada* system is a male exclusive institution and there is a possibility of distortion of this cosmic order by men who might abuse their power in the institution. *Siiqee* institution, therefore, is meant to keep the natural balance between men and women by serving women as a means to defend their rights.

Among the various uses of *Siiqee*, the first is its role in signifying the property of a married woman. Under the *Gada* system, women are generally excluded from holding a political post and their property rights including their rights to inheritance are limited. Even if women lack the right to inheritance under *Gada* system, they do have various ways of securing properties from their parents and relatives. One of these instances is at the time of their marriage. The parents and relatives of the bride give her various properties called *siiqee*.[173] The bride have the right to dispose these gifts as she deems fit.[174] Kumsa also asserts that in former times women used to touch the properties they acquire through raids by the tips of their *siiqee* to signify their ownership right.[175]

Secondly, as an extension of the right to own the huts they built, women also have control over what is going on under the hut.[176] Women under *Gada* system had, therefore, control over their sexuality.[177] Affirming this situation, Legesse states that, in *Gada* system, marriage is indissoluble once it is concluded. *Gada* has no laws or institution to deal with separation.[178] Marriage is a social pact, the purpose of which is to raise children and maintain the

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[173] Borbor, Supra note 104; Jatani, Supra note 103; Hinsene Supra note 136; and Godana, Supra note 136. In this case *siiqee* is used to refer to the property given for the bride at the time of her marriage as a gift to enable her to be independent in her new life as a married woman.

[174] Kumsa, Supra note 113

[175] Under Gadaa system, War is conducted only by male members of the society. Women cannot take part in war since it is believed that they have the role of giving life and cannot take it by killing. They instead fight in peace using their *siiqee*. Kumsa, Supra note 113, pp.123-124

[176] Legesse, Supra note 105, p.20

[177] Kumsa, Supra note 113, p.125

[178] Borbor, Supra note 104

continuity of society.[179] Sexual gratification is, however, regarded as an individual matter and society allows mechanisms of maintaining extramarital sexual relationships through maintaining a lover (*garayu* or *sanyo*).[180] The control of the wife over her sexuality is not limited to the right to maintain extra-marital sexual relationship. She rather has the right to refuse to have a sexual intercourse with her own husband without her consent, which protects married women from 'marital rape'. Failure to respect this right of married women over her sexuality was considered as contradicting the balance of the cosmic order and the loss of *safuu* giving rise for *iyya siiqee* (siiqee scream).[181]

Thirdly, *siiqee* also serves as a weapon to protect the right of married Oromo women to organize and take part in women exclusive meetings (*walargee*) and take part in *siiqee* solidarity.[182] According to Kumsa, the fact that women are considered as *halagaa* (outsiders) and not considered as part of the family to which they are married to make cooperation with other fellow women crucial. They get together to pray, discuss their problems and deliberate on measures that have to be taken. Similar to other violations, intervening in the right of women to take part in the meeting gives rise for its restoration through *siiqee* scream.

Another crucial role of *siiqee* in the protection of the rights of women is its potential in protecting women from violence. The *Gada* system regards women as vulnerable members of the society and requiring protection by the community at large. Therefore, it provides for laws of *muka laaftuu* which have the purpose of protecting vulnerable groups of the society including women.[183] The *Gada* system, therefore, takes violence against women seriously. Beating a

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[179] Legesse, Supra note 105, pp.18-32

[180] Legesse, Supra note 105, pp.18-32; Kumsa, Supra note 113, p.124; and, Dibaba, Supra note 114, pp.67-91. The practice of maintaining a lover (*garayu*) doesn't exist anymore in Borana Oromo, because of its danger in exposing the society to various sexually transmitted diseases including HIV/AIDS. Jatani, Supra note 103

[181] *Iyya siiqee* is a way of communication through which a woman whose rights are violated calls for a cooperation of other women members of the community in a quest to restore lost *saffuu*. Restoration of *saffuu* is a collective matter and other women members of the society respond by grabbing their *siiqee* and joining the victim. See, Kumsa, Supra note 113, pp.128-129, Megerssa, Supra note 167

[182] Kumsa, Supra note 113, p.126

[183] Kumsa, Supra note 113, pp.126-127; Megerssa Supra note 166; Hinsene Supra note 135; and, Borbor, Supra note 103

women holding *siiqee* is considered as beating the *ayyaana*[184] of fertility and prosperity.[185] When a woman is a victim of violence, she will take up her *siiqee* and march on *iyya siiqee* (siiqee scream). If the violation is serious, the measure will also be severe. The women members of the society will leave their home and assemble under a big tree (*kiltu)*[186] which is termed as *godaansa siiqee* (*siiqee* trek). According to Megerssa, the women will not return home until the verdict they pass as a punishment is executed and *saffuu waaqa* is restored.[187] In Arsi Oromo, when the violence involves a mother who have recently gave birth, the measures taken are more severe. A woman who gave birth for a child wears a small diabolic shaped bead on her forehead called *qanafa* for about six months after delivery which represents the highest dignity they have assumed.[188] The *qanafa* serves as a symbol of motherhood and designed to protect a new mother from physical or psychological abuse.[189] *Qanafa*, therefore, underlines the care that has to be taken while dealing with women wearing it and, as such, supplements the role of *siiqee*.

4.3.4. *Ateetee*

Baxter describes *ateetee* as a festival held by women of a neighborhood in which the celebration of a specific womanliness of a woman is a major theme.[190] Among the various *ayyaanas* in the traditional Oromo religion of *waaqefanaa*, *ateetee* is celebrated (which is called '*ateetee facaafachuu'*) to honor *ayyaana dubartii* (*ayyaana* of a woman).[191] Basically, therefore, *ateetee* was celebrated to honor the fertility of women. As such, *ateetee* was performed by every woman

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[184] See, Supra Note 148

[185] Haile, Supra Note 100, p.199

[186] Kiltu is a big tree chosen by Oromo people mainly for its shade to conduct assemblies.

[187] Kumsa, Supra note 113, pp.129-131

[188] See, Dibaba, Supra note 114, p.65; and, Demisse, Supra note 104, pp.176-180

[189] Culture and Change: Ethiopian Women Challenging the Future. (2003) Nairobi: IIRR.

[190] Baxter, P.T.W. (1979), Atete in a highland Arsi Neighborhood. North East African Studies. Pp.1-22. Describing how *ateetee* festivity is celebrated Dibaba asserts that women dress in their traditional dresses, hold a luxuriant wet grass called *coqorsa* and their *siiqee* to come to the ceremony. Then there will be song, dance, prayer, blessing and sacrifice in honor of the sanctity of the women deity (*ayyaana dubartii*). See, Dibaba, Supra note 114, p.57

[191] *Tamaam Haaji-Aadam (2011), Ateetee: Sirna Adunyaaratti Addaa, Tan Mirga Dubartoota Oromoo Eegduu fi Eegsiftu. Dirree Dawaa: Mana Maxxansaa Kalaaf. P.1*

who wished to be pregnant.[192] It was used for various purposes concerning female members of the society.[193] It served as women's religious institution within *waaqeefanaa*. It is believed that *ateetee* practice by women is one part of a belief in which women are intermediary figures between *waaqa* and the physical world, since they are closer to nature in their nurturing and life sustaining activities.[194] It is an exclusively women ritual. According to Bartels, in former times *ateetee* was performed every year by all women who were not beyond childbearing according to their age. But later, under the influence of Christianity and Islam, it was more generally performed by women who feared they would have no more children and who wish to have a further child.[195]

A*teetee* also have a social and political purpose in which Oromo women employed to counter male atrocities and to enforce sanctions against related behaviors. Such measures are taken especially where the violence has to do with endangering the fertility of women.[196] *Ateetee,* in this case, is an event in which women assemble in order to discipline an erring male or female neighbor and later to celebrate their success in doing so by song, dance, prayer, blessing and sacrifice. Oromo women used to practice *ateetee* as a way of strengthening their solidarity and as a tool to counter atrocities staged against them by men.[197] Just like *siiqee*, *ateetee* is a women exclusive institution where they decide on issues affecting their lives in the society and strengthen their solidarity.[198]

4.3.5. Gummii/Caffee/

Among the fascinating aspects of *Gada* system one has to do with the principle that most of the laws of *Gada* system, except the cardinal laws[199], are subject to amendment in order to fit them to the changes in the society. According to Borbor, the Oromo people under *Gada* have a principle which says *"waaqqi dhugaa tolche, namni aaddaa tolche"*, which literally means '*Waaqa* created truth whereas man created culture'.[200] From this basic principle follows that, the

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[192] Bartels, Supra note 144, P.124
[193] Dibaba, Supra note 114, pp.54-58
[194] Legesse, Supra note 105; and Bartels, Supra note 144
[195] Bartels, Supra note 144, P.321
[196] Dibaba, Supra note 114, p.57
[197] Koppen et al (eds), Supra note 101, p.152; and, Aadam, Supra note 191, Pp.17-22
[198] Dibaba, Supra note 114, p.58
[199] Haile, Supra Note 100, pp.109-110
[200] Borbor, Supra note 104

laws of *Gada* system which are regarded as manmade are subject to amendment and/or repeal.

Gummii (*Caffee*) to which Legesse refers as 'Assembly of the Multitudes' is a kind of a national assembly which is made up of all the assemblies and councils of the *Gada* system who meet in the middle of the Gada period once every eight years to review existing laws, to make new laws, to evaluate the men in power and to resolve major conflicts that could not be resolved at lower levels of their judicial organizations.[201] In Borana, this *Gummii* is called *Gummii Gaayyoo*.[202] *Gummii* is an assembly with the highest degree of political authority constituting the assembled representatives of the entire society in conjunction with any individual who have the initiative to come to the ceremonial grounds.[203] Therefore, decisions passed by the *Gummii* are binding on every one under *Gada* system.

Being the ultimate power holder of the *Gada* system, laws and customs that affect the rights of women could be brought to the attention of the *Gummii*. As the Borana Oromo says, 'what the *Gummii* decides cannot be reversed by any other assembly' and everyone has to adhere to them.[204] If the *Gummii* is convinced about the changes that have to be done to protect women members of the society, it could modify prior laws and/or come up with new laws to meet the needs of the society and get rid of practices that limit the rights of women. Earlier records state that among the central Oromo, all the laws of the land were abolished by the great Assembly and each law is then reiterated and reinstituted when power is transferred from one *luba* to the other (*baallii* ceremony).[205] Hinsene and Godana claim that the rights of women could be better protected by *Gada* system if the *Gummii* amends its laws which limit the rights of women, such as inheritance rights.[206] The fact that the system is an all

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[201] Haile, Supra Note 100, p.53

[202] The Pan-Borana meeting at the well of *Gayo* is an event that brings together almost every important leader. Legesse describes Gumi Gayo as by far the most inclusive event in Borana political life. See Legesse, Supra note 105, pp.93-99

[203] Legesse, Supra note 105, p.93

[204] Borbor, Supra note 104; Jatani, Supra note 102; and, Legesse, Supra note 105, p.93

[205] Legesse, Supra note 105, p.96

[206] Hinsene and Godana, Supra note 136

inclusive system and its laws and values are adhered to by everyone under the system could protect and promote the rights of women.[207]

4.4. Challenges to the *Gada* System as a Cultural Institution for the Protection of the Human Rights of Women

Culture has a significant role in the understanding and exercise of human rights. Every society has its own understanding of human rights defined by its specific cultural values and norms since what is a dignified life in one society might not be true for the other. This is at the heart of the universalism-cultural relativism debate of human rights. Despite the continuous changes that could be observed within the Oromo people, the *Gada* system is the cradle of understanding the world around them and construing what a dignified life means. Understanding *Gada* system could, therefore, be used to promote and protect the human rights of women within the Oromo people.

At the time when the *Gada* system was fully active, the Oromo people also respected the various features of the *Gada* system including those that give high regard for women members of the people. Together with the decline of the system, the efficiency of the laws, values and institutions of *Gada* also decreased. Identifying and nurturing these potentials of the system should be the starting point for protecting the human rights of Oromo women. It is obvious that this premise better works for the part of the people where the system is still active. However, the same could be true for other parts of the people where the system is no more active since the legacy of this egalitarian institution shapes the philosophy of life of most Oromo people. Hence, it would be wise to examine various factors that are forcing *Gada* system to decline since this negatively affects its potentials for the advancement of the human rights of women and creating cultural legitimacy of international human rights norms protecting women.

The starting point of the decline of *Gada* system could be traced far back to the great expansion of the Oromo people and most recently to the conquest of King Menilik II of Shoa (1889-1913), in the formation of Ethiopia as it stands today,

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[207] Hinsene and Godana, Supra note 136. In line with this thought, for instance, the Borana Zone Women and Children Affairs was planning to present concerns of the rights of women and children to the attention of the *Gummii Gaayyoo* assembly at the time of the preparation of this piece. Boru Boba, Borana Zone Women and Children Affairs, Interview conducted on December 14, 2011

which started in the last decades of the 19th C.[208] Be that as it may, I would like to focus on some basic factors under the current Federal Democratic Republic of Ethiopia that are facilitating the decline of *Gada* system.

The first challenge to *Gada* system is attributed to the inefficient legal protection accorded to cultural institutions in Ethiopia. This factor could be seen by classifying it into two: constitutional recognition, both at federal and regional level; and, inefficient legal pluralism. The Constitution of the Federal Democratic Republic Ethiopia has given recognition for the individual as well as collective rights of the Nation Nationalities and Peoples of Ethiopia (NNPs) to promote their culture and preserve their history.[209] The Constitution has also established a federal state structure.[210] One of the effective ways of promoting and protecting the right to culture of the NNP of the country is, therefore, through recognition and expression of the same right in the constitutions of the regional governments so established. However, the Constitution of Oromiya National Regional State doesn't mention *Gada*, or other cultural institutions of other NNPs within the region for that matter, as its core foundation within its regional constitution.[211] It rather replicates the FDRE constitution in almost all of its provisions. This clearly raises the question 'what other identities of the Oromo people the regional constitution protects within the federal setup if it failed to rely on *Gada* system' which is, as Jalata calls it, 'the pillar of the Oromo culture and civilization'.[212] The start point for exercising the right incorporated under Art 39(2) of the FDRE constitution would have been to start with constitutional recognition at regional level and working to foster it and protect it from decline. This way the values and principles of the *Gada* system that could be used to further protect the human rights of women could also be protected and exploited accordingly for extending the horizons of protection for women members of the Oromo people. On the other hand, the FDRE constitution also created a legal pluralism by conferring judicial power on cultural and religious institutions for cases involving personal matters[213] in addition to the formal Court structures where the state and federal judicial powers normally reside according to Art 79(1) of the FDRE Constitution. The absence of effective coordination between formal judicial organs and

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[208] See, Legesse, Supra note 105 and Jalata, Supra note 132
[209] FDRE Constitution, Supra Note 87, Art 39(2)
[210] FDRE Constitution, Supra note 87. Art 1
[211] The Revised Constitution of Oromiya National Regional State, Magalata Oromiya, Proc. No. 46/2002
[212] Jalata, Supra note 132, p.20
[213] FDRE Constitution, Supra Note 87, Art 34(5) cum 78(5)

traditional institutions including *Gada* system, however, has created a favorable condition for some individuals to escape justice.[214] This has a damaging impact on the traditional institutions such as *Gada* system since the society loses confidence on their effectiveness.

Secondly, the challenge comes from the current government holding political power itself. Most of my informants[215] asserted that *Gada* system by nature requires the strict adherence to the principles and requirements of the system. For instance, the *Abba Gada* and his *luba* has to be physically present within the community and need to learn from their predecessors (*Abboottii Gadaa*).[216] The *Abboottii Gadaa* serves as advisors of the ruling Gada officials (*luba*). However, the government is considering the *Abba Gadaas* as its own political officials which is isolating them from the culture and creating confusion as to whom they have to be accountable.[217] My informants asserted that *Gada* system used to have a principle in which the people might recall (*buqqissuu)* officials who failed to carry out their responsibilities. But this right might not be exercised if the *Abbaa Gadaas* are shielded under the formal state structure having the blessing of the government affecting the adherence of the ordinary people to the decisions adopted and laws passed by the ruling *luba*. Moreover, another informant asserted that even if the initiative of the government to foster the system as one cultural heritage is a good thing, the approach being followed by the government doesn't serve this purpose. Rather than supporting the *Abboottii Gadaa, the luba* and other parts of the society running the system, the government targeted only the *Abbaa Gadaa*. According to my informant, if the government really wanted to preserve the system, the emphasis has to be on these groups and not on an individual *Abbaa gadaa*. This approach which is helpful to minimize the danger of co-opting the traditional leaders with formal

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[214] To escape justice some individuals flee to other areas where traditional institutions could not reach them usually to urban areas. The formal judicial institutions don't also prosecute them since the victims usually do not follow them once they leave their community. See, Israel Itansa (2009), Gada System Conflict Resolution Mechanisms and the Quest for Survival. MA thesis submitted to Institute of Peace and Security Studies of Addis Ababa University, pp.41-42

[215] Because of the sensitive nature of this particular subject and protection of my informants I have chosen to keep the identity of my informants not to expose the names of my informants for the sake of their protection.

[216] Those who have served as Abba Gada and worked in Gada Assemblies before are commonly referred to as '*Abboottii Gadaa*'.

[217] The effect of this consideration on the behavior of *Abbaa Gadaa's* is described in detail by Itansa. Itansa cited an incident in which conflict of personal interest resulted in a fight between the current Abba Gada and Arero District Governor; the last thing expected from Abba Gada. See, Itansa, Supra note 214, p.36-41

government officials and restore the trust of the ordinary people on the *Gada* system.

The other major threat comes from the most widely followed religions in Ethiopia and the regional government of Oromiya, i.e. Christianity and Islam. The traditional Oromo religion, *waaqeefannaa*, is at the core of the Gada system. Most of the laws, values and institutions of the system such as the principle of *muka laaftuu, siiqee* and *ateetee* are founded on the natural laws of *waaqa*. The strength of the system is partly attributed to this traditional religion.[218] Thus, *w*hile keeping the principles of *waaqeefannaa,* the society is at the same time respecting most of the laws and principles of the *Gada* system. However, most of the philosophies underlying *waaqeefannaa* are in sharp contrast to the philosophies of Christianity and Islam. As such, these two major religions wrongly consider most of the ritual practices of *waaqeefannaa* as worshipping what they call 'evil'. When one *waaqeefattaa* family converts to either of these religions, therefore, it will be forced to relinquish most of the philosophies of *Gada* system based on the laws of *waaqa*.

[218] Of course, there is a principle of separation of political power and religion in Gada system. This is why *Qaalluu*, which is hereditary, has no political power. The only point the institution of *qaalluu* and Gada intersect is at the *baallii* (Gada power transfer) in the occasion of *muda* ceremony. Keeping the cosmic balance of nature is the foundation of most of the principles of Gada system.

BIGAMY AND WOMEN'S LAND RIGHTS: THE CASE OF OROMIA AND SNNP NATIONAL REGIONAL STATES

By Belachew Mekuria Fikre *

Background

While carrying out a research for the Ethiopian Institution of the Ombudsman on women's land rights in selected regions of Ethiopia, I came across some puzzling facts relating to women's rights. They related to multiple marriages, technically called polygamous marriages, which are prohibited by law as a crime of bigamy. Bigamy is an act where more than one marriage is concluded by a person at the same time, whether by a man or a woman.[1] Based on regional family laws as well as the federal law on the matter[2], a person shall not conclude a new marriage as long as s/he is bound by a bond of a preceding marriage.[3] What is affected when there are multiple individuals being married

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[1]Legally speaking, a woman's act of entering into a polygamous marriage is similar to that of the man and as such prohibited. However, unlike the man, multiple marriages by a woman are culturally and religiously impermissible. For example, polyandry – plural marriages by a wife – is strictly forbidden under the Islamic law as can be observed from Surah 4:24. See Johnson, Heather, (2005), 'There are worse things than being alone: Polygamy in Islam, past, present and future,' *William & Mary Journal of Women & Law*, Vol 11, pp 563-596, (563)

[2] When it comes to family law (among others), the federal law issued by the federal parliament is limited to a defined territorial reaches namely to the cities of Addis Ababa and Dire Dawa. See the Revised Family Code, Proclamation No 213/2000, *Federal Negarit Gazeta Extra ordinary issue*, 6th year, No 1, Addis Ababa, 4th July, 2000. Specifically, para 4 of the Preamble states that 'it has become essential that a family law be enacted by the House of Peoples' Representatives to be applicable in administrations that are directly accountable to the Federal Government.' The federal family law (among others) in practice continues to provide some guidance to the exercise of regional family law making.

[3] For instance, the Revised Family Code (ibid) under Article 11 has this prohibition. Moreover, Article 30 of Oromia National Regional State's Family Law (amendment) Proclamation No 83/2003 and Article 21 of the Southern Nations, Nationalities and

to a person is, among others, family property, which understandably is finite. Further division of property with new comers to the family may become a cause for contention amongst spouses and their children. Being one of the resources that know no growth amidst ever-increasing family size attributed to population growth, land becomes the centre of multifaceted conflicts.

The research that inspired this contribution was conducted in six selected Woredas of Oromia and Southern Nations, Nationalities and Peoples (SNNP) regions with the objective of examining rural women's access to land, security of tenure and institutional guarantees as far as their land rights are concerned. The findings are rather mixed in the sense that the remarkable progress of the certification process provides a ground for cautious optimism. For example, the 'low-cost land reform has contributed to increased perception of tenure security for both women and men.'[4] On the negative side, the certification process seems to have victimised women who are the ones sharing a single man in the relationship. This is because the issuance of a certificate of land holding to a person either by listing his wives exhaustively (the practice in Oromia) or by dividing the land in the name of each wife having the husband's name in all (the practice in SNNP) has serious implications on women's access to land.

This article is meant to point out how these institutional practices have indirectly permitted bigamy contrary to a clear prohibition in the family laws. The first part provides a brief introduction on the meaning and effects of marriage to situate the land rights of women in the context of the institution of marriage and its effects. The article then proceeds in its second part to elaborate on the international and regional human rights framework concerning plurality of marriages. Particularly, the UN Human Rights Committee and the Committee on the Elimination of Discrimination against Women (CEDAW) have taken a firm stance while providing authoritative interpretations on the relevant provisions of the ICCPR and CEDAW.

Peoples' Regional State (SNNPRS) Family Law Proclamation No 75/2003 prohibit bigamous marriage.

[4]See Stein Holden and Tewodros Tefera, 'From being property of men to becoming equal owners? Early impacts of land administration and certification on women in Southern Ethiopia' (UNHABITAT-Land Tenure and Property Administration Section 2008) 78; a World Bank sponsored country-wide survey also commended the certification process as 'a very successful start. See Klaus Deininger, Daniel Ayalew, Stein Holden, and JaapZevenbergenrs, 'Rural land certification in Ethiopia: Process, initial impact and implications for other African countries' (2008) 36 (10) World Development 1786, 1806

Moreover, the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa will also be looked at together with some practices of human rights courts to reveal what the selected regional human rights normative frameworks have to say concerning polygamous marriages. By clarifying the country's human rights commitments on the subject, this part aims at informing the research and policy debate that abound the issues of bigamy.

The third part explicates the domestic norms on polygamous marriage. This section will examine the possible justifications that underpin the country's positions on plural marriages. In the final two parts of this article, elaborate discussions are in order concerning women's rights under the current rural land administration laws in Ethiopia, which shall then be followed by specific treatment of plural marriages and their implication on women's right to access and control rural land. The discussions in these two latter sections will bank on the Oromia and SNNPR states rural land administration laws and practices. Drawing from the human rights norms and the domestic laws regulating the subject at hand, the work concludes that the rural land administration practices inadvertently deviate from the spirit of the law and threaten women's rights to access and control rural land equally with their men counterparts.

I. A brief note on the meaning and effects of marriage

Marriage is a social institution created with a firm conviction that it will last for an undetermined future. As a social status, it imposes responsibilities on those who voluntarily decide to enter into it. The effects of marriage, which feature in the form of personal and pecuniary effects, are by far the most difficult elements when one ventures in the tasks of unpacking their exact content and contours. For instance, under the *personal effects of marriage* we find such duties as the duty to assist and cooperate.[5] What may constitute a violation of the duty to assist and cooperate under real life scenarios is very difficult to prove. Moreover, it is usually impossible to enforce this form of duty and the only resort for couples that complain of lack of care, support and cooperation is probably ending the relationship. This is because policing as a means of getting them back on track is implausible. Nothing different could be said with regard to the *pecuniary effects of marriage*. A consideration of common and personal debts as elements of pecuniary effects of marriage is but one intriguing aspect as far as the matrimonial property is concerned. Where a debt is contracted for

[5] For example, these duties are stated in the federal Revised Family Code Proclamation No. 213/200, Article 49.

the interest of the 'livelihood' of the family, it remains to be common debt for which the common property of the spouses shall serve as a pledge for its repayment.[6]

A number of effects that are related to the matrimonial property are provided under the law and they begin by defining what may constitute a personal property of the married couple thereby underscoring the sanctity of private property that even transcends the institution of marriage. Even if two individuals are united by marriage, they can still enjoy private property. However, any of the fruits thereof are deemed to form part of the spouses' common property.[7] What constitutes common property of the spouses is defined as 'all income derived from personal efforts of the spouses and from their common or personal property.'[8]

Contrary to the ethos of the Civil Code on matters related to marriage[9], the Revised Family Code has proclaimed the equality of the spouses in the

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[6] Though an attempt has been made to provide some form of guidance as to what may constitute expenses that are meant 'debts in the interest of the household' it is not that simple to understand what exactly may be regarded as a debt contracted in the interest of the household. Moreover, how these debts are going to be paid is another point that the law tries to address. There is also a divergence in approach among the regional family laws with regard to how a personal debt is supposed to be paid. According to Article 91(1) of the Tigray Family Code, the personal debt of a spouse is primarily payable from the personal assets of the indebted spouse and where his/her personal asset does not suffice to repay all the debt, the creditor could then resort to the common property of the couple but only up to the personal share of the indebted spouse that s/he may have from the common property. This is not similarly treated under the other regional family laws. See for instance the SNNP region's family law counter-part on personal debt, Article 79(1); and Oromia family law, Article 86(1).

[7] See, for instance, Article 62 of the Revised Family Code on which there are no differences in the other family laws.

[8] Ibid

[9] Until the adoption of the FDRE Constitution that entrenched the principle of equality in general and specifically equality of men and women before, during as well as up on dissolution of marriage, there had been a legislatively sanctioned male dominance in marriage relations. The husband was appointed as the head of the family, the custodian and administrator of the household property, and a decision-maker on almost every matter concerning their married lives. A glance look at Articles 562(a), 581(1), 635, 637, 641(1), 644 and 646 of the Civil Code suffices to get the sense of how 'empowering' the law was for the husband. See Civil Code of the Empire of Ethiopia, Proclamation 165/1960, *Negarit Gazeta, Gazette Extraordinary*, 19th Year No 2, Addis Ababa, 5 May 1960 (hereinafter referred as the Civil Code of Ethiopia)

administration of the matrimonial property and thus any decision that concerns the common property is, in principle, to be taken with consensus without either of them enjoying any power of 'vetoing' the other. This position squarely fits with the guarantee of equality under the FDRE Constitution both as embraced by the general equality clause of Article 25 and the specific stipulation of family-related rights under Article 34. Apart from this firm position with regard to equality, the current family law regime has also liberalised the grounds of divorce that could now ditch to the extent of 'no-fault divorce'; it redefined the marriageable age and resized significantly the indispensable role that family arbitrators used to play in spousal disputes. All these changes have critical implications in underwriting the right to equality in marital relations at all levels.

II. Plurality of marriages and human rights

When bigamy exists, the matrimonial property is inevitably going to be shared among those who are involved in the multiple relations. This negative economic implication, together with the moral grounds of equality, provides part of the justification for outlawing multiple marriages. Arguably, it also raises a question of the right to equality since it is usually the man who goes for two wives than the woman going for two husbands.[10] Economists have also argued that polygyny is preferred to polyandry for the reason 'of the preference people have towards raising their own children rather than someone else's.'[11] Samuel further reasoned to strengthen the argument for wider practice of multiple marriages by men than women in the following words:

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[10] Professor Ross, for instance, reviews the equality clauses of the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Elimination of all forms of Discrimination against Women to make a case for a prohibition of polygyny under the international human rights scheme. See Ross, Susan Deller, (2002), 'Polygyny as a violation of women's right to equality in marriage: An historical, comparative and international human rights overview,' *Delhi Law Review*, Vol XXIV, pp 22-40

[11]Samuel Chapman (2001), *Polygamy, Bigamy and Human rights*, (Xlibris Corporation, USA), p 20. It was also found out by Borerhoff Mulder that 'based on a simple regression analysis, an extra wife adds about 6.5 children to a man's fertility, while sharing her husband with an additional co-wife reduces a woman's fertility by about 0.5 children.' Quoted in Theodore C. Bergstrom, 'Economics in a family way', *Journal of Economic Literature*, Vol 34, No 4, pp 1903-1934, (Dec 1996), p 1920

> As the father of a child is not readily known when a mother has several husbands, each husband effectively lowers the productivity of the other husbands by increasing the uncertainty that subsequent children are theirs. This reduces the return on investment from children and so polyandrous systems would not be expected to be able to compete against polygynous systems.[12]

The fact that bigamy is more akin rather unfortunately to men than women has also been emphasized in the United Nations Human Rights Committee's exposition of Article 3 cum 23 of the International Covenant on Civil and Political Rights (ICCPR).[13] While the first provision lays down the general equality clause for men and women, Article 23 of ICCPR is an all-inclusive stipulation on the relevant aspects of the rights of women in relation to the institution of marriage. Except on recognition of religious and customary marriages as well as the possibility to adjudicate family disputes in accordance with religious or customary laws, all the elements under Article 34 of the FDRE constitution are verbatim copies of Article 23 of the ICCPR.[14] The latter provides;

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

The Committee under its general comment number 28 dwells on explicating what may be pointed out as factors that impose hurdles to the exercise of the equal right of women to marry, and states how polygamy is incompatible with the right to equality of treatment:

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[12]Ibid.

[13] See Article 23 of the *International Covenant on Civil and Political Rights* (1976)

[14] These two additions exist under Article 34(4) and (5) of the FDRE constitution. See Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, *Federal Negarit Gazeta*, 1st Year No 1, Addis Ababa, 21 August 1995 (hereinafter referred to as the FDRE constitution)

> It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[15]

This unequivocal stance is thus a rejection of the nuances that permeate many marriage acts in Member States and is an express endorsement of monogamy as a form of marital relation. The statement specifically deems polygamy as an act which is contrary to the dignity of women and also considers it discriminatory. It was the CEDAW Committee that forwarded reasons that described this form of marital relation as undignifying to and discriminatory against women in the following words:

> Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.[16]

It is important to note that no international or regional human rights instrument definitively bars bigamy; nor does there exist a normative prescription of monogamy as the only rightful form of marital relations. The provision alluded to in the above quoted CEDAW Recommendation only imposes a duty on member states to take appropriate measures:

> To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the

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[15] See UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, adopted at the sixty-eighth session of the Human Rights Committee 29 March 2000, CCPR/C/21/Rev.1/Add.10, Para 24

[16] See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, adopted at the thirteenth session of the Committee on the Elimination of Discrimination against Women, in 1994 (contained in Document A/49/38), para 14

> superiority of either of the sexes or on stereotyped roles for men and women.[17]

Thus the Committee, in propounding monogamy, regards its opposite – polygamous marriage – to be in violation of equality of the sexes having serious emotional and financial repercussions on women and their children. This understanding strongly corroborates our assertion that bigamy, where it is legalised under the pretext of custom or religion, is exclusively a practice by men and that deepens the power play between the sexes. In turn, the negative emotional and financial consequences flowing from this unequal relation, which the Human Rights Committee regarded as affecting the dignity of women, is discriminatory in character.

Close to Article 5(a) of CEDAW, the African Charter on Human and Peoples' Rights has a stipulation that says, 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'[18] A more concrete stipulation exists under the Protocol to the African Charter on Human and Peoples' Rights on the rights of women. This Protocol, which also replicates most of the provisions of the CEDAW, generally enunciates those rights as they relate to marriage. And specifically the Protocol imposes an obligation on member states to enact appropriate laws to guarantee that:

> …monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.[19]

Here, too, the authors of the Protocol are not cocksure enough to proscribe polygamy and declare monogamy as the exclusive norm. What the provision does is to set a norm of aspiration for states parties which must do their best to

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[17] See Article 5(a) of the *Convention on the Elimination of All forms of Discrimination Against Women*, adopted by the United Nations General Assembly Resolution 34/180 of 18 Dec 1979, Entered into force 3 Sept 1981

[18] See Article 18(3) of African Charter on Human and People's Rights ('Banjul Charter'), adopted 27 June 1981

[19] See Article 6(d) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, the Assembly of the African Union at the 2nd summit of the African Union in Maputo, Mozambique, 21 July 2003, entered into force on 25 Nov 2005. It is important to mention that Ethiopia, though a signatory, is yet to ratify this Protocol.

encourage monogamy and at any rate to promote and protect women's right in any form of marital relations, polygamous marriages included. This is, therefore, an area where national legislation will have to take precedence in determining the right path, adequate regard, however, being given to ensuring gender equality.

Some practices of African countries also address the issue of polygamy from the angles of equality between men and women as most of the time the laws provide express recognition to polygyny and not polyandry. For instance, Article 143 of the Code of Individuals and Family of Benin allows a man to marry more than one woman and not vice versa. Accordingly, the Constitutional Court of Benin reviewed the legislation on the basis of Article 26(1) & (2) of the country's constitution that declares 'the state ensures for all equality before the law without distinction…of gender…Men and women have equal rights…'[20] The position of the court, therefore, confirms the Protocol to the African Charter on women's rights statement in that without express negation of polygamy, it regarded the act of recognising polygyny to be in violation of the right to equality of women and men.[21]

In the case of *Bhe and Others v Magistrate, Khayelitsha and others*, the Constitutional Court of South Africa had also considered, albeit tangentially, the issue of polygyny where it had extensively elaborated on the Intestate Succession Act of 1986.[22] The court had been seized of the matter of polygyny for purposes of protecting a woman's right to succeed a man in intestacy with whom she had been related in a polygynous marriage. It had made cautiously coined statements on the propriety of excluding spouses in polygynous unions from intestate succession that merely talks of 'surviving spouse' without, however, alluding to this spouse as being in a monogamous or polygamous union.[23] The court, under para 124 of its decision, stated as follows:

> An appropriate order will, therefore, be one that protects partners to monogamous and polygynous customary marriages as well as unmarried women and their respective children. This will ensure that their interests are protected until Parliament enacts a comprehensive

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[20] See Benin Constitutional Court, Decision DCC 02-144, 23 Dec 2002, reported in the *African Human Rights Law Review*, Vol. 127, [2004]

[21] See Para 7 of the decision, *op.cit*

[22] See *Bhe and Others v Magistrate, Khayelitsha and Others*, Constitutional Court of South Africa, CCT 49/03, decided on 15 Oct 2004

[23] See Section 1(1)(a)(i) of the Intestate Succession Act of South Africa, (Act no 81 of 1987)

> scheme that will reflect the necessary development of the customary law of succession. It must, however, be clear that no pronouncement is made in this judgment on the constitutional validity of polygynous unions. In order to avoid possible inequality between the houses in such unions, the estate should devolve in such a way that persons in the same class or category should receive an equal share…[para 125]… However, as has been pointed out, the section provides for only one surviving spouse and would need to be tailored to accommodate situations where there is more than one surviving spouse because the deceased was party to a polygynous union.[24]

What we can observe here too is the apex court of South Africa desisting from an explicit acknowledgement of multiple marriages as a proper conduct of behaviour though it has given protection in matters of succession for a woman who would have otherwise been excluded as being in an illegitimate relationship. It is clear in circumstances like this that the polygynous husband is no more alive and for the same reason the 'faulty' marriage does not exist anymore. Thus, in this situation denying the woman a share in the estate of the deceased [in countries where the law allows a spouse to inherit her deceased husband][25] would only amount to penalising her for, strictly speaking, the fault of the deceased polygynous husband.

A more or less similar approach has been followed in one crucial Cassation Court decision of the Federal Supreme Court in Ethiopia. The facts of the case indicate that a man, who had been married to two women, had ended by divorce the marriage he had with one of the women. During post-divorce property division, the other woman wanted to intervene into the proceeding claiming that she has vested interest in matters of division of a house built on 1,250 square metres because of her existing marriage relation with the defendant. Her claim was rejected by the various levels of courts in the SNNP region which had stated that the house was built by the husband's money and should only be divided between the claimant and the defendant.[26] The Federal

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[24]The case of *Bhe and others v Magistrate, Khayelitsha and others*, *op.cit*.para 124 & 125

[25] This is important because in countries like Ethiopia husband and wife cannot succeed each other, except in testate succession. See Articles 842-851 of the Civil Code of Ethiopia that discuss the orders of the degrees of relationship that will have to be called in cases of intestate succession that clearly excludes spousal relationship from those persons to be called to succeed.

