

Ethiopian Journal of Human Rights

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Rooting Life and Death in Ethiopian Law: Suggesting a Holistic Approach to Human Rights Law

Abadir M. Ibrahim

*Oh, come with old Khayyam, and leave the Wise
To talk; one thing is certain, that Life flies;
One thing is certain, and the Rest is Lies;
The Flower that once has blown forever dies.*

Omar Khayyam¹

Abstract

The article explores the intricate ways in which human rights are woven into a legal system. In order to fully understand any right, one has to be aware of the many intricacies that surround it. Especially those interested in the protection of human rights through legislation ought to approach the subject with a recognition of the multifaceted nature of rights and the many, and sometimes controversial, subtopics that accompany rights. Whereas the article takes up the matter in reference to Ethiopian law, the discourse on life is very likely to be drawn along the same topics and fault lines under other legal systems as well.

I. INTRODUCTION

Reading through the bill of rights in the Ethiopian Constitution we stumble upon the right to life before any other. There it stands, at the top of the list of the 'inalienable and inviolable'. The authors of the FDRE Constitution, our 'social contractors' as it were, employed three separate articles to emphasize that life is every person's inviolable and inalienable right. Although it is granted that all human rights are inviolable and inalienable

· J.S.D. St. Thomas University School of Law (2014); L.L.M in Intercultural Human Rights Law St. Thomas University (2010); LL.M. in International Law, Addis Ababa University (2009); L.L.B Addis Ababa University (2005).

¹ Edward FitzGerald (Edited by Christopher Decker), *Rubáiyát of Omar Khayyám: A Critical Edition* (Univ. Press of Virginia 1997) p. 184.

by virtue of article 10 of the FDRE Constitution,² article 14 reaffirms the same principle in relation to “life, the security of person and liberty.” This is quickly followed by article 15 which declares the right to life by itself. The right is again reaffirmed in article 36 where the right to life is granted to children separate from their entitlement to the right as human beings. The right to life has been gracefully crowned as the mother of all rights; the most important of all rights without which other rights could not be exercised.³ Despite the passionate aura in which this right is exalted, it has so far not been seriously studied in Ethiopian academia, whether that is in the legal field or the social sciences. The article begins with a holistic discussion of life, and following old Khayyam it inevitably ends with death, that is, at least - the right thereto.

The main challenge that the article desires to tackle is to demonstrate how human rights are intricately woven into the fabric of positive law. By showing that intricacy, it is hoped to consequently show that anyone wishing to root a right, any right, in a domestic legal system, needs to reach into many branches of the law so as to meaningfully protect the right. It is hoped that the article will demonstrate why it is often claimed that rights are interconnected and interdependent in so many ways. With respect to the right to life, the article not only shows how the right to life is interconnected with other rights but that it interconnects different fields of law and even different generations of right holders. In the end, the article proposes to lawyers and especially to human rights lawyers that, due to the interconnected nature of rights, both with one another and with other positive laws, it would be advantageous to incorporate or mainstream human rights into legal thinking. This would not only affect law making but also the teaching of law subjects other than human rights law.

II. ETHICAL MOORINGS OF THE RIGHT TO LIFE

² Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995 (hereinafter “FDRE Constitution”).

³ Human Rights Committee, General Comment 6, Para. 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994); Misganaw Kifelew, *Non-Derogable Rights Under the FDRE Constitution*, (Unpublished, AAU Law Library, Submitted in partial fulfilment of the requirements of the LL.B. degree 2000) p.78; also see H. J. McCloskey, *The Right to Life*, Mind, New Series, Vol. 84, No. 335 (1975) p. 404.

The right to life is probably one of the oldest and most widely accepted precepts found in most societies.⁴ When one thinks about the nature of any human right, or the right to life in particular, one is likely to presume that the right is self-evident and universally applicable. Nevertheless, such a view may stand on premises that are unstated, and possibly wanting, or a logic that is faulty. Whereas it is customary in legal discourse and research to seek theoretical justifications and genealogies for one's stances (or come to the stances through theoretical investigation) such an endeavor is not futile as it allows one to understand that the law has deeper purposes and sometimes just shallow histories.