[26] W/roZeynebaKelifa and W/roKedijaSiraj, Federal Supreme Court of Ethiopia, Cassation file no 50489, decided on 24 Meskerem 2003 (EC)

Supreme Court Cassation division discussed the heart of the matter that was not addressed by any of the lower courts by stating as follows:

> Except the divorce decision on one of the marriages and the ensuing property division, no mention had been made of the presence of polygamous marriage in the lower courts' decisions. In circumstances where one of the marriages in polygamous marriage has been dissolved by divorce, the question of how we approach the property division becomes very crucial.
>
> Both the federal and the region's family laws have anticipated only the conclusion and dissolution of monogamous marriages which is partly because they both have expressly outlawed polygamy. However, because of the widespread practices of polygamous marriages, it is the judiciary's responsibility to cautiously adjudicate the consequent disputes in such circumstances even if not foreseen by the law so as to reduce the undesirable social ramifications.[27]

The Cassation court then reversed the lower courts' decision which had divided the property into two halves for the husband and the divorcee wife by bringing in the second wife to partake in the half of the husband's share. This is pertinent and arguably cautious in the sense that it does not necessarily condone polygamy while at the same time has provided economic protection to the most vulnerable party in the relationship.

This measured articulation of the judiciary, though accorded economic protection to the weaker party, may be regarded as an implicit acknowledgement of the practice of polygamy. By attaching a legal consequence to the polygamous relationship, the court has travelled a long way towards providing a judicial legalisation of an act which the legislature has prohibited. Even though the immediate outcome of the decision had accorded protection to the weaker party, the precedence it has set would ultimately undermine the legal position on polygamy. The Court did not even slightly show interest to condemn the act and rather went at length to describe the discordance between the law and the practice. Therefore, one may say either the particular woman's condition in this case had 'overshadowed the court's judgement' or it simply is a start of an emerging moral shift on the matter. How this implicates on property allocation where both of the marriages

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[27] See ibid, para 6-8

exist is the other point that we consider while dealing with certification of land holdings in polygamous situations.

III. Plurality of marriage under Ethiopian law

> *A man shall not have two wives, for this pleasure and the contracting of many marriages serve to gratify concupiscence and not to begat offspring as God ordered…It is not right for a man to have concubine…since our Lord Jesus Christ has established a law of freedom. If you say that David, Solomon, and others had concubines, and if you want to know the reason, listen; it is because men were scarce at that time on earth. It has therefore been permitted to them to marry and have concubines, so that men might multiply on the earth. (The FethaNagast, Part II, Chapter XXIV, Section V, NIQYA 27 and Chapter XXV, BAS 7)*

> *If you fear that you shall not be able to deal justly with the orphans[28], marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly with them, then (marry) only one…(Qur'an 4:3) You are never able to be fair and just as between women even if it is your ardent desire. (Qur'an 4:129)*

In part II, we have made some observations on the foundations of the prohibition on polygamous marriage as reflected in the various human rights instruments together with some practices of African states. In this part, we proceed to further examine the relevant norms within the Ethiopian context.

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[28] It is believed that polygyny is justified for many reasons and one among all stands out supreme. In the time Surah 4:3 was revealed to the Prophet after the Battle of Uhud, females outnumbered males in the community, and thus the reference in Surah 4:3 to 'orphans' to describe those women who had lost their husbands in the Battle. It was said:

> In most human societies, [also] females outnumber males. Because women depend upon men for protection, the Shari'ah…does not tolerate any woman seeking refuge under the roof of any man unless she is married to him or he is within the prohibited degrees of relationship to her. Because Islam does not encourage female infanticide or celibacy, allowing a man to be lawfully wedded to multiple wives seems the only reasonable alternative to meet the needs of women for protection and care.

See Johnson, Heather, *op.cit*. pp 566-67; and also see Abdulah Yusuf 'Ali, (2004), *The meaning of the Holy Qur'an*, cited in Rodgers-Miller, Brooke D., (2005), 'Out of Jahiliyya: Historic and modern incarnations of polygamy in the Islamic world,' *Wm. & Mary J. Women & L.*, Vol 11, pp 541-562, (544)

Even if the various laws of the regions have taken a firm position in prohibiting multiple marriages, the practice in many parts of rural Ethiopia has defied the legal proscription and bigamy is rather widely practiced. For example, in the research by Stein Holden and his colleague in the Southern region of Ethiopia, from the total sample size of 600 households, more than 12% of them are found to be living in polygamous relations.[29] And the practice continues to marginalise women, disempowering them economically and has also curtailed their voices from being heard. The situation is, as is argued in this article, aggravated where the practice gets support from other institutions of the law that condone or indirectly encourage the conclusion of polygamous marriages.

What makes matters more problematic is the stipulation that the Criminal Code has made with regard to the exemption from criminal liability of culprits of bigamous acts. According to the Criminal Code, the act of bigamy is punishable with imprisonment that could go up to five years.[30] The Code, however, makes an exception from this general prohibition under Article 651 stating, 'the preceding Article shall not apply where bigamy is committed in conformity with religious or traditional practices recognised by law.' Therefore, for a bigamous act to be condoned under this provision, the existence of a law acknowledging the particular religious or traditional practice must be proved. This had been likewise stipulated under the 1957 Penal Code that criminalised the act of bigamy in principle. The Civil Code had also provided bigamy as one of the prohibitive conditions to marriage.[31] Now that we moved from the unified Civil Code to a period where we have multiple family law regimes under the federal set up, whether an act of bigamy could be punishable or exempted from punishment depends on the particular region's family legislation. Therefore, when a bigamous marriage is concluded in regions where the family laws expressly prohibit that form of behaviour, the offenders will be criminally liable.

The recognition or proscription of polygamy continually occupied centre place in discussions of family law revision in Ethiopia. Moreover, there was an instance where express permission was given to bigamy in a regional family

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[29] See Stein Holden, supra note 4, pp 16 & 60

[30] See Article 650 of the Federal Criminal Code Proclamation No 414/2004, *Federal NegaritGazeta*, Addis Ababa, 9th May 2005

[31] See Articles 616 & 617 of the Penal Code of the Empire of Ethiopia, Proclamation 157/1957, *NegaritGazeta, Extraordinary issue*, 16th Year, No 1, Addis Ababa, 23rd July 1957; See also the Article 585 of the Civil Code of Ethiopia

law which was later on amended.[32] It is, however, difficult to establish a convincing justification for a statutory recognition of polygamy in present day Ethiopia. Even the above religious verses from the two major religious books hardly support polygamy as a proper fit to our modern social order because both speak about pre-modern conditions of 'scarcity of males' that rendered polygyny a matter of necessity. While the secular laws have introduced significant changes by way of entrenching gender equality upon entering into marriage, during marriage and upon its dissolution, legalisation of polygamous marriage would undermine the international human rights commitments and it also poses difficulties in ensuring gender equality.

One may even put on task those legislative bodies that could be tempted to allow bigamy exceptionally because of culture or religion of the spouses for a case of unconstitutionality. Article 35(4) of the FDRE constitution imposes a duty on the state to enforce the rights of women to eliminate influences of harmful customs and it declares that 'laws, customs and practices that oppress…women are prohibited.' No doubt that bigamy obtains validity from cultural practices and religious doctrines that have obtained their way through the social order thereby disproportionately hampering the exercise by women of their equal rights with men. Such custom and practice is what the Constitution astutely urges the state to prohibit and a direct acknowledgement of bigamy in the family laws contradicts head-on with this constitutional statement. That also is true to the criminal code that provides for an exemption from criminal liability with regard to persons who have committed the crime of bigamy in accordance with a legally recognised traditional or religious practice. One must, in other words, be accorded exemption neither from civil nor criminal liabilities under the guise of religion or tradition where that act militates against women's rights enshrined in the FDRE Constitution.

When Article 34 of the Constitution on the 'marital, personal and family rights' was discussed, the Constituent Assembly had been overwhelmed with a number of questions that particularly raised the religious and customary law implications of the provision. Among the topics of concern that underpinned the prolonged discussions equality of men and women in marriage, the status of bigamy and its implications on marital property, whether or not the jurisdiction of religious courts be conditioned on 'the consent of the parties to

[32] See Article 32 of the repealed Tigray Family Law Proclamation 33/1998, 10 November 1998

the dispute', and issues of abduction stood out to be the main ones.[33] Interestingly, a certain participant spoke on the implications of bigamy on women's right to equality in light of Islam's teachings. When plural marriage was permitted for men under strict conditions, people had questioned the Prophet as to why it was not similarly allowed for women, the participant was recorded to have described the Prophet's response:

> The Prophet asked each of his interlocutors to bring milk of various animals (of sheep, goat, camel and cow) and to mix them all together. Then they were again asked to abstract each one of their own milk from the mix which they could not. They were then told the rationale for not allowing women to get married to more than one man at the same time.[34]

The overall spirit of the discussion had been on the one hand to acknowledge and provide protection to spousal equality and on the other to leave wider space for religious and customary norms in family relations. There was, however, no concrete position taken on specific matters such as outlawing or permitting plural marriages.

At the final stages of the discussions, the Chairperson of the Women's Affairs Committee had been quoted to have made the following remarks:

> Concerning bigamy, Article 34 recognises the right to get married in accordance with religion, custom or law. Therefore, where a man wants to get married to more than one woman based on his religious teachings and believing that he has the economic capability to administer a family with more than one wife it must not be regarded as an interference in the rights of women so long as the second marriage is concluded with the knowledge and consent of the other wife. Moreover, if she does not consent, it is her right, irrespective of her being Christian or Muslim, to resort to divorce proceedings.[35]

This remark by the then Chairperson of Women's Affairs Committee appeared to have taken rather simplistically the complex gender relations and dynamics of the country. It unduly presumes that Ethiopian women freely consent or object to their husband's decision to double on their marriage relationship by

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[33] See The Ethiopian Constituent Assembly Minutes, Hidar 8-13, 1987 (E.C.), Sections 000023-000044, Addis Ababa.

[34] See Section 000040 of the Minutes (the writer's translation), ibid

[35] See section 000043 of the minutes (the writer's translation), ibid

wedding to another woman or women. Moreover, it covertly undermines the institution of marriage from which spouses could easily walk out and does not consider the dire consequences of divorce on society in general and women in particular. The overall outcome of the discussion, therefore, had left the constitutional provision as neutral on matters of monogamy or polygamy and emphasise on the need to protect the rights of women before, during and after marriage.

IV. Rural land administration and women's rights

Land administration for the purpose of rural land holdings is described as a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural land holders are enforced, and information on farm plots and grazing land holders are gathered, analysed and made available to users.[36] Accordingly guaranteeing security, formulating and implementing land use plans and policies, resolving land-related disputes and above all collecting, storing and availing information relating to land are tasks that need to be carried on the basis of the laws to be issued both at the federal and regional levels.

The administration of rural land has taken substantial strides forward in recent periods largely owing to the certification process by which rural land holding certificates are being issued as proof of rural land use right. Particularly its contribution towards making holding rights secure is commended as one of the achievements of the certification exercise.[37] The certificate is expected to indicate to the minimum 'the size of the land, land use type and cover, level of fertility and borders, as well as the obligations and rights of the holder.'[38] This process of certifying possession of land has been underway in Ethiopia for the last few years with a bid to grant possessory title, secure possessory rights and reduce land-related conflicts among the predominantly agricultural society.

Even though the purposes of granting possessory title are clear, relevant and timely, the process primarily benefits those who already have land holdings based on the previous regime's land distribution measures carried out in the

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[36] This is a comprehensive definition provided under Art 2(2) of the Federal Rural Land Administration and Land Use Proclamation No 456/2005, *Federal NegaritGazeta*, 11th Year, No 44, Addis Ababa, 15th July 2005 (hereinafter referred to as Proclamation 456/2005).

[37] See Stein Holden, supra note 4

[38] See Article 6(3) Proclamation 456/2005, *op.cit*.

late 1970s after the promulgation of the ground-breaking law to nationalise all urban and rural land.[39] The then distribution was done based on household units as beneficiaries and thus individuals *per se* had not obtained land use rights, rather households had.[40] That automatically excludes women from obtaining land because for one thing the head of the family/household being the husband they were left out from being called to get the title. Secondly, because of the fact that they could not by themselves plough the land, female headed families would not have had the opportunity to obtain title. Therefore, these two factors – the patriarchal laws making the husband alone head of the family[41] and the tradition undermining female's agency in agriculture – continually interlace to exclude women from accessing land. And in consequence, the certification process that is underway is only meant measuring, certifying and granting land possession certificates to those persons who already have land holdings provable by and to the members of the land administration committee members established at the lowest administrative levels of the respective regions.

The framework legislation issued by the federal government has specific provisions that acknowledge the equal access to and control on rural land of women and men. For instance, the provision that lays down the core guiding principles on acquisition and use of rural land declares 'women who want to engage in agriculture shall have the right to get and use rural land.'[42] This stipulation evokes an impression and a dilemma that agriculture is primarily an area for men to engage in. In a sense, it is a legislative acknowledgement of the reality that prevails in our rural society in which women do not normally

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[39] See generally Svein Ege, *The promised land: The Amhara land redistribution of 1997* SMU-Rapport 5/97 (Dragvoll Norwegian University of Science and Technology, Centre for Environment and Development 1997)

[40] Article 4 of proclamation 31/1975 provided for important principles on distribution of privately owned rural lands. It had stipulated the principle of equality and non-discrimination, the maximum size of land to be allotted to a particular family and a prohibition on the use of hired labour to cultivate one's holding. Particularly, Article 4(3) stated, 'the size of land to be allotted to any farming family shall at no time exceed 10 hectares.' Therefore, it was a 'farming family' rather than an individual that was taken as a beneficiary of holding right.

[41] A simple look at Article 635 shows the long-standing gender-biasedness of the Civil Code provisions on the personal effects of marriage that had appointed the husband to be the head of the family and this had been in full operation until it was set aside by the 2000 Revised Family Code.

[42] See Article 5(1)(c) of Proclamation 456/2005

plough; and in cases where they have land holdings, the rule is to contract the land out for those male farmers under share-cropping or other schemes.[43]

That being a guarantee for access to agricultural land by women, with regard to control too the Proclamation ascribes to a conjoint certification of possession rights over a land that belongs to husband and wife. The provision states that 'where land is jointly held by husband and wife…the holding certificate shall be prepared in the name of all the joint owners.'[44] This also underpins the practice that the said regions flaunt in their bid of implementing the certification process. This piece of legislation, however, omitted what its predecessor had inaugurated as one important principle of land administration under its Article 5(4) that read:

> The land administration law of a region shall confirm the equal rights of women in respect of the use, administration and control of land as well as in respect of transferring and bequeathing holding rights.[45]

It is hardly possible to decipher any rationale for the regression as finding a niche for this form of comprehensive equality framework within the new legislation would have served a noble purpose than its absence. One area where this general equality clause would have served is, for instance, in guiding the regional laws to ensure gender balance in constituting the various land administration institutions, particularly the Kebele-level land administration committees.[46]

The regional laws have also stipulated various equality clauses with regard to rural women's access, control and use of land. The SNNP region has for

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[43] Under Proclamation 31/1975 too, the use of hired labour to cultivate land was exceptionally permitted for 'a woman with no other adequate means of livelihood.'

[44] See Article 6(4) of Proclamation 456/2005

[45] See Article 5(4) of proclamation 89/1997 which has been expressly repealed by Article 20(1) of Proclamation 456/2005.

[46] It is particularly a common practice in patriarchal societies to impose legal minimums of female membership in various institutions that are empowered to make crucial decisions on matters as vital as land. For instance in neighboring country Uganda the Land Act requires land management bodies and institutions to have women representation. 'The Uganda Land Commission must include at least one female among its five members, one-third of the membership of the District Land Boards must be female, and Land Committees at the parish level must have at least one female among their four members.' See Asiimwe, Jacqueline, (2001), 'Making women's land rights a reality in Uganda: Advocacy for co-ownership by spouses,' *Yale Human rights & Development L.J.*, Vol. 4, pp 171-188, (pp 177-78)

instance a number of provisions on the matter. Some of these are women's right to get and use land if they want to engage in agriculture;[47] equal rights of husband and wife on their common land holdings;[48] female headed households have full use right to their landholdings and the right to be given a landholding certificate in their name;[49] where a husband is engaged in government services the wife continues to enjoy the right to use rural land and to obtain a landholding certificate in her name;[50] and the issuance of a joint landholding certificate in the name of the husband and wife in relation to a land jointly held in marriage.[51]

The first provision is a direct endorsement of the federal land rural land proclamation mentioned above. It hardly adds any value in the efforts of tackling women's problems as they relate to rural land rights except acknowledging the unfounded categorisation of agriculture in principle to be men's engagement. This is because it unnecessarily submits as law a presumption that there are rural women who do not want to engage in agriculture. The next provision has two important guarantees: first, spouses shall have equal use right on their commonly held rural land; secondly, neither spouse would lose the rural landholding that existed before the conclusion of the marriage. While the first is self-evident, the second bit of the provision that stipulates the continuation of pre-marriage private holding rights requires closer examination in light of the customary practices that prevail in the country. When a woman gets married it is customary that she leaves her family's locality to join her spouse and accordingly she leaves behind all the belongings she had except her personal items. Therefore, the provision in a way perpetuates the landless women's condition by stating that the spouses shall maintain landholdings they had before the conclusion of the marriage. Landholding being a unique type of property on which the family's livelihood is to be established, the preferred approach would have been to exempt the application of this family law principle by which spouses may exclude each other from their pre-marriage properties. This nuanced approach would also have empowered the woman to have a legitimate say on her husband's decision to bring in a new wife. And because as he would no more single-

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[47] See Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilisation Proclamation No 110/2007, *DebubNegaritGazeta*, 13th Year No 10, Awassa, 19th Feb 2007, art 5(3)

[48] See ibid, art 5(5)

[49] See ibid, arts 5(6)& 6(5)

[50] See ibid, art 5(7)& 6(6)

[51] See ibid, art 6(4)

handedly decide on the pre-marriage landholding, it might even have reduced incidences of polygamous marriages.

Articles 5(6) and 6(5) of the SNNP region rural land administration law particularly aim at dispelling the longstanding legal and traditional presumption that regarded the husband as the head of the family and that accordingly marginalised female-headed household for distributional purposes such as land allocation. These provisions emphasise the entitlement of women to get landholding as heads of family without any distinction from men-headed household and their entitlement to have a certificate of holding to be issued in their name. Articles 5(7) and 6(6) of this region's law are also in recognition of real life where a husband of a rural woman might be engaged in non-agricultural means of livelihood. It states that her right to engage in agriculture and obtain rural land right may not be impaired by her husband's non-agrarian profession. Therefore, there can be spouses where the wife has a rural landholding for purposes of agriculture and the husband working elsewhere in government or non-governmental services. The absence of a similar stipulation for a rural husband whose wife is carrying out a non-agrarian profession could simply be explained as because to provide so would be stating the obvious. When looked at from gender perspective, however, it provides a clear picture of the deeply entrenched patriarchy that presumes only a husband living in rural areas may rise to a government or other non-agrarian way of life. A balanced statement of the law would have been neutrally worded by referring to both spouses. Thus, it should have stated the principle that where either spouse has opted for a non-agrarian profession that must not bar the other to have a rural landholding for purposes of agriculture.

Article 6(4) of this law speaks about the issuance of a certificate for a jointly held land by husband and wife or any other persons. Here, a simple reading of the provision reveals that spousal land is to be represented by a certificate that proves its being a joint property of the couple. However, there may be situations where a person has more than one wives and also has landholding for which a certificate will have to be issued. In this situation, the manner of issuing the certificate as a proof of landholding of a person and its numerous wives poses a problem particularly considering the diverse practices as discussed below. The following discussion will be informed by the laws and practices in SNNP region in comparison with the Oromia region that reveal a remarkable difference.

V. Rural land administration, bigamy and women's rights: The experience of SNNP and Oromia regional states

In this article, as has been mentioned, two regions' land administration laws, that of Oromia and SNNPR, are to be considered to show how bigamous marriages are treated both in the law and practice. These two regions have promulgated rural land administration laws titled Oromia Rural Land Administration and Use Proclamation 130/2007 and SNNPR Rural Land Administration and Use Proclamation 110/2007. Lists of guarantees have been provided under these two proclamations that even touch upon matters that are not directly referred to in the framework legislation of the federal parliament.

The certification process in the Oromia and SNNPR states is done in a slightly different manner when it comes to certifying possessions of a person who is living within a marriage. The Oromia Land Administration, Use and Environmental Protection Bureau, similar to its SNNPR's counterpart, has the mandate, *inter alia*, of issuing land possession certificates to individuals. They both have adopted a standard certificate in a slightly different way with regard to the holder's particular entries, photographs and the manner of registering a title holder married to more than one person at the same time.

As can be observed from the Oromia region's standard certificate, a person's holding is entered in his own name as 'holder's name.'[52] The second name to be entered into the certificate will be the wife's or wives' name(s).[53] In this regard, the certificate provides numbers 1, 2, 3, 4 downwards.[54] At the back of the document is a space to post the picture of the holder.[55] Accordingly, the registration is done in such a way that a man will have his name mentioned as holder and then his wife's/wives' names is/are listed, and finally his picture alone is posted at the back of the book.

The certification in Oromia provides distinctly, from the other region, a unique Parcel Identifier (PI) by which every parcel in the region will have at the end of

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[52]Maqqa Aba Qabiyyee is the term used in the certificate, which means 'holder's name.'
[53]'Maqqahadda manna/mannotta' is the phrase in the certificate meaning 'wife/wives' name/names.
[54] Whether that cups the maximum wives one may have or just describes the Share'alaw's maximum number of wives that one may enter into is unclear. One may even say that it just is meant to be economical in the use of the paper space and more may also be welcomed.
[55] Having one's picture at the back, from a lay person's perspective, symbolises exclusivity, security and sense of superiority, to name few. Thus, the practice, unmatched by other regional laws and practices, has empowered the man and at the same time left the woman excluded, unsecure and as inferior to the man within the household, by implication also beyond the household.

the process a unique number.[56] Accordingly, all wives in a polygamous relationship will have a joint use title which is identifiable by a unique number. As all information is recorded on the title book manually, updating of changes to both the land and the right holders is very precarious. It is also important to reiterate the fact that the Oromia family law is among those regions which have prohibited polygamy and accordingly endorsed monogamy as the only form of lawful marital relationship.

When we look into the SNNP region's approach to the matter, there are slight differences from what is observed in the Oromia region. As can be seen from the standard certificate in the region, the title holders will be two where the holder is in a marital relation. And the entry is to be done in the order of holder no 1 and holder number 2. By default the husband's name is to be written first and then follows the wife's. However, legally speaking that has no effect whatsoever, unless one sees some form of superior-inferior order to be drawn from that structure as it appears. The picture is to be posted at the front page of the certificate just above the names' list and here lies the second difference where the certificate has to carry the picture of both the husband and the wife.[57] Where bigamous marriage exists, here too the land administration bureau is not in a position to refuse certification. However, it does it in a slightly different way, which is distinct from the country-wide practices of certification. The husband will have to decide which one of the wives to be the first in his married life and get her registered as second to his possession. For the remaining wives, parcels will be allocated and each one of them will be registered in a separate certificate. In the separate certificate(s), the wife's name is to be written as first and husband as second holders on the list. In this manner, therefore, the person remains married to multiple wives and in cases where division of the property is tabled, each one of them goes with half of the land for which her name has been registered as first holder. No matter how awkward and at the same time novel this may appear, it is intrinsically unfair and militates against women's right to property.

The undesirable end

These two approaches of rural land certification just summarised exhibit one circumstance where the practice has utterly defied the legal position. Even if

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[56] See note 4, p [29]

[57] Even in one of the Woredas, the spouses should appear together in a single photo and that obviates the strict desire on the part of the custodians of the certification process to put the two at bar as far as the right to their land is concerned.

the desired end, which is reducing family and land related disputes, and even if that purpose has been arguably realised, the means used is irreconcilably flawed. Primarily, the law of bigamy and the land certification practice collide heads-on because the former's prohibition has been disregarded by the latter. And well established rules on legal construction have it that where two rules on the same topic conflict, the one having higher authority must be given precedence over the other. In this specific situation, the land certification process is conducted based on some form of administrative decision or directive.[58]

What the land administration bureau personnel had stated was that in the registration process they are not permitting bigamy; neither are they refusing to register a person's land in his own name and then in the name of his 'wife/wives'.[59] The joint certification's benefits in terms of enhancing the sense of tenure security as argued by Stein Holden and TewodrosTeferacannot be matched with the fall outs from indirectly encouraging polygamous relations.

Similar trends underpin both the Cassation Division's decision in the case of *W/roZeineba and W/roKedija* and this land administration practice. They both neither explicitly condemn nor condone polygamous relationships. What they simply do is at least is effectuate them, by enabling to share from matrimonial property as legitimate wives do in the court's case and providing a rural landholding certificate with a clear knowledge that they come under polygamous relationships in the case of the rural land practices of these two regions. No doubt that these practices would ultimately erode the foundations for the prohibition of polygamy in the country's laws.

The criminal law's exceptional exoneration from liability of a person who has committed an act of bigamy is also one area that must be revisited on the basis

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[58] An attempt to find any authoritative legal instrument that stipulates this form of registration process has not been successful except the model certificate that can at least be considered as an administrative directive of the respective regional councils.

[59] When it comes to the SNNPR, things are straight forward because the certificate doesn't say husband or wife, rather only has two places in which are to be written the name of holder number I and holder number II. In the Oromia national regional state, though not as objective as the SNNPR, it states wife/wives without entering into the issue of whether the marriages co-exist or not. When asked officials state that if the marriage is declared as bigamous and illegal, courts' decisions and the parties' request for partition settle the matter. Until then officials of land administration seem to have no right to refuse registration of a parcel/parcels in the name of a person and his wife/wives.

of the constitutional provisions on equality. Apart from the equality doctrine, one may also look at polygamy from its demographic implications as it correlates with fertility rates. A fairly recent study made in twelve Sub-Sahara African countries has shown a strong positive relation between polygamy and fertility.[60] Apart from its human rights implication in terms of disenfranchising women, it is imperative, therefore, to approach polygamy rather broadly as it affects socio-economic and demographic fabrics of communities. A consistent and principled approach on the matter should guide both policy and action. Accordingly, a strict observance of the prohibition enshrined in these two regions' family laws must be used to correct the wrongs committed by certifying holding rights of polygamous spouses. As the process graduates from first level to second level certification, it may not be still too late to right the wrongs.

[60] See Paul Cahu, Falilou Fall and Roland Pongou, 'Demographic transition in Africa: The polygamy and fertility nexus' institute national d'estudesdemographiques J12, J13 15 March 2011 <http://www.ined.fr/fichier/t_telechargement/38577/telechargement_fichier_fr_d3_fall.pdf> accessed 27 October 2012; this confirms with previous studies in the area that similarly established this direct correlation. See for example Helena Chojnacka, 'Polygyny and the rate of population growth' (1980) 34(1) Population Studies: A Journal of Demography 91-107

TRADE UNION RIGHTS OF GOVERNMENT EMPLOYEES IN ETHIOPIA: LONG OVERDUE!

By Desset Abebe Teferi*

1. Introduction

Countries all over the world follow various approaches towards the implementation of trade union rights. Some countries recognize trade union rights only for those workers in the private sector and deny these rights for public sector employees. Other countries follow a procedure whereby a limited category of workers are entitled to trade union rights provided in labour law. There are also countries that recognize trade union rights for most sectors such as civil servants, teachers, journalists, medical personnel and even the police. Countries with liberal legal framework may extend the recognition of trade union rights protection to workers in the informal sector including domestic workers.[1]Assessing the scope of protection provided for government employees (civil servants) in Ethiopia is the main aim of this article.

This article is primarily prompted by the motto 'Trade Union Rights are Human Rights', which was selected by the 49 year old Ethiopian Workers' Associations Confederation (EWAC) for the celebration of May Day in Ethiopia which was celebrated for the 123th time in the world and for the 37th time in Ethiopia on May 1, 2012. In his statement on the press release for the celebration, Ato Kassahun Folo, the President of the EWAC, stated that the motto was chosen after closely scrutinizing the *status quo* of enjoyment of trade union rights by workers/employees in the country.[2] Trade union rights are among those fundamental human rights and freedoms entrenched in the bill of rights section (Chapter Three) of the Federal Democratic Republic of Ethiopia Constitution (1995) (the Constitution or FDRE Constitution). Apart from the Constitution various international and regional human rights instruments ratified by Ethiopia guaranteed trade union rights.

In Ethiopia, government employees 'whose work compatibility allows for it and who are below a certain level of responsibility' are entitled to trade union

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[1] 'ህብረት የህልውና መሰረት' *የሰራተኛው ድምጽ* 23 ሚያዝያ 2004 ዓ.ም ነ5.

[2] 'የ2004 ዓ.ም.የሜይዴይ በዓልን አስመልክቶ በኢሰማኮ ስራ አስፈጻሚ የተሰጠ ጋዜጣዊ መግለጫ' (n 1 above) 7.

rights as per article 42 (1) (a) of the Constitution. The Constitution stipulates that categories of such government employees should be determined by further legislation. It has been more than 16 years since the adoption of the Constitution and such law has not yet materialized, which left a legislative void in the implementation and protection of a fundamental human right. This lack of legislation has contributed significantly to a deep rooted misunderstanding that government employees are not entitled to trade union rights despite the fact that it is a constitutionally guaranteed fundamental right.[3]

This article aims to bring light to the issue by providing a descriptive overview of sources of the right both at the national and the international level. It further seeks to show gaps in the protection and enhance awareness on the scope and content of trade union rights in general and the scope of entitlement of this right to government employees in particular. Finally, it aims to point out a way forward to uphold this fundamental human right by indicating possible steps that could be taken and the appropriate bodies that are responsible to take these steps. In order to achieve the above objectives, the article will discuss the history, definition, nature and components of trade union rights and particularly the scope of entitlement of these rights to government employees in Ethiopia by exploring legal basis for the right both in national legislations and international instruments adopted by Ethiopia.

2. Historical background

The history of trade unions all over the world is a history of struggle for greater social justice, both in societies and at the work place.[4]Being the centers of capitalist development and industrialization, the United States and Great Britain were major states of strikes, unrest and a series of killings where workers lost their lives during the 19thcentury.[5] In most cases, as individual

[3] It has been more than 2 years now since the EWAC started vigorously advocating for the amendment of the Labour Proclamation 377/2003 to include civil servants for the purpose of trade union rights. Ato Kassahun Folo highlighted the wrong impression created by the statement made by some government officials regarding the non entitlement of trade union right for civil servants/government employees. 'የሰራተኞች የመደራጀት መብት ጥያቄዎችና ፈተናዎች' ሪፖርተር 21 ሚያዝያ 2004 ዓ.ም. www.ethiopianreporter.com/politics/295-politics/6117-2012-04-28-09-03-23.html (accessed on 3 August 2012).

[4] M Serrano & E Xhafa et al (eds) *Trade unions and the Global Crisis: Labour's visions, strategies and responses ILO* (2011) Page xi.

[5] J Apsel 'The Right to Work in Dignity: Human Rights and Economic Rights'.

workers were economically weak and possessed low bargaining power, they were exposed to exploitation and their lives and working conditions became so poor over time. Trade unionism is a response to such situations which forced workers to protect themselves from exploitation such as low pay, long working hours and generally appalling working conditions.[6] Through time, organized through trade unions and by engaging in collective bargaining and social dialogue, workers were able to escape poverty, exploitation and the violation of their basic human rights.[7] Accordingly, workers who were part of the movement to resist injustice and oppression and worked towards human solidarity and labour rights, take the credit for the beginning of trade union movements.

At the national level, the formal history of trade unions in Ethiopia dates back to the year 1963 when the monarchical rule of Hailesselasie adopted the Labour Relations Decree of 210/1963. Though the 1955 Constitution guaranteed right to form workers' association, it was only after the Labour Relations Decree came into force that the 'Federation of Employers of Ethiopia' in 1963, and the 'Confederation of Ethiopian Labour Unions' (CELU) in 1964 came in to picture.[8] The history before that was marked by the suppression of any movement close to unionism as criminal. This forced workers undertaking similar actions in to hiding and hold their meetings under the guise of social gathering in the compound of churches.[9] Even after the adoption of the 1963 Decree, trade unions were not as strong and independent as they should have been, since the law was highly biased towards employers.[10]

The 1975 Workers Proclamation no 64 adopted under the military regime similarly did not bring about the desired change on the status of labour unions, rather unions were used as a tool for the promotion of socialist ideology and

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http://www.nyu.edu/projects/mediamosaic/thepriceoffashion/pdf/apsel-joyce.pd (accessed on 23 July 2012).

[6] A Bersoufekad 'Ethiopia Trade Union Country Report' (November 2003). http://www.fes-ethiopia.org/media/documents/social-development/Ethiopian%20Trade%20Union%20Country%20Report.pdf (accessed on 18 August 2012).

[7] (n 5 above) para 3.

[8] 'National Labour Law Profile: Federal Democratic Republic of Ethiopia' http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158894/lang--fr/index.htm (accessed on 10 August 2005).

[9] (n 1 above) 7.

[10] As above.

mouth piece of the government.[11]After the overthrow of the Dergue regime in 1991, the law adopted to govern labour relations in Ethiopia was the Labour Proclamation no 42/1993. This law preceded the 1995 FDRE Constitution in its recognition of trade union rights.[12]This proclamation stayed into force until the adoption of Labour Proclamation no 377/2003. The 1995 Constitution, unlike the Constitutions in the previous regimes, comprehensively recognized rights of labour in general and trade union rights in particular.[13]

3. Conceptual framework

3.1. Definition of Labour Unions (Trade Unions)[14]

Blacks' Law dictionary defines a labour union as 'an organization formed to negotiate with employers, on behalf of workers collectively, about job-related issues such as salary, benefits, working hours and working conditions.'[15] Several writers provide similar definition reflecting the nature and function of a labour union. The following definition of a labour union was developed by the Australian Bureau of Statistics and adopted by International Labour Organisation (ILO) in its 'World Labor Report 1997-1998':[16]

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[11] The Labour Proclamation no. 64 of 1975, adopted during the Dergue regime provided no autonomy with regard to the conclusion of collective agreements as a form of independent control over working life exercised by freely constituted trade unions, there were no employers' organizations and no contractual freedom between employer and employee.

[12] Article 113 of the Labour Proclamation no 42/1993.

[13] Fassil Nahum stated that the concern of the Constitution for labour rights emanated from the fact that labour has generally been the underdog at the hand of employers interested in profit maximization. He further stated that the struggle that were made to establish trade union rights i.e. the right to form or join trade unions, collective bargaining, the right to strike, was an important means to the recognition of rights at work such as healthy and safe work environment. F Nahum *Constitution for a Nation of Nations: The Ethiopian Prospect* (1997) 170.

[14] The term labour union (British English) and trade union (American English) bear similar meaning throughout this article. i.e. legal instruments in Ethiopia including the Constitution uses the term 'Trade Union' while scholarly articles might use the term 'Labour Union' referring to similar concept.

[15] The Dictionary provides definition for several form of unions such as closed unions (a union with restrictive membership requirements, such as high dues and long apprentship periods); company union (a union whose membership is limited to the employees of a single company / a union under company domination). BA Garner *Black's Law Dictionary 8th Edition* (2004) 4759.

[16] Dr. MT Khan et al 'Role of Labour Unions for Human Resource Development (HRD) (Review Research)' (2012) 2:7 *International Journal of Business and Behavioral Science* 23.

> [It] is an organization, consisting predominantly of employees, the principal activities of which include the negotiation of pay and conditions of employment for its members.

In addition to describing its composition and purpose, the following definition describes the means by which labour unions advance the interest of workers:

> [It] is an organization based on membership of employees in various trades, occupations and professions, whose major focus is the representation of its members at the workplace and in the wider society. It particularly seeks to advance its interest through the process of rule-making and collective bargaining.[17]

On the other hand, the Labour Proclamation no 377/2003 defines trade unions simply as an organization formed by workers.[18] The Proclamation states that, among other things, trade unions have the function of observing the conditions of work, respect the rights and interest of members and in particular, represent their members in collective negotiation and in labour disputes, engage in awareness creation of laws at work and laws in general and ensure their implementation by the members, initiate laws and regulations pertaining to workers and actively participate in the process of their adoption.[19]

The definitions provided above demonstrate that labour unions are a special type of association both in their defined composition (workers/employees)[20] and the modality of operation they follow to advance the interest of workers (collective bargaining/negotiation with employers).[21] The legal regime regulating trade unions and other type of associations is also different. For

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[17] http://www.ilocarib.org.tt/Promalco_tool/productivity-tools/manual09/m9_4.htm (accessed on July 28 2012).

[18] Article 113 (2) (1) of Labour Proclamation no 377/2003.

[19] Article 115 of Labour Proclamation no 377/2003.

[20] This distinctive character of the composition of trade unions were also emphasised by the Supreme Court Cassation Division Judgment in the Case FDRE Ministry of Labour and Social Affairs v National Bank of Ethiopia Trade Union (2012) 55731. The Court highlighted that only 'workers/employees' as stated under article 42 of the Constitution can form/join trade unions. 'Federal Supreme Court Decisions: Volume 11' (2012) 209. http://www.chilot.me/2012/02/11/new-federal-supreme-court-cassation-decisions-volume-11-12/ (accessed on July 20 2012).

[21] The Court, citing the provisions of the Constitution (article 42) and Proclamation no 377/2003 stated that a trade union is different from other type of associations both in its organization, objective and modes of operation. (n 20 above) 208.

instance in Ethiopia, while other type of associations are registered under the Charities and Societies Proclamation no 621/2009 either as a 'Charity' or a 'Society' at the Charities and Societies Agency, a trade union that has membership of more than 50% support by workers is expected to register itself at the Ministry of Labour and Social Affairs (MoLSA).[22]

The separate guarantee provided for the 'right to association for any cause or purpose' under article 31 and the right of workers '…to form associations to improve their conditions of employment and economic well-being' under article 42 of the Constitution is another evidence indicating the unique nature of the right to freedom of association enjoyed by workers through trade unions.[23]

On the ground, trade unions function differently from other similar associations such as 'professional associations'. While a professional association is composed of group of professionals organized to practice and promote their profession,[24] trade unions are strictly composed of workers focused on advancing work related rights of their members. Moreover, trade unions are more effective in that they deal with specific work-related issues or rights, taking on an active role in the day-to-day work life of employees.[25] They further possess the legal right to negotiate on behalf of member employees i.e. on payment, conditions of work and key policies at work.[26] They also undertake the function of representing workers in labour dispute which provides workers with strong bargaining power.[27]

On the other hand, professional associations tend to address issues beyond the confine of the work place. They take more of an advisory or educational role and the tactics they use are mostly limited to dissemination of information,

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[22] Article 115 (b) of Labour Proclamation 377/2003. According to article 30(5) of Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation no 691/2010 the Ministry of Labour and Social Affairs is the government organ mandated with the registration of workers and employers associations.

[23] The Supreme Court cassation Division also underlined this point in its decision in FDRE Ministry of Labour and Social Affairs v National Bank of Ethiopia Trade Union. (n 20 above).

[24] Garner (n 15 above) 378.

[25] 'The ILO and Public Service' a UNISON fact sheet'. www.unison.org.uk/file/ILO.pdf (accessed on 03 August 2012).

[26] As above.

[27] M Guadagni *Ethiopia Labour Law Handbook* (1972) 101.

holding discussion platforms, establishment of standards and improve public relations through publication and lobbying.[28]

3.2. Categories of workers in Ethiopia

Broadly speaking, workers in Ethiopia can be categorized on the basis of their employment status as government employees (civil servants) and private sector employees.[29] Government employees are those working in government institutions excluding government officials.[30]The Civil Servant Proclamation no 515/2007, which regulates the federal civil service sector, also defines 'Civil Servant' as a person employed permanently by federal government institution.[31] The definition excludes the following employees and officials:[32]

- Government officials with the rank of State Minister, Deputy Director General and their equivalent and above;
- Members of the House of Peoples' Representatives and the House of the Federation;
- Federal Judges and Prosecutors;
- Members of the Armed Forces and the Federal Police including other employees governed by the regulations of the Armed Forces and the Federal Police;

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[28] TM Hoveka 'Professional Associations or Unions? A Comparative Look' (1997) 46:2 *Library Trends* 242.

[29] The term 'government employees' 'public employees' 'civil servants' all bear similar meaning and refer to those employees in government institutions. In Amharic 'Yemenegist Seratегnoch' is used in legislations and in the Constitution itself to represent the above mentioned English terms i.e. The Amharic translation of the 'Federal Civil Servants Proclamation' is ' Ye Federal Mnegset Seratегnoch Awaj'.

[30] Article 2 (1), the Federal Courts Proclamation no 25 (1996) provides definition for the term 'Officials of the Federal Government'. Accordingly, members of the House of Peoples' Representatives and the House of the Federation, officials of the Federal Government above ministerial rank, ministers , Judges of the Federal Supreme Court and other officials of the Federal Government of equivalent rank' are officials of the government. A similar enumeration of high level government officials is also provided under other legislations i.e. Article 2 (5) of the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation no 433/2005.

[31] Article 2 (1) of the Civil Servants Proclamation 515/2007. The term 'Government Institution' is further defined under sub article 3 as '…any federal government office established as an autonomous entity by a proclamation or regulations and fully or partially financed by government budget; included in the list of government institutions to be drawn up by the Council of Ministers.'

[32] Article 2 of the Civil Servants Proclamation 515/2007.

- Employees excluded from the coverage of the Proclamation by other appropriate laws.

At the federal level all employment relationship of civil servants as defined above is governed by Proclamation no 515/2007, while the employment relationships of civil servants at the state level is expected to be regulated by laws that are adopted by states themselves according to article 52 (2) f of the Constitution.[33]

Another major category of employees is the category of employees at the private sector, which for the purpose of the labour law includes employees of public enterprises. [34] These categories of employees are governed by the Labour Proclamation no 377/2003, a law which also provides for trade union rights of workers in Ethiopia as guaranteed under article 42 of the Constitution.[35]

Another category of workers are those employees working in essential public service undertakings.[36] Though they are not regulated by a separate law they

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[33] It must be noted, however, that all arguments and conclusions in support of trade union rights of civil servants in this article are equally applicable to civil servants at the regional level. Trade union rights are guaranteed under the supreme law of the land, the FDRE Constitution and international human rights instruments, legally binding instrument which have universal application throughout the nation. Accordingly a state cannot act otherwise and resort to non recognition of trade union rights for civil servants found under its jurisdiction.

[34] 'Public Enterprise' or 'Yemenegist Yelemat Dirijit' was defined as 'any Federal Public Enterprise or Share Company which is fully or partly owned by the Government.' Some of the distinctive characteristics of public enterprises include: their profit making aim which is different from government agencies entrusted with the task of performing essentially regulatory function with the aim of civil service; the manner of money allocation from the state to public enterprises which is basically a onetime thing provided for the former as a working capital unless the government decides to subsidies it unlike government agencies whose budget is allocated every year; payment of income taxes and manners of books and account keeping. D. Asrat & A Shiferaw 'Law of Public Enterprises and Cooperatives: Teaching Material.' http://chilot.files.wordpress.com/2011/06/public-enterprises-and-cooperatives.pdf (accessed 02 August 2012).

[35] The Proclamation defines 'employer' as a person or an undertaking who employees one or more person' and 'undertaking' as 'any entity established under united management for the purpose of carrying on any commercial, industrial, agricultural, construction or any other lawful activity'. Article 2 (1) (2) of the Labour Proclamation no 377/2003.

[36] Essential Services are 'those the interruption of which would endanger the life, personal safety or health of the whole or part of the population'. L Swepston

are treated differently from other category of workers when it comes to enjoyment of trade union rights due to the special nature and importance of their tasks. According to article 136 (2) of the Labour Proclamation no 377/2003 essential public service undertakings has been defined as those services rendered by undertakings to the general public and includes the following:

- air transport;
- undertakings supplying electric power;
- undertakings supplying water and carrying out city cleaning and sanitation services;
- urban bus services;
- hospitals, clinics, dispensaries and pharmacies;
- fire brigade services; and
- telecommunication services;

As it can be inferred from the provision, the list is neither exhaustive nor limited to services provided by only private undertakings.

In the following sections, the article will discuss trade union rights and the legal basis of these rights of government employees in Ethiopia. Legislative framework found both at the international and national level will be analysed.

4. The right to work

The right to work is fundamental to human dignity and central to the survival and development of human personality.[37]The right to work is interrelated and interdependent with other human rights such as the right to life, the highest attainable standard of physical and mental health and adequate standard of living, the right to education, freedom of movement, and freedom of association among other rights.[38]

Various international and regional human rights instruments adopted by Ethiopia guarantee the right to work including the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Economic Social and Cultural Rights (ICESCR) (1966) and the African Charter on Human

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'Human rights law and freedom of association: Development through ILO supervision' (1998) 137:2 *Interantional Labour Review* 188.

[37] 'The Michigan Guideline on the Right to Work' www.refugee.org.nz/Michigan/Work.html 'accessed on 25 July 2012'.

[38] See further article 5 of the Vienna Declaration and Program of Action (1993) about the universality, indivisibility and interdependence of all human rights.

Peoples' Rights (ACHPR) (1981).[39]The right to work is also guaranteed under article 42 of the Constitution. The provision provides protection for the following fundamental components of the right to work:

- trade union rights including the right to strike
- the right of women to equal pay for equal work
- defined working hours, breaks, leisure, periodic leave with pay, paid public holidays and a safe and healthy working environment

In addition to human rights instruments guaranteeing the right to work in general, the separate elements of rights at work are protected by international labour standards especially by the eight fundamental ILO conventions. Ethiopia is member of ILO since 1923 and has ratified its eight core labour conventions. The following table shows ILO instruments ratified by Ethiopia.

Ethiopia ILO Labour Convention Ratification Status[40]			
No	**Cn no**	**Convention Title**	**Date of Ratification**
1.	C. 2	Unemployment Convention, 1919	11.06.1966
2.	C. 11	Right of Association (Agriculture) Convention, 1921	4.06.1963
3.	C. 14	Weekly Rest (Industry) Convention, 1921	28.01.1991
4.	C. 29	Forced Labour Convention, 1930	2.09.2003
5.	C. 80	Final Articles Revision Convention, 1946	23.07.1947
6.	C. 87	Freedom of Association and Protection of the Right to Organise Convention, 1948	4.06.1963
7.	C. 88	Employment Service Convention, 1948	4.06.1963
8.	C. 98	Right to Organise and Collective Bargaining Convention, 1949	4.06.1963
9.	C. 100	Equal Remuneration Convention, 1951	24.03.1999

[39] Article 23 and 24 of the UDHR, Article 6 and 7 of the ICESCR, Article 15 of the ACHPR respectively guarantees the right to work.

[40] 'International Labour Standards List of ratifications of International Labour Conventions'
http://webfusion.ilo.org/public/applis/appl-byCtry.cfm?lang=EN&CTYCHOICE=0780 (accessed on 10 August 2012).

10.	C. 105	Abolition of Forced Labour Convention, 1957	24.03.1999
11.	C. 106	Weekly Rest (Commerce and Offices) Convention, 1957	28.01.1991
12.	C. 111	Discrimination (Employment and Occupation) Convention, 1958	11.06.1966
13.	C. 116	Final Articles Revision Convention, 1961	11.06.1966
14.	C. 138	Minimum Age Convention, 1973 *Minimum age specified: 14 years*	27.05.1999
15.	C. 144	Tripartite Consultation (International Labour Standards) Convention, 1976	6.06.2011
16.	C. 155	Occupational Safety and Health Convention, 1981	28.01.1991
17.	C. 156	Workers with Family Responsibilities Convention, 1981	28.01.1991
18.	C. 158	Termination of Employment Convention, 1982	28.01.1991
19.	C. 159	Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983	28.01.1991
20.	C. 181	Private Employment Agencies Convention, 1997	24.03.1999
21.	C. 182	Worst Forms of Child Labour Convention, 1999	2.09.2003

The right to work as guaranteed under various international and regional human rights instruments obliges states to take measures with a view to move towards full and productive employment. At the core of the right to work is freedom to gain a living by work freely chosen or accepted.[41]This is the first and fundamental component of the right to work encompassing access to employment without discrimination and free choice of work and entitlement to a supportive structure that aids access to employment, including access to vocational training.[42]

The other significant component of the right to work is contained under bundle of rights that can be summarized by the term 'rights at work'. Long hours of hazardous work and lack of decent working conditions resulting in increased mortality and morbidity of workers and the physical and mental repercussions of such exploitation on peoples' lives and those of their families and communities is the background of the struggle for recognition of rights at

[41] (n 37 above).
[42] Article 6 (1) (2) of the ICESCR.

work.[43]The following are the most important components of rights at work guaranteed under the various human rights instruments:[44]

- the right to safe, hygienic and dignified working conditions;
- the right to work that is freely chosen or accepted; (protection against forced labour)
- the right to adequate remuneration;
- the right to a limited workday and remunerated periods of rest;
- the right to equal pay for work of equal value;
- the right to equal treatment; and
- the right to freedom of association and collective bargaining.

While all the above listed rights are guaranteed for individual workers, given the fact that employment relationship creates a degree of dependency of the employee on his/her employer, the power of individual workers to demand and enforce their rights at work has proven to be weak. Accordingly, as it has been discussed on the history of trade unions, collective power of workers to 'improve their conditions of employment and economic well being'[45] became necessary.

5. Trade union rights

The right of workers to form or join trade unions is part of the right to work and is guaranteed under various international and regional human rights instruments and national laws. In general, the components of trade union rights are the following.[46]

- the right of workers to join and be active in trade union
- the right of workers and unions to organize (i.e. to form trade union or federation and recruit members)
- the right of a union to determine its own constitution and membership

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[43] Apsel (n 5 above).

[44] The rights identified as elements of the right to work are found inculcated in international and regional human rights instruments such as the UDHR (article 23,24), ICESCR (article 6,7,8), ACHPR (article 15)and ILO Conventions adopted on specific rights.

[45] Article 42 (1) of the Constitution.

[46] KD Ewing & J Hendy 'Trade Union Rights: The short story' www.ier.org.uk/sites/ier/Trade%2oUnion%20Rights%20-%20The%20Short%20Story_0.pdf (accessed on 2 August 2012).

- the right of a union to decide for itself what activities to undertake, including organizing industrial action
- the right of workers to take industrial action
- the right to free collective bargaining

The above listed components of trade union rights are guaranteed under various international human rights instruments adopted by Ethiopia. Accordingly, the state has three types of obligations towards enforcing this right: obligation to respect, obligation to protect and obligation to fulfill. The obligation to respect requires states to refrain from undertaking any action that impairs the enjoyment of trade union rights while the obligation to protect demands that states protect right holders from third party violation of rights by taking legislative, administrative and other necessary measures. The third obligation which is the obligation to fulfill requires states to take relevant measure towards the enjoyment of rights by right holders. [47]

5.1. Legal Framework at the International Level

5.1.1. Universal Declaration of Human Rights (UDHR)

A significant human rights instrument that enshrined trade union rights at the international level is the UDHR. Though it is a declaration and does not have a binding nature it is the most influential human rights document that laid down the ground for the adoption of other binding human rights instruments such as the ICESCR which is a binding legal instrument guaranteeing trade union rights. Article 23 of the UDHR guarantees the right to work in general and trade union rights in particular. The provision states that 'everyone has the right to form and to join trade unions for the protection of his interests'[48] in absolute terms unlike other human rights instruments which place exception of some kind.

[47]M Sepulveda & Tv Banning et al *Human rights reference handbook* (2004) 16.

[48] Article 23 of the UDHR. It is to be recalled that Ethiopia is one of the 48 states voting in favor of the UDHR during its adoption in 1948. http://www.globalization101.org/universal-declaration-of-human-rights/ (accessed on 7 July 2012).

5.1.2. International Convention on Economic, Social and Cultural Rights (ICESCR)

The Committee on Economic Social and Cultural Rights (Committee on ESCR), which is part of the United Nations (UN) human rights monitoring system and the body assigned to monitor the implementation of the ICESCR, acknowledged the fundamental role trade unions play in ensuring the respect of the right to work at the domestic and international level.[49]ICESCR explicitly guarantees the following trade union rights under article 8:[50]

- the right of everyone to form or join trade union of his/her choice for the promotion and protection of his economic and social interests;
- the right of trade unions to establish national federations or confederations or join international trade organizations;
- the right of trade unions to function freely;
- the right to strike, provided that it is exercised in conformity with the laws of the particular country.

The ICESCR guarantees trade union rights to 'everyone' including government employees. Any restriction placed on the exercise of these rights should be 'prescribed by law and must be necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedom of others.'[51]However, states are given the discretion to restrict the exercise of these rights by 'members of the armed forces or of the police or of the administration of the state.'[52]

The ICESCR did not define what it meant by 'members of the administration of the state'. However, similar stipulation is found under ILO Convention no 98 (Cn 98) which states that 'the Convention does not deal with the position of public servants engaged in the administration of the state'.[53] The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has explained that restricting the rights of workers employed in the 'public administration of the state' to form and join trade unions is compatible with international standards only if 'the

[49] UN Committee on Economic, Social and Cultural Rights (Committee on ESCR): General Comment No. 18 (24 November 2005) 13.
[50] Article 8 of the ICESCR.

[51] Article 8 (1) (a) of the ICESCR.
[52] Article 8 of ICESCR.
[53] Article 6 of ILO Cn 98.

legislation….limits this category to persons exercising senior managerial or policy-making responsibilities' and these workers 'are entitled to establish their own organizations.'[54]

According to article 2 of the ICESCR, states have an obligation to take steps including adopting legislative measures with a view to the realisation of rights enshrined in the Convention. States also have an obligation of reporting to the ICESCR monitoring Committee, the steps they have taken to enforce rights enshrined in the Convention, including measures they took towards guaranteeing trade union rights.[55]

5.1.3. Standards under the International Labour Organisation (ILO)

The ILO is a specialized agency of the UN specifically concerned in protecting those human rights related to labor conditions.[56] The ILO Constitution establishing the Organisation was adopted in 1919 and freedom of association and collective bargaining are fundamental rights rooted in the Constitution[57] and the Declaration of Philadelphia annexed thereto. [58] In practice, the Organisation underlined the vitality of these rights by undertaking extensive standard-setting functions and establishing various supervisory mechanisms

[54] Human Rights Watch 'Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights' (2003)15:5(B) 10. www.hrw.org/sites/default/files/reports/elsalvador1203.pdf (accessed on 10 July 2012).

[55] Article 16 of the ICESCR.

[56] It should be noted, however, that the ILO only joined the UN in 1946 after 26 years of its establishment in 1919. www.ilo.org/declaration/thedeclaration/history/lang--en/index.htm (accessed on 25 July 2012).

[57] In its Preamble the ILO Constitution (1919) recognizes the principle of freedom of association as one of the means of improving conditions of workers, bringing social justice and ensuring peace.

[58] The Declaration of Philadelphia (1944), which forms part of the ILO Constitution, asserts that among other freedoms, freedom of association is essential for sustained progress and that it is one of the fundamental principles on which the ILO is based.

dedicated solely to monitor the implementation of freedom of association principles.[59]

The two most significant ILO instruments defining the content and scope of trade union rights of workers are the Freedom of Association and Protection of the Right to Organise Convention no.87, 1948 (Cn 87), and the Right to Organise and Collective Bargaining Convention no. 98 (1949) (Cn 98).[60] In addition to these conventions the ILO Declaration on Fundamental Principles and Rights at Work (the Declaration) adopted in 1998 was also a significant step forward in the recognition of freedom of association and the effective recognition of the right to collective bargaining (trade union rights) as one of the four principal values to which all ILO members are committed to.[61] This commitment extends to all state members of ILO regardless of whether they are party to relevant ILO conventions. According to article 2 of the Declaration states has an obligation to 'respect, to promote and to realize, in good faith and in accordance with the Constitution of ILO' these four principal values.[62]

Another prominent aspect of trade union rights standards under the ILO is the supervisory mechanisms of the Organisation. The ILO has a very strong enforcement mechanism for the standards it adopts in general and on freedom of association principles in particular. These multi-layered supervisory mechanisms were praised by various writers as being the most efficient and effective enforcement mechanism at the international level.[63]These mechanisms can be classified as regular and special system of supervision. The regular supervision system contains the Committee of Experts on the Application of Conventions and Recommendations (CEACR)[64] and the International Labour

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[59] 'Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of ILO' (2006) *Fifth revised edition* 2. (hereinafter referred as 'Digest')

[60] These Conventions will be further analysed in the subsequent section.

[61] The other fundamental principles are (also referred as Core Labour Rights): the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. Article 2 of the Declaration (1998).

[62] Article 2 of the Declaration (1998).

[63] VA Leary 'Lessons from the Experience of the International Laour Organisation' in P Alston (edtd) *The United Nations and Human Rights: A critical appraisal* (1992) 581.

[64] Its main mandate includes examining government reports, receiving workers' and employers' organizations comments and consider it together with the report of governments, request states which are not fully applying the relevant freedom of association standards to take the necessary action to do so. D Tajgman & K Curtis

Conference Committee (CC) on the Application of Standards.[65] The regular supervisory mechanism is dependent on the reports submitted by state parties according to article 22 of the ILO Constitution and observations sent by workers' organisations and employers' organisations.

The special system of supervision contains the Committee on Freedom of Association (CFA)[66] Fact-finding and Conciliation Committee on Freedom of Association,[67] Article 24 representation, [68]Article 26 complaint.[69] Unlike the regular system of supervision, these special procedures are based on the submission of a representation or a compliant.

Freedom of Association: A user's guide Standards, Principles and Procedures of the International Labour Organisation (2000)1.

[65] The Conference Committee on the Application of Standards (CC) is a standing tripartite body of the ILO which examines, each year, the report published by the CEACR. See further 'Conference Committee on the Application of Standards: Extracts from the record of procedures' www2.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_116491pdf (accessed on 3 August 2012).

[66] The Governing Body (GB) of the ILO set up, in 1951, a Committee on Freedom of Association (CFA).The CFA examines complaints containing allegations of violations of the Conventions on freedom of association, regardless of whether or not the countries concerned have ratified those instruments. The consent of the governments concerned is not necessary in order for these complaints to be examined: the legal basis for this concept resides in the Constitution of the ILO and the Declaration of Philadelphia, according to which member States, by virtue of their membership in the Organization, are bound to respect the fundamental principles contained in the ILO Constitution, particularly those concerning freedom of association. See further Tajgman & Curtis (n 64 above) 58.

[67] Ratification of the relevant convention is not required if the state agrees to the jurisdiction of the Committee.

[68] As per article 24 of the ILO Constitution, in the event of any representation being made to the ILO by an industrial association of employers or of workers that any of the members of the Organization has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party the ILO GB may communicate the representation to the government against which it is made, and may invite that government to make statement on the subject.

[69] Where the government whose reply was sought by the GB as per article 24 fails to forward a timely response or the reply is not deemed to be satisfactory, the GB of the ILO holds the right to publish the representation and the reply by the government. In addition its publishing mandate, the GB may establish a Commission of Inquiry (COI) as an ad hoc body. Tajgman & Curtis (n 64 above) 1.

Reports, recommendations and decisions of these supervisory organs bear great significance in understanding the practical effect of the various ILO conventions and define the scope of rights guaranteed within. The influence of these reports, recommendations and decisions is primarily moral and the objectivity of the content and the perseverance of the bodies to follow up on concrete results coupled with the weight of public opinion is the most valuable means at the disposal of these supervisory mechanisms.[70]

The issue of trade union rights of civil servants has been dealt with by the various ILO supervisory bodies in various occasions. The recommendations and decisions of these supervisory bodies had significant practical influence and impact on state practice over the years.[71]Accordingly, in addition to provisions of relevant conventions, reports and digest of decisions and principles by these supervisory bodies, especially those adopted by the CEACR and CFA are employed to elaborate on the concept and content of freedom of association of civil servants throughout this article. Particularly the 'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO' is used as a major reference document, as it collects and summarize important decisions made by the CFA about the application of freedom of association principles in cases brought before it.

- **Freedom of Association and Protection of the Right to Organise Convention No 87[72]**

The very foundation of the trade union movement is the need for workers to join forces in their collective defense and for the advancement of their interests.[73]Cn No. 87 promotes recognition of trade union rights of workers and urges states to take measures aimed at protecting these rights. The Preamble of the Convention refers to the Preamble of the ILO Constitution declaring that

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[70] Leary (n 63 above) 608.

[71] Tajgman & Curtis (n 64 above) 1.

[72] The Convention was adopted by the 31st Session of the International Labour Conference, in June 1948, by 127 votes to 0, with 11 abstentions. Thus the principles and guarantees embodied in the Convention were endorsed by an overwhelming majority of the delegates to the Conference. Ethiopia has ratified Cn 87 on 4 June 1963 which makes it part of the law of the land as per article 9 (4) of the Constitution.

[73] http://training.itcilo.it/ils/foa/library/labour_review/1998_2/english/dunning_en.html (accessed on 1 August 2012).

'recognition of the principle of freedom of association is a means of improving conditions of labor and of establishing peace'.[74]

Under article 2, the Convention provides for the first fundamental guarantee towards freedom of association in the following terms:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Despite the overall clarity of the article, the question 'which employees are entitled to the right?' has been frequently asked. In principle, distinction based on occupational categories is prohibited and 'all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing.'[75] Accordingly, the establishment by the state, of a limited list of occupations with a view to recognizing the right to associate would be contrary to this principle.

The wording of article 2 of Cn no 87, stating that 'workers and employers, without distinction whatsoever,'[76] have the right to establish and join organizations of their own choosing, affirms this principle and clearly extends the guarantee to both private sector and government employees.[77] Apparently, it was deemed inequitable to draw any distinction in trade union matters between workers in the private sector and government or public sector employees. After all the main rationale behind trade unionism is defending occupational interest, i.e. an interest which both private sector and public sector employees have in common. [78]

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[74] 'Considering that the Preamble to the Constitution of the International Labour Organization declares recognition of the principle of freedom of association to be a means of improving conditions of labour and establishing peace;' Preamble of Cn no 87.

[75] Digest (n 59 above) para 216.

[76] Article 2 of Cn 87.

[77] It should be noted that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees are entitled to the right to form or join trade union of their own choosing. Digest (n 59 above) para 255.

[78] Digest (n 59 above) para 218.

The only exception to this rule is the one provided under article 9 of Cn 87 which states that 'the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations'.[79] However, sub article 2 stresses that the ratification of the Convention should not be interpreted in such a way that these groups will lose a right to freedom of association previously guaranteed by any existing law, award, custom or agreement.[80]

Article 3 of the Convention provides for the right of workers and their organization to draw up their constitutions and rules, freely electing their representatives, organizing their administration and activities and formulating their programs.[81]This provision thereby guarantees organizations against any interference by the authorities which would impede the lawful exercise of these rights.

Another protection to the right from an arbitrary administrative act is the limitation of the power of the administrative authorities to take a unilateral act of compelling the dissolution of an organization. Article 4 states that workers and employers organizations will not be liable to be dissolved or suspended by administrative authority and their dissolution can only be pronounced by ordinary courts of law.[82]States bear the obligation of taking all the necessary and appropriate measures to ensure that workers and employers exercise their right to organize freely. These measures include legislative, administrative, budgetary or other appropriate actions. On the other hand, states should also refrain from taking steps that might hamper, harm or curtail the enjoyment of these rights.

- **The Right to Organise and Collective Bargaining Convention no. 98 (1949)[83]**

Though Cn 87 provides protection for the rights of workers to form or join trade union, the protection was not enough by itself since trades union members were exposed to several types of rights violations as a result of their trade union activities. Accordingly, the necessity of adopting a framework to

[79] However, it should be noted that civilians working in the services of the army have the right to form trade unions. Digest (n 59 above) 229.
[80] Article 9 (2) Cn. 87.
[81] Article 3 of Cn. 87.
[82] Article 4 of Cn. 87.
[83] The Right to Organise and Collective Bargaining Convention (No. 98) was adopted at the 32nd Session of the International Labour Conference (June 1949).

protect workers in trade unions was felt by ILO which adopted another binding document, the Right to Organise and Collective Bargaining Convention no 98 (1949). In addition to its protection against anti-union discrimination, Cn 98 provides for other fundamental trade union rights; protection against acts of interference in trade union activities and the right of workers to be represented by trade unions in negotiating conditions of employment collectively (collective bargaining).

The first of these guarantees is embedded under article 1(1) of the Convention which states in terms of general principle that workers have the right to enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Sub article 2 states that such protection should apply more particularly, in respect of acts calculated to:

- make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
- cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours

Apart from protection against anti-union discrimination, article 2 provides for prohibition against interference in employers organization by workers organization or agents and vice versa. This prohibition in particular applies to acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organisations or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organizations.[84]

The other significant component of trade union rights guaranteed under Cn 98 is the right to bargain freely with employers with respect to conditions of work. Collective bargaining is the primary means through which trade unions

[84] Article 2(2) of Cn 98. According to article 3, the state is expected to provide for machinery appropriate to national conditions, where necessary, for the purpose of ensuring respect for the anti-unionism and non-interference guarantees provided for under article 1, and 2 of the Convention.

safeguard the interest of their members.[85]As per article 4 of Cn 98, states are required to take:

> measures appropriate to national conditions wherever necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[86]

Even before Cn 98 was adopted it was clearly indicated in the preliminary work of the adoption of Cn87 that 'one of the main objects of the guarantee of freedom of association is to enable employers and workers to combine to form organisations independent of the public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements'.[87]Cn 98 gives a strong protection to this fundamental objective of trade unionism.

The scope of workers entitled to the right of collective bargaining is an issue that is dealt with the CFA in several occasions, for there has been inquires as to the status of public servants (government employees) from various actors. The CFA stated that all 'public service workers' other than those engaged in the 'administration of the state' should enjoy collective bargaining rights and Cn 98 article 4 also applies to them. The CFA emphasized that:

> a distinction must be drawn between, on the one hand public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions[88]

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[85] International Commission for Labour Rights 'The denial of public sector collective bargaining rights in the state of North Carolina (USA): Assessment and report' (14 June 2006). http://www.laborcommission.org/ICLR_-_North_Carolina.pdf (accessed on 24 August 2012).

[86] Article 4 of Cn 98.

[87] Digest (n 59 above) 882.

[88] Digest (n 59 above) 887.

According to the CFA only the first category of workers are excluded from the scope of Cn 98 i.e. public servants who by their functions are directly engaged in the administration of the State as well as officials acting as supporting elements in these activities.[89] What originally was inserted to exclude 'public officials' and 'senior civil servants' has been interpreted over the year by most governments as excluding any worker delivering public service[90]which made the CFA take the initiative of elaborating on the issue and define the scope of permitted categories of workers that can be excluded.

In addition to a generalized comment on the issue of public sector servants, the CFA focused on the rights of groups whose right has been disputed. Accordingly, the CFA affirmed the right of workers such as state-owned commercial enterprises, workers found in the education sector (teachers with civil servant status),[91] and the staff of national radio and television institution to collectively bargain on their conditions of work.

The 'subject matter' of collective bargaining is another issue that needs focus. As per the CFA, 'matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in a legislation etc.'[92] It has been further emphasized that these matters should not be excluded from the scope of collective bargaining by law.

Similar with article 9 of Cn. 87, article 5 states that the extent of the application of the convention to the armed forces and the police is to be determined by national laws or regulations. Ethiopia is party to Cn 98, therefore provisions within the convention dealing with the right of government employees and the scope of rights detailed by the CFA is directly relevant to government employees in Ethiopia.[93]This further reinforces the Constitutional guarantee and helps to understand the legal scope of the right at the national level.

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89 As above.

90 'The ILO and Public Service' a UNISON fact sheet. www.unison.org.uk/file/ILO.pdf (accessed on 03 August 2012).

91 Digest (n 59 above) para 901.

92 Digest (n 59 above) para 913.

93 Both in the Convention and the illustrations provided by the CFA terms such as 'public employees' and 'civil servants' has been used while the Ethiopian Constitution generally uses the term 'government employees', however when it

- **The right to strike**

The right to strike is an 'intrinsic corollary to the right to organize protected by Cn 87' through which workers and their organizations may promote and defend their economic and social interests.[94] On many occasions the CFA underlined that the right to strike do not solely concern the betterment of working conditions only. Accordingly, workers seeking solutions to economic and social policy questions and major social and economic policy trends which have direct impact on their member and on workers in general and in particular matters regarding employment, social protection and standard of living are legitimate objects for the right to strike.[95]The CFA emphasized that conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike.[96]

Like all other human rights, the right to strike is not an absolute right. Especially in case of civil servants 'recognition of the principle of freedom of association does not necessarily imply the right to strike'.[97] Accordingly, the CFA stated that the right to strike can be restricted or even prohibited:

a. In the public service only for public servants exercising authority in the name of the State (these are officials working in the administration of justice and the judiciary, customs officers and the like who exercise authority in the name of the state)[98]
b. In essential services, in the strict sense of the term (these are services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)

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comes to derivative legislations even in the Ethiopian legal frame work terms such as civil servants and government employees is used to refer to employees of institutions who work in institutions which are financed fully or partially by the government. Other categories of 'workers functioning in the name of the state' or 'public officials' are also recognized under Ethiopian legal framework. Definition and classification of the same is provided in this article under section 3.2 'Categories of Workers'.

[94] Digest (n 59 above) para 523.

[95] Digest (n 59 above) para 526, 529.

[96] Digest (n 59 above) para 547,548.

[97] Public servants in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements, enjoy suitable protection against acts of anti-union discrimination and enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population. Digest (n 59 above) para 572,577.

[98] Digest (n 59 above) para, 578,579.

With regard to essential services the CFA put down some criterion by which what is 'essential' could be identified. Accordingly, the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population could justify the labeling of a service as 'essential'.[99] However this is not a clear cut criterion since what is essential is determined to a large extent by the situation prevailing in the particular country and what is identified as a non-essential service may prove essential given the length of time the strike goes on.[100] The CFA listed services that might right away fall under the purview of essential services as follows:[101]

- the hospital sector
- electricity services
- water supply services
- the telephone service
- the police and the armed forces
- the fire-fighting services
- public or private prison services
- the provision of food to pupils of school age and the cleaning of schools
- air traffic control

The CFA however did not keep silent on the issue of prohibition or restriction of the right to strike and leave workers without a weapon to advance their interests. Accordingly, the state has an obligation to accompany this measure with a strictly impartial conciliation and arbitration procedure and a prohibition on the part of the employer from taking lock out measures.[102]

To conclude, Ethiopia is party to both Cn no 87 and Cn 98; accordingly all the guarantees provided for trade union rights of government employees are directly applicable to government employees in Ethiopia. For the time being there is no legislation adopted to provide for trade union rights of government employees. Nevertheless, when one is adopted in the future, it must be in line with these two conventions and the scope of rights they provide.

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[99] Digest (n 59 above) para 581.
[100] Digest (n 59 above) para 581,582.
[101] Similar list is also found under article 136 (2) of the Labour Proclamation no 377/2003.
[102] Digest (n 59 above) para 600,601.

5.2. Legal Framework at the National Level

5.2.1. The Constitution of the Federal Democratic Republic of Ethiopia

In Ethiopia, the Constitution is the supreme law of the land and any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution has no effect.[103]The bill of rights of the Constitution containing list of fundamental rights and freedoms is found under Chapter Three. Under this chapter, article 42 (1) (a) (b) of the Constitution explicitly guarantees trade union rights. Text of the provision is reproduced below:[104]

> 1 (a) Factory and service workers, farmers, farm laborers other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well being. This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests.
>
> (b) Categories of persons referred to in paragraph (a) of this sub-Article have the right to express grievances including the right to strike.

As it can be inferred from the provision significant elements of trade union rights such as the right to form trade unions and other associations, to collectively bargain and the right to strike are fully protected. Apart from guaranteeing trade union rights, the Constitution stipulates the category of workers entitled to the rights i.e. factory and service workers, farmers, farm laborers other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility[105]. The Constitution stipulates that further legislation should be adopted with a view to determine the category of government employees who

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[103] Article 9 (1) of the Constitution.

[104] Article 42 (1) (a) (b) of the Constitution.

[105] It must be noted here that the Constitution limits the category of employees who has the right to form/join trade union which is incompatible with Cn no 87 which states all 'workers….without distinction whatsoever…' has the right to freedom of association. This would be a matter for further scrutiny; however, this article will limit itself to discussing on the need to adopt the legislation required by the Constitution with regard to government employees. See section 5.1.3 of this article for further reference on the content of Cn 87.

are entitled to trade union rights guaranteed under article 42 (1) (a) (b).[106]The Constitution, as evidenced above endorses trade union rights of government employees in compliance with international and regional human rights instruments and ILO Conventions Ethiopia has committed to.

The other important stipulation found in the Constitution relevant to the protection of trade union rights of government employees is the manner of interpreting Chapter three and the status of human rights instruments in the normative framework of the country. The Constitution stipulates that fundamental rights and freedoms guaranteed under Chapter Three should be 'interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.'[107]Accordingly, if at all an issue of Constitutional interpretation arises regarding trade union rights, the UDHR and other international human rights instruments, ILO standards and their underlying principles will have to be called in to attention.[108]The main principle underpinning international human rights instruments such the principle of universality, inalienability, indivisibility and interdependence of human rights also support the entitlement of trade union rights to government employees.

By virtue of article 9 (4) all international agreements ratified by Ethiopia are an integral part of the land which includes international human rights instruments since they are a special type of multilateral agreement.[109] Accordingly, international human rights instruments which guarantee trade union rights and particularly the ICESCR and the two ILO conventions (Cn 87 & Cn 98) that recognize trade union rights of government employees are part of the law of the land. The main importance of this stipulation is that government employees should be able to invoke directly the provisions of these instruments to get remedy before the court of law where adequate guarantee is not provided for within national legislations.[110] However, this has

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[106] Article 42 (1) (c) of the FDRE Constitution.

[107] Article 13 (2) of the Constitution. It should be noted, however, that when the provision is clear the issue of Constitutional interpretation will not arise.