Though this section does not undertake to justify the right to life in a thorough manner, it will explore some ethical and moral justifications of the right. It will cover just enough for the reader to take cues on how the right to life can and has been defended. Since it would be implausible for the article to simply presume a self-evident and universal right to life, lest it should risk philosophical naivety, it does set a minimally acceptable ground on which the right can be grounded only to continue on a positivist quest for the meaning of the right to life and how it is given fixture in the law.

Although it is contended that religion is a late comer to human rights discourse, contemporary religious hermeneutic enterprises have resulted in complex religio-ethical views on human rights.⁵ In the monotheistic traditions the right to life is usually based on religious convictions such as the creation of man from the image of God or the sacred nature of the human species.⁶ Yet another way to argue in favor of the existence of the right to life is to refer to the possession of a soul by humans as opposed to animals, other "things",⁷ inanimate objects and living non-humans.

The right to life may also be based on religious edicts that prohibit murder. The right to life can be derived from the Christian and Muslim holy books in the form of concepts that prohibit murder such as the Bible's "[t]hou

⁴ See Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford Univ. Press 2010) pp. 22-47.

⁵ Rasa Ostrauskaite, *Theorizing the Foundation of Human Rights*, E-Journal., December 2001, Elaine Pagels, "Human Rights: Legitimizing a Recent Concept", *Annals of the American Academy of Political and Social Science*, Vol.442 (1979).

⁶ Jerome J. Shestack, 'The Philosophic Foundations of Human Rights, *Human Rights Quarterly*', Vol. 20 No. 2 (1998), p. 205.

⁷ H. J. McCloskey, *supra* note 3, p. 406.

shall not kill”⁸ and the Quran’s “take not life, which Allah hath made sacred except by justice and law.”⁹ The customary Gada system, a belief system indigenous to Ethiopia, posits that “*Waq*a gave man a place under the sun; he is *Waq*a’s creation independent of any one’s will. Therefore his life should be respected.”¹⁰ Given that religion is taken rather seriously in Ethiopia, and many African countries, it is a worthwhile endeavor to explore religious and traditional discourse on how the right to life can be defended.

The natural rights tradition is one of the older theories to have dealt directly with the right to life. John Locke, the man who is credited for fathering the theory in Western academia, argued for the right to life in the following terms:

*The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker...*¹¹

Locke’s argument is visibly theistic in its approach as were most other enlightenment philosophies. But that does not mean that the natural rights approach is necessarily religious. The theoretical basis of human rights could equally be consistently applied on evolutionary, anthropological or other empirical premises. For example McDougal, Lasswell et al. of the New Haven School of law apply sociological data to derive rights from common human values.¹² Naturalism oriented theories have today grown out of their religious connotations and have established a secular tradition.¹³ Read thus, the right to life could be justified on the basis of the

⁸ Holy Bible, King James Version, (Ohio: 1924) Exodus 20: 13, Deuteronomy 5:17.

⁹ Quran 6:151, Abdullah Yusuf Ali, THE HOLY QURAN: ENGLISH TRANSLATION OF THE MEANINGS (King Fahd Holy Quran Printing Complex 1987).

¹⁰ Fikadu Hunduma, ‘Forms of Restraints on the Power Process of the Gada Government from the Perspective of Modern Constitutional Principles,’ (Unpublished LLB Dissertation) Faculty of Law Addis Ababa University p.57 (1995).

¹¹ C.B. McPherson, *John Locke Second Treatise of Government* (Hackett Pub. Inc.: 1980) p.10.

¹² See See Haroldd Lasswell & Myress McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (1992) pp. 726-86. .

¹³ Ostrauskaite, *supra* note 5; also Lloyd L. Weinreb, ‘A Secular Theory of Natural Law’, *Fordham L. Rev.* Vol. 72 Issue. 6 (2004) p. 2287 (arguing that since an Athenian (sic. secular)

human instinct for self-preservation and reproduction. Since it is only the fittest that will endure the cruelties of nature, human beings could be said to have evolved in such a way that they need to protect their lives from wild beasts and other human beings as well. This approach gives a socio-biological ground for the protection of the right to life. It is because of the evolutionary process that human laws, morality, religion etc. contain tenets that protect the right to life.