[108] Since the guarantee providing for trade union rights is clear the issue of interpretation is most likely out of question. For the issue of interpretation of the Constitution see AK Abebe 'Human Rights under the Ethiopian Constitution: A descriptive Overview' (2011) 5 *Mizan Law Review* 43/46.

[109] Article 9 (4) of the Constitution.

[110] There is a technical problem connected to invoking particular provisions of international human rights instruments before the courts in Ethiopia. Most

a practical difficulty since these instruments are not translated and promulgated in the Federal Negarit Gazette as per the requirement of the Federal Negarit Gazeta Establishment Proclamation no 3/1995.[111] Studies have shown that where the provisions of a ratified international instrument are not officially translated into the working language, their implementation at the domestic level is close to nil.[112]

5.2.2. The Civil Servants Proclamation

The Federal Civil Servants Proclamation no 515/2007 is the law regulating the employment relationship of government employees at the Federal level in Ethiopia.[113] Articles 3 and 4 of the Proclamation defines the term 'Civil Servant'[114] and 'Temporary Civil Servant simultaneously providing for list of workers falling out of the definition. A Civil Servant is an employee employed permanently (non-permanently incase of Temporary Civil Servant) by federal government institution. 'Federal Government Institution' means 'Federal Government Office established as an autonomous entity by a proclamation or regulations and fully or partially financed by government budget...'[115]

The Proclamation, however, excludes the following government employees from its scope of application and they are not considered as 'Permanent Civil Servants':[116]

a) government officials with the rank of state minister, deputy director general and their equivalent and above;

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international human rights texts are found in English and only instrument of ratification is published in the Negarit Gazette. There is a need to interpret the contents and publish these instruments in the Federal Negarit Gazette. Initiatives are currently taken by institutions such as the Ministry of Justice and the Ethiopian Human Rights Commission to interpret the text of international human rights instruments in to local vernaculars. However these initiatives are mostly limited to instruments found under the UN human sights system and not the ILO labour standards which contain a set of rights at work.

[111] Article 2 (3) (4) of Federal Negarit Gazette Establishment Proclamation no 3/1995.

[112] R Messele 'Enforcement of Human Rights In Ethiopia' (2002) (31 August 2012) 39.

[113] Article 3 states that the Proclamation will be applicable on 'Government Institutions' and 'Civil Servants' ('Yemenegist Seratегnoch' in the Amharic version of the Proclamation).

[114] The term 'civil servant' and 'government employee' have a similar meaning in the Amharic Translation i.e 'Yemengist Seratегnoch'. This can simply be inferred from the English and the Amharic Short Title of Proclamation no 515/ 2007.

[115] Article 2 (3) of the Federal Civil Servants Proclamation 515/2007.

[116] Article 2 (2).

b) members of the House of Peoples' Representatives and the House of the Federation;
c) federal judges and prosecutors;
d) members of the Armed Forces and the Federal Police including other employees governed by the regulations of the Armed forces and the Federal Police;
e) employees excluded from the coverage of this Proclamation by other appropriate laws

The following lists of personnel are also excluded from the scope of application of the Proclamation and they are not considered as 'Temporary Civil Servants':[117]

a) persons employed as daily labourers who are paid on daily basis;
b) persons who are assigned for internship or training;
c) persons who enter into a contract with a government office as an independent contractor for consideration;
d) persons who enter into a contract with a government office due to their special skills and ability on part-time basis for consideration

The Proclamation regulates every aspect of employment relationship of Civil Servants with the government including recruitment, salary scale, promotion, transfer, conditions of work etc. However, the Proclamation does not provide for trade union rights for government employees in line with the Constitution. On the other hand, article 421 of the Criminal Code provides for a punishment of fine not exceeding one thousand birr or simple imprisonment not exceeding six months[118] for any 'public servant who, in breach of his professional or statutory obligations, goes on strike of his own free will or urges others to strike'.[119]

5.2.3. Labour Proclamation

Labour Proclamation no 377/2003 (the Proclamation) is the principal source of labour law in Ethiopia and it is applicable throughout the country.[120] Providing guarantee for the right of workers and employers to form their respective

[117] Article 2 (2) of the Civil Servants Proclamation no 515/2007.
[118] Article 420 of the Criminal Code of Ethiopia (2004).
[119] Article 421 of the Criminal Code of Ethiopia (2004).
[120] According to article 55 (3) of the Constitution the legislative power to enact labour laws is vested in the House of Peoples Representative while states are left to regulate employment relationships of civil service in their respective state as per article 52 (2) (f) of the Constitution.

associations and engage in collective bargaining is one of the objectives of the Proclamation as stated under its Preamble.[121] Expanding on this objective, the Proclamation provides for a Part, sub divided by Chapters, solely dealing with collective relations between workers and employers and particularly on 'trade unions and employers associations' and 'collective bargaining' respectively.[122]

Under Chapter One, Article 113 provides for the right of workers and employers to establish and form trade unions or employers' associations, respectively and actively participate therein. In addition to stipulating the right, the Proclamation contains detailed provisions on formation and function of organizations/associations[123] (both workers and employers), registration, refusal to register and cancellation of registration of organizations. The following Chapter, Chapter Two deals with the issue of collective agreement/bargaining, its definition, subject matter, content, scope, registration and all other procedural issues of making a collective bargaining.

Save for few discrepancies with international standards, the Proclamation is commendable for it dedicates several provisions dealing with trade union rights and their implementation. One of the malignant discrepancies of the Proclamation is the exclusion of several groups of workers from its scope of applicability. This in turn excludes these workers from the rights and guarantees it aims to extend including trade union rights. Article 3 is the provision that defines the scope of applicability of the Proclamation. Accordingly groups covered by the following employment contracts fall outside the scope:[124]

- Contracts for the purpose of upbringing, treatment, care or rehabilitation;
- Contracts for the purpose of educating or training other than apprentice;[125]
- Managerial employees;[126]

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[121] Preamble, Labour Proclamation no 377/2003.

[122] Part Eight, Chapter One of the Proclamation.

[123] The Proclamation uses the term 'trade union', 'organization' to refer to workers association while it uses the term 'employers association' to refer to associations composed of employers.

[124] Article 3 of the Labour Proclamation no 377/2003.

[125] Here it should be noted that both teachers in the private and public sector are excluded by virtue of this specific stipulation which in turn make these group of workers fall out of the guarantee of trade union rights and other rights as provided by Proclamation no 377/2003.

- Contracts relating to persons such as members of the Armed Force, members of the Police Force, employees of state administration, judges of courts of law, prosecutors and others whose employment relationship is governed by special laws;
- Contracts relating to a person who performs an act, for consideration, at his own business or professional responsibility.

Most workers employed by the government who fall in the above exception are covered either by the Civil Service Proclamation or are governed by special laws i.e. the judiciary, public prosecutors and the army. However, the Proclamation applies to government employees working in public enterprises.[127]

5.2.4 Charities and Societies Proclamation

It is important to discuss the Charities and Societies Proclamation no 621/2009 (CSP) so as to emphasize the unique nature of trade unions compared to other type of associations. As it can be inferred from the Preamble, the basic rationale behind the adoption of the CSP is ensuring the realization of citizens' right to association enshrined in the Constitution.[128] Accordingly, the CSP neither recognizes trade union rights nor does it regulate trade unions.

The Constitution under article 31 guarantees the right of every person to freedom of association for any cause or purpose. Accordingly, workers including those working in the public sector can form associations with a view to promoting their interest as a 'society' according to the CSP.[129]However, a

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[126] The Proclamation details who managerial employees are. Accordingly employees who are vested with powers to lay down and execute management policies by law or by the delegation of the employer depending on the type of activities of the undertaking with or without the aforementioned powers an individual who is vested with the power to hire, transfer, suspend, layoff, assign or take disciplinary measures against employees and include professionals who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer.

[127] See section 3.2 of this Article on categories of workers to learn about public enterprises further.

[128] Article 31 of the Constitution.

[129] According to article 55 (1) of Charities and Societies Proclamation no 621/2009, 'Society' means an association of persons organized on non-profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes as well as to coordinate institutions of similar objectives.

workers association established under this Proclamation is not a trade union and it is not entitled with the rights guaranteed under article 42 of the Constitution i.e the right to bargain collectively and the right to strike. These two significant components of trade union rights are neither provided nor regulated under the CSP.[130]

5.2.5 Supplementary legislations

There are other legal regimes which regulate employment relations falling outside the ambit of the Labour Proclamation no 377/2003 and Civil Servants Proclamation no 515/2007. Most employees who are found under the government employment sector and who fall outside the scope of the above legal regimes are in the category of workers who are deemed to be engaged in either in the 'administration of the state' or they are 'senior civil servants' as defined by the ILO supervisory bodies. Under this category are found Government Officials, Judges, Prosecutors, members of the police and the defence force and prison wardens. Following are few of the legislations regulating this category of workers:

- Federal Courts Proclamation no 25/1996.
- Federal Prosecutor Administration Council of Ministers Regulations no 44/1997.
- Police
    - Federal Police Proclamation no. 207/2000
    - Federal Police Commission Proclamation no 313/2003
    - Federal Police Administration Council of Ministers Regulation No. 86/2003
- Prison Wardens – Federal Prison Commission Establishment Proclamation no 365/2003 (Part Three)
- Defence Forces Proclamation no 27/1996.

These legislations do not recognize trade union rights. Despite the limitation placed on the collective bargaining rights of those employees who are 'engaged in administration of the state'[131] and members of the police and army forces,[132] the rights of all employees without any distinction to form/join trade unions is

[130] However, such association could still promote the interest of its members using methods such as demonstration and petition as provided under article 30 of the Constitution.

[131] Article 6 of Cn no 98.

[132] The state is given the discretion whether to recognize or not, the freedom of association rights of members of the police and defense forces. Article 9 of Cn 87.

guaranteed under Cn 87.[133] Therefore, together with the adoption of a legislation recognizing the trade union rights of civil servants, amending the above listed legislations so as to bring them in line with ILO conventions is another matter that should be deliberated upon by relevant government organs.

5. Prevailing patterns in practice

By virtue of Labour Proclamation no 377/2003 workers in the private sector and in public enterprises can form trade unions in their own respective institutions. Though it is not mandatory, currently, trade unions after joining federations become part of the Confederation of Ethiopian Trade Unions (CETU), which is the sole national centre for more than 370,000 workers in Ethiopia.[134]The CETU is composed of nine industrial federations (Federation of Food and Beverage, Tobacco and Allied Workers; Ethiopian Federation of Metal, Wood, Cement and other Workers; Federation of Commerce, Technical Print, and other Workers; National Federation of Farm, Plantation, Fishery and Agro-Industry; National Federation of Tourism, Hotels and Generic Service Workers; Industrial Federation of Ethiopian Textiles, Garment and Shoe Workers; National Federation of Energy, Chemical, Petroleum Workers; Transport and Communication Workers; Ethiopian Banking and Insurance Industrial Federation) which are umbrella for 702 basic trade unions.[135]

Trade union activities in general were assessed as being weak except for a relative strength of those formed by public enterprises.[136] Public enterprises including, financial public enterprises has been benefiting from trade union right entitlements.[137] However, the Supreme Court Cassation Division

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[133] Article 42 of the Constitution however does not recognize the right of all government workers to freedom of association rather it categorically entitles this right only to lower level government employees whose work compatibility allows for it.

[134] 'Country Situational Report of the Confederation of Ethiopian Trade Unions (CETU)' actrav-courses.itcilo.org/en/a 1-05066/a 1…/Ethiopia/at…/file (accessed on 25 August 2012).

[135] As above. See further National Labour Law Profile: Ethiopia (n 8 above).

[136] National Employment Policy and Strategy of Ethiopia (November 2009) 11.

[137] The case of Bole Printing Press and Shell Ethiopia trade unions who stood up for the right of their members to fair conditions of work and found them a favorable judgment is an important instance indicating the significant role trade unions play in the protection of the rights of workers. 2009 Country Reports on Human Rights Practices '2009 Human Rights Reports: Ethiopia'

Judgment delivered on the case National Bank of Ethiopia Trade Union (NBE) v Ministry of Labour and Social Affairs (MoLSA) has posed a threat and uncertainty as to this guarantee. This Judgment caused the dissolution of the NBE Trade Union which was functional for 33 years.[138] Despite the fact that the NBE argued its case citing ILO Convention nos 87 and 98, the Court simply disregarded the argument and missed an opportunity to make a case of implementation of international human rights standards at the local level. Rather, the Court justified its judgment by stating that the employees of the NBE are administered by Council of Ministers Regulation no 157/2008, by virtue of which they will be exempted from the Labour Proclamation no 377/2003 and fall within the list of employees regulated by special laws as per article 3 (2) (e) of the Proclamation. This seems a regression in the protection of one of the fundamental human rights. The ruling of the Court sets a bad precedent and legitimizes the act of taking away of the rights that is currently being enjoyed by trade unions recognized by the Labour Proclamation 377/2003 by simply adopting a special law that governs their employment relationship.

Apart from the above mentioned trade unions, there are organisations that basically fit the structure and nature of trade unions yet not legally recognized as such in Ethiopia.[139] The case of the Ethiopian Teachers Association (ETA) which is composed of workers (teachers) and which is instituted to promote the interest of its members is one good example. The Association was informally established in 1949 and got nationwide recognition in 1965 under the name 'Ethiopian Teachers Association'.[140] The ETA was primarily established with a view of supporting primary level teachers in carrier development, alleviating difficulties teachers face due to lower salary rate, improve quality education and other similar issues.[141] Through time the

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http://www.state.gov/j/drl/rls/hrrpt/2009/af/135953.htm (accessed on 3 November 2012).

[138] National Bank of Ethiopia Trade Union (NBE) v Ministry of Labour and Social Affairs (MoLSA) (22 Yekatit 2003 E.C.) Case no 55731.

[139] While the Association is only recognized as a professional association in Ethiopia, it is considered as a trade union by ILO for all practical purposes. This understanding emanates basically from Article 10 of Cn no 87 which asserts that the Convention applies to any organization of workers and employers instituted for the purpose of furthering and defending the interests of workers and employers.

[140] It used to be known as 'Teachers Union' at the time of its establishment. 'የኢትዮጵያ መምህራን ማህበር አጭር ታሪክ' *የኢትዮጵያ መምህራን ማህበር ልዩ እትም መጽሔት* (ሰኔ 2000) 9.

[141] As above.

Association evolved to an institution reaching beyond the need of its immediate members through its activism and started being at odds with the government on matters related to social, economic and political policies.[142] The association was among the prominent actors who significantly contributed to the end of the monarchical and dictatorial regimes that existed in Ethiopia until the year 1991.[143] The story of ETA after 1991 is marked by an extended internal conflict between groups who alleged to be the legal representatives of the Association. After an extended court litigation that took more than 14 years, the Supreme Court Cassation Division ruled in June 2008 upholding the ruling of the lower courts by ordering the transfer of all property including bank asset and the name and logo of the Association from the group that was in control of the asset to the currently functioning ETA.[144] The group that lost the case has been trying in vain to register at the CSA under the name National Teachers Association (NTA) since 2008.[145]

As for ETA, recently, the issue of teacher's salary scale improvement that took place after a long negotiation between the Association and the government were a point of debate. While the ETA 'welcomed and appreciated the decision made by the Government'[146] with regard to improvements on salary scale, the subsequent fallout between dissatisfied teachers on the one side and ETA and

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[142] The attempt of the Association to lobby the Government regarding the promotion of free health service and education in the country is an indication of its high involvement in areas wider than work place matters (n 140 above) 13.

[143] The 1974 revolution which ended up in the collapse of the monarchical regime is partly the result of the continuous demonstration by ETA against the Sector Review Program introduced by the regime which spread to students and other interest groups. (n 140 above) 12.

[144]http://www.ethiopianteachers.org/index.php?option=com_content&view=article&id=64:the-long-standing-court-case-finalized&catid=34:eta-news&Itemid=*1* (accessed on 3 December 2012).

[145] This has lead ILO to put Ethiopia in the list of 5 countries (the other countries being Argentina, Cambodia, Fiji and Peru) which has serious problems regarding freedom of association among 32 cases that has been reviewed. http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_193200/lang--en/index.htm (accessed on 20 November 2012).

[146]http://www.ethiopianteachers.org/index.php?option=com_content&view=article&id=95:teachers-salary-scale- increased&catid=34:eta-news&Itemid=1 (accessed on 20 November 2012).

the Government on the other side seems to put a question mark on the true representativeness of the Association.[147]

At the end of the day ETA is a professional association deprived of all the legal tools available to it had it been a trade union i.e. collective bargaining, undertaking a legal strike action, protection from interference by the government in its activities and protection of its members from anti union discrimination.[148] There is no legal provision providing for trade union rights of teachers both under the public service and private schools in the country. The CFA expressed its concern over the matter and requested the government 'to amend its legislation so that teachers, like other workers, have the right to form organizations of their own choosing and to negotiate collectively' to no avail.[149]

Not limited to the issue of teachers, ILO supervisory bodies have been making repeated comments on the situation of freedom of association rights of civil servants in Ethiopia. In its observation adopted in 1995, the CEACR commended the fact that the draft Constitution of 8th December 1994 granted civil servants the right to organize and to conclude agreements with their employers.[150] However, in its subsequent observations the CEACR repeatedly

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[147] Most importantly, the silence of the Association with regard to the issue of teachers fired as a result of striking to express their dissatisfaction has raised eye brows among different critics and teachers themselves. 'መምህራን እና መንግስት ወዴት?' *ሪፖርተር* 23 መጋቢት 2004. www.ethiopianreporter.com/politics/295-politics/5779-2012-03-31-09-38-58.html (accessed on 15 December 2012).

[148] See section 3.1 of this article on the difference of professional associations and trade unions.

[149] (n 8 above).

[150] Since then the CEACR in its observations made in 1998, 1999, 2000 and 2001 relentlessly requested a report indicating the development on a law that implements the right of civil servants to organize. In the year 2001 the government reported stating that the 'legislation' is under consideration and the Federal Civil Service Commission is planning to adopt it in the near future pursuant to the civil service reform on which the country is embarking at the time. The government further asserted that the legislation will be adopted after concerned organizations provide their comments on the draft. However, after repeated call for report on progress the CEACR noted in its 2004 observation that Proclamation no 262/2002 adopted to govern the civil service do not provide for the right to organize of employees at all. The CEACR requested the government to 'ensure the recognition both in law and in practice' of the right to voluntary negotiation of employment conditions for public servants. Similarly, in the years 2005, 2007, 2008 and 2009 the CEACR made repeated call to the government to amend the civil service legislation.

expressed its concern on the fact that the country has not yet taken measures to facilitate the implementation of trade union rights of government employees. The Government, through its response, asserted that the country is not ready to fully cater for a framework that provides for a separate association in the civil service and the government itself has not developed the capacity to engage in a fully fledged bargaining process with civil servants.[151] The Government further stated that the matter is to be presented for consideration once the Civil Service Reform program is successfully implemented in the country and the necessary national capacity is in place.[152] The response of the government is a clear indication of the power balance between the civil servant and its employer, the Government. It seems to indicate that civil servants should wait to enjoy their right until the government is ready to deal with them. This is simply an unacceptable excuse to withhold a constitutionally guaranteed right.

Apart from ILO supervisory bodies the Committee on ESCR, expressed its concern in its Concluding Observations adopted following the state report submitted by Ethiopia regarding trade union rights of public servants:

> The Committee is concerned that the right to form and/or join trade unions is not fully guaranteed in law and practice, and that public

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In the year 2011, the government replied saying that the 'country is under a comprehensive civil service reform program designed to provide efficient and effective services to the public and that civil servants, as part and parcel of the executing body, have a key role to play in implementing the reform ….the reform will have a significant role in strengthening democracy, ensuring good governance and guaranteeing the rights of all citizens in the country….within, this process, it commits itself to ensure the benefits of civil servants'. Despite the generalized response by the government, the CEACR stressed that 'the civil servants proclamation should be amended so as to ensure that civil servants, including teachers in the public sector, have the right to negotiate their conditions of employment through collective bargaining'. For further detail consult, Observation (CEACR)-adopted 2011, published 101st ILC session (2012)). Observation (CEACR) – adopted 1995, Published 82nd ILC session (1995).

http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO::P13101_COMMENT_ID:2698955 (accessed on 25 July 2012).

[151] International Labour Conference, 100th Session, 2011 'Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)' http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_151556.pdf (accessed on 18 August 2012).

[152] As above.

> sector workers, in particular teachers, have allegedly experienced dismissals and transfers in connection with their trade union activities. It is also concerned that section 421 of the Criminal Code provides for imprisonment for public servants who have gone on strike.[153]

The Committee on ESCR, recommended that Ethiopia should 'take steps to guarantee both in law and in practice, the right to form and/or join trade unions of workers including civil servants and to amend the Criminal Code so as to remove the sentence of imprisonment for public servants who have gone on strike'.[154]

6. Concluding Remarks

To conclude, trade union right of government employees is a human right that is recognized by international human rights instruments and guaranteed by the Constitution. The Government has, both at the international and national level, an obligation to take steps towards ensuring that this right is practically enjoyed by government employees. It is obvious that adoption of enabling legislation is the first most important step to protect trade union rights. Government employees should be able to form or join trade unions of their choice with a view to promoting their economic or work related interests, by any means available to them including collective bargaining. The absence of a legislative framework implementing this constitutional right has resulted in denial of rights for employees in the government sector. Like all other human rights the government has the duty to respect and protect trade union rights of employees in the public sector.

The legislative void which rendered trade union rights of government employees practically inapplicable is a failure to respect and to protect both, of a constitutionally guaranteed fundamental human right and internationally accepted human rights standard. The constitutional status of trade union rights of government employees is an indication of the grave importance that lies in the same. The failure of the legislature to adopt legislation undermines its constitutionally imposed duty to ensure the observance of the Constitution in general and its bill of rights in particular. Not only the legislature yet both the judiciary and the executive failed as organ of the state with a duty to ensure observance of the Constitution as stipulated under article 9 (2) of the

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[153] 'Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights' E/c.12/ETH/CO/1-3 (May 2012) 3 para 12.

[154] As above.

Constitution.[155] By no means are they exhaustive yet following are few remarks on the way forward.

The primary step that should be taken is the adoption of a legislation identifying the category of government employees entitled to trade union rights as stipulated under article 42 of the Constitution.[156] The House of Peoples Representatives (HPR), the constitutionally mandated law making organ,[157] is the organ primarily responsible for adopting legislation as per the stipulation of article 42 (1) (c) of the Constitution. HPR undertakes its legislative mandate through enacting new laws and amending or repealing existing laws, ratifying international agreements and passing resolutions.[158]The initiative to adopt such a law could come from 1) the Government 2) Members of the House 3) Committees of the House 4) Parliament Groups 5) Other bodies authorized by law.[159] Among this list of organs that can initiate laws, the Legal and Administration Affairs Standing Committee (LAASC) which has also the function of 'following up and supervising the effective observation of the rights and freedoms enshrined in the Constitution' would be the relevant organ to initiate a law on trade union rights of government employees.[160] Trade union right of government employees is one of the rights and freedoms guaranteed by the Constitution and the initiation of a law which ensures the observance of the same is in line with the 'following up and supervision of effective observation' mandate of the LAASC. As for the civil service

[155] Article 9 (2) of the Constitution.

[156] Amending the Labour Proclamation no 377/2003 might not be a feasible option since the scope of right provided for private sector employees and public sector employees is different in some aspects i.e. collective bargaining and the right to strike of some government employees is limited. Amending the civil servants proclamation no 515/2007 might also bring difficulties since there are employees whose employment relationship is not governed by the same i.e. judges, prosecutors etc. Accordingly adopting a separate legislation dealing exhaustively with trade union rights of public servants is the most viable choice.

[157] According to article 55 (1) of the Constitution the HPR is the organ having the power to legislate all matters assigned by the Constitution to federal jurisdiction. Since matters of Federal Civil Servants fall under the jurisdiction of the federal government it falls within the mandate of the HPR to adopt legislation for the implementation of trade union rights of government employees.

[158] Article 49 of the House of the Peoples' Representative of the Federal Democratic Republic of Ethiopia Rules of Procedure and Members Code of Conduct Regulation no 3/2006.(Regulation no 3/2006)

[159] Article 50 of Regulation no 3/2006.

[160] Article 170 of Regulation no 3/2006.

employees at the regional level, Regional State Councils should take similar initiative to adopt legislation.

The other relevant organ for the purpose of presenting a draft law to the HPR is the MoLSA. Initiation of laws is one of the powers and functions allotted to Ministries according to article 10 1(a) of the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation no 691/2010. MoLSA is the government organ having the power and duty to promote rights to work in general and trade union rights in particular.[161] MoLSA could take up this task in collaboration with the Ministry of Civil Service (MCS), the organ which is entrusted with the regulation of the civil service sector at the federal level.[162]

The MCS itself is also a relevant organ with regard to the task of initiating a draft law. As the name of the establishment indicates, it is the principal body mandated to follow up on matters related to the civil service and civil servants. For practical reasons, the MSC is better placed than MoLSA to take the responsibility of coming up with the draft legislation identifying civil servants entitled to trade union rights. However, there is no mention of a mandate given to the MCS related to trade union rights. For lack of such mandate, it is reasonable to assert the obligation of MoLSA to come up with a draft.

The Ethiopian Human Rights Commission (EHRC) is the organ with the duty of ensuring that human rights and freedoms provided within the Constitution and those enshrined in international agreements ratified by Ethiopia are ensured.[163]As it has been discussed throughout this article, trade union rights of government employees are human rights guaranteed both under the Constitution and international human rights instruments ratified by the country. One of the duties and powers of the EHRC is making recommendation for the revision of existing laws or enactment of new laws.[164] Accordingly, the EHRC should take the initiative of doing the same with regard to trade union rights of government employees.

Another important initiative that should be taken by EHRC and which again falls within its powers and duties is the translation of ILO instruments

[161] Article 30 of the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation no 691/2010. (Proclamation no 691/210)

[162] Article 17 (1) of Proclamation no 691/210.

[163] Article 2 (5), 5 & 6(1) of the EHRC Establishment Proclamation no 210/2000.

[164] Article 6(5) of the EHRC Establishment Proclamation no 210/2000.

guaranteeing trade union rights ratified by Ethiopia.[165] So far the EHRC translated into various local vernaculars and effected the distribution of, core international and regional human rights instruments ratified by Ethiopia. However it has yet to translate any of the ILO conventions containing fundamental right to work guarantees in general and trade union rights in particular.

The government should not withhold or delay the enjoyment of a constitutional right; rather it has an obligation to take progressive measures to facilitate the full enjoyment of rights by the right holder. The Constitution, under article 13 (1) asserts the responsibility and duty to respect and enforce fundamental rights and freedoms enshrined under Chapter Three (Bill of Rights of the Constitution) of all Federal and State Legislative, Executive and Judicial organs at all levels. As Fasil Nahum indicated, there is a reason why labour rights are entrenched in the Constitution[166] and the Constitution itself demands that human and democratic rights of citizen be respected.[167] Finally, there is no justification viable enough to discriminate against government employees on matters of trade union rights based on their occupational status and a legislation recognizing this has being long overdue. It is not an option but an obligation of the relevant government organs to uphold trade union rights of government employees, for the Constitution says so.

[165] Article 6 (8) of the EHRC Establishment Proclamation no 210/2000.
[166] Nahum (n 13 above) 170.
[167] Article 10 of the Constitution.

THE LAW OF AFFIRMATIVE ACTION IN ETHIOPIA: A FRAMEWORK FOR DIALOGUE

By Wondemagegn Tadesse Goshu*

Introduction

It has been more than two decades since affirmative action (AA) was recognized in the FDRE Constitution.[1] The recognition has arguably underscored the urgency to accelerate the equality of the marginalized, discriminated and those subjected to historical injustice. General for immediate application, the provisions of AA in the FDRE Constitution have required the issuance of policies and laws that would allow implementation in specific instances. Hence, following the Constitution, few ordinary laws and policies on AA have been issued. Several international human rights instruments with both obligatory and permissive clauses of AA have been ratified. What is then AA (and its measures) in Ethiopia arising from these laws and instruments? That is the core issue of this article. By making a comparative analysis of national laws, international instruments, and where necessary the literature, the article provides the national legal framework of AA to assist dialogue on the subject.

By exploring the normative framework, the article seeks to achieve the following objectives: to outline the normative framework of AA, to initiate dialogue among policy makers on the implementation and reform of AA, to clarify ideas and programs of AA that may enrich the dialogue, and to lay a foundation for future empirical research presently lacking in the practice of AA in Ethiopia.

With these objectives in mind, the first section of the article provides skeletal definition of AA, which will be further elaborated in subsequent sections. Drawing on international and national instruments, sections 2 and 3 will outline the laws of AA in Ethiopia. Because of their significance to Ethiopia's human rights law, international human rights instruments adopted by Ethiopia

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[1] This is not to mean that the FDRE Constitution is the first to recognize AA in Ethiopia. For example, Article 36 of the 1987 Constitution of the Peoples' Democratic Republic of Ethiopia provides for AA for women to ensure equal participation of women with men in political, economic, social, and cultural affairs, particularly in education, training, and employment.

will be explored together with the Constitution and some ordinary national laws providing for AA. Sections 4 to 7 will explain the main components of AA: the temporary nature of AA, target groups for AA, and measures of AA. After a brief outline of arguments against and in favour of AA, the remaining sections will explore the role of the state, private sectors, and empirical evidence in the law and practice of AA. Finally the article will provide conclusions and recommendations that may be useful in the dialogue of AA in Ethiopia.

At the outset it should be clear that the article does not deal with implementation of AA. Two reasons have contributed: first, as already indicated, legal analysis is the principal objective of the article. To assess the existing legal framework, one need not consider the actual application of AA. But this is not to say that practices in AA are no use for normative analysis. This evokes the second reason, which is lack of national empirical research outputs on AA. Evidence on implementation of AA is rare to come by. As a result, general statistics and hypothetical facts as necessary are used to illustrate points under consideration.

1. What is Affirmative Action

1.1 Definition

The meaning of AA has not always been clear as it appears at first. In the existing literature, several reasons have contributed to the misunderstanding concerning AA. One major source of misunderstanding has been the existence of diverse laws and policies under the same name AA. As Professor Appelt puts it, the uncertainty about AA comes mostly "from the vast array of often inconsistent practices and policies that fall under that rubric."[2] For example, a diligent effort by a government to reach out potential minority employees through notices targeting this group may be considered AA equally with the government's attempt to reserve a percentage of available positions to the same group. Conversely, the use of a variety of terms for similar AA laws and practices has also been another factor adding to the ambiguity of AA. Using the term *temporary special measures* for policies and practices that are almost the same with measures of *affirmative action* is an example (see Section 1.3). Likewise, the use of a term for a program of AA as synonymous with the whole AA is another reason adding to the confusion. For example, the use of

[2] Erna Appelt, *Affirmative Action: a Cross-National Debate* in Erna Appelt and Monika Jarosch (eds.), Combating Racial Discrimination: Affirmative Action as a Model for Europe (2000), p.8

"quota" in place of AA, when actually quota is just one rare form of AA, typifies this misunderstanding. Indeed this latter characterization of AA as quota is sometimes a deliberate distortion by some opposed to AA. Instead of providing thoughtful treatment of AA, some tended to label AA as quota making AA incorrectly appear a contradiction to merit.[3]

With the aim of identifying the general content of AA for later sections of this article, which will clarify this confusion, a working definition of AA is necessary. As a matter of fact, various definitions are attributed to AA. For this article, two general definitions, which the writer believes are comprehensive enough for a dialogue in AA, are presented:

> Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.[4]
>
> and
>
> AA can be defined as attempts to make progress towards substantive rather than merely formal equality of opportunity for those groups such as women or racial minorities that are currently underrepresented in significant positions in society by explicitly taking into account the defining characteristics – sex or race – which have been the basis for discrimination.[5]

Though worded differently, the definitions provide elements of AA that substantially coincide. The joint reading of these definitions provides a fairly complete list of key components forming AA. These key components are *measures*, the *temporary* character of these measures, *underrepresentation* as a cause for AA, *groups* targeted by laws and practices of AA, and substantive or effective *equality* as the final aim of AA.

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[3] See Section 8.2 below on the argument based on merit.

[4] Marc Bossuyt, Prevention of Discrimination: The Concept and Practice of Affirmative Action, UN Doc E/CN.4/Sub.2/2002/21, para.6. This is a report submitted by Mr. Marc Bossuyt, Special Rapporteur on AA, in accordance with Sub-Commission Resolution 1998/5. It may be taken as fairly representing the theory and practice of AA in the world. In the report, the Special Rapporteur has expressly acknowledged the "substantive replies" by more than 20 governments for a list of questions on theory and practice of AA, which the Special Rappoteur took into account in the preparation of the report. There were also consultations with international organizations and non-governmental organizations that may have enriched the report.

[5] Appelt, cited above at note 2, p.8

For the sake of preliminary understanding, *measures* refer to legislative or other actions in economic or social affairs, which allow a positive advantage such as attending a university education or getting employment or business opportunity.[6] *Temporary* nature dictates the provisional nature of AA that ends with the expiry of a specified duration or the achievement of a goal. *Target groups* are those identified on the basis of sex, ethnicity or any other factor to benefit from measures of AA. *Underrepresentation* as a basis for AA indicates the existence of unjust situation where social and economic benefits are not equitably distributed. For example, a one-to-ten representation of women-to-men in the highest executive positions in a government may be an unfairly disproportionate representation for women. Substantive e*quality* or equality in law and in fact is the objective AA. Whether in employment, business opportunity, or political decision making, *equality* is the final aim of measures of AA. These components will be analyzed at length in subsequent sections of this article after outlining the legal framework of AA. However, the relationship of equality and AA, which is at the heart of any dialogue on AA, will be noted in the remaining paragraphs of this section.

1.2 Equality and Affirmative Action

It is possible to imagine an ideal situation where all humans are equal; not just in constitutions or ordinary laws; not only in education or in parliamentary seats; not only in government or international organizations; equality in all aspects of life: social, economic, and political. It is also easy to imagine different traits of humanity, irrespective of which all are equal: sex, race, skin colour, etc; not only in law but in practice; not only in private but also in public life. Not only in such an ideal state but even in the less so ideal, the concept of AA may not exist. AA is called for when there are troubles with equality; when equality for some becomes illusive; when inequality becomes pervasive. In other words, the objective of AA is achieving equality for those whose situation is unequal.

There are three aspects of the relationship between equality and AA that should be noted. The first relates to the factual and causal relationship between equality or its absence and AA. What this means is inequality or the absence of equality usually triggers or causes measures of AA. Once introduced, moreover, AA aims at or causes equality. In other words, inequality or lack of equality is a necessary, though not sufficient, condition for policies and practices of AA. Likewise, practices and policies of AA cause, though not necessarily, equality. This means that if measures of AA are extensively

[6] Sections 4 - 6 of the article will discuss temporary nature, target groups and underrepresentation, and measures.

applied, after some time it is likely that equality will be achieved. Hence, under normal circumstances, there is a linear relationship between inequality, AA, and equality: widespread inequality leads to AA, which leads to equality.

The second relationship, which is in a way normative, is on the face of inequality and discrimination, the principle of equality in legal and political instruments implies measures of AA. What does this mean? Since it is an important ingredient for later discussions, this relationship requires further elaboration. Take the example of a hypothetical state where inequality is rampant and women in government employment share only 30% – out of which 90% are employed in menial work – when actually in terms of size of workforce and qualification women constitute 50%.[7] From this it is easy to see how women are underrepresented in government employment. Again it is easy to argue that this inequality requires some corrective action. The principal corrective action may be to enshrine the principle of equality in major political and legal instruments such as constitutions as modern day constitutions widely do. Now, the question for the instant discussion is whether this equality principle in those instruments implies AA. It is such an equality clause in constitutions that is usually used to justify as well as attack measures of AA. Equality as a basis of denial of AA will be considered later (see Section 8). For now the focus will be on equality as the basis for AA.

Normally when the principle of equality is enshrined, the state is required to take measures ensuring equality. One possible argument is that such measures are measures of implementation of *strict* equality without favouring any group in all situations, ruling out AA. But there are two problems with this *strict* equality: first is whether treating everybody equally is really equality. This issue is at least relevant where for example there is a clear difference in physical or other traits of persons treated equally. Take for example the situation of a person with disability; apply the criterion of *strict* equality in employment, which obliges not to favour anyone; avoid any positive measures of providing assistive technology and see if the person is treated equally. This is a point made by CERD when it has considered the meaning of non-discrimination. According to CERD, "[t]he term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other

[7] This illustration is close to Ethiopian experience. According to the 2008 civil service statistics, 67% of employees are men while 33% are women. Even within this percentage, women are found in the low paying, non-professional, and non-decision-making jobs in the civil service. Federal Civil Service Agency, 2007/8 Civil Service Human Resources Statistics, *Hidar* 2002 E.C

words, if there is an objective and reasonable justification for differential treatment."[8] On the contrary, CERD notes, "[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect" as discriminatory it is "the unequal treatment of persons whose situations are objectively the same."[9] What is interesting here is CERD's equation of *equal* treatment with *unequal* treatment depending on circumstances.

The second problem, which is more relevant to the discussion here, is that the strict equality argument seems to naively ignore the systematic or structural nature of discrimination, which sometimes remains unaddressed by the strict equality principle. Of course there is little disagreement as to the importance of strict equality. It requires formal equality and its diligent enforcement. But why is it, for example in Ethiopia, after decades of declaration of equality, satisfactory results have yet to be achieved in terms of equity in business, employment or political decision making among different ethnic groups? Taking particularly the case of Ethiopian women, why is it at least after 20 years of declaration of equality between women and men, the state does not yet have equal (rather equitable) level of representation of women in business, employment or decision making? Two generally accepted explanations may be tendered: first is strict equality is not implemented, which is likely to be right and implementation has to be pursued; and second, the non-discrimination is systematically rooted and strict equality may not efficiently combat the systematic discrimination; hence additional or affirmative measures are necessary.

The second explanation is mostly the rationale when equality is used as a basis for AA. As long as systematic discrimination bars the achievement of equality of those discriminated despite strict enforcement of equality, AA is necessary. What this means is that the sophistication of some forms of discrimination has to be appreciated before rejecting AA as negating the principle of non-discrimination. Although some forms of discrimination such as direct discrimination can easily be tackled, other forms of discrimination are subtle

[8] CERD, General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc CERD/C/GC/32, 24 September 2009, para8. CERD is the Committee on Elimination of All Forms of Discrimination established by the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD), Article 8
[9] Id, para8

and eliminating them through strict or formal equality may not be effective.[10] This has been the concern of the CESCR when it outlined the direct and indirect forms of discrimination.[11] Direct discrimination in CESCR's understanding is discrimination based on prohibited grounds such as political opinion, for example where employment in an educational institution is denied because of one's political opinion.[12] Of interest here is the indirect discrimination, which:

> refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.[13]

Hence, behind the extension of the principle of equality to embrace AA lies the idea of *de facto* equality. This means that instead of a mere formal equality – both enactment and implementation of *strict* equality – equality has to be seen in the *results*. In its explanation of "equality and non-discrimination as the basis of special measures", CERD has also asserted that the equality clause of ICERD "combines formal equality," which is strict equality, with "substantive or de facto equality,'' which is equality in results.[14]

Arguing for the normative and implied relationship between equality and AA should not diminish the importance of express provisions of AA in major legal and political instruments in states such as Ethiopia. In an express direction of AA, the legal questions are settled and governments are required to enact ordinary laws and policies on AA. However, such express provisions of AA as will be explained later are limited in their application; and resort to the principle of equality from time to time to justify AA may be inevitable.

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[10] To some extent, the method of combating direct discrimination in Ethiopia is not clear. Take for example a private employer which has the policy of direct discrimination against say a specific ethnic group. Assuming that the employer has a significant share in the labour market, do employees have the procedure to institute a suit against the employer, who has been practising direct discrimination?

[11] CESCR is the Committee on Economic, Social and Cultural Rights, established by the UN Economic and Social Council, with the mandate to monitor the implementation of the ICESCR. Economic and Social Council Resolution 1985/17

[12] CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para10

[13] Ibid

[14] CERD, General Recommendation No. 32, cited above at note 8, para6

Moreover the understanding of AA as an extension to equality will normally preempt many of the objections against AA that are based on the principle of equality. Once AA is understood as part of the principle of non-discrimination, it will be logically impossible to reject measures of AA on the ground of discrimination.

One final aspect of the relationship between equality and AA, which is obvious but often overlooked, is the complementary nature of AA to measures of strict equality. The idea of *strict* equality is mostly relevant to laws and policies on *formal* equality and non-discrimination. But it is also relevant for AA because AA is intended to supplement measures of *strict* equality. Imagine a situation where a certain group, minority or not, has never been represented in some professions. Despite the rhetoric of equality, private and government institutions deny education and employment to this group. Now the question is about the role of AA to ensure equality of this target group. In this hypothetical situation, there is clearly a gross violation of the inherent right to equality. With such policies and practices, AA is hardly meaningful. As it should be known, deep-rooted violations, if any, of the equality principle in Ethiopia as elsewhere will obviously foreclose the utility of measures of AA.

1.3 Terms for Affirmative Action

The use of terms in connection with AA has not been consistent. Complete understanding of AA requires clarity of terms used. In the international sphere, "AA" was widely used at the now defunct Commission on Human Rights, whose sub-commission appointed a Special Rapporteur for the "task of preparing a study on the concept and practice of *affirmative action*"[15] (Emphasis added.) The Special Rapporteur, in discharging his responsibility, has used the term "affirmative action" after noting the existence of terms like "positive discrimination", "positive action", "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment."[16] Because the study was conducted to assess laws and practices of AA throughout the world, it is possible to assume that these terms fairly reflected what was in the laws and policies world-wide. Moreover, the practice of using either of these terms world-wide is generally acknowledged by UN human rights committees. CEDAW, for example, recognizes that states use terms like "affirmative

[15] Sub-Commission on Prevention of Discrimination and Protection of Minorities, The concept and practice of affirmative action, Sub-Commission Resolution 1998/5
[16] Bossuyt, cited above at note 4, para5

action", "positive action", "positive measures", "reverse discrimination", and "positive discrimination".[17]

From the review of international as well as national laws and practices, useful observations may be made. In international law, "temporary special measures" or simply "special measures" is the preferred term in place of AA. This is borne out of use of terms in international human rights instruments and the jurisprudence of UN human rights committees. CEDAW, acknowledging the various terms in national laws and practices and admitting its previous use of other terms, applies "temporary special measures" as used by Article 4(1) of CEDAW.[18]

Regarding "positive discrimination" and "reverse discrimination", both terms have been criticized as inappropriate and have been more or less abandoned.[19] Obviously "positive discrimination" is a contradiction in terms; hence its use should be discouraged.[20] "Reverse discrimination" on the other hand is a term used by opponents of AA to misrepresent the idea of AA and to portray AA as discriminatory and as such its use has to be resisted.[21] "Positive action" has been widely used in Europe.[22] The only limitation identified to affect the recurrent use of "positive action" is its extended meaning in international law that requires a state to take a *positive action* compared to the obligation to *abstain from action*.[23] Other than this limitation, the use of "positive action" in place of AA raises no objection.

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[17] CEDAW, General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), para17

[18] Id. The report by the Special Rapporterur also states that "affirmative action is generally referred to in international law as special measures". Bossuyt, cited above at note 4, para 40

[19] Hanna Beate Schopp-Schilling, *Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of All Forms of discrimination against Women* in Boerefijin, Ineke et al (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003), p.22

[20] CERD, General Recommendation No. 32, cited above at note 8, para12

[21] In his investigation of cases of AA in US Courts, Kellough identifies 'reverse discrimination' against 'nonminority males and sometimes nonminority women' as a basis for suits against AA. J. Edward Kellough, Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice (2006), p.12

[22] Schopp-Schilling, cited above at note 19, p.22

[23] Ibid

The other terms like "preferential treatment" and "reservations" as will be explained later are mere forms of AA and cannot be substitutes for AA. From forms of AA, quota deserves additional clarification. First, quotas, as explained elsewhere, are just forms of AA. Second, "quota" has been strongly opposed by critiques of AA, creating the negative sense of the term. For example in the US, the highest court is said to have expressed hostility towards quotas.[24] Hence the use of this term requires care.

Which term for Ethiopia? Unsurprisingly, the use of terms in Ethiopia is likewise diverse.[25] The list of terms in Ethiopia include: "Affirmative measures" (for women),[26] "special assistance" (to Nations, Nationalities, and Peoples), "affirmative support" (to regional states), "equitable representation" (of Nations, Nationalities and Peoples), "preference" (for employment), "affirmative action" (Ministry of Women, Children and Youth Affairs-MWCYA, Ministry of Education, and Growth and Transformation Plan-GTP), "special admissions procedures" and "remedial actions" (in Higher Education). From these, it is clear that the use of terms of AA in Ethiopia is far from consistent. It is also clear that the term "affirmative action" is frequently used in Ethiopia indicating that, at least in normative instruments, "affirmative action" is preferred. Hence in a generic sense, "affirmative action" seems appropriate. But some other names such as "special admissions procedures" representing one or another form of AA may be used with indication that they are forms of AA and not synonymous with AA.

2. International Human Rights Law

Two formal sources of AA having national relevance are noted: international and national. The national framework will be sketched in the next section. In this section, a brief summary of international human rights law will be made. Since the aim is to provide the context in which national laws on AA are understood, the discussion is limited to international instruments having legal force in Ethiopia, i.e. those ratified instruments that have become the law of the land.

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[24] Ashutosh Bhagwat, *Affirmative Action and Benign Discrimination*, in Vikram David Amar and Mark V. Tushnet (eds.), Global Perspectives in Constitutional Law (2009), p.113

[25] See Section 3 on the laws of Ethiopia, using several terms for AA.

[26] Although the use of 'AA' in the Amharic versions like in the English is mixed, *ye-de-gaf er-mi-ja* or *liyu digaf* seems frequent. But in using this term, which literally means *supportive action*, the undesirable connotation that those benefiting are weak needing *support* may appear. Either *re-tua-wi er-mi-ja* or *liyu er-mi-ja* may be preferred.

As indicated in the previous section, the right to equality requires measures of AA, wherever is necessary. As a result, provisions of equality and non-discrimination in international law incorporate measures of AA as long as those measures are necessary to ensure "effective equality". Since all major human rights instruments Ethiopia has ratified recognize non-discrimination and equality as fundamental principles, AA or "temporary special measures" as often called in international law are required under these instruments, including ICCPR, ICESCR, CEDAW, ICERD, and CRPD.

The non-discrimination clause of the International Covenant on Civil and Political Rights (1966) (ICCPR) has long been considered the source of AA although the instrument itself has not expressly provided for AA. Explaining the scope of the principle of equality or non-discrimination in ICCPR,[27] CCPR[28] has pointed out that "the principle of equality sometimes requires States parties to take *affirmative action* in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[29](Emphasis added.)

ICESCR, like ICCPR, does not have express provisions for AA. But its provisions of equality and non-discrimination are believed to incorporate AA. The general non-discrimination clause, the equality of women and men, the equality of all in employment, and the equality of all in education are considered to embrace AA wherever necessary.[30] In CESCR's interpretation of these non-discrimination and equality provisions, the importance of AA has frequently been highlighted. CESCR in its explication of the principle of non-discrimination has brought to notice the obligation of States parties "to adopt

[27] The non-discrimination principle of ICCPR provides the obligation of a State Party (such as Ethiopia) "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' (Article 2(1) of ICCPR)

[28] CCPR (Committee on Civil and Political Rights) is the Human Rights Committee empowered to monitor the implementation of ICCPR. Its interpretation of ICCPR is widely accepted. ICCPR, Article 28

[29] CCPR, General Comment No. 18, para10

[30] Article 2 (1) of ICESCR guarantees that ICESCR's rights are "exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Articles 3, 7, and 13 of ICESCR also provide the equality of women and men in the enjoyment of all economic, social and cultural rights, equality of all in employment, and equality of all in education, respectively.

special measures" in efforts to eradicate "substantive discrimination."[31] Relating to the right to education, CESCR asserts, "[t]he adoption of *temporary special measures* [meaning AA] intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination."[32] After noting the inadequacy of the "principles of equality and non-discrimination" to ensure "*de facto* or substantive equality for men and women," CESCR places AA as part of states' obligation *to fulfill* their obligation to ensure equality of men and women.[33]

Despite lack of an express provision of AA, the discussion so far has presented compelling evidence that AA is implied in equality provisions. However, in addition to such implied provisions of AA, measures of AA in various names and forms are expressly provided in international law. CEDAW is one of the several international agreements dealing expressly with AA.[34] In addition to its equality and non-discrimination clauses, where it calls for all "measures required for the elimination of such discrimination in all its forms and manifestations"[35], CEDAW has expressly provided for AA:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[36]

ICERD, designed to eliminate racial discrimination, does the same, expressly recognizing AA.[37] Article 1(4), which explains the scope of "discrimination", recognizes AA to guarantee equality of certain "racial or ethnic groups or

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[31] CESCR, General Comment No. 20, cited above at note 12, para9

[32] CESCR, General comment No. 13: The Right to Education (art. 13), para32

[33]CESCR, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), paras15-21

[34] Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)

[35] CEDAW, last preambular paragraph

[36] CEDAW, Article 4(1)

[37] Article 1(1) of ICERD (the International Convention on the Elimination of All Forms of Racial Discrimination (1965)) defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

individuals" where needed as compatible with the prohibition of racial discrimination. Going further, Article 2(2) imposes an obligation on States Parties to take "special and concrete measures" to guarantee equality of "certain racial groups or individuals" where "circumstances so warrant."

Another instrument worth noting is the Convention on the Rights of Persons with Disabilities (2006) (CRPD). CRPD's general principles of non-discrimination and equality, "full and effective participation and inclusion", "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity", and "equality of opportunity" in all likelihood justify various measures of AA.[38] Moreover, Article 5(4) maintains that "specific measures" including AA "necessary to accelerate or achieve *de facto* equality of persons with disabilities" are not discriminatory measures under CRPD. There is another express provision of AA in connection with the right to work and employment. After recognizing equality at work of persons with disability, an obligation is imposed on states to "promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures."[39]

One more instrument having significance for AA is the ILO Non-Discrimination Convention. This convention is particularly important since employment – its subject – is an area where AA is frequently practiced. To its credit, ILO, having recognized the importance of non-discrimination in employment, has made "the elimination of discrimination in respect of employment and occupation" one of the four "fundamental principles and rights at work".[40] The non-discrimination convention provides for elimination of discrimination in employment and occupation including vocational training.[41] Two general qualifications to the scope of the meaning of non-discrimination are provided. The first is a legitimate exclusion or preference that should not be considered discrimination:

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[38] CRPD, Article 3 and 5(1)&(2)

[39] CRPD, Article 27(1)(h)

[40] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, the International Labour Conference (Eighty-sixth Session, Geneva, 18 June 1998), Article 2. The other three fundamental principles of labour are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; and the effective abolition of child labour.

[41] ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), Articles 1 and 2

> Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."[42]

The second qualification, which is more relevant to the instant discussion, is that a member state is permitted to authorize special measures where such measures are required.[43] In either case, AA is authorized by this Convention.

3. National Laws[44]

Before sketching AA in national instruments, the types of instruments considered here have to be noted. While the discussion in this article is mainly about legal instruments – namely to the FDRE Constitution and ordinary laws – it is important to note that AA is not limited to those instruments. Various national policies and strategic plans provide for AA. The example of GTP should be mentioned. The GTP, in connection with higher education, expects institutions of higher education to develop "schemes for the provision of affirmative actions for those who need additional support, (such as females, youth with disabilities, emerging regions, etc) such as, [sic] special admission criteria, tutorial support and scholarship opportunities."[45] Moreover, in capacity building and good governance, GTP envisions AA "to enhance the participation of women at *Woreda* and *Kebele* level."[46] Although this and other policy instruments have embraced AA, they are not discussed in this article. The intention is neither to exclude nor to diminish their importance. On the contrary, if effectively used, these instruments may drive the implementation as well as reform of existing laws of AA. However, the meaning in reality of GTP and other national policies in their different forms and fields of AA is not

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[42] Id, Article 1(2)

[43] Id, Article 5

[44] Apart from the FDRE Constitution and federal laws having national relevance, national regional states based on the FDRE Constitution may issue measures and policies of AA of enormous significance in accelerating equality within their territory. Although this article mainly reviews federal laws, arguments raised in this article are mostly valid for regional states. This is because many of the legal instruments reviewed for this article validly apply to regional states. Moreover, all the constitutions of regional states have provisions on AA that emulate the FDRE Constitution. For example, Article 35(3) of the Constitution of Oromia National Regional State and Article 35(3) of the Constitution of the Amhara Naitonal Regional State provide similar statements of AA to women.

[45] Federal Democratic Republic of Ethiopia, Growth and Transformation Plan: 2010/11 – 2014/15, 6.1.4, last paragraph.

[46] Id, 7.1.1, para4

yet clear. Moreover, to the writer's knowledge, apart from existing laws on AA, it is not clear if the measures envisioned in those policies have ever been acted upon.

3.1 The Constitution of the Federal Democratic Republic of Ethiopia

In a national context, AA is usually a constitutional issue. Like in international human rights instruments outlined in the previous section, two general categories of sources of AA are identified: equality provisions and express statements of AA. The right to equality for all, the equality of women in general, and the equality of women in marriage, property relations, and employment are all provisions of equality that may trigger measures of AA wherever is needed.[47] What this means is the government may issue and justify measures of AA in the areas of equality identified. For example in connection with land administration, to rectify historical deprivation of land possession by women, the federal government may take AA and target women in the allocation of new land or redistribution.

In addition to the equality provisions appearing in different parts, there are express provisions of AA in the FDRE Constitution. The first such provision is in connection with the special protection to women:

> The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.[48]

Another express provision of AA in the Constitution is under national economic objectives, providing for Government's duty of "special assistance to

[47]FDRE Constitution, Article 25 reads, "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status." Sub-Articles 1, 2, 7, and 8 of Article 35 provide for equality of women in general, equality of women in marriage, equality of women in property relations, and women's equality in employment, respectively.

[48] FDRE Constitution, Article 35 (3)

Nations, Nationalities, and Peoples least advantaged in economic and social development".[49]

Owing to the implied (in the equality provisions) and general (in express provisions) nature of AA in the Constitution and the country's international human rights obligations, the enforcement of AA in Ethiopia depends substantially on the existence of specific AA laws and practices. As a result, few ordinary laws have been introduced with specific measures for implementation. The following sub-sections provide a review of ordinary national laws regarding AA.

3.2 Federal Executive Organs Enabling Laws

In the Proclamation that determines the "powers and duties" of executive organs of the federal government, each executive organ is empowered to provide two categories of AA, one relating to "regional states eligible for affirmative support" and two relating to "persons with disabilities and H.I.V AIDS victims". All Ministries of the Federal Government in their areas of jurisdiction are required to "provide assistance and advice to regional states, as necessary; and provide coordinated support to regional states eligible for affirmative support."[50] They are also required to "create, within … [their] powers, conditions whereby persons with disabilities and H.I.V AIDS victims benefit from equal opportunities and full participation."[51] Since these Ministries constitute almost what is usually identified as the executive, the implications of these overarching powers should not be underestimated. The benefit here is that these organs have the discretion to issue directives and policies in their areas of responsibility ensuring extensive application of AA.

In addition to these cross-cutting measures of AA, some ministries are also empowered to provide AA in their own sectoral activities. The Ministry of Defense is given "the powers and duties to…ensure that the composition of the national defense forces reflect equitable representation of nations, nationalities and peoples."[52] This equitable representation signifies the possibility of AA towards recruitment of members from least represented "nations, nationalities, and peoples" to the defense forces. MWCYA has also the power to design a mechanism "for the proper application of women's right to affirmative actions

[49] FDRE Constitution, Article 89 (4)
[50] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 10 (1) (e)
[51] Id, Article 10(5)
[52] Id, Article 13 (3)

guaranteed at the national level and follow the implementation of same" and to "ensure that due attention is given to select women for decision-making positions in various government organs."[53] Under the first clause, MWCYA may monitor how women exercise their rights under existing laws of AA. This responsibility may be discharged if MWCYA prepares standards for adoption by all concerned for use in documentation of implementation of AA. What is problematic probably is the second. What can MWCYA do to ensure due attention is given in empowering women in decision-making, especially given the parallel relations among government organs? Probably making studies and presenting suggestions, goals, and so on may be contemplated.

3.3 Higher Education Laws

Together with employment, higher education is the most widely practised area of AA. Given the role of university degrees for employment, this may not be surprising. The Ministry of Education, which is centrally managing admissions to government universities accounting 83% of all university admissions in the country, is empowered to "ensure that student admissions and placements in public higher education institutions are equitable."[54] The higher education law also expressly provides for "special admissions procedures for disadvantaged citizens to be determined by regulation of the Council of Ministers and to be implemented by directive of the Ministry."[55] Since the Ministry is solely responsible for placement nation-wide, its role in enforcing AA should not be lightly taken. Even in the future when public institutions are allowed to

[53] Id, Article 13 (3) and Article 32 (7) and (8). In the repealed legislation *the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005*, Article 29 (5) empowers the Ministry of Women's Affairs to "submit recommendations on the application of affirmative measures in order to promote the participation of women in economic social and political affairs by taking into account the oppression they faced for centuries as a result of inequality and discrimination." Compared to this repealed law, the new law omits any reference to "oppression they faced for centuries." Is this omission intentional? Assuming it is, what implication does the omission have in the law and practice of AA for women in Ethiopia? Legally speaking the omission does not have much of an impact as long as the historical reference is maintained in the Constitution.

[54] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 28(7). According to the educational statistics of 2010/11, government higher educational institutions account for 83% of all undergraduate and postgraduate admissions in the Country. FDRE Ministry of Education, Education Statistics Annual Abstract 2010-11, p.59

[55] Higher Education Proclamation No. 650/2009, Article 39(4)

administer admissions directly, the Ministry will have the power to determine, among others, "eligibility for admission, including entitlement to affirmative action."[56] Other special measures to "physically challenged students" are recognized in the law though many of these measures are permanent measures instead of AA.[57]

3.4 Federal Civil Service Law

Another significant area for AA in Ethiopia is employment in the federal civil service. In its principles of non-discrimination "among job seekers or civil servants in filling vacancies'" and merit-based filling of vacancies, the law for federal civil service provides preference to "female candidates," "candidates with disabilities," and candidates from "nationalities comparatively less represented in the government office" in "recruitment, promotion and deployment."[58] There are four aspects of this law that should be emphasized here: first, the principle of non-discrimination is enshrined; second, employment is merit-based; third, AA is applied at all stages of employment relations –at the time of employment, promotion and deployment; and finally, three categories of (potential) employees are identified to benefit from AA – namely women, persons with disability and members of nationalities less represented.

3.5 Laws on Persons with Disability

Another law covering employment-related AA is the law that deals with the employment of persons with disabilities. The law entitles a person with disability to recruitment, promotion, placement, and transfer in employment or participation in training without discrimination.[59] In its strongest anti-discrimination provisions, the legislation bars from application "[a]ny law, practice, custom, attitude or other discriminatory situations that impair the

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[56] Id, Article 39(6)

[57] Id, Article 40. The term *Physically Challenged Students* is not defined. However, since the Amharic uses similar terms as persons with disability, the term should be used interchangeably with persons with disability. Permanent obligations of institutions recognized in the Proclamation include ensuring to the extent resources permit ease of physical access, provision of educational 'auxiliary aids' including in building design, computers and other infrastructures, and ensuring to the extent necessary and feasible academic assistance, including tutorial sessions, exam time extensions and deadline extensions.

[58] Federal Civil Servants Proclamation No. 515/2007, Article 13

[59] Right to Employment of Persons with Disability Proclamation No. 568/2008, Article 4(1)

equal opportunities of employment of a disabled person…"[60] More forceful is also the outlawing of the "selection criteria which can impair the equal opportunity of disabled persons in recruitment, promotion, placement, transfer or other employment conditions."[61] The legislation also outlaws as discriminatory "the absence of a reasonable accommodation," which deprives equality of opportunity to a person with a disability.[62] There are two qualifiers to these prohibitions: the "inherent requirement of the job" and "measures of affirmative action", which are not discriminatory under the law.[63] The law also provides a compulsory AA "where a person with disability acquires the necessary qualification and having equal or close score" in candidacy for recruitment, promotion, placement, transfer, or participation in training.[64]

One special aspect of this legislation, unlike other national laws, is that its application goes beyond the public sector to include the private. However, its coverage of the private sector may need supplemental legislation defining the extent of AA permitted and required. While the implementation of these measures in the civil service is easier owing to the existence of a directive, the framework for implementation in the private sector needs to be worked out by concerned organs particularly the Ministry of Labour and Social Affairs. Other than those compulsory, voluntary measures of AA are also permitted. Accordingly "affirmative actions taken to create equal employment opportunity to persons with disabilities" are not discriminatory.[65] There is also another clause of AA that recognizes the multiple challenges of women with disability. The provision imposes a responsibility on employers to take "measures of affirmative action to women with disability taking into account their multiple burdens that arise from their sex and disability," of which an employer may be excused where the measures impose "an undue burden."[66]

3.6 Election Laws

The importance of women's participation in decision making through candidacy in political organizations and holding of legislative seats needs no argument. Election laws in Ethiopia, though negligible one may argue, have provided a form of AA. In the law dealing with registration of political parties, the number of women candidates nominated by a political party is placed as a

[60] Id, Article 5(1)
[61] Id, Article 5(2)
[62] Id, Article 5 (3)
[63] Id, Articles 4(3), 2(4) and 4(1)
[64] Id, Article 4(2)
[65] Id, Article 5(4)
[66] Id, Article 6 (1)(b)

factor (along with the number of seats and candidates nominated) for assistance by government to political organizations.[67] It arguably gives an incentive to political organizations to promote women for candidacy and political positions. While the outcome of it all is not clear, this may be strengthened through additional and sincere goals and timetables by the government to ensure for example women's participation in the highest elected executive offices.

4. Temporary Nature of Affirmative Action

Almost all instruments of AA reaffirm AA as a temporary measure that must be stopped as soon as substantive or *de facto* equality is achieved. For example, ICERD provides that the special measures "shall not be continued after the objectives for which they were taken have been achieved."[68] Hence, the temporary nature of AA raises no issue. Never the less, the question of how temporary is temporary is far from clear. How long should AA stay in the system of human rights protection, a decade, 25years or a century? This is important because the end of the duration, assuming there is a predetermined one, brings an end to measures of AA. But for those seeking a timeframe for the expiry of AA, an easy answer is not available. Explaining the temporary nature of AA, instead of a predetermined duration, CERD recognizes the "functional and goal-related" nature of AA, meaning that it is the achievement of the objective of *de facto* equality rather than any specific duration that determines the termination of AA.[69] The implication is that until such equality is achieved, measures of AA should be maintained regardless of the length of time the measures have been in place.[70] CEDAW on its part expects special measures to last "for a long period of time".[71] In determining this duration, CEDAW applies the criterion of "functional result" and not "predetermined

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[67] Revised Political Parties Registration Proclamation No. 573/2008, Article 45(1) and (2). The same is provided in the Procedure for Determining the Apportionment of Government Financial Support to Political Parties Regulation Number 5/2009 issued by the National Electoral Board of Ethiopia. Article 15 sets "the number of female candidates nominated by the party" as one of the criteria in the determination of the financial assistance to political organizations.

[68] ICERD, Article 1(4)

[69] CERD, General Recommendation No. 32, cited above at note 8, para27

[70] Although a predetermined duration for AA is unlikely, it is not non-existent. For example, the Indian system of AA originally was set for 20 years, though the duration was extended. On this see Sowell, Thomas, Affirmative Action around the World: An Empirical Study (2002) p.23

[71] CEDAW, General Recommendation No. 25, cited above at note 17, para20

passage of time" as the final test for termination of AA.[72] "Temporary special measures", CEDAW recommends, "must be discontinued when their desired results have been achieved and sustained for a period of time."[73] This apparent expansive interpretation of the duration by CEDAW embraces two criteria: the achievement of desired results and sustainment of those results for a certain period of time. The first may need empirical data of the results though the cost of ascertaining is likely to be enormous and common knowledge and other indicators may be useful. The second is also worth noting since even after the achievement of results, sustainment is another factor determining the duration.

The FDRE Constitution, unlike the international instruments, does not explicitly provide either a definite time framework or a reference to goals based on which measures of AA are terminated. While providing the justification for AA, i.e. "the historical legacy of inequality and discrimination", the Constitution does not indicate a situation that should terminate AA. Wordings of the ordinary laws outlined in the previous section are not any different. Three alternative conclusions can be drawn. First, it was an oversight by the drafters of the Constitution; hence termination on reasonable grounds namely achievement of equality is possible. Second, owing to the generality of AA in the Constitution, it is the function of ordinary laws such as proclamations and regulations to work out the details including the duration of temporary measures. However, since they have not yet worked out on the issue, ordinary laws have not been successful in the determination of temporary nature of AA. Third, AA is permanently mandated and unless the Constitution is amended, women who are expressly entitled to AA in the Constitution can always demand AA. However, considering the interpretative functions of international instruments and given those instruments are part of the law of the land, the functional approach of AA should be adopted. Once equality is achieved, AA must be terminated. Since AA opposes the principle of equality, where *de facto* equality prevails, maintenance of AA after attainment of equality of results will be discriminatory.

5. Target Groups and Underrepresentation

Measures of AA are directed at a group of individuals that benefit from AA laws and policies. In the report on AA, the Special Rapporteur on AA has identified this group as "a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is

[72] Ibid
[73] Ibid

based and who find themselves in a disadvantaged position."[74] Two defining factors are emphasized: the group's common characteristics and the disadvantaged position in which the group finds itself. Regarding the first, the Special Rapporteur highlights innate and inalienable characteristics "such as gender, colour of skin, nationality or membership of an ethnic, religious or linguistic minority" as the usual markers of the target group.[75] Accordingly, women, black people, immigrants, poor people, persons with disability, veterans, indigenous peoples, racial groups, and minorities are said to be among the target groups in the world-wide policies and practices of AA.[76]

Of course this does not mean that all these groups claim AA in any given state. Nor does it mean that the state at any given time is willing and able to target all of these groups for AA. The second criterion plays decisive role: whether these groups are disadvantaged. It is when these groups find themselves in a disadvantaged position that AA becomes relevant. While underrepresentation is clearly a sign for AA, disagreements arise on whether underrepresentation *per se* should entitle one or another group to AA.[77] Generally two arguments are forwarded. The first is that the cause of existing underrepresentation has to be traced to past discrimination and it is only afterwards that AA can be used as a tool to achieve equality. The second argument, compatible with the purpose of AA, is that underrepresentation irrespective of past discrimination is adequate to entail AA. In CEDAW's opinion, for example, such evidence of past discrimination is not necessary. Admitting the usual effects of AA to remedy consequences of past discrimination, CEDAW affirmed that member states' obligation "to improve the position of women to one of *de facto* or substantive equality with men exists irrespective of any proof of past discrimination."[78] Likewise CERD indicated that "it is not necessary to prove 'historic' discrimination in order to validate a programme of special measures" placing the emphasis on "correcting present disparities and on preventing further imbalances from arising."[79]

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[74] Bossuyt, cited above at note 4, para8

[75] Ibid

[76] Ibid

[77] Determination of the situation of underrepresentation itself is not easy. For example in what situation should one consider that women are underrepresented in the civil service? Is it the percentage of women employees, or is it the average wages of women, or is it the type of labour? Is the women's representation across sectors including the private sector for example relevant in the determination of underrepresentation?

[78] CEDAW, General Recommendation No. 25, cited above at note 17, para18

[79] CERD, General Recommendation No. 32, cited above at note 8, para22

As a matter of historical factors, resources, and democratic governance, states usually restrict the application of AA policies to a limited number of target groups. In the US, for example, AA policies have been primarily based on race and sex.[80] In Europe, while race-based AA policies are rare, few European countries have gender-based AA policies.[81] In India, AA policies have been adopted to "untouchables", "Scheduled Casts" and "Scheduled Tribes".[82] In South Africa, AA policies are designed to benefit black South Africans.[83] But this selection of target groups does not necessarily mean that it is easy for states to pick target groups. States usually find it difficult to determine which target groups deserve which forms of AA. Identification of those groups "sufficiently disadvantaged" to merit AA is usually a contentious issue.[84]

Once the target group such as a minority group is determined, identification at individual level in actual implementation of a particular measure of AA may sometimes pose challenges. The challenges of individual level identification are two: one is whether the criterion of disadvantaged position should be used also at an individual level; or to rephrase it, should an individual in the target group, who is much better off than members of the group non-targeted, benefit from AA?[85] The second is identifying characteristics may not perfectly fit to the individual case at hand. For example, in the identification of a minority ethnic group, one may apply the criteria of language, custom and social practices. But when it comes to an individual level identification, membership of an individual with a parent from a target group and another parent from a non-target group poses difficulty. The general wisdom for individual identification is self-identification unless the contrary is justified.[86]

Coming to Ethiopia, the target groups are: women, "Nations, Nationalities, and Peoples (NNPs) least advantaged" for social and economic assistance,[87] "disadvantaged citizens" for higher education, persons with disabilities for

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[80] Anita L. Allen, *Can AA Combat Racial Discrimination? Moral Success and Political Failure in the US* in Erna Appelt and Monika Jarosch (eds.), Combating Racial Discrimination: Affirmative Action as a Model for Europe (2000), p.8, p.24

[81] Bhagwat, cited above at note 24, p.114

[82] Id, pp.112-3

[83] Id, pp.103-4

[84] Bossuyt, cited above at note 4, para9

[85] For arguments on whether AA sometimes favours those better off and fails those worse off, see Section 8.1

[86] CERD, General Recommendation No. 32, cited above at note 8, para34

[87] That is the term used in the Constitution where it says: Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development (Article 89(4))

employment and education, and "nationalities comparatively less represented in the government office" for the civil service. While the group constituting women is clear, problems may be expected in further identification of other target groups. Regarding NNPs, there are regulations issued by the federal government to determine entitlement to assistance by the federal government. They are identified as less developed regions involving Regional States of Afar, Somali, Gambela, Beneshangul Gumuz, and pastoralist areas n Oromia and SNNPs Regions.[88]

6. Measures of Affirmative Action

From literature on the law and practice of AA, three aspects of measures of AA are identified.[89] The first relates to the formal source, namely legislative, policy, or other measures providing for AA. The second relates to fields of measures, which relate to spheres such as social, economic, or political measures that are subjected to AA. The third relates to forms of measures such as training, preferential treatment or quota. Brief overview of these three with remarks on the situation of Ethiopia will be presented in this section.

6.1 Source

In terms of formal sources of AA, CEDAW identifies "legislative, executive, administrative and other regulatory instruments, policies and practices" as possible sources of AA. [90] Measures of AA may also stem from "negotiated administrative directives and guidelines or on voluntary programs."[91] Hence constitutions, parliamentary statutes, administrative directives, executive orders, policy instruments, administrative guidelines, administrative agreements, and voluntary commitments could all potentially be sources of AA. Probably the only legal restriction on sources is hierarchical observance of superior laws. This particularly concerns constitutionality of some measures of

[88] The Council of Ministers Regulation for the Establishment of Federal Board to Provide Affirmative Support for Less Developed Regions Regulation No. 103/2004, Article 2(1)

[89]According to CERD, for example, *Measures* include "the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments." CERD, General Recommendation No. 32, cited above at note 8, para13

[90] CEDAW, General Recommendation No. 25, cited above at note 17, para22

[91] Schopp-Schilling, cited above at note 19, p29

AA. Since a constitution is the highest authority, measures of AA authorized by other sources need to comply with the constitution. Never the less this restriction is quiet moot for two reasons. First, in most cases, constitutions expressly provide and proactively promote measures of AA and non-compliance with constitutional restrictions is unlikely. Examples of constitutions that expressly provide for AA include the South African Constitution and the Constitution of India, where unless these constitutions are amended, compliance by subsidiary laws of AA is easy to meet.[92] The second is as pointed out elsewhere, measures of AA are implied by principles of equality and non-discrimination, which are the hall-marks of any modern constitution. This means that under normal circumstances, measures of AA are either required or permitted by constitutions; hence non-compliance by ordinary instruments in relation to measures of AA is unlikely. However this should not obscure the fact that in exceptional cases and in some countries where equality is allegedly achieved, some measures of AA not expressly provided by constitutions are routinely challenged.

In Ethiopian context, the FDRE Constitution, proclamations, regulations, directives, and policies have all served as sources of measures of AA. Although there is no legal challenge presented on the constitutionality of some areas of AA for which explicit reference is not made, it is possible to inquire the constitutional basis of some measures of AA. For example, what is the constitutional basis to grant preferential treatment in higher education for the "disadvantaged citizen"? Or as strange as it seems, would it be unconstitutional for example if the government comes with the policy of quota in higher education and reserves 25% of admission to students coming from say schools outside cities? Such kinds of questions should be seen in light of the relationship between the principle of equality and AA. As stated all along, AA is part of the equality principle. Measures of AA to accelerate the equality of a disadvantaged group are likely to fall under the principle of equality in the FDRE Constitution.

From the overview of AA laws in Ethiopia, conspicuously missing probably are voluntary commitments, either by government organs or private entities. Private entities will be noted in a later section. Voluntary commitments by the government can be measures by any government body to increase the participation of a target group through for example a numerical goal. This is

[92] Constitution of the Republic of South Africa (1996), Article 9(2) and the Constitution of India (1949), as amended by Constitution (First Amendment Act) 1951, Article 15(3) & (4); and Articles 16(4) and 16(4)(A) of Constitution of India (1949), as amended by the Constitution (Seventy-Seventh Amendment Act), 1995

probably relevant for government organizations such as public enterprises, which are left out of many of the existing measures of AA. A government's voluntary commitment for example to increase the percentage of women CEOs (in public enterprises) or ministers to 35% in the next 10 or 20 years may be imagined as a commitment that will have an impact on efforts in the promotion of equality of women.