Jeremy Bentham's principle of "the greatest happiness of the greatest number" can also be used to build an understanding of a right to life. Imagine a world in which your life or the life of your loved ones can be taken by the next person on the street or any government official and without much consequence. Compare this world to one in which life is protected by the state. If it can be reasoned that the first situation will cause general social fear and anxiety (and thus greater unhappiness) and that you as well as the majority of the members of society will prefer the second situation then the right to life has been justified on utilitarian grounds. The best defense of rights in utilitarian philosophy is found in John Stuart Mill's *On Liberty* where he argued that individual rights and freedoms should not be interfered with as long as their exercise does not harm others.¹⁴

Positivist doctrine posits the existence of human rights not on any moral or metaphysical views but on the laws that are proclaimed by the state. Since the theory sees moral-philosophic justifications of rights as inherently subjective it focuses on positive law as an objectively ascertainable source of rights.¹⁵ Therefore, the argument goes, the right to life exists only because it has been declared in the International Covenant on Civil and Political Rights ("ICCPR"), the FDRE Constitution and other laws. Thus, whether the impetus to make laws comes from religion, philosophy or simply the

notion of natural law is the basis for the Christian natural law tradition contemporary secular natural law is only taking natural law back to its origins); also generally see 'Richard Vetterli & Gary C Bryner, Hugo Grotius and Natural Law: A Reinterpretation' *Political Science Reviewer* (1993) p. 370-402; Larry Arnhart, 'Thomistic Natural Law as Darwinian Natural Right', *Social Philosophy and Policy*, Vol. 18:1 (2001) p. 1-33.

¹⁴ Vincent Barry, *Philosophy: A Text with Readings* (Wadsworth 2nd ed. 1983) p. 191-194. However, also see *Consequentialism*, *Stanford Encyclopedia of Philosophy*, (Thu Feb 9, 2006) available at <<http://plato.stanford.edu/entries/consequentialism/>> last accessed on 1/12/2014.

¹⁵ See H. L. A. Hart, *The Concept of Law* (Oxford Univ. Press: 2nd ed. 1994), for a notable account of positivism.

decision of the sovereign positivist analysis would focus on how to craft the laws that result and how to interpret and enforce them.

Whereas many of the approaches can be a basis for ethically grounding the right to life, this article adopts the positivist approach for three main reasons. First, such an approach begins with a post-ethics and post-formative point in the process of legislation thereby avoiding the moral controversies and debates that shape the law. It is extremely difficult to reject positive law as the most important source of human rights, the only concern being that the law can be potentially violative of an important moral edict. Second, positivist methodology is, as will be shown shortly, very practical in the technical construction of the notion of the right to life. Third, the article is primarily meant for the consumption of lawyers and law students especially those in the Ethiopian legal system. A positivist approach is therefore closer to home both in terms of technical understanding and professional contribution to a legal community that is trained in the positivist tradition.

III. WHAT THE RIGHT ENTAILS: A HOHFELDIAN RENDITION

The right to life, in the Hohfeldian categorization, can be understood as a claim-right. When we say that 'A has a right to life' we are asserting that A has a claim against others who owe A corresponding duty to her right.¹⁶ Another sense in which we can use the term is to denote that the right to life is a liberty-right. In that case when we say that 'A has a right to life' what we mean is that A has the right to life in as much as A has no duty stop living or live in a certain way. Understanding the right to life as a claim-right is very useful as we can distinguish three elements from this observation. First there is the right holder who is making the claim (that is A). Second, there is the right itself. Third there are those to whom a duty is ascribed.

The first element of a claim right leads us to the question of who possesses or is capable of possessing rights. The answer to this question seems obvious at first sight since, by definition, it is only human beings that have

¹⁶ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, The Yale Law Journal, Vol. 23, No. 1. (1913), p. 16-59. L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, University of Toronto Law Journal, Vol. 35, No. 1. (1985), p. 86-93.

a human right to life.¹⁷ But it is not the clear and standard cases of humanness that we will find troublesome. The trouble lies in borderline and challengeable instances of humanness. This article deals with future generations and fetuses as border line cases of humanness.