6.2 Fields

Generally speaking, the fields of application for AA are as diverse as social life itself. For example CEDAW considers AA to affect all areas of life including "the political, economic, social, cultural, civil or any other field."[93] Likewise CERD envisions "all fields of human rights deprivation" to be areas of AA.[94] But this does not mean that governments are eager to enact AA in all areas of human life. Employment and education are widely practiced fields of AA. Expansion of business opportunities to target groups is another area. AA in political activities has also been considered crucial in accelerating the *de facto* equality of target groups.

In Ethiopian context, the fields of AA are mostly in education and employment. Political participation is recognized to an extent, which is little more than nominal. But questions may arise if the coverage of fields is adequate to bring equality of those targeted. AA to women, which is expressly provided in the Constitution, may be illustrative. The purpose of the measures of AA, according to the Constitution, is to ensure equality in "political, economic and social life". This indicates the extensiveness of the envisioned measures of AA that may be taken to ensure equality of women. However, existing measures of AA have failed to cover major areas of underrepresentation of women in agriculture (land use for example), business opportunities, and higher decision making.

6.3 Forms

To understand forms of AA, one should imagine laws of AA not as a single universal measure to be applied to all fields and in all situations. Rather they are better envisioned in a spectrum of measures, ranging from measures that resemble mere enforcement of strict non-discrimination to those extreme ones such as quotas where a certain percentage of benefits are reserved to target groups. Professor Allen provides a list of programs and policies amounting to

[93] CEDAW, General Recommendation No. 25, cited above at note 17, para18
[94] CERD, General Recommendation No. 32, cited above at note 8, para33

AA.[95] Drawing on this list and other relevant literature on forms of AA, the following measures[96] fairly capture the range of varied forms of AA:

a) Efforts to keep track of the numbers of target groups such as minorities within an organization [a preliminary form of affirmative action].[97]
b) Vigorous implementation of equality, ensuring the equal and fair treatment of the target groups; for example, screening rejected women applicants for employment checking if any discriminatory practice has occurred, or allowing a special mechanism of complaints against unfair treatment of women or target groups;[98]
c) Efforts that emphasize recruitment and outreach activities designed to increase the diversity of applicant pools;[99]
d) Special training programs to target groups, which could be for university admission, employment or promotion;
e) Allocation of resources for the benefit of target groups, for example allocation of special funds for a training of a target group or creating employment opportunity;
f) Establishment of numerical goals and timetables, for example a state setting a goal to increase the percentage of women parliamentarians to 35% within 10 years and acting accordingly;[100]

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[95]Allen, cited above at note 80, p.5.

[96] The list of measures here leaves out Professor Allen's one particular measure on AA, which is about "[p]olitical empowerment measures, including efforts to create political districts in which a majority of the eligible voters are racial minority group members capable of electing minority candidates to state, local and federal offices." The list has also benefited from forms of AA enumerated in the recommendations of international human rights committees. Forms of AA CEDAW identifies include allocation of resources, preferential treatment, targeted recruitment, hiring and promotion, numerical goals connected with time frames, and quota systems. CEDAW, General Recommendation No. 25, cited above at note 17. For political and public life it also identifies measures "including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies." CEDAW, General Recommendation No. 23 (16th session, 1997): Article 7 (political and public life), para15

[97] This set of measures is adapted from Kellough, cited above at note 21, p. 6

[98] Adapted from Bossuyt, cited above at note 4, para73

[99] Kellough, cited above at note 21, p. 6

[100] On this item in the list see also Frances Raday, *Systematizing the Application of Different Types of Temporary Special Measures under Article 4 of CEDAW* in Boerefijin, Ineke etl (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women

g) Preferential treatment, including in employment, schooling and business opportunities. The preference may be from equally qualified, few points' preference or more – generally referred to weak or strong forms of preference respectively;
h) 'Set-aside' programmes, reserving a percentage of business opportunities to the benefit of target groups; this principally relates to government contracts/projects, which can be allocated based on the participation of target groups;[101] and
i) Quotas: theoretically it can be anywhere between zero to 100% although the increase in percentage would likely increase the resistance to measures of quota; quotas are usually reserved for governmental positions such as parliamentary or executive.

The list is not exhaustive. The items in the list may also overlap. Before commenting on the relevance of these measures to Ethiopia, the controversy surrounding these measures of AA should first be noted.

6.4 Controversial Forms of AA

Although not immune to criticism, the above list, created for the sake of clarity in the discussion of measures, may indicate the direction of controversy involving AA. When one moves from the first item to the next until one reaches the last, one can experience incremental discomfort with each item in the list, quota causing the most uneasiness. For example, it is unlikely for one to oppose items 'a' to 'c'. Depending on whether the person is in favour or against AA, the uneasiness with the other items increases as the person goes downward in the list. According to the Special Rapporteur on AA, measures which he calls "affirmative fairness" and "affirmative mobilization", roughly corresponding to 'a' to 'e' in the list, do not give rise to controversy, as opposed to measures what he calls "affirmative preference", corresponding to the remaining items in the list.[102] This finding is shared by many scholars. For

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under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003), p. 43

[101] "Set-asides" in the US are "measures awarding a predefined percentage of public contracts to minority-owned businesses, minority meaning blacks, Hispanics, Asians, Native Americans, Eskimos and Aleuts, and women." Daniel Sabbagh, A Strategic Perspective on Affirmative Action in American Law (2007), at Note 68

[102] Bossuyt, cited above at note 4, para7. Special measures are called measures of "affirmative mobilization" when, "through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution." Measures of AA are called measures of "affirmative fairness", when "a meticulous examination takes place in order to make

example, in the US context, the most controversial forms are awards of employment or education or business opportunity on a preferential basis to target groups such as recognized minority groups.[103] However, unlike the categorization by the Special Rapporteur, who seems to suggest that a preference to equally qualified is as controversial as quota (implied in the "affirmative preference category"), a distinction has been made between "weak" forms of preferential treatment in which members of a target group with equal (or substantially equal) qualification are preferred and "strong" forms of preferential treatment in which a preference is made to members of target groups with less qualification.[104] What this means is that "weak" forms of AA attract less controversy than "strong" forms of AA. Hence quota forms of AA are the most controversial. For example in the US, even presidential candidates are said to have campaigned against quotas.[105] This does not mean that other countries have not adopted quotas as AA. For example the Indian system of AA is said to rely substantially on quotas.[106]

Why are some forms of preferential treatment controversial and others not? Three explanations to be discussed later are usually given. The first relates to the general objection to AA: because preferential treatments depend on "a characteristic, such as race, gender, or caste, that is otherwise a forbidden ground for discrimination."[107] In other words, one may find it difficult to accept the legitimization of treatments based on factors such as race, which have been long condemned for violating equality and non-discrimination. The second is because of the preferential treatment, members of non-target groups are losing benefits in employment, education, etc. The third is because preferential measures seem to oppose qualification or merit by granting benefits to less qualified.

Apart from the controversy, two ideals of equality are said to provide general guidance on the choice of forms of AA by states: equality of opportunity and

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sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion." The Special Rapporteur uses "Affirmative Preference" to include preference among equally qualified, preference to less qualified, goals and quota. Bossuyt, cited above at note 4, paras72-77.

[103] Allen, cited above at note 80, p.24

[104] Schopp-Schilling, cited above at note 19, p.30

[105] Allen, cited above at note 80, p.32. Presidents Ronald Reagan and George Bush in the US are said to have campaigned on express opposition of AA "quotas".

[106] Bhagwat, cited above at note 24, p.113

[107] Id, p.102

equality of results.[108] What this means is that where equality of opportunity is the preferred ideal, AA measures expanding the opportunity of the target groups, for example measures from "a" to "e" are chosen whereas the equality of results dictates all forms of AA including "strong" forms of AA.

Which forms of AA are pursued in Ethiopia and what is the extent of the controversy surrounding AA? Potentially all measures of AA may be lawfully adopted in Ethiopia. This is because international agreements allow and sometimes require the adoption of all measures necessary to bring not mere equality of opportunity but also equality of results *or de facto* equality. Hence the Constitution's human rights provisions that have to be interpreted in line with international law should generally permit any of the measures including the strong forms of AA. However, judging from the review, Ethiopia has not extensively applied many of the forms of AA identified in this section. It is doubtful if ever measures of "affirmative fairness" and "affirmative mobilization" have been issued. The preferential treatments in the civil service and higher education seem to be "weak".[109]

Regarding controversies, to the writer's knowledge, there is not any major objection against any of the laws of AA in Ethiopia. A number of assumptions may be made: the first is that the measures are not known. The second is that the measures are very few to attract controversies at national level. The third is that the laws are not meaningfully implemented to invite any objection. The fourth is that the nature of the measures is "weak", which attracts little objection.

7. Other Special Measures

A distinction has to be made between measures of AA and other positive or special measures that have some resemblance to AA. Examples of such measures include:

- The rights of women to non-identical treatment with men on account of women's biologically determined needs such as special measures protecting maternity;[110]

[108] Bossuyt, cited above at note 4, para31

[109] In the civil service, for example, the preference is only 3 points out of 100. Federal Civil Service Agency, Directive on Employment of Federal Civil Servants, 2007/08

[110] CEDAW, Article 4 (2); also CERD, General Recommendation No. 32, cited above at note 8, para15

- Measures to enforce the rights of minorities to enjoy their own culture, language and religion;[111]
- Measures to protect the rights of indigenous peoples, including the right to land traditionally occupied;[112]
- Positive measures such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.[113]
- Measures to ensure to persons with disabilities access to the physical environment, to transportation, to information and communications;[114]

As indicated above, these measures are provided in various international instruments and the jurisprudence arising therefrom, especially of CEDAW, CERD, and CRPD. Three principal features of distinction are usually suggested. The first feature is the temporary nature of AA while these special measures are in most cases permanent. The second feature lies in the purpose of the measures: while measures of AA are to accelerate and achieve equality, the other special measures aim at differential treatment of features that are meaningfully different.[115] The third feature is that those special measures are

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[111] CERD, General Recommendation No. 32, cited above at note 8, para15

[112] Ibid

[113] CESCR, General Comment No. 20, cited above at note 12, para9

[114] Extensive list of special measures for persons with disabilities are provided in the CRPD. The obligations of states in favour of persons with disabilities identified in CRPD include measures: to ensure access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas; to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public (Article 9); to ensure personal mobility with the greatest possible independence by: (a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost; (b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost; (c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; (d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities (Article 20).

[115] That is an argument used by CEDAW in connection with the Convention's categorization of measures of AA and other special measures. According to CEDAW, while the purpose of affirmative measures is "to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to

better understood in terms of special rights belonging to a group of people rather than special measures associated with the right to equality.[116]

The points raised in the previous paragraphs are relevant to Ethiopia. In Ethiopia as well, those special measures are different from measures of AA in ways explained. Those special measures are provided in the Constitution and various other ordinary laws. Some of them are:

- Maternity leave;[117]
- Ethiopian peasants' right to land and Ethiopian pastoralists' right to free land for grazing and cultivation;[118]
- Special representation of minority Nationalities and Peoples, who shall have at least 20 seats in the HPR and the representation of each Nation, Nationality, and People by at least one vote in the House of Federation.[119]
- Provision of appropriate working and training materials for persons with disability;[120]

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effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation,' the objective of others special measures is to provide 'for non-identical treatment of women and men due to their biological differences." CEDAW, General Recommendation No. 25, cited above at note 17, paras 15 and 16

[116] CERD, General Recommendation No. 32, cited above at note 8, para15

[117] FDRE Constitution, Article 35(5)

[118] FDRE Constitution, Article 40 (4)and (5)

[119] FDRE Constitution, Articles 54(2) (4) and 61(2). "Territorial, cultural, political" and other measures that benefit minority nationalities are considered by some to be measures of AA. For example, for the now defunct USSR, a historian, borrowing the term AA from the US practice, used the *Affirmative Action Empire* to identify the Soviet Union, owing mostly to the state's extensive AA policies regarding the maintenance of national (in ethnic sense) territories, promotion of national languages and elites, and recognition and support for national culture through measures such as education and employment. The historian also identifies the USSR as the first country in world history to introduce AA programs for national minorities. Terry Martin, The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939 (2001), pp10-19

[120] The Right to Employment of Persons with Disability Proclamation No. 568/2008 provides several specific measures aimed at enhancing the participation of persons with disabilities in employment. Worth noting are Article 6, which provides for employers' obligations to (a) take measures to provide appropriate working and training conditions and working and training materials for persons with disability; (b) take all reasonable accommodation … to women with disability taking into account their multiple burden that arise from their sex and disability; and c) shall assign an

Finally, while treatment of such special measures is out of the inquiry of this article, it should be stated that generally these special measures are obligations under international and Ethiopian national laws and as such are binding. Moreover, it should be noted that differential treatments, whether measures of AA or not, are not against the principles of non-discrimination and equality "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate."[121]

8. Arguments for and against Affirmative Action

At the outset, questions may arise as to the relevance of arguments for or against AA in this article, particularly for Ethiopia where AA is constitutionally mandated. First, the understanding of AA is superficial without understanding the arguments. Second, particularly relevant to Ethiopia where forms of AA are few and national awareness is in doubt, policy makers need to understand these arguments in order to act on AA to a sufficient degree. As the review of national laws indicates, measures of AA in Ethiopia are very limited in a sense that various forms and fields of AA are left out of normative instruments. Agricultural sectors (where overwhelming majority of the population and target groups live), private sectors, business opportunities, and decision making positions are not treated in existing measures of AA. Arguments presented here will help in the construction of further AA policies and laws, where needed. Third, clarity in the arguments will facilitate genuine and diligent implementation of existing laws on AA.

8.1 Arguments For

Depending on the fields and forms of AA, various arguments are provided in support of AA. The following are commonly made.

Remedying Past Discrimination The argument here is that a systematic discrimination practiced for ages in the past has caused an unjust situation; and to correct this unjust situation compensation presented by AA is crucial.[122] Taking the case of a minority target group, for example, the target group in the past has been subjected to widespread discrimination through denial of decision making, employment, education, business opportunity, and so on.

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assistant to enable a person with disability to perform his work or follow his training. Employers may be exempted from the first two if there is undue burden, while exemption is not granted for the third (Article 6(2)).

[121] CCPR, General Comment No. 18, para13

[122] Bossuyt, cited above at note 4, para17

Owing to such discrimination, the group now finds itself substantially underrepresented in schools, in employment, and so on and unable to equally compete owing to lack of skills. To correct such underrepresentation, measures of AA are necessary. This argument is implicitly provided in FDRE Constitution, for example, which states, "[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures."

Diversity There are variants of arguments based on diversity. The first is that diversity by itself enhances the fields of AA such as business, employment and education.[123] What this means is ensuring participation of the target groups such as women and minority would increase productivity, creativity, efficiency, and so on in employment, education and other areas where measures of AA are applied. The other argument rests on recognition of the value of diversity *per se,* i.e. "differences should be valued, and that organizations should be managed in a way that allows people from all backgrounds to succeed."[124] This argument can be extended to apply to the right of everyone for fair participation in a democratic society, probably without resorting to evidence for any increase in productivity. The objectives of higher education in Ethiopia such as promotion of democratic culture and multicultural community life and fairness in the distribution of public institutions may be related to arguments relating to diversity.[125]

Social Utility This argument proposes that AA is not simply for the benefit of individuals who may have obtained preferential treatment for employment or admission or any other advantage. But measures of AA also benefit the target group as a whole in various forms. Better service to a target group by professionals from this group, better understanding of interests of the target group by officials from this group, role-model impact of AA to other members of the target group, and reduced stereotypes are some of the social benefits of AA.[126] The social benefits of this argument may be randomly stated taking the example of a hypothetical woman that has benefited from AA: A woman-doctor provides enhanced service to the reproductive medical needs of women; a woman parliamentarian (congresswoman) will serve women better; a woman business executive inspires young woman; and a successful woman professor will reduce stereotypes that women are not up to university professorship.

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[123] Allen, cited above at note 80, p.24
[124] Kellough, cited above at note 21, p.68
[125] Higher Education Proclamation, Article 4(8) and (9)
[126] Bossuyt, cited above at note 4, paras22-24

8.2 Arguments against AA

AA has never been without objection.[127] But in understanding the arguments against AA, it should be admitted that opponents of AA do not flatly reject all forms and fields of AA. For example, there are not many in literature denying the desirability of "affirmative mobilization" such as providing training opportunities for minorities or women to qualify for admission in education or employment. Rather, arguments against AA usually target "strong" forms of preferential treatments and quotas.

Equality and Non-discrimination

Principal arguments against AA are rooted in AA's alleged contradiction to the principle of equality and non-discrimination. The argument is that since measures of AA are against the principle of equality, they should be illegal. This position is reflected in the US and Europe, where in some cases their highest courts have struck down measures of AA as having violated the principle of pure equality.[128] Three challenges to this argument may be raised. The first relates to the meaning of equality. The meaning of equality AA espouses is the meaning of substantive equality or equality of results. If that is the case, the principle of equality should embrace measures of AA as long as in practice the target group is disadvantaged. The second is that AA is mostly provided with the principle of equality making it compatible or at least a legitimate exception to equality.[129] The third argument is that *pure* equality advocated by critiques of AA, which is mostly about *formal* equality, does not

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[127] It should be understood that arguments against AA are made not only by those 'non-preferred' groups such as men or majority ethnic groups. Some members of target groups have also made strong arguments against AA. For example, it is not all women that favour AA. Carol Bacchi, *The Practice of Affirmative Action Policies: Explaining Resistances and How These Affect Results* in Boerefijin, Ineke etl (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003) p.86

[128] Raday, cited above at note 100, p.42

[129] A separate provision for AA with equality principle should not mean that the principle of equality does not inherently include measures of AA. CEDAW, for example, "views the application of these measures [temporary special measures] not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms." CEDAW, General Recommendation No. 25, cited above at note 17, para18

satisfactorily answer structural and indirect instances of discrimination.[130] For example in Ethiopia, it is possible to suspect that many employers have stereotypes towards women, who may be wrongly perceived to be better housewives than civil servants. As a result, interview points assigned to women candidates in the situation of *equal* employment opportunity may reflect such prejudices resulting in lower points to the woman candidate than the man with almost same qualifications. Then would not it be fair to the woman to be considered for measures of AA to tackle such structural discrimination as long as she has obtained substantially equal number of points?

Two-Class Theory

Arguments surrounding the objection to two-class theory of AA are presented from two sides: from the side of the target group (such as minorities and women) and from the non-preferred group (such as nonminority or men). Within the target group, as they exist now, AA measures tend to benefit those that are least disadvantaged. Studies indicate that "it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures."[131] What this means in Ethiopia for example is that AA measures for women in the civil service or higher education benefit the least disadvantaged of women such as city women or women coming from affluent families. The most disadvantaged of women such as rural women or women in poor families benefit the least out of AA. Hence instead of helping, AA measures leave out those least advantaged, a fact that diminishes the moral force of AA.

For the non-preferred, AA measures tend to harm those least advantaged in the non-preferred group. This means that AA "makes victims of innocent nonminority," or innocent men or any innocent member of a non-preferred group.[132] Consider in Ethiopia a man from a poor family, who has never benefited from past structural discrimination or injustice and whose education is poor owing to his family's situation. This is the man who is likely to lose in the implementation of AA instead of the man with a better upbringing, probably associated with his families' past connections with regimes that had systematically discriminated against women.

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[130] Structural discrimination "encompasses all kinds of measures, procedures, actions or legal provisions which are, at face value, neutral as regards race, sex, ethnicity, etc., but which adversely affect disadvantaged groups disproportionately, without any objective justification." Bossuyt, cited above at note 4, para19

[131] Id, para11

[132] Kellough, cited above at note 21, p.88

These arguments based on two-class theory are not mostly against measures of AA. The concerns raised seem legitimate and, if those concerns are addressed in existing measures of AA, the arguments may lose currency.

Stereotyping

It is argued that strong preferential treatment may "lead to the claim that individuals who are promoted by this method are incompetent, thus perpetuating stereotypes."[133] Three concerns are raised against this argument. The first concern, which is similarly shared by those espousing this argument, is that AA does not create stereotypes. Stereotypes existed independently and before measures of AA. The stereotypical assumptions against women or minority or other groups existed long before the introduction of measures of AA. The second concern is whether there is empirical evidence to support that measures of AA reinforce stereotypes. Wrongful identification of beneficiaries of specific measures of AA as incompetent or weak may be just the expression of existing stereotypes instead of stereotypes allegedly reinforced by AA. The third concern is, even assuming AA reinforces stereotypes, it may be doubtful if it ever nears close to the benefits of AA.

Merit and Qualification

Naturally the question of qualification and merit arises in affording advantages on the basis of race, sex or another similar ground: less qualified people getting employment, education, and other opportunities. This opposition comes from the idea of meritocracy by which social positions have to be obtained through merits, namely education, skills, intelligence, and so on.[134] But the idea that AA sacrifices merit is not wholly true. The starting point for AA is merit. It is not that a member of a target group joins university education from 9th grade or joins a civil service with no certificates when actually the position requires a university degree. While there is no proponent of AA who advocates the application of AA without fulfilling the minimum criteria for admission to school or employment, in most cases beneficiaries are granted employment where their qualification or merit substantially is similar to the non-target group. The Ethiopian case is a typical illustration. Moreover, "qualifications and merits" sometimes may be biased against minorities and women, without genuine link to the opportunity at hand.[135] For example, in a locality where minorities are unemployed, requiring a professional degree for a position of

[133] Raday, cited above at note 100, pp. 41 and 42

[134] On critical insights on mmeritocracy, see Stephen J. Mcnamee and Robert K. Miller, The Meritocracy Myth (2nd ed, 2009)

[135] CEDAW, General Recommendation No. 25, cited above at note 17, para23

daily labour may be suspicious. Likewise meritocracy should not be all. For public and political offices, for example, "factors other than qualification and merit, including the application of the principles of democratic fairness and electoral choice, may also have to play a role."[136] It is true that merit becomes a real concern where mere quotas or similar forms of AA are used in areas where qualification alone is decisive. But to avoid such problems, strong forms of AA are mostly applied to "political representation, public appointments" or similar other programs while retaining the weak forms to "economic activity, credit, employment and educational opportunity."[137]

The above arguments for and against AA validly apply to the situation of Ethiopia. Unfortunately the writer has little evidence if the measures of AA in the Constitution and ordinary laws were informed by these arguments during deliberations. In any case, AA to a certain degree is provided in the Constitution and needs little justification for its implementation. But as is argued at the beginning of this section, the arguments would be useful in executing, consolidating, expanding, and reformulating AA measures in the Constitution and other ordinary laws. The importance of these arguments in raising the awareness of government organs tasked with implementing policies, target groups, and other stakeholders should not also be underestimated.

9. Obligations of the State and the Politics of Affirmative Action

Generally government's obligations in relation to AA may be viewed in terms of the nature of measures: self-executing and non-self-executing.[138] The self-executing measures of AA are those that could be readily enforceable by administrative, judicial, and quasi-judicial organs of the state. These are measures in Ethiopia found in ordinary laws of the civil service, election, and persons living with disability. The task here is to implement those legislations through awareness raising, monitoring the actual execution of the measures, assessing progress and so on.

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[136] Ibid

[137] Raday, cited above at note 100, p. 42

[138] "Self-executing" refers roughly to a legal instrument (or a provision), which is "effective immediately without the need of any type of implementation action"; Garner, Bryan A (ed.), Black's Law Dictionary (7th ed.) p.1364. While the nature of legal instruments as self-executing and not is controversial, the classification here is used loosely.

Under the non-self-executing measures of AA fall measures that are expressly or impliedly provided in the Constitution and international instruments such as CEDAW, ICERD, ICCPR, and ICESCR. The question is: is there a legal obligation on the state to issue specific enabling laws to implement these non-self-executing measures? The answer to this question is mixed. In international human rights instruments, especially where measures of AA are implied such as in ICCPR and ICESCR, it is the state's *discretion* to take measures of AA if it so chooses. CESCR, for example, indicates that states "are *encouraged* to adopt temporary special measures" and that "such measures are *not* to be considered *discriminatory*"[139] (Emphases added.) A different position is the position taken by CEDAW and CERD, which indicate that taking measures of AA is obligatory. Applying contextual interpretation to its founding instrument, CEDAW "considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality."[140] Similarly CERD affirmed "the mandatory nature of the obligation to take such measures."[141]

In relation to the FDRE Constitution, the legal obligation to issue specific measures is twofold. In connection with express provisions of AA policies, the government is under obligation to enact laws of AA. For example, the Constitution's entitlements to women for AA must require the state to act and enact since it is the state's obligation to respect and enforce the Constitution. In connection with implied AA measures, however, the state's discretion plays crucial role. As is argued by Kellough, "[a]ny finding that preferential affirmative action is constitutionally permissible does not mean, however, that a government organization must implement such a policy. It simply means that government has the opportunity to do so if it chooses."[142]

But throughout these non-self-executing measures of AA lies the assumption that the state is committed to act. But what if the state is permitted to act but does not and, more important, what if the state is obligated under international or constitutional laws to act but does not? Here brings the issue of AA in politics. The article's consideration of AA in terms of legal framework should not obscure the crucial importance of politics in the life of AA. In other words, as far as target groups of AA are concerned, the role of the law to implement

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[139] CESCR, General Comment No. 16, note cited above at 33, para36
[140] CEDAW, General Recommendation No. 25, cited above at note 17, para24
[141] CERD, General Recommendation No. 32, cited above at note 8, para30
[142] Kellough, cited above at note 21, p.128

non-self-executing measures of AA either in the Constitution or international instruments is very much limited.[143] As argued by Kellough, measures of AA "were as much the product of political machinations as they were the result of a commitment to justice."[144]

This is to say that if normative measures of AA are said to be inadequate in Ethiopia such as in dearth of coverage of forms and fields of AA, it is more to the political "machinations" to find a solution. Those interested parties including women and other groups may need to press policy makers to enact further measures of AA. Moreover, it is not clear if measures of AA are being diligently implemented in Ethiopia. If that is so political solutions to limitations in judicial enforcement of AA may be useful. Especially measures of AA identified in policy instruments such as the GTP require further policy actions, which can be brought about through political participation and lobbying.

10. Empirical Evidence

For AA, empirical evidence is relevant for two related purposes: one is to justify AA. As indicated already, AA is based on a factual situation of underrepresentation caused mostly by historical injustice and discrimination, which require empirical evidence. As CERD indicated, "[a]ppraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions."[145] These data may or may not justify measures of AA. For Ethiopia, the writer does not have information on the role of empirical evidence in the introduction of AA including in the Constitution.

The second is the importance of empirical evidence to assess the progress of AA. Here the dual goals of the assessment may be served. The first is to end AA where empirical evidence suggests that equality has already been achieved. As is emphasized elsewhere, AA measures are temporary measures that should be terminated as soon as its objectives of substantive equality are

[143] Here the state's international responsibility may be invoked to enforce obligatory non-self-executing international norms of AA. Moreover, the government's failure to act as the Constitution required it through measures such as extensive application of AA in agriculture and private sector may raise the issue of constitutional interpretation. Both situations raise complex legal issues beyond the scope of the article.

[144] Kellough, cited above at note 21, p. 22

[145] CERD, General Recommendation No. 32, cited above at note 8, paras16-7

achieved. As CERD outlined, "[t]he requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal."[146] The second is to assess the impacts of specific policies, whether positive or negative, to be able to make informed decisions to change the forms or fields of AA. In Ethiopia there seems to exist reluctance to record or publish the progress achieved through measures of AA. For example both in the civil service and educational statistics, the number of employees or students, who have benefited from measures of AA, are not reported.

The cost of carrying out empirical assessment may be huge and cost-benefit analysis is necessary. However, statistical analysis of existing data in employment, agriculture and other sectors may provide indicators of the overall prevalence of underrepresentation, to which policy makers may respond in the form of AA. Statistical data required in states reports to UN treaty bodies, especially relating to disaggregated data based on sex, minorities, or other factors may be useful to achieve the first goal of assessing the situation of underrepresentation although the progress achieved by either AA or other measures of equality has to be corroborated by other sources.

Taking educational statistics in Ethiopia, a point may be made. In the 2010/11 educational statistics, undergraduate enrolment of girls is only 27% when postgraduate enrolment is only 13.8%.[147] This statistics tells many stories. The first is despite some progress, women in higher education are still highly underrepresented; hence corrective measures are necessary to ensure equality of results in accessing higher education by women. The second story is that the existing measures of AA have not brought about any meaningful change. This probably indicates the importance of taking other forms of affirmative or equality measures. Such measures may target high school education or other places that have caused the huge disparity of girls' attendance in higher education.

11. Private Organizations: The Forgotten Players?

In discussions relating to AA in Ethiopia, the question of normative framework applicable to the private sphere poses difficulty. The issue seems neglected especially considering the increasing involvement of the private sector in the country. Should measures of AA cover the private sector? What fields and

[146] Id, para35
[147] FDRE Ministry of Education, Education Statistics Annual Abstract 2010-11, pp.59-60

forms of AA are suitable to the private sector (loosely referring to private business, political organizations and other institutions)? The opportunities in the private sector are enormous, for example getting employment in the widening private sector. The importance of applying preferential treatment in the private sector has also been highlighted in the literature. In his final report, the Special Rapporteur on AA, for example, has identified the private sector such as educational institutions (together with the public sector) as actors that could carry out measures of AA.[148]

In the Ethiopian system of AA as well, private sector is implicated in the application of measures of AA. In the FDRE Constitution, for example, the equality referred to as the purpose of AA to women is equality both in public and "private institutions," leaving way for the application of AA to the private sector.[149] AA provided for persons with disability also applies to private organizations.[150] This may be the only exception in ordinary national laws though its implementation and monitoring has yet to be detailed and scrutinized.

There are generally two possibilities to integrate the private sector into the sphere of AA: through mandatory laws and voluntary commitments. Regarding mandatory rules, the possibility is shown through AA measures to persons with disabilities, though the awareness and implementation of those rules remain unclear. Regarding voluntary commitments, CEDAW foresees the possibility of negotiated and voluntary measures of AA by the private sector.[151] In Ethiopia one can imagine voluntary commitments through measures negotiated between the government and the private sector in government projects. It is also possible to hope the private sector taking its own initiatives of AA. Still doubts remain as to the effectiveness of such negotiated or unilateral commitments. Their effectiveness may be ensured through incentives by tax cuts, government grants, or other measures in which the interaction between the government and private sectors is inevitable. The incentive in the financial assistance by the government to political parties for increased participation of women provides a typical illustration.

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[148] Bossuyt, cited above at note 4, para7

[149] FDRE Constitution, Article 35(3)

[150] Right to Employment of Persons with Disability Proclamation No. 568/2008, Article 2(3) defines "Employer" as "any federal or regional government office or an undertaking governed by the Labor Proclamation".

[151] CEDAW, General Recommendation No. 25, cited above at note 17, para32

12. Conclusions and Recommendations

Affirmative action is part of the human rights law of Ethiopia. It is rooted both in international and national laws. Despite the country's human rights obligations that require extensive forms and fields of AA to enhance equality, however, the review has indicated that fields and forms of AA are very limited. The fields of AA are concentrated in the civil service and higher education, without much policy or legal programs to embrace target groups in the rural community and private sector. The measures of AA are also "weak" forms, which have not taken due account of measures of affirmative mobilization and fairness that would benefit target groups with little social resistance. Although there is little evidence to conclusively state on the effectiveness of AA, statistics in the civil service and higher education indicate that equality aimed by AA has not been achieved. For example, in higher education, the participation of women is only 26% while in the civil service it is less than 35%.

These partial figures indicate that the country has not yet overcome its history of discrimination and marginalization to foresee the end of AA. On the face of such underrepresentation, the importance of AA to accelerate equality becomes more important. Hence, the implementation of existing AA laws and policies has to be intensified. Owing to the inadequacy of existing laws and programs, new forms and fields of AA to enhance the equality of all should be introduced. For example, measures of AA to be implemented in rural areas, business opportunities, and private undertakings should be explored. Together with reforms in mandatory measures of AA, new fields and forms of AA may be designed to encourage governmental and private entities to have voluntary commitments in AA to enhance the representation of certain target groups.

At this moment, a comprehensive strategy for reform and serious implementation of AA seems necessary. This has to be principally the government's undertaking to lead. But complete reliance on the government's initiatives may be too optimistic. One clear option would be for target groups such as women to agitate the government, their representatives, local administrators and policy makers to take equality concerns seriously and to implement measures of AA. For example, target groups may use their votes to dictate how equality and measures of AA on the face of underrepresentation matter.

In introducing new fields and forms of AA, emphasis may be placed on the merit-based application of AA, which counters prejudices and simplifies the implementation of AA. This requires introduction of measures of affirmative fairness and affirmative mobilization. Article 41 of the FDRE Constitution may

also serve as the starting point in identification of new fields and beneficiaries of AA. A number of economic, social, and cultural rights are identified in the article to be areas where the state has to allocate resources to enhance the situation of certain categories of people that require special measures of protection.

Ordinary laws of AA with limited exceptions are shy of embracing private organizations. This may largely be the result of policies of non-interference by government towards private organizations. While providing compulsory legislations may trigger some resistance on grounds of efficiency, merit, *laisez faire* and equality, incentives may be provided to private entities that embrace AA. Moreover, "weak" forms of AA, which entail little objection even by private entities, may be introduced by law and reinforced by government incentives and public scrutiny. Incentives in government projects, tax breaks, and so on should also be possible.

By law, as is indicated, political parties have small incentives to increase the number of women candidates in elections. Aside from that, there are not national goals and timetables set by the government to achieve the number of desirable seats in crucial elected and/or appointed public offices such as ministerial positions in which the representation of women is only a fraction. This should be one critical area where new forms of AA have to aim.

The importance of empirical evidence on the implementation of AA is explained. In efforts of reform as well as enhancing implementation, effectiveness of measures, attitudes of beneficiaries (and other groups), and other aspects of AA have to be empirically tested. Empirical evidence is especially necessary owing to the unsatisfactory statistics (regarding AA) in vastly acknowledged fields of AA, namely the civil service and higher education. Unfortunately, the exact contribution of AA in the progress to equality in these sectors has not been reported. Hence empirical researches on AA are called for if there is a real commitment for meaningful evaluation of AA. Those researches should aim at exploring the awareness on AA, impacts of existing measures, attitudes towards the various potential forms of AA, and so on.

The existing measures of AA have their own institutions to monitor implementation. However, why those institutions have not carried out regular assessments and monitoring with the objective of reevaluating the direction of AA is not clear. Ministry of Labour and Social Affairs, MWCYA, and the Electoral Board are the institutions entrusted with monitoring the outcomes of some of the AA outlined in this article. Their assessment and monitoring as

part of empirical investigation of AA are likely to determine the direction of their respective measures of AA; hence these institutions should be required to regularly monitor the implementation of AA. Apart from that, with suggested reforms in measures of AA, establishment of special offices may be contemplated.

Finally it should be remembered that AA is a means to ensure equality. It starts where committed enforcement of the principle of strict equality ends. If there is no substantial enforcement of equality, measures of AA are nothing but superfluous.

ON TAX FORECLOSURE RULES AND TAXPAYERS' RIGHTS TO PRIVACY AND OF ACCESS TO JUSTICE IN ETHIOPIA

By Kinfe Micheal Yilma*

Introduction

Ethiopia is amongst countries with the lowest tax-to-GDP ratio in the world. In the 2011/12 fiscal year, for instance, the ratio stuck at 12.4 % - even way below the Sub-Saharan average which is 18 % according to the IMF. More often than not, the government blames the very low tax compliance rate as the primary culprit. But, factors inducing low level of voluntary compliance by potential taxpayers have rarely been investigated, and often authorities resort to seasonal and perhaps aggressive enforcement against businesses alleged to have gone delinquent. It is not also uncommon to overhear that discussions between authorities and businesses on matters of taxation are often dictations where the latter are gaged in the deal.

Lessons from other countries reveal that changing the attitude of potential taxpayers towards the tax system plays a pivotal role in effectively exploiting the national revenue potential. Taxpayer honesty, to a large extent, depends on the perception and reality that the system treats taxpayers decently and fairly.[1] According to Jinyan Li, taxpayers are more likely to comply with the law if they perceive the system to be fair, clearly setting out and respecting their basic rights.[2] In line with this, various substantive and procedural rights are envisaged in tax laws of states. In some cases these statutory rights are elaborated in non-binding declarations. Relevant constitutional provisions are also at times invoked in tax cases before courts and tribunals.

Apart from the possibility of invoking constitutional provisions, one hardly finds clear and detailed taxpayer rights in the relevant tax laws and other documents in Ethiopia. Our concern on this inattention to taxpayer rights is compounded by the incorporation of potentially intrusive tax seizure rules following the tax reforms of the 2002. That tax seizures are enforceable by tax

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[1] Jinyan Li(1997), Taxpayers' Rights in Canada, *Revenue Law Journal*, Vol. 7, Issue 1, P. 83

[2] *Ibid*, PP. 83-84; see also, Xu Yan(2006), Taxation and Constitutionalism in China, *36 Hong Kong Law Journal 365*, P. 1

authorities unilaterally without any judicial oversight inevitably becomes a cause for concern particularly in relation to the rights of taxpayers. Furthermore, despite the potential of grave results, the tax foreclosure rules have not received due academic treatment[3] which could have helped in raising understanding of both authorities and taxpayers. And, such ignorance to the regime is likey to undermine rights and interests of taxpayers.