The second element of claim-rights concerns the nature of the rights. The nature of particular rights, from a positivist perspective, is matched if not defined by the correlating duties that they impose. In this context we can discern two distinct features most claim-rights share: they are either negative claim-rights or positive claim-rights. The former are rights against others requiring inaction or non-interference. They could also involve a duty to discontinue an ongoing violation or interference. The later, on the other hand, imposes a duty to take some kind of action. The main body of this article discusses the negative duty of the state and individuals to refrain from killing or infringing the right to life and other positive duties such as the duty to provide medical care or to clean the environment. The nature of the particular right also determines the scope of the right. That is, it determines what kind(s) of obligations are imposed and to what extent. With the scope of the right to life is raised the question of whether the right to life consists of a negative right not be prohibited from slaying one's self.

The third element is concerned with the identity of the duty bearers or addressees of the right or claim. Based on who the addressee is these are divided into rights *in personam* and rights *in rem*.¹⁸ Rights *in personam* are claims held against a particular singled addressee. For example the state, international organizations or nongovernmental organizations could be identified as bearers of human rights duties. Rights *in rem* on the other hand are held against the world at large.¹⁹ We could therefore say that A who has a right to life has a claim against every other individual including the state and judicial persons not to be harmed in her right. A may also have a right *in personam* to be provided with basic sustenance from her parents if she were a child for example.

¹⁷ Jack Donnelly and Rohda E. Howard, *International Handbook of Human Rights* (Greenwood Press: 1987) Ch. 1.

¹⁸ Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, *Philosophy and Public Affairs*, Vol. 7, No. 2. (1978), p. 96.

¹⁹ Jack Donnelly, *Human Rights: Working Paper no 23*, Graduate School of International Studies (2005).

A. A Duty Not to Kill

The right to life is primarily intended to protect individuals from arbitrary deprivation of life by state officials through arbitrary, summary and extra-judicial killings. Without the right to life the helpless individual is seen as vulnerable in front of the massive and oftentimes dangerous state machinery. Thus by imposing a duty on the state, the right to life makes sure that the individual is not arbitrarily deprived of her life. Where the right to life is violated, the right obliges the state to take measures to hold to account the state machinery responsible for the violations. This much being said about the role of the right to life, the question that comes to the fore is: how exactly is it that life is protected from harm?

The answer to this question can be stated in the form of an assumption or a general dictum. Assume that the state is not allowed to take the life of individuals under all foreseeable circumstances except one. This circumstance is one in which the state takes away life in self-defense – its own defense, the defense of the society and/or the defense of the life of citizens. If we call this exception the “legitimate self-defense exception” we can say that any life taken except for a legitimate defense is illegal and a violation of the right to life.²⁰

It is of no doubt that a state which kills individuals who are in arms to destroy its existence is in no fault. The state would in fact be at fault if it failed to eliminate or otherwise arrest such individuals because inaction could lead to its own death, the death and destruction of its society, and most certainly the death of numerous individuals. Thus, in a situation in which the state, its institutions or its peace is fired upon (as in an armed uprising, an armed conflict or a similar attack) it may legitimately defend itself by firing back. Its right to fire back is, of course, also regulated as this is not a prerogative given lightly.

Since the state, a constructed entity, cannot itself bear arms or operate weaponry, the Criminal Code refers to officials of the state when it gives permission to the state to defend itself. Article 68 of the Criminal Code

²⁰ The issue of legitimacy may of course be raised not only in the context of the legitimacy of the state's acts but also on the legitimacy of the state itself. The concern in the second situation arises where one enquires into whether an undemocratic state can use deadly force under any circumstance. We will pursue only the first context in this article since second context will require of us to go into questions of state legitimacy and social contract. Questions only remotely connected with the article.

states that acts in respect of public (state or military) duties, undertaken within the limits permitted by law, do not constitute a crime and are not punishable.²¹ Article 77 (1) also states that:

An act done by an officer of a superior rank in active service to maintain discipline or secure the requisite discipline in the case of a mutiny or in the face of the enemy shall not be punishable if the act was the only means, in the circumstances, of obtaining obedience.

These rules do not of course give the state a blank check on the fate of other's lives. Although state killing, or firing back, is envisaged under these situations it is only a last resort and when killing is absolutely necessary under the circumstances.²² The state therefore may under no circumstances allow its police force to follow a shoot-to-kill policy as an exception to the right to life. Where life is lost in the operations of the police it should always make an investigation to ascertain if the death was necessary and justified.²³ A police officer who is found to have violated the right to life will most certainly be dismissed in addition to being prosecuted in a court of law.²⁴

An overbroad iteration of the principle that the police should use lethal force only out of necessity and when justified in the circumstances can be found in article 38(2) of the Federal Police Administration Council of Ministers Regulation No. 86/2003. It should however be noted that compared to the standards contained in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials²⁵ and the Economic and Social Council's Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,²⁶ Ethiopian law falls far too short since it does not have detailed legislative principles, substantive rules or procedures that deal with this matter.²⁷

²¹ The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No.414/2004, Federal Negarit Gazeta May, 2005 Addis Ababa [hereinafter "Criminal Code"].