In an attempt to lessen this gap, this note reflects on the implications of the Ethiopian tax seizure rules on taxpayers' constitutional rights to privacy and of access to justice. Concomitantly, it brings to the fore various modes of regulating taxpayer rights informed by the experiences of other countries. Accordingly, I first briefly introduce the basics of the tax seizure rules (I) and discuss the foreclosure rules in light of right to privacy and of access to justice provisions of the FDRE Constitution (II) followed by a discussion on approaches of taxpayer rights regulation(III).

I. Tax Foreclosure Rules of Ethiopia: A Premier

Whilst the Ethiopian tax system had undergone a series of piecemeal reforms over decades[4], the changes it experienced a decade ago were markedly significant. The tax reforms of 2002 touched a range of issues from introduction of new varieties of taxes, application of self-assessment, broadening of tax bases, and institutional reshuffling to a drastic change in the modality of enforcing delinquent taxes. Of the latter, the reforms brought along a unilateral out-of-court means of enforcing delinquent taxes called tax foreclosure which literarily represents a procedure of seizing and selling delinquent taxpayers property. The *Black's Law Dictionary* describes tax foreclosure as a public authority's seizure and sale of the property for non- payment of taxes.[5]

Randall Thomsen states that the purposes of tax foreclosure processes are twofold; first and foremost to recover delinquent taxes to secure public revenue and second to ensure that taxpayers are not denied their rights to property and due process.[6] It is among the various types of foreclosures such

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[3]This has also been a point of concern in the US. See, Randall Thomsen (1996/97), Washington State Property Tax Foreclosures: Quoerere Dat Aaperere Quoe Sunt Legitima Vere, *32 Gonzaga Law Review123*, Gonzaga Law Review Association, P. 3

[4] For a brief overview of tax reforms in Ethiopia, see generally, Alemayehu Geda and Abebe Shimeles(2005), Taxes and Tax Reform in Ethiopia: 1993-2003, UNU-WIDER and World Institute for Development Economics *Research, Research Paper No. 2005/65*

[5]Bryan A. Garner(Ed., 2004), *Black's Law Dictionary*, 8th ed., P. 1916

[6] Thomson, *supra* note 3, P. 4

as 'strict foreclosure'[7], 'judicial foreclosure' and 'power of sale foreclosure'. Tax foreclosure is basically a replica of power of sale foreclosure, the only variation being the source of the power of sale – while contracts between the creditor and the debtor forms the basis for power of sale foreclosure, tax law gives the power of sale for tax authorities.[8] Tax foreclosure is generally commended for being cost effective and expedient in recovering unpaid taxes as opposed to erstwhile judicial means of recovering unpaid taxes.[9]

Tax seizure rules are provided verbatim in almost all of the country's tax laws including a detailed directive (Directive) specifically dedicated to foreclosure processes, and a non-binding working manual (Manual) which has made some modification to the laws.[10] The customs law also embraces disparate seizure rules by which custom officers are empowered to detain a means of transport and seize goods loaded therein where they have reasonable suspecion that

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[7] Strict foreclosure, the oldest type of foreclosure, is simply a procedure that grants the mortgagee (creditor) title to the mortgaged property without a Sale. Since it doesn't allow the debtor to recover the excess proceeds of the sale, it is regarded as the harshest type of foreclosure and its utility has diminished over the years. See generally, 2nd American Jurisprudence(1971), *Mortgage*, Vol. 55 (2nd ed., The Lawyers Cooperative Publishing Company)

[8] It is however to be noted that the tax authority is a late comer to the game as banks have already been bestowed with similar power of sale earlier by which they foreclose debtors' assets upon default. See, See, Property Pledged/Mortgaged with Banks Proclamation, 1998, Proc. No. 97/98, *Fed. Neg. Gaz*., 4th year, No. 16

[9] Eschewing away judicial execution which was considered to be inexpedient and costly is reportedly the primary reason for instilling tax foreclosure in Ethiopia.

[10] See, for instance, Arts 77-79 of the Income Tax Proclamation No. 286/2002, Art. 31 of the Value Added Tax Proclamation No.285/2002, Art. 17 of the Value Added Tax Regulation No. 79/2002, Art 10 of the Excise Tax Proclamation No. 307/2002 and Art 13 of the Turnover Tax Proclamation No. 308/2002. See also, A Proclamation to Provide for the Establishment of The Ethiopian Revenues and Customs Authority, 2008, Art. 16(2(3)) and Art 18(2(h)), Procl. No. 587/2008, *Fed. Neg. Gaz*., 14th year, No. 44. See also, for instance, the Southern Nations, Nationalities and Peoples Regional State Turnover Tax Proclamation, 2003, Arts 14, Proclamation No. 57/2003, *Debub Neg. Gaz*., 8th year, No.6. Regulation of tax foreclosure is also furthered in a very detailed directive issued by the Ministry of Finance and Economic Development and a Working Manual by the Ethiopian Revenues and Customs Authority. See, "□□□ □□□□□ □□□□□□ □□□□□ □□□ □□□□□ □□□ □□□□□ □□□□ □□□□ □□□□□ □□□□□□□□□ □□□□ □□□□□ □□□ □□□□" □ □□□□□□ □□□□ □□□ □□□□□ □1996E.C; "□□□□ □□□□□ □□ □□□□ □□□ □□□ □□□□" □ □□□□□□ □□□□ □□ □□□□ □□□□□□ □ □□□ 2□□□ E.C. All references in what follows is to the Income Tax Proclamation(ITP) unless stated otherwise.

cusoms formalities have not been complied with.[11] Although not clearly articulated, such seizures would result in ultimate sale of the goods where the owner does not report to the tax authority or fails to bring the case to court in 30 days from notice of seizure.[12]

Tax foreclosure is not a one-step procedure; it rather involves a series of procedures that must be followed before the actual sale of the taxpayer's property. It is initially triggered by the taxpayer's default of paying taxes due.[13] Then the tax authority proceeds to issue a default notice to the taxpayer stating that unless taxes due are paid in 30 days, seizure will be authorized.[14] In the meantime the tax authority makes an inquiry[15] about the assets of the delinquent taxpayer followed by a procedure of attachment by which the tax authority blocks any attempt of concealing or absconding of property by the taxpayer.[16]

Where the taxpayer fails to pay the taxes due within the deadline set in the notices or declines to enter into an agreement for extension of period of payment or installment, the tax authority seizes property of the taxpayer. Seizure for tax purposes involves seizure by any means including the collection from the person who owes the taxpayer.[17] Though seizure is often regarded as

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[11] See, Art 82 cum Art 2(49) and Art 109 of Customs Proclamation No. 622/2009, *Fed. Neg. Gaz.*, 15th year, No. 27

[12] *Id*, Art 82(3)

[13] There are generally three conditions under which a taxpayer may be deemed to be in default of paying taxes under Art 73(2 and 3) of ITP. These are: where the taxpayer fails to pay the tax due within 30 days from the receipt of the assessment notice or from the date of the decision of the review committee; or where the period for lodging appeal on the decision of the tax appeal commission has expired; or where the court of appeal renders its final decision. Note that the manual introduces another condition to regard a taxpayer in default of paying taxes, i.e. where the taxpayer fails to honor her/its obligation to pay under [agreement for the payment of the tax]. See, Manual, P. 37

[14] The ITP sets a minimum of 30 days period which the manual has enabled by including additional layers of notices such as prior notice by phone calls before the final notice of seizure. See, Art 77(4) of ITP, Art 7 of the Directive and Manual, P. 37 *et seq.*

[15] The inquiry is mainly conducted to facilitate the subsequent attachment and later seizure of property. The inquiry involves collecting information with regard to the assets (type, location, ownership titles and any securities attached) and any transactions of the taxpayer. See, Art 17 of VAT Regulation No. 79/2002, *Fed. Neg. Gaz.*, 9th Year, No. 19 cum Manual, P. 41

[16] See, Art 11 of Directive

[17] See, Art 77(2) of ITP

a hostile act, it may not necessarily involve actual capture of physical property. An example in this regard is seizure made on the salary of a delinquent taxpayer where the tax authority just sends out orders to employers to realize collection.

Valuation or appraisal of the seized assets is subsequently made with the view to use the estimated value of the property as the minimum price in the tax sale to be held thereafter.[18] Tax sale can be conducted either in public auction or tender ten days after the seizure of taxpayer's property save sale of perishable goods.[19] Settling the tax liability culminates the foreclosure process where the proceeds of the sale sufficiently cover the unpaid taxes. However, if the proceeds are unable to satisfy the tax liability, the seizure may extend to other assets of the delinquent taxpayer without any need to restart the foreclosure process afresh. In what follows, we reflect on possible implications of these series of unilateral procedures of tax seizures and sale on constitutionally guarateed rights to privacy and of access to justice of taxpayers.

II. Tax Foreclosure Vs Constitutional Rights to Privacy and of Access to Justice

As noted above, tax foreclosure processes in Ethiopian law basically render tax authorities both the judge and enforcer, and judicial oversight is totally excluded. It follows from this state of affair that such procedures entail the natural tendency of giving unfettered latitude to authorities while putting rights and interests of allegedly delinquent taxpayers at stake. There is obviously an ample room for constitutional and statutory rights of taxpayers to be mishandled in the process.[20] More particularly, the constitutional rights to privacy and rights of access to justice might be at stake in the midst of unilateral tax seizure procedures. In what follows, these constitutional rights of taxpayers are discussed in light of the tax seizure rules.

a. With One's Right to Privacy

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[18] See, Manual, P. 49

[19] In exceptional circumstances, tax sales may be conducted through private arrangements. See, Art 5(6) of Directive and Manual, P. 50

[20] Of course, imposition of taxes *per se* is sometimes regarded as invasion of person's rights by expropriation of her assets, and the taxpayers should be reassured that the tax system operates fairly and impartially. See, Daniel N. Erasmus II(2009), Taxpayer's Constitutional Rights: A South African Perspective, *TJSL Research Paper No. 1478784*, PP. 1, 37

Privacy as a concept is regarded as a slippery notion, one that is often and easily used but with imprecise meaning.[21] Scholars define privacy based on the various state measures, mainly in human rights instruments, taken to safeguard privacy. In this regard, Koops and Leens identify three variants of privacy: *physical privacy*, *relational privacy* and *informational privacy*.[22] Physical privacy is the protection of people's bodies against any kind of invasive procedures such as body searches and sets the limits of intrusion into the home and other physical environments.[23] Relational privacy concerns the security and privacy of communications such as e-mail, phone correspondences and privacy of intimate relationships such as family life. Protection against collection and handling of personal data such as credit information, medical records is generally guaranteed by what is called informational privacy.[24]

Right to privacy is guaranteed in a handful of multilateral human rights instruments such as the Universal Declaration of Human Rights (UDHR)[25], International Covenant for Civil and Political Rights (ICCPR)[26], European Convention on Human and Fundamental Freedoms (ECHR)[27] and the American Convention on Human Rights (ACHR)[28]. Notably, the privacy provisions of ECHR and ICCPR have authoritatively been invoked in numerous cases before the European Court of Human Rights (ECtHR) and the Human Rights Committee respectively.[29]

Art 17 of the ICCPR, to which Ethiopia is a party, provides as follows:

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[21] Bert-Jaap Koops and Ronald Leenes(2005), Code and The Slow Erosion of Privacy, *12 Mich. Telecomm. Tech. L. Rev*. 115, P. 123

[22] *Ibid*, P. 126

[23] It appears that tax seizures are assessed in the context of this version of privacy.

[24] Koops and Leenes, *supra* note 21, P. 127

[25] UDHR, General Assembly Resolution 217 A (III) of 10 December 1948, Art 12

[26] ICCPR, General Assembly resolution 2200A (XXI) of 16 December 1966, Art 17

[27] ECHR, Rome, 4.XI.1950, Council of Europe Treaty Series, No. 5, Art 8

[28]ACHR, Pact of San Jose, Costa Rica, Art 11. It is to be noted that the African Convention on Human and Peoples' Rights doesn't, strangely, provide for the right to privacy.

[29] Unlike the ECtHR, the Human Rights Committee is just an oversight and complaint handling organ whose interpretation of the ICCPR may not be necessarily binding under international law. Moreover, complaints for breaches of the ICCPR are handled only where the country concerned is party to the first Optional Protocol to the ICCPR, and only upon exhaustion of domestic remedies. See, Lee A. Bygrave(1998), Data Protection Pursuant to the Right to Privacy in Human Rights Treaties, *Journal of Law and Information Technology*, Vol. 6, P. 248, citing Manfred Nowak(1993), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*(Engel), P. xix

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In General Comment 16, the Human Rights Committee stated that the right is required to be guaranteed against all such interferences and attacks whether they emanate from state authorities or persons and the state should adopt legislative and other measures to give effect to this prohibition against such interference and attacks as well as the protection of the right.[30]

The FRDE Constitution similarly guarantees the right to privacy. Art.26 of the Constitution partly reads:

(1) Everyone has the right to privacy. The right shall include the right not to be subjected to … [seizure of any property under one's personal possession].
(2) ….
(3) Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights [except in compelling circumstances and in accordance with specific laws] whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.

Pursuant to this article, the right to privacy belongs to everyone regardless of her nationality and it involves one's right not to be subjected, among others, to seizure of one's property under personal possession. However, the right is not absolute; it may rather be restricted in accordance with specific laws on certain compelling circumstances. The restriction can therefore be made only if two conditions are met – first, there must be compelling reasons necessitating the seizure and second, there must be specific laws authorizing such restriction for purposes stated thereunder.

Given the above conditions and scope of the right, it appears that the interplay between the tax seizure rules and right to privacy has to be assessed on a case by case basis. On top of having tax laws authorizing seizure it is highly

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[30] General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), 32 Session, 04/08/1988, Paragraph 1, available at http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd?Opendocument [Accessed on July 29/2012]

necessary to make the seizure only in those circumstances compelling the action. It is clear from the wordings of Art. 26 (3) that the two conditions are cumulative suggesting that any restriction has to be exceptional. Whether tax laws have those purposes should not come as a point of contention, recovering delinquent taxes might easily be thought as protecting the rights and freedoms of others to get public services which depend on public revenue. The question then boils down to what circumstances constitute "compelling" to justify seizure of delinquent taxpayers' property.

One may plausibly construe compelling circumstances to include those cases jeopardizing the collection of taxes. This construction hence would hold that a sheer existence of tax laws authorizing seizure and a mere default on the part of taxpayers cannot itself warrant the constitutionality of the seizure. Seizure should be undertaken only when delinquent taxes cannot be recovered in any other possible means without affecting the fiscal interest of the government.[31] This would dictate tax authorities to reserve tax seizure as a last resort measure in the enforcement continuum and to scheme other possibilities through which the delinquent taxpayer could discharge her tax liabilities.

Legislating possibilities of entering into installment agreements or agreements for the extension of period of payment between authorities and the taxpayer is one viable alternative. Such agreements help to keep the taxpayer focused in business and give a grace period to pay taxes over an agreed period of interval.[32] Other relief mechanisms such as grant of waiver of interests, penalty, requiring the taxpayer to furnish security for payment and, in certain circumstances, grant of remission of the tax liability should be exploited before resorting to seizure of taxpayer property.[33]

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[31] This point reflects the notion of *proportionality* by which any restrictive measure must be appropriate to achieve its objective. In relation to this, the Human Rights Committee noted that restrictive measures under Art 17 of the Covenant must be least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. See, General Comment 16, supra note 30, Paragraphs 14-15

[32] These possibilities are commendably schemed under the Ethiopian tax laws. Contrary to the promise to issue a regulation under Art 68(2) of ITP, a directive has been issued on agreement on period of payment. See, □□□□/□□□ □□□□ □□ □□□□/□□□ □□□□ □□ □□□□□ □□□□□□□ □□□□, □□□□□□ □□□□ □□ □□□□ □□□□□□ : 2001 E.C.

[33] ITP, under Art 42, gives the Minister of Ministry of Revenue (now the Director of Ethiopian Revenues and Customs Authority based on the transfer of rights and obligations under Art 23 of Procl. No. 58708) to grant waiver of tax liability to certain amount. It does also contain an enabling clause for enactment of detailed regulations/directives on the subject.

In this connection, views of the Human Rights Committee might give insight on whether a mere existence of a law authorizing interference (seizure in our case) would justify any interference with one's right to privacy. The Committee held that the term "unlawful" means that no interference can take place except in cases envisaged by law, which in itself must comply with the provisions, aims and objectives of the ICCPR.[34] It further stated that an arbitrary interference might take place even in cases where the interference is provided for under the law. It flows from this that arbitrary tax seizure that runs over other fundamental rights such as the right to property of taxpayers although mandated under the law might be in breach of Art 17 of the ICCPR.

Speaking of privacy implications of the tax seizure rules, one might consider the propriety of requiring judicial warrant before any act of seizure as it is the case in criminal matters. As alluded to above, the very fact that the tax authority is the sole decision maker whether there is a 'compelling' circumstance warranting seizure of property is a cause for concern. That the bureaucracy is hardly matured, prone to impropriety and less synchronized to win the confidence of taxpayers compounds the concern; or so I believe. In dealing with such situation requiring prior tax seizure warrant would be perhaps befitting. Of course, requirements of prior tax seizure warrants are also common in countries where the tax system is remarkably matured, developed, and where regard to basic rights of taxpayers is a paramount priority.

In the US, for instance, seizure of taxpayers' property violates right to privacy unless the tax authority (IRS) obtains a prior judicial warrant save the exception when seizure is made at public places.[35] This requirement was introduced by the Supreme Court of the US in *G.M. Leasing Corporation Vs United States* case in 1977.[36] It was direct application of the Fourth Amendment right of the US Constitution to tax seizures which has earlier been interpreted in the context of criminal searches and seizures. The Court stated that a judicial warrant is required for non-exigent tax seizures involving entry into and search of private premises.[37] Of course, the requirement has been made part of

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[34] See, General Comment 16, *supra* note 30, Paragraph 3

[35] 2nd American Jurisprudence: Federal Tax Enforcement (2001), Vol. 35 (Cooperative Lawyers Publishing Company), P. 20

[36] Erin Suzanne Enright (1988), Probable Cause for Tax Seizure Warrant, *The University of Chicago Law Review*, Vol. 55, No. 1, PP. 210-211

[37] *Ibid*, note that the exception to warrant requirements for seizures made in public places is justified on the basis of a rule called 'reasonable expectation of privacy'.

the Internal Revenue Code in 1998 when the Congress passed the third bill of taxpayer rights.[38] In the summary judicial proceeding to obtain 'tax seizure warrant', the IRS has to demonstrate a *probable cause* for the seizure. In addition, the application for the warrant must sufficiently be specific to enable the judge to make independent determination. Furthermore, the IRS has to sufficiently indicate in the application particular items of property that the government intends to seize.[39]

A slightly similar rule applies in Canada. To give an authorization of seizure, the Minister of National Revenue must certify that all or part of an amount payable has not been paid and register a certificate in the Federal Court of Canada.[40] What is peculiar about the Canadian law is that the tax authority would be required to obtain judicial warrant even in cases where 'collection is in jeopardy'.[41] Though complying with the routines of issuing notices of seizure and registering a certificate before the court can be derogated, the law still requires the prior judicial warrant before any collection action such as seizure. In so doing, the tax authorities would be required to demonstrate the existence of urgency justifying abrupt collection action.

This stands in contradistinction with the Ethiopian case where the tax authorities are rather exempted from issuing a notice to the taxpayer, let alone obtaining a judicial warrant, when they found out collection of taxes is in jeopardy.[42] All what is required of the tax authority is to make a demand for 'immediate payment of the tax'; upon failure or refusal, seizure without notification would be lawful. The ensuing question would be: 'how immediate is immediate?'. This provision appears to be very encroaching leaving taxpayers to no recourse. There is also a related privacy invasive procedure called jeopardy assessment whereby the tax authority may order the immediate blockage of taxpayer's bank account and have access to information thereof where it believes that the collection of the tax is in jeopardy to make

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According to this rule, no reasonable person expects privacy at public places, and hence, searches and seizure made there and then do not constitute invasion of privacy.

[38] IRS Restructuring and Reform Act of 1998, section 6334(e)(1)

[39] 2nd American Jurisprudence, *supra* note 35, PP. 20-21

[40] Li, *supra* note 1, P. 115; see also Sections 222-225 of Consolidated Canadian Income Tax Act of 1985, available at <http://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-365.html#docCont> [Accessed on July 19/2012]

[41] Section 225.2 of Consolidated Canadian Income Tax Act of 1985; see also, Li, *supra* note 1, P. 116

[42] See, Art 77(5) of ITP

immediate assessment of the tax for current period. It must then obtain a court authorization within 10 days from giving the administrative order.[43]

As it can readily be noted, the tax authority has to obtain judicial authorization *ex post* after having blocked the bank account and accessed personal data of the taxpayer. It doesn't really give sense what purpose that the judicial authorization is set to achieve after the fact, perhaps after the damage is done to the privacy of the taxpayer; nor is it clear what remedies are available to the taxpayer should the court reject the administrative order whose effect has already taken place. It would have been in line with the constitutional right to privacy had the judicial authorization were to be secured before the administrative order is given by the tax authority.

This and other points raised earlier give a convincing reason to incorporate prior judicial warrant requirement into our tax seizure rules. It is evident that such a legal requirement is pivotal in safeguarding the right to privacy of taxpayers. I argue that the judicial involvement in the tax enforcement venture adds a value in building trust and confidence of taxpayers, not to mention the benefits in inculcating transparency in tax administration. Generally, there seems to exist a better sense of trust by the general public towards court procedures, at least on such matters, than fully administrative measures; or so I feel. Little can be said on how tax seizures are handled at this point in time as tax foreclosure practices have not fully evolved; yet we do not have to wait for an influx of 'horror stories' of taxpayer abuse to introduce a protective measure.

In my conversations with tax authority officials few years ago on the propriety of introducing tax seizure warrants, they were very skeptical in that bringing the court again into the game would be rolling back to the previous hard times of collecting taxes. Judicial execution is not a favored candidate in the tax authority's menu of enforcement. I argue the other way. For one thing, since tax seizure warrants would be obtainable through summary *ex parte* proceedings, the trauma of inexpedient judicial enforcement is untenable. Tax seizure warrants could be secured as quickly as seizure warrants in criminal procedure are obtained. Secondly, one would be struck to notice the considerable commonalities between the tax seizure rules of the US and Ethiopia with the exception of tax seizure warrants requirements. Poor draftsmanship? Or perhaps hasty and inconsiderate transposition?! In conclusion, I suggest inclusion of tax seizure warrants in that judicial involvement would probably raise taxpayer confidence which in turn return

[43] See, Art 81 of ITP

with a rise in the rate of voluntary tax compliance. Concomitantly, it would assure full safeguard to the right to privacy of taxpayers in line with the Constitution and the ICCPR.

b. With One's Right of Access to Justice

The tax foreclosure regime also poses questions in connection taxpayer constitutional right of access to justice, a right enshrined under Art. 37 of the FDRE Constitution. As shall be seen below, there are not rooms for taxpayers to lodge complaints against irregularities and abuses committed in the course of foreclosure processes. Irregularities in the sending out notifications, in the actual seizure, undervaluation of seized properties and, more particularly, the way how the sale is conducted are likely to arise in foreclosure processes. Given that tax seizures are left to tax authorities with no judicial oversight whatsoever, the absence of any recourse to court in cases of possible abuses is worrying.

In line with Art 8 of the UDHR, Art.37 (1) of the FDRE Constitution reads:

> Every one has the right to bring a justiceable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power.

According to this constitutional provision, the right to bring one's matter to judicial bodies is the right of everyone so long as the matter is justiciable. While apparently crude and imprecise, no one would doubt that grievances in the course of tax seizures and sale constitute justiciable.[44]

In similar vein, the ICCPR guarantees the right to an effective remedy under Art 2 which partly reads:

(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative

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[44] The Black's Law Dictionary describes justiciable as 'a case or a dispute…capable of being disposed judicially'. Garner, *supra* note 5, P. 2530. The Human Rights Committee similarly describes 'justiciability' as those matters which are appropriately resolved by the courts. See, General comment 9, E/C.12/1998/24, The Domestic Application of the Covenant CESCR, Paragraph 15; available at <http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument#Notes> [Accessed on July 29/2012]

authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Although tax laws devise three levels of lodging grievances on tax issues, viz, 'review committee', 'tax appeal commission' and 'court of law', none of these allow taxpayers dissatisfied with the tax foreclosure proceeding to lodge their grievances. For instance, a taxpayer can present his grievances to the 'review committee' only to request 'waiver of tax liability' and/or 'compromise of penalty and interest'.[45] Similarly, appeal to the tax appeal commission is restricted only where the taxpayer has 'objection on the assessment of the tax'.[46] The last resort is the 'judiciary' to which a taxpayer can appeal only when he is dissatisfied with the decision of the tax appeal commission.[47] Therefore, it appears that one cannot resort to either to the administrative tribunals or courts upon dissatisfaction with the tax foreclosure proceedings.

Art 16(1) of the directive is the only provision that might seemingly give the right to lodge complaint against tax foreclosure processes which reads as follows:

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Yet, the scope of the right to present one's objection per this provision is limited to cases when the taxpayer raises objections that the seized property is exempt from seizure or/and attachment; hence no other objections have a place even administratively let alone judicially. Moreover, this same provision is not also clear as to whether the decision of the tax authority is final or not so that one can resort to courts. The right of access to justice does not however necessarily require the right to appeal to court; the Human Rights Committe has also stated the same position in that administrative remedies will in many cases be adequate in so far as rightholders have the legitimate expectation that administative tribunals would live up to the requiremnts of the ICCPR.[48]

Although not directly related with tax foreclosure, a very recent row between the tax authority and Yesu PLC might help to realize the magnitude of the legal

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[45] Art 105(1(a)) and Art 106 of ITP

[46] *Ibid*, Art 107(1)

[47] *Ibid,* Art 112(1)

[48] General Comment 9, *supra* note 44, Paragraph 9; whether there ever exists such reasonable expectation among taxpayers in Ethiopia is at best questionable.

ambivalence concerning the right to an effective remedy or appeal. In a criminal charge filed before the Federal High Court in April 2012, the tax authority accused Yesu PLC and *et al* for, among others, evading taxes, understatment/concealment of income and presenting false and misleading statement.[49] What is particularly to be noted is that the taxpayer(Yesu PLC) had not received an assessmnt notification until July 2/2012[50], hence unable to file an application to the Review Committee – to request compromise of penalty, interest and waiver of penalty – or the tax appeal commission to obeject the assessment. That a statement of taxpayer rights, which may presumably include right to appeal, must be part of the assessment notification under Art 72(7) of ITP, the reported failure on the part of the tax authority appears to be a dangerous erosion of the taxpayer's right of access to jusctice and due process rights. This incident is perhaps the tip of the iceberg in that many more irregularities may have passed unnoticed over the years.

In sum, it is safe to conclude that existing appeal procedures apparently limit the constitutional right of access to justice and must be reviewed to enable taxpayers appeal against possible mishandling of their rights before the courts and/or admistrative tribunals. This state of affair also adds a case for express recognition of taxpayer rights in either of the models of regulating taxpayer rights discussed below.

III. Models of Regulating Taxpayer Rights

Apart from the possibility of applying constitutional rights to tax purposes[51], there are differing approaches among countries in setting out specific taxpayer rights. One can generally identify four variant approaches in this regard.[52] The first approach, represented by the US, regulates the basic rights of taxpayers in a separate bill of taxpayer rights. The Congress of the US has issued a series of three taxpayer bill of rights over a decade. The first taxpayer bill of rights was issued in 1988 as part of the Technical and Miscellaneous Revenue Act which

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[49] Bezawit Bekele, Yesu Plc Appeals to Tax Auth's Review Committee, *Addis Fortune,* Volume 13, Number 638, July 29/ 2012; available at <http://www.addisfortune.net/Yesu%20Plc%20Appeals%20to%20Tax%20Auths%20Review%20Committee.htm> [Accessedon July 30/2012]

[50] *Ibid.*

[51] Elsewhere a range of constitutional rights are invoked in tax cases. In Canada, for instance, right to equality, right to non-retroactive application of the law, right to certainty of the law, right to freedom of conscience and religion have widely been invoked before tax courts. See, Li, *supra* 1 , PP. 128-134

[52] See generally, OECD Tax Guidance Series(2003), *Taxpayers' Rights and Obligations – Practice Note*

aims at increasing the awareness of taxpayers of their rights during controversy with tax authorities and enhancing procedural protection of taxpayers.[53] The law requires tax authorities to prepare and furnish taxpayers with relevant information which have been given to taxpayers as a publication called 'Your Rights as a Taxpayer' ever since.

The sequel bill came out in 1996 as taxpayer bill of rights II covering a range of issues including establishment of a position called 'Taxpayer Advocate' replacing the hitherto 'Taxpayer Ombudsman' and a requirement that the tax authorities(IRS) shall send delinquent taxpayers annual reminder of their outstanding tax liabilities.[54] Two years later the third bill of taxpayer rights was adopted containing, among others, a provision that prohibits seizure of taxpayers home without judicial approval in direct restatement of the decision of the Supreme Court in *G.M. Leasing Corporation Vs United States* case in 1977. In addition to these trilogy of taxpayer bills of rights, the Congress has issued other pieces of taxpayer bill of rights and it is still considering a bill introduced in 2010 which, according to reports, is not likely to get final imprimatur.[55]

The second approach provides for specific taxpayer rights in the tax law proper and details these rights in a non-binding declaration of taxpayer rights. Canada follows this approach where the basic rights of taxpayers are recognized in the Income Tax Act. The income Tax Act ever since its introduction in 1917 recognized the basic taxpayers' rights to privacy, confidentiality and the right to appeal decisions of tax authorities.[56] The Act has been supplemented by a 'Declaration of Taxpayer Rights' which is a non-binding charter of taxpayers' fundamental rights. The declaration is regarded as the response of the Canadian tax authority (Revenue Canada) to the Constitution (Charter of Fundamental Rights) and it basically reiterates the provisions of the Charter pertinent to tax matters.

The third approach simply sets forth general statements of broad principles which should govern the relationship between tax authorities and taxpayers. While such statements are often made part of the relevant tax legislation, in some countries they are included in documents that provide detailed guide to

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[53] Leandra Lederman(2000), Of Taxpayer Rights, Wrongs, and A Poposed Remedy, *Tax Notes,* P. 1134

[54] *Ibid.*

[55] Ibid, PP. 1134-35; For on going legislative intiatives on taxpayer rights in the Congress, see also <http://www.govtrack.us/congress/bills/112/hr6050> [Last Time Acessed on 27th July 2012]

[56] Li, *supra* note 1, P. 83

the rights of taxpayers at various stages of the tax assessment process.[57] In setting out only specific codes of conduct of employees of the tax authority, the Ethiopian income tax law seems to adopt this approach.[58] The list of codes of ethics requires tax officers to refrain, among others, from discriminatory, unfair treatment of taxpayers. Hence, *acontrario* reading of provisions dealing with codes of conduct of tax authority employees might be a source for certain statutory taxpayer rights such as the right to fair treatment by tax officers and right to equal treatment.

A related version of this approach is that taxpayer rights could be drawn from a list of responsibilities of tax authorities vis-à-vis taxpayers. A good case in point is duty of confidentiality of tax information. The tax authority is obliged to keep all tax information confidential except in certain conditions.[59] The disclosure is also qualified by the so called 'minimality principle' of data protection law according to which the disclosure of tax information must be kept to minimum necessary to achieve the purpose for which the disclosure is permitted. Hence, the duty of confidentiality of the tax authority gives taxpayers the right to confidentiality and protection of their personal data.[60]

The fourth approach includes statements about behaviors expected from officials and taxpayers in documents such as mission statements of the tax administration. Such an approach rarely features as the sole way of regulating taxpayers rights; it rather appears in tandem with either of the above mentioned approaches.[61] Except that such statements feature in legally non-binding media such as posters and that are often briefer in detailing those behaviors, they are closely akin to the third approach mentioned above. Despite the differing approaches alluded to above, rights of taxpayers are by and large similar.[62] These rights primarily include the right of confidentiality and privacy, right of appeal, right against unlawful searches and seizures, right to information, right to apply for waiver or cancellation of interests, penalties and other reliefs, right to security and rights of equality.

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[57] See, OECD Tax Guidance Series, *supra* note 52, PP. 3-4

[58] See, Art 40 of ITP

[59] *Id*, Art 39

[60] It is however to be noted that the duty of confidentiality provision is not repeated in the other major tax legislations. For instance the Excise tax, the VAT and Turnover proclamations skipped duties of the tax authorities including duty of confidentiality and instead enumerate obligations of tax payers and powers of the tax authority, alas!

[61] Indeed, it is to recalled that case law also significantly complements statutory laws elaborating taxpayer rights in a wide array of cases.

[62] See, OECD Tax Guidance Series, *supra* note 52, P. 3

As hinted above, Ethiopian law does not provide for a specific catalogue of taxpayer rights save a few general references with taxpayer right undertones in the tax laws. One relates with tax assesement whereby the tax authority has to give a brief statement of the taxpayer's rights in the assesment notification.[63] It is nevertheless unclear what rights of the taxpayer have to be included in the notification; nor do the consequences for failing to put the statement on the part of the tax authority. Given that appeal to the tax appeal commission is limited to the assessment *per se* (not on the elements of the notification), it unlikely that taxpayers would be entitled to object non-inclusion of their rights in the notfication. While it is praiseworthy that such statemens are mandated by the law, informing taxpayers about their statutory and constitutional rights beforehand, earlier before the statge of tax assessment, is always to be preffered.

The other reference to taxpayer rights is the 'taxpayer safeguards' provision in the enforcemnt rules which entitles delinquent taxpayers to get surplus proceeds from the sale of their property in tax sales.[64] Perhaps the other is a provision with a caption 'right to appeal' in the Stamps Duties Proclamation which entitles a person disatisfied with the decision of the tax authority in respect to the amount of the duty to appeal to the high court.[65] This is of course should we consider stamp duties as taxes in the fullest sense of the words, and the person charged as a taxpayer. Else, despite yielding a range of admirable modifications to the tax seizure rules, the working manual on collection of taxes also does not provide for express list of taxpayer rights.[66]

The Ethiopian government apires to increase the Tax-to-GDP to 17.1 % by the end of the five-year 'Growth & Transformation Plan (GTP)', i.e. in 2014/15 fiscal year.[67] It is rarely heard about plans to voluntarily engage taxpayers in whetting its obviously insatiable revenue apetite, however. Expectedly, the government is likely to engage in aggressive collection actions to live up to the

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[63] Art 72(7) of ITP

[64] Art 83 of ITP

[65]See, Art 9, A Proclamation to Provide for the Payment of Stamp Duty, Proc. No. 110/1998, *Fed. Neg, Gaz*., 4th year No. 36.

[66] It, for instance, elevates rights of taxpers to be duly notified by setting forth muliple phases of notification before tax seizure takes place starting from a phone call notification to twice written notices. See, the Manual, P. 53 *et seq.*

[67] Mahlet Mesfin, Tax Auth's Collections Beat Gov Goal, *Addis Fortune*, Volume 13, Number 638, July 22/ 2012; available at <http://www.addisfortune.net/Tax%20Auth%E2%80%99s%20Collections%20Beat%20Gov%20Goal.htm>[Accessed on July 29/2012]

widely advertised and fussed multi-million projects it launched in recent years, leaving rights of taxpayers at peril. As noted in the foregoing, the tax foreclosure regime is potentially encroaching as it currently stands. Worse, the aforementioned references to taxpayer rights are very crude, truncated and certainly inadequate to ensure fair and just treatment of taxpayers. It is doubtful if taxpayers would invoke their constitutional rights in controversies with authorities in the absence of clear statutory and administrative recognition of their basics rights. It would also be naive to expect harmonious, abuse free execution of tax seizures in the time to come in the face of unclear legislative guidance.

This state of affair necessitates explicite recognition of taxpayer rights in the interest of both taxpayers and authorities. In addtion to establishing a reliable and sustainable revenue source based on voluntary compliance, recognition of and respect for basic taxpayer rights uphold constitutionalism and rule of law. All of the approaches to taxpayer rights regulation disussed above might very well be fit in our case. The easiest way forward seems inclusion of specific list of taxpayer rights in the major tax laws such as income, value-added, turnover and excise taxes. On top of setting of the rights, channels of invoking those rights, manner of exercise and other related details must sufficienty be addressed in the relevant section of the laws. It must also be followed by deployment of various means to communicate these rights of taxpayers in very intelligible and plain language. One way of doing is regular publication and distribution of handy brochures to taxpayers about what they are entitled to as taxpayers, and of course, what is required of them as taxpayers.

Concluding Remarks

Inclusion of tax seizures in Ethiopian tax system ushered in a new frontier in relation to rights of taxpayers. That tax authorities are vested with the dual role of ordering and executing tax seizures in the venture to recover delinquent taxes is particulary a cause for concern. In the foregoing, the possible implication of the tax foreclosure rules on taxpayers' rights has been highlighted by taking the two most vurnerable constitutional rights of taxpayers as an example. It is pointed out that tax seizures must be resorted to only under exceptional circumstances and only where recovery of delinquent taxes is infeasible through any other possible means.

The tax authories must take a step in exhausting all possibilities through which the taxpayers could discharge their tax liabilities before subjecting their property to sale. With the view to espouse right to privacy of taxpayers, a suggestion to consider introducting tax seizure warrants has also been made. The limitation of the tax foreclosure rules in not providing possibility of bringing grievances has also been raised in light of the right of access to justice

of the FDRE Constitution. No recourse is apparently possible either to administrave tribunals or courts upon dissatisfaction in the foreclosure processes. In this regard, the laws have to be amended to enable taxpayers excercise their constitutional right to bring their case to courts and have effective remedy.

Emphasising on the pivotal role that due recognition of and respect for basic taxpayer rights for tax compliance, this note suggested for a specific attention to be given to taxpayer rights by express incorporatation of various taxpayer rights in the relevant tax legislations. In addition, these rights must be communicated to taxpayers in very plain language to impart what they are entitled to as taxpayers. This would be particularly very important in improving the natural scorny attitude of taxpayers towards the tax system; hence to breed the habit of voluntary compliance. The properiety of a specific tax payer bill of rights akin to the US series of taxpayer bill of rights might be considered.

Besides legislative measures envisaging basic rights of taxpayers, taxpayers should also campaign in concert for recognition and further protection of their rights. This could best be realized by organizing themselves in the form of associations or unions. It is doubtful if there is any association of taxpayers in Ethiopia as such except the Chambers of Commerce and Sectoral Association which rarely make moves on tax matters. Neighboring countries such as Kenya, Uganda and Tanzania have robust taxpayers' associations which are also members of the World Taxpayers Association, a Sweden based coalition of world's taxpayers associations.[68] The later has recorded myriad of successes in championing and lobbying taxpayers' rights and interests through various platforms. Ethiopian taxpayers, at least the heavy ones, may have to take the intiative in anchoring the way forward in this respect. There is also a role to be played by the media in bringing to limelight tax controversies which might otherwise remain unnoticed. The English weeekly Addis Fortune newspaper is perhaps the only medium in admirably paying attention to tax matters in general. Media attention to such cases ultimatly benefits both taxpayers in airing their grievances to a wider public and to the government in easily detecting impropriety of its tax officers.

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[68] Details on the World Taxpayer's Association is available at <http://www.worldtaxpayers.org/members.htm>; see also, <http://www.adamsmith.org/80ideas/idea/58.htm> [Accessed on July 15/2012]

LEGAL ADVICE AND INFORMATION IN MALAWI AND ETHIOPIA: ACCESS TO JUSTICE FOR POOR PEOPLE

By Gillian Long*

This reflection is a synthesis of two projects that set out to provide models of delivering legal advice and information to poor people in specific areas of Ethiopia and Malawi. Both projects were three-year, short-term programmes that attempted to address the issue of how to provide access to justice, especially for the poor living in rural areas. Using teams of trained paralegals to give one to one advice and information to people about their social, economic and civil rights, both projects began by establishing urban centres and from there extended their services to offer outreach clinics in rural areas. In Ethiopia the urban centres were in Addis Ababa, Hawassa and Adama and in Malawi, the peri-urban centres of Mangochi and Dedza were the starting points. Both projects had similar aims: to provide legal advice and information and access to justice to poor people; to raise awareness of human rights and the law and to use information from the client base to provide feedback to Government on gaps in the law and highlight areas for improved implementation. Both projects demonstrated that there are cost effective ways of delivering legal aid and that it is possible to provide services in both urban and rural areas. Government commitment to adequate funding and to quality assurance is what is required to support effective scaling up.

The experience of both projects highlights some valuable lessons that contribute to the design and planning of legal aid services. Whilst more has been written about the criminal justice system and most attention in the design of embryonic legal aid services is focused on criminal matters[1], these projects specifically set out to provide legal aid and information on civil issues. That is not to say that legal aid for criminal cases is unimportant, simply to point out that there were specific reasons for the focus on social, economic and civil rights. The reasons are three fold: the understanding of poverty as a lack of human rights; the links between instituting the rule of law and development and the changing nature of society in which social and economic rights come to the fore.

Both projects were conceived within the framework of a rights based approach to poverty reduction that is the understanding that focusing on rights and access to justice is fundamental to addressing poverty. This approach sits

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[1] Access to legal aid in criminal justice systems in Africa, UN Report 2011

within the concept of poverty as a multidimensional problem. Although lack of income is an underlying feature, it alone does not describe or provide the reason for poverty. For instance, lack of health care may lead to ill health that leads to lack of ability to earn a living. The multi dimensional approach may encompass, lack of education or health or the inability to participate in society or lack of dignity. This thinking owes much to the work of Sen and his understanding of poverty as a "deprivation of basic capabilities rather than merely lowness of incomes."[2] Whilst Sen does not use the language of human rights, development practitioners have used his analysis and his emphasis on freedoms and capabilities to view poverty as a denial of human rights, for example, the right to freedom from hunger, to an adequate standard of living, to health and to education. Using the principles of human rights, the approach emphasizes universality, indivisibility, equality and non-discrimination, participation and inclusion, accountability and the rule of law.[3]

A reading of poverty reduction strategies in the last decade reveals the increasing emphasis on good governance and democracy as underlying, enabling factors for development. An essential part of good governance is acceptance of the rule of law. While this may be variously defined, essential elements are that decisions are made according to sets of publicly agreed rules, that no-one is above the law and that principles of generality, equality and certainty protect the rights of the individual. The World Bank cites the rule of law as one of the key indicators of good governance: "(the) extent to which agents have confidence, abide by the rules of society and in particular the quality of contract enforcement, the police, the courts as well as the likelihood of crime or violence."[4] But how is the ordinary citizen to exercise his or her right to be treated fairly under the law without knowledge of what the law says and without being able to seek redress. Legal advice and information on civil and criminal rights are essential to expanding the rule of law and ensuring good governance.

Throughout the world societies are changing rapidly and this brings new challenges: recognition of gender equality and the rights of women brings with it a rising divorce rate, issues of child custody and maintenance and challenges to deeply entrenched traditional practices about women's role; the industrialization of agriculture and privatization of landconfront customary

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[2]SenAmarta, Development as Freedom, 1999.

[3] See, for example, Human Rights and Poverty Reduction: A Conceptual Framework, OHCHR, 2005

[4] Kaufman D et al, Governance Matters VI Governance indicators for 1996 – 2006 World Bank Policy Research Working Paper number 4280

practice in land ownership and inheritance; urbanization brings people to work in cities where the conditions of work determine the well being of the employee.

Rural populations are dependent on land as a source of livelihood; women burdened with the responsibility for care for children and family need maintenance on separation or on the death of a spouse; once domestic violence is recognized as a crime, women need protection and globalisation and the ease of modern travel brings benefits but also the threat of trafficking and exploitation of labour. These are all real examples of how social and economic rights affect the well being of the poor and why legal advice and information and access to justice are crucial to addressing poverty.

However, the task of providing access to justice is large. In Ethiopia where 38.9 per cent of the population and in Malawi where 52.4 per cent live below the national poverty lines, the vast majority of the population cannot afford the services of a lawyer.[5] The scarcity of lawyers also puts legal advice well beyond the reach of most. Ethiopia with a population of some 81 million has only one lawyer for every 20,250 people and in Malawi the ratio is 1:37,500. Provision for legal aid is primarily focused on criminal cases. Ethiopia reports: "minimal legal aid service in many criminal cases (and) "understaffing in the office of the defence council".[6] What legal services are available are concentrated in urban areas and focus on criminal issues. When over 80 per cent of the population in both countries live in the countryside, this makes nonsense of the idea of access to justice. The challenge, therefore, is to devise a system that can offer legal advice and information on the issues that affect ordinary people's daily lives and to make such a service accessible geographically.

Both projects set out to try to provide models of working that would meet this challenge. The actual process of what they did and how they worked is described in more detail in two small booklets.[7] Here I intend to focus on some of the issues and lessons learned from both of the projects which can help to inform the provision of legal services. The key issues which I will address are: reaching the rural populations; voluntarism and support for volunteers; quality

[5]World Bank data: http://data.worldbank.org/country/malawi; http://data.worldbank.org/country/ethiopia

[6]Access to legal aid in criminal justice systems in Africa, UN Report 2011

[7] Long G, 2011, Legal advice and information in three regions of Ethiopia: a practical guide and Long G, 2012 Rights advice centres: a practical guide to providing legal advice and information services in Malawi. See www.activelearningcentre.org

control of information and advice; sources of information; principles and building client trust; and local ownership and using traditional justice mechanisms.

Both projects adopted a similar basic model of recruiting and training paralegals and deploying these volunteers first in the urban centres and then in the rural areas. Each centre employs a manager whose responsibilities include devising ways of organising and managing legal clinics or outreach services in the rural areas. Training of the paralegals and provision of accurate and accessible information is crucial in ensuring the quality of advice but selection of paralegals is also important in establishing outreach in remote communities.

In Ethiopia the presence of universities in the urban centres enables the project to use law students and community representatives, while in Malawi where the only university teaching law is in Zomba, the project relies on recruiting community activists. Both models bring separate benefits. While law students have a basic understanding of the law and some technical expertise as well as considerable literacy skills, community activists speak local languages and have local connections that can build community trust as well as a clear understanding of local customs and practice that may be in contravention of the law. In Malawi, where some of the outreach centres are about two hours travelling from the urban centres on unmade roads, the model was to recruit paralegals for training from the rural outreach communities. The recruits would be people with sufficient literacy skills, for example, the local school teacher. Both projects use selection procedures to determine whether candidates have the potential to undertake training and to adhere to the principles of confidentiality and non-discrimination which are fundamental to the service.

Considerable resources were spent in both projects on writing legal manuals which can be used by non-lawyers but which are sufficiently detailed to deal with the most common legal problems. Writing legal information using non-legal language is an expert task. Instead of writing 'cut down versions' of the law, which have a tendency to mislead or exclude necessary detail, a problem-centred approach was used, arranging the information under the key questions that a client might ask. Typically people do not ask: 'What does section 7 of the Employment Act say?' rather they ask: My boss has just sacked me – can he do that?' Budgets also have to be generous enough to ensure regular updating: information and advice must be accurate and current. The basic manuals were also extended to include citations and case studies that would assist accurate interpretation by the paralegals. In Ethiopia translations were made from the

original Amharic into Oromifa and Sidama but in Malawi, where English is the language of the law, specific legal terms were translated into Chichewa to prevent misinterpretation.

Training is possibly the most expensive part of the operation and in order to ensure a regular supply of volunteers has to be run on a regular basis. Our experience demonstrated the benefits of participative methodology, the production of self-study units which can be used by volunteers as refresher training and the inclusion of skills training on the principles of legal advice work, interviewing, using the legal manuals and alternative dispute resolution. In-service and update training are regular features as is a compulsory period of induction which in the Malawi project includes self study by observing an experienced paralegal and a series of visits to courts, the labour office and the victim support units to understand the procedures of different partners in the justice field.

Various places became homes for the rural clinics. In Malawi trading centres, usually the market town for a traditional authority area, are the most favoured option where for very little money a basic room can be hired to provide a space for client interviews. Here the trained paralegals drawn from the area open two or three days a week and operate a rota system. In Ethiopia a market town outside of Hawassa was selected as well as rural kebeles on the outskirts of Adama and Addis Ababa. But other ways of ensuring access to people living in the countryside are also employed. One outreach clinic in Hawassa is sited in the Sidama region appeal court and a further one in a rural woreda court at Dore Befana. Clients whose cases have already been referred to a court can then receive the benefits of advice on procedure and presenting a case before appearing before a judge. The President of the Sidama High Court commented on the enormous benefits that this advice gave clients in conducting appeals. Similar experiments are now being tried in the Malawi project in the magistrates courtsand they are also piloting providing outreach services by using the premises of other organisations, for example, running a regular advice session in the local community based organization working with people living with HIV.

Volunteer paralegals receive payments only for expenses. Critics suggest that volunteers are unlikely to provide a consistent, quality service. We put in place a number of measures to try to ensure quality standards. It was made clear to all volunteers on selection that they would be expected to work for a minimum of 5 hours a week and on completing their training all are required to sign a statement acceptance of the principles of nondiscrimination and confidentiality. We have produced volunteer application forms, selection

procedures and job descriptions which specify what the volunteer will be required to do and what supports she /he may expect in return.

The main tools for ensuring standards are regular support from the managers and the use of case records. The case recording system requires paralegals to complete social information about the client (with the client's permission) which gathers useful data about client groupings and their typical problems; to summarise the client's case and also provide a brief account of the advice given including the paragraph numbers of the legal manuals referred to. Whilst this is not a fool proof system, it does allow centre managers to regularly check the case record and, if necessary, correct any mistakes. This is a relatively easy procedure in the urban centres but in the outreach services entails regular visits by the manager to provide support and to check case records. Our experience has shown that a mobile phone per outreach (with a monthly credit allowance) and motor bikes for the centre managers are essential. The mobile phone allows the paralegals to consult with the centres where full legal texts are held in addition to the legal manuals and to receive guidance from the centre managers.

A set of principles that specify the values underlying the services offered were adopted by both projects, namely the service would be free, confidential, independent, impartial (non-discriminatory) and empowering. Confidentiality is fundamental but particularly so when offering a service to a small community which is to be run by members of that same community. Independence is also vital in building community trust. People need to be confident that the service is independent of government control. The principles of the service being 'free' and 'non-discriminatory' in terms of who may receive help have the potential to conflict with the project's aim to assist the most vulnerable and the poorest, namely: women, people with disabilities, those living with HIV/AIDS, the young and elderly.

However, means-testing, a measure most frequently used in developed countries to target services on the poorest is not easily applicable in countries like Ethiopia or Malawi where there are few measures of low income.[8] Instead the projects try to target the most vulnerable in different ways: by developing local advisory committees for the centres and outreach clinics with representatives from the vulnerable groups; through advertising via local

[8]Much has been written about the problems of means-testing in developing countries and therefore the need to adopt a universal approach to providing services. See, for example, S Kidd, Child Poverty in OECD Countries: Lessons for Developing Countries, Pathways' Perspectives, Number 2

CBOs and by recruiting paralegals from the most vulnerable groups. In both projects, as a matter of policy, half the paralegals are women. Disabled paralegals encourage others and in one outreach a paralegal who is also a sheik has proved invaluable in enabling the centre to offer a service to Moslem women. The value of empowerment relates directly to the way in which paralegals are trained to offer advice and information. The purpose of the exercise is to offer accurate and relevant information and to set out the options available; it is the client's right to decide on a course of action.

The local advisory committees established for each outreach service have also proved effective in providing an interface with the custodians of traditional justice. In Malawi, in particular, where the system of traditional justice is deeply entrenched, recruiting the local chief and village headmen onto the committee acknowledges their status within the community and legitimizes the project. The effort has been to encourage the chiefs to make use of the legal manuals and the expertise of the paralegals so that when chiefs dispense traditional justice they do so with the benefit of the knowledge of statute. Training in alternative dispute resolution skills also helps paralegals to assist in mediating with traditional authorities, representing and negotiating on behalf of clients.

The statistics for both the Ethiopian and Malawi projects demonstrate a steady rise in demand as the services become known. In Malawi in particular, awareness-raising sessions are held to talk to communities about rights issues and advertise the presence of the centres and outreach services. In both projects, use is made of radio phone-ins, discussions and drama programmes about legal issues and posters and information leaflets increase public knowledge of the law and link people to the rights advice centres. Interestingly the figures show that demand for service is as high in the countryside as it is in urban areas.

Advocacy is also a feature of both projects, the case records providing evidence for a series of briefing sheets aimed at government officials and justice sector personnel. Each of these briefing sheets focuses on the common legal problems faced by clients on specific legal issues and points out gaps in the law or failures in implementation. The Malawi Law Commission, responsible for making recommendations to government on legal change, has written commenting that these briefing sheets are extremely useful.

The International Covenant on Civil and Political Rights, to which Malawi and Ethiopia are signatories, states the right of a person "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means

to pay for it." The challenge is for governments to see how to fulfill that obligation. Malawi's recent Legal Aid Act, 2010, goes a long way towards this by recognizing that legal assistance should extend to both criminal and civil cases but that legal aid is not simply about lawyers appearing in court but should encompass a wide range of activities including legal advice, assistance, education and alternative dispute resolution. As the Malawi Government moves to develop a strategy for delivering the new structure of an independent Legal Aid Bureau with regional and district legal assistants, it also acknowledges the importance of non-lawyer services. Civil society organisations are to be actively involved in delivering the new structure and extending the scope of legal aid operations. It is a model that recognizes, as the Lilongwe Declaration notes: "the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants."[9]

Whilst this is a step forward there are still considerable challenges to overcome: how are quality of service and uniformity in provision to be achieved? How are civil society organisations to be funded to deliver legal aid services? The pilot projects in Malawi and Ethiopia have demonstrated that it is possible to run cost effective and efficient ways of delivering legal advice and information and it is possible to envisage the growth of a network of civil society organizations who can contribute to expanding services. But professional standards need to be established and maintained. Our experience suggests that there needs to be agreement and collaboration over supply and sources of legal information, common principles to be adopted by legal aid providers, standards of training and of delivery of legal advice. These standards need to be agreed and quality assured by a central body to ensure that scaling up and taking on board other providers does not imply degradation of service. This will require both regulation and adequate finance. Poor people don't deserve a second rate service. They have a right to a quality service that will deliver access to justice. It is this challenge that governments must meet.

[9]The Lilongwe Declaration on Accessing Legal Aid in Criminal Justice Systems in Africa 2004, and Plan of Action were both adopted by the African Commission on Human and People's Rights in 2006 and the UN (ECOSOC) in 2007 (2007/24). The UN Principles and Guidelines 2012 cite the Lilongwe Declaration and broaden the definition of legal aid.

ETHIOPIA'S FIRST NATIONAL HUMAN RIGHTS ACTION PLAN: AN OVERVIEW *

By: Abraham Ayalew **

Ethiopia is now on the verge of adopting its first National Human Rights Action Plan. The Action Plan addresses a recommendation of the Vienna Declaration and Programme of Action, adopted at the second World Conference on Human Rights in Vienna in 1993. The Vienna Declaration requested "each state consider the desirability of drawing up a national action plan identifying steps whereby that state would improve the protection and promotion of human rights."[1] For this purpose, the United Nations Office of the High Commissioner for Human Rights (OHCHR) prepared a handbook to guide states considering the preparation of national human rights action plan.[2] The recommendation to draw up national human rights action plans was adopted as a result of a proposal from Australia, which was also the first country that elaborated the preparation of a human rights action plan.[3] It adopted its action plan in 1994 and continued the cycle since then.[4] By now

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* The Human Rights Action Plan considered here is a document that was unanimously approved by the Council of Ministers in December 2012 and distributed at the Conference for International Partners held on March 5, 2012. The document has been transferred to the House of Peoples Representatives since then. The House is expected to endorse the document shortly; it has already conducted the first reading in plenary and forwarded it to the Law and Administrative Affairs Standing Committee. Nonetheless, the document shall still be binding within the federal executive organs as it is adopted by the Council of Ministers.

** M Phil, LL.B. The writer has served as a Secretariat of the National Coordination Committee representing the Ethiopian Human Rights Commission (EHRC) in the course of the preparation of the action plan. While the writer is grateful to the EHRC for the permission to use records for the preparation of the Action Plan, all assertions are of the writer's and not of the EHRC or any other institution or committee.

[1] Vienna Declaration and Program of action A/CONF.157/23 (12 July 1993) *available at* www.unhchr.ch/huridocda/huridoca.nsf/.../a.conf.157.23.en The Vienna Declaration and Program of Action was adopted unanimously and has a persuasive value in terms of moral obligation though it is not legally binding.

[2] Handbook on National Human Rights Plans of Action:- Professional Training Series No. 10, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, UNITED NATIONS, New York and Geneva, 29 August 2002.

[3] Ibid. p. 11

[4] Ibid.

more than thirty countries across all continents and all levels of development have prepared national human rights action plans.[5]

After two decades since the World Conference, Ethiopia is to adopt a national action plan, which is the first of its kind to the country; hence it is important to see the reasons for Ethiopia to adopt the action plan. In addition to the call of the 1993 Vienna Declaration to adopt a national action plan by all states, Ethiopia received a specific recommendation to adopt a NHRAP during the deliberations of the Universal Periodic Review (UPR); the recommendation was fully accepted by the government.[6] Moreover, the Growth and Transformation Plan of 2003-2007 E.C. (GTP), which is the state's single most important policy document, has set, as one of its goals, good governance and consolidation of democratic system. An indispensable component of the latter (good governance and democratic system) as recognized in the policy document is protection and promotion of human rights.[7] Though most specific developmental policies and strategies of the government introduce human right values, it is believed that Ethiopia has not had a comprehensive policy or strategy dealing with human rights (apart from general constitutional rights and freedoms). As a result, the GTP makes no mistake in explicitly indicating the preparation of National Human Rights Action Plan (NHRAP) as one of the major activities in the Policy Matrix.[8]

The process of developing the NHRAP, however, got momentum when the EHRC in cooperation with the Ministry of Foreign Affairs (MoFA) and the OHCHR East Africa Regional Office organized a 'National Consultative Workshop on the Development of NHRAP for Ethiopia' on 15 March 2010.[9] Another consultative workshop on the recommendations under the UPR-Ethiopia indicated in one of its resolutions that the process of developing a NHRAP should be commenced under the supervision of a steering committee

[5] Action Plans in other countries at http://www.scottishhumanrights.com/actionplan/othercountries , visited on March 12, 2013.

[6] UPR Recommendation on Ethiopia no 3 forwarded from Canada and accepted by the government of Ethiopia available at The Universal Periodic Review Information Website at http://www.upr-infor.org visited on March 12, 2013.

[7] Federal Democratic Republic of Ethiopia, Growth and Transformation Plan 2010/11-2014/15 p. 104

[8] Ibid p. 28

[9] Conference Minutes, 'National Consultative Workshop on the Development of NHRAP for Ethiopia' on 15 March 2010. During the conference government institutions, civil society organizations and international agencies were in attendance.

composed of Federal and Regional government officials.[10] The resolution assigned MoFA as the responsible government organ in the overall process of developing the NHRAP. The EHRC on the other hand was assigned to monitor the implementation of the resolution and provide technical assistance to MoFA in the latter's mandate of developing the NHRAP.[11] In addition to its technical assistance, the EHRC was to serve as a secretariat.[12]

Since the workshops, the EHRC had held bilateral consultations with different stakeholders principally with MoFA. During the consultations, the process came to the attention of the Prime Minister's Office, which made relevant changes on the composition of the steering committee.[13] According to this amendment, Ministry of Justice is handed over the chairmanship of the Steering Committee; Government Communication Office and Ministry of Federal Affairs were included as members of the highest body.[14] A direction on the timeline of activities was also given when it was decided that the action plan be drafted in six months.[15] The changes were later incorporated into the roadmap and the terms of reference for the committees.

Generally, there are five broad steps that need to be taken in the preparation of a NHRAP. These are the *preparatory phase*, *development phase*, *implementation phase*, *monitoring phase*, an *evaluation phase*.[16] Only the first two steps are complete so far and the discussion here will be limited to the two.

Preparatory Phase

The preparatory phase is composed of consultations and discussions held between and among relevant stakeholders to inculcate the idea of development of a NHRAP through the decision of the highest government organ. This phase

[10]Resolution of the Conference, National consultative workshop on the recommendations Ethiopia has accepted under the UPR, November 2010, Addis Ababa, Ethiopia

[11] Ibid.

[12] Ibid.

[13] In a letter from the Office of the Prime Minister dated 20 July 2003 E.C which established the structures for the preparation of the action plan it was indicated that the Ministry of Foreign Affairs has written a letter to it on June 14, 2003 E.C

[14] Ibid.

[15] Minutes of the launching of the Human Rights Action Plan preparation, August 26, 2003 E.C. The drafting of the action plan, however, took more than what was intended as it has already been a year and half before the document gets endorsed by the Parliament since the meeting was chaired by the then deputy premier and current prime minister.

[16] Op. cit. 2 at p. 41

also incorporates the setting up of structures and committees that actively oversee and engage in the preparation of the document.

In this regard several discussions were held regarding the preparation of the action plan involving the EHRC, the government being represented by different ministries, and the OHCHR. These consultations resulted in a roadmap outlining the development process of the action plan. The EHRC afterwards wrote a formal letter with the roadmap attached to the MoFA requesting a formal decision to start the development process.

Following this request, a letter was sent from the Prime Minister's Office to relevant government offices (copied to the EHRC) indicating the decision of the government to develop the action plan.[17] In addition to communicating the decision, the letter highlighted the structure, the institutions to be involved and the process to be followed in the preparation.[18] The letter, among others, provided direction on the structural arrangement of the preparation process and called for a meeting of the representatives of the Steering Committee.[19] This meeting was the official launching of the preparation of the action plan attended by ministers representing the Steering Committee and chaired by the then Deputy Prime Minister (currently Prime Minister). The letter, the launching meeting and the Steering Committee put the structure for the preparation of the action plan.

The Structure

1- **National Steering Committee**: At the highest level of the preparation, a National Steering Committee to lead and provide guidance of the overall preparation process was setup. This Committee was chaired by the Ministry of Justice and deputized by MoFA. The Ministry of Finance and Economic Development, Ministry of Federal Affairs, and the Government Communication Office were appointed as members. The Ethiopian Human Rights Commission was called on to serve as Secretariat. The representatives of these organizations who served in the Committee were all at ministerial level. Thus the Minister of Justice was the chairperson and the Chief Commissioner of the EHRC served as Secretariat while all the other institutions were represented by State Ministers. The fact that this Committee was composed of ministries represented by high officials is evident of the political will of the Government, which is a necessary

[17] Letter from the Office of the Prime Minister to members of the Steering Committee dated 20 July 2003 E.C
[18] Ibid.
[19] Ibid.

prerequisite in the preparation of a NHRAP.[20] It also indicated the importance and seriousness of the decision in providing political guidance and calling attention from all stakeholders including the media and the public.

2- **National Coordination Committee**: Below the Steering Committee lies a National Coordination Committee to ensure wider participation and effective coordination across a range of federal and regional government organs. This Committee had about 200 members chaired by the State Minister of Justice embracing the Vice Presidents of the nine regional states and deputy mayors of the two city administrations, heads of relevant bureaus of regional governments, representatives of federal ministries, law making bodies, the judiciary, representatives of civil societies, the OHCHR, and other independent organs. To run the day to day business of the Committee, an Executive Committee was set up from among the members. The Executive Committee replicates the structure and organs of the Steering Committee and adds senior officials from the Ministry of Women, Children and Youth and the Ministry of Labor and Social affairs as members. Although this committee was setup to guarantee participation and coordination, it is yet another indicator for the prevalence of wider political will in the preparation process.

3- **National Human Rights Action Plan Office**:- The establishment of this office at the EHRC was called for as instrumental in the process of the drafting of the action plan. This office was composed of a head who is also a director at Ministry of Justice, three experts seconded from the Ministry of Justice, MoFA, and the EHRC; four experts recruited solely for this purpose and other administrative staff. The overall mandate of the Office was to draft the action plan and present it to the tiered committees.

4- **Team of consultants**:- The Steering Committee has later decided on the inclusion of high level consultants to assist the experts in the Office of the action plan. As a result five consultants pulled from various government offices and academia were appointed.

5- **Media and Communication wing**:- Through the preparation process the Steering Committee also gave direction for the establishment of a media and communication wing to serve as a channel of communication on the preparation of the plan. [21] This was chaired by the executive committee member of the National Coordination Committee representing the

[20] Op. cit. at 2 p. 43.
[21] Minutes of the Steering Committee

Government Communication Office embracing two members who are Directors of Communication at the Ministry of Justice and the EHRC.

Developmental Phase

Consultative meetings and Baseline

After the preparatory phase, the *developmental phase* is where substantive issues are considered to be part of the plan. The process of developing a human rights action plan is as important as the document itself and consultation among stakeholders is vital.[22] Cognizant of this and as a result of necessity in both the preparation and development process, quite numerous meetings and consultations were held among stakeholders.[23] The fact that there had numerous consultations at different levels including the general public can be considered an important process indicator that the preparation complied with accepted standards.

The Steering Committee and the Executive Coordination Committee held several meetings to guide the process. Thus there were over fifteen meetings of the NSC and the executive of the NCC. What is more, the National Coordination Committee (NCC) in its totality had also two national colloquiums that discussed the process and content of the action plan. The NCC members also had meetings within regions and with the Office to discuss and provide objective data and information for the document. The National Coordination Committees in regions and city administrations each nominated nine focal persons, who were trained on human rights in general and the preparation of action plan. The focal persons were later helpful in colleting and transferring information to the Office of the Action Plan. The Office has also held consultations with civil society actors, the media and the general public in each region and the two city administrations. Besides, an invitation through television and other media outlets was announced for any individual, business or charitable organization to submit views, suggestions and information for the

[22] Op.cit 2 at p. 56. It is stated in the document that the process is important because it will determine 1- The extent of political support for the plan; 2- The extent to which relevant government agencies and NGOs are effectively involved; 3- Whether there is sufficient interaction between the various actors to ensure that the plan derives full benefit from their varying insights and perspectives; 4- How widely the plan is recognized and supported by the general public; 5- How effectively the plan is monitored.

[23] Presentation of the Minister of Justice, Workshop on Ethiopia's Human Rights Action Plan for International Partners in Ethiopia, Hilton Hotel, March 5, 2013.

process and the document.[24] Valuable information has been documented via email, telephone or personal conversations held with the Office of the action plan.[25]

Objective, Coverage and Content

A very simple and generalized purpose of a NHRAP is to improve the promotion and protection of human rights in a particular country.[26] Within this general purpose the goal of the Ethiopian action plan is "to come up with a comprehensive and structural means for the better respect, protection and promotion of the fundamental human and democratic rights recognized under the FDRE constitution"[27] Restating this goal as the main objective too, the document outlines the specific objectives of the action plan as follows:[28]

- *Indicate the strategic guidelines to promote human and democratic rights in the country;*
- *Set forth a comprehensive, structural and sustainable strategies to respect and protect human rights in the coming three years;*
- *Define means to raise public awareness of human rights;*
- *Indicate strategies on how the government could work in collaboration with NGOs legally allowed to work on human and democratic rights, development partners, civil societies and other international stakeholders.*

In terms of scope it is well stated that a national action plan need to be broad in keeping with the indivisibility of human rights.[29] In this regard the action plan can claim to *address in detail the issue of civil and political rights, economic, social and cultural rights, rights of vulnerable groups (women, children, elderly, persons with HIV/AIDS and persons with disability), rights to clean environment and right to development.*[30] This is significant as it reinforces the interrelation, interdependence and indivisibility of rights.

Within this scope it covers a wide range of topics in six chapters in addition to a prelude to the preparation. The first chapter under the title *The Foundations of Human Rights Protection in Ethiopia* assesses the form and structure of government, the legal framework for human rights protection including the Constitution, international human rights instruments and the institutional

[24] The Federal Democratic Republic of Ethiopia: National Human Rights Action Plan, 2013-2015, Draft Unofficial Translation. p. 10.
[25] Ibid
[26] Ibid p.9
[27] Ibid P. 6
[28] Ibid.
[29] Op. cit. 2 at p.73
[30] Op. cit. 25 at p. 10-11

framework including national institutions. This chapter tries to give a baseline for the action plan by describing the human rights situation in the country through analysis of human rights laws and institutional actors. In identifying the level of achievement as a baseline and proposing the action plan the following documents were used as sources:[31]

- federal and regional Constitutions;
- government policies, laws, strategies, programmes and the national growth and transformation plan;
- federal and regional offices action plan and performance report;
- official government data and statistics;
- research publications of government organs;
- ideas and opinions from the proceedings of conferences;
- information from civil society
- recommendations of Universal Periodic Review;
- Ethiopian Government reports submitted to UN and AU Human Rights bodies and the corresponding feed-backs.

The second chapter entitled *Civil and Political Rights* delves on the actual action plan. This part includes right to life, right to the security of persons and prohibition against inhumane treatment, rights of arrested persons, persons held in custody and convicted prisoners, rights of the accused, access to Justice, right to freedom of opinion, thought and expression, freedom of association, and freedom of religion and belief.

The third chapter deals with economic, social and cultural rights. Under this broad chapter, the rights to food, health, education, work, housing, clean water, social security, and culture are dealt with. The next chapter addresses issues related to the rights of vulnerable groups. As such rights of women, children, persons with disability, persons living with HIV AIDS and the elderly are dealt at length. The fifth chapter covers environmental rights and right to development. Thus four chapters of the document are devoted to explain substantive rights having specific action plans.

The last chapter looks at implementation, monitoring and evaluation of the action plan. The topics covered are implementing procedure, implementing institutions, performance plan, awareness creation, the role of development partners, donor organizations and civil society, the role of national human rights institutions, expansion of human rights education and monitoring and evaluation procedure. Most importantly this part identifies the five pillars to be designed for implementation of the action plan:[32]

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[31] Ibid

[32] Ibid at p. 171

- inclusion in the implementing institutions' performance plans;
- creation of awareness of the Action Plan;
- collaboration with the development partners and civil associations, and public participation;
- utilization of the National Human Rights institutions; and
- human rights education

Role of the Ethiopian Human Rights Commission

The Ethiopian Human Rights Commission (EHRC) is an independent organ established to ensure that the freedoms and rights guaranteed under the Constitution and other international human rights instruments are enforced. For this purpose, the EHRC has been bestowed with an adequate powers and responsibilities. The most relevant of these being that the EHRC can advise the government to come up with policies and strategies or submit draft legislations.[33] As a result, the EHRC may draft an action plan and submit it to the legislature for adoption. This would however lack meaningful participation which is a basic requirement in the preparation of action plans. Thus it is very important that the EHRC took the initiative with the MoFA and the OHCHR to first sensitize the preparation of NHRAP and later accept the request to serve as a Secretariat at the developmental stage.

National Institutions play a significant role in the preparation of action plans in a different manner and need to take part at all levels. However the participation of national institutions in the development of action plans has not always been the same. The South African National Human Rights Commission took the initiative to develop the human rights action plan by calling a national conference.[34] The Philippines Human Rights Commission was the designated organ responsible to coordinate the implementation of the action plan.[35] The New Zealand Human Rights Commission has a different experience. By virtue of its mandate, it has prepared an action plan and submitted to the government for implementation.[36] The role taken by the EHRC is very much similar to the South African one. Albeit the EHRC took part in the initiation of the action plan, it has maintained its functional difference with the government; hence the

[33] Proclamation 210/2000, EHRC Establishing Proclamation, Article 6.
[34] Op. cit. 2 at p. 51
[35] Ibid.
[36] The Human Rights Act of New Zealand describing the functions of the human rights commission reads that the Commission has a function "to develop a national plan of action, in consultation with interested parties, for the promotion and protection of human rights in New Zealand".

actions in the document predominantly impose obligations on the government. The EHRC is entrusted with a mandate to monitor and follow up the implementation of the action plan in addition to serving as Secretariat to the proposed Ethiopian National Human Rights Action Plan Affairs Coordinating Committee that will oversee the implementation of the action plan.[37] The EHRC is also empowered to take necessary measures for the preparation of a successive plan.[38]

Concluding Remarks

The preparation of a human rights action plan by the government of Ethiopia is a new milestone in the protection of rights recognized in the Constitution of the country. As is the case with any human rights action plan, the Ethiopian action plan does not intend to address all human rights and at once. However, it is a comprehensive action plan embracing civil and political as well as economic, social and cultural rights with due consideration for the indivisibility, interdependence and interrelatedness of human rights. It is an action plan prepared in a participatory manner as a national undertaking where all relevant stakeholders have taken part at least in the wider consultations held all over the country. It is also important to note that the action plan has a monitoring and evaluation mechanism and an indication that there will be successive plans.

Nevertheless, this Action Plan is a three-year action plan; hence, each and every human rights issue may not have been entertained in detail. This means that relevant organs shall act beyond the calls of the Action Plan as long as other legal and policy documents require them so. Thus reporting to mandate holders (treaty bodies) within the AU or UN, which is missing in the action plan, shall be conducted as per the schedule to avoid any overdue report of the state. After all government organs have the wider obligation to enforce constitutionally guaranteed rights and freedoms. In this regard, the Action Plan should be seen as an essential instrument that assists in the enforcement of the rights enshrined in the Constitution and not as a sole mechanism. What is more, the successful implementation, monitoring and evaluation of the Action Plan requires the continued high level commitment of the government with a nationwide mobilization witnessed during the preparatory and developmental phases of the Action Plan.

[37] Op. cit. 25 at p.177
[38] Ibid p. 175