²² See, e.g. Article 79(1) of the Criminal Code.

²³ Andrew Le Sueur et. al., *Principles of Public Law* (Taylor & Francis, Inc. 2nd Ed. 1999) p. 384.

²⁴ See, Articles 52 cum 54 of Regulation No. 86/2003.

²⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²⁶ Recommended by Economic and Social Council resolution 1989/65 (24 May 1989).

²⁷ A detailed analysis of the shortcomings is not dealt with here primarily because the Ethiopian law on the topic constitutes of one phrase while the international standards are exponentially

Although the law does set up the requisite institutions, the “Federal Police Discipline Committee” and the “Public Complaints Hearing Organ”,²⁸ that could ensure that federal police officers do not use lethal force in violation of the principles of necessity and justification, there are no rules of conduct or standards that these organs can enforce. This shortcoming is replicated at the regional-state level as well.

The law still operates in protecting the life of uninvolved individuals even where the country is submerged in an all-out war. As long as one is not involved in conducting violence or partaking in hostilities one still has the right to have her life protected by the law. The law protects all civilians, the wounded, sick, and shipwrecked and prisoners of war as they do not fall under the “legitimate self-defense” exception to the prohibition against killing.²⁹ Even so, we know all too well that people tend to ignore the law in war where anarchy and savagery prevail. That seems to be the reason why the FDRE Constitution instructs the Parliament to set up a “State of Emergency Inquiry Board” the same time a public emergency is declared.³⁰ Thus even in extraordinary times the executive is not to be fully trusted with the life and rights of citizens. That appears to be the logic behind establishing an independent State of Emergency Inquiry Board that monitors the executive and people in power so that they do not abuse their powers or take measures beyond what is needed to avert the emergency.

The FDRE Constitution’s framework on the declaration of states of emergency is potentially one of its most dangerous shortcomings. Despite the significance of the matter it has been given little attention in the literature and has not been litigated, as a formal state of emergency has never been declared under the FDRE Constitution.³¹ At least at first sight,

more detailed. Put another way, there is so little Ethiopian law/policy on this that makes comparison pointless.

²⁸ See articles 68 and 22 respectively of Federal Police Administration Council of Ministers Regulation, Reg. No. 86/2003, Federal Negarit Gazeta 9th Year No. 39 (7 Apr. 2003) and Federal Police Commission Proclamation No. 313/2003, Federal Negarit Gazeta 9th Year No. 30 (4th Jan. 2003).

²⁹ Criminal Code Articles 269-275.

³⁰ Article 93(5) of the FDRE Constitution.

³¹ Although *de facto* states of emergency have existed in the country (such as in Ogaden, Gambella and Oromia regional states) only one involved official announcement of derogation. The only official derogation took place in the context of the 2005 post-election violence and was litigated in *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*. The most detailed account of this case is found in Abdi Jibril Ali, ‘Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case’, Haramaya L.

the FDRE Constitution seems to make the right to life one of its derogable rights as its list of non-derogable rights include only equality, protection against inhuman treatment, slavery and human trafficking, and the right to self-determination.³² If we take a literal approach to the FDRE Constitution, therefore, the Ethiopian government can decide to suspend the exercise of the right to life and literally kill anyone, at any time and place and for any reason. Not only does such a literal interpretation not make sense, Ethiopian lawyers and legal scholars who have studied this topic are in full agreement that the FDRE Constitution should be interpreted in conformity with international law which makes life a non-derogable right.³³ While this interpretation makes perfect sense, states of emergency are not typically declared by legal scholars in ivory towers. This means that we will have to wait until specific laws or the judiciary and the House of Federation mete out rules that prevent states of emergency from being a *de jure* license to kill.

Although the prohibition from taking away the life of persons applies primarily to the state and its agents, the proscription also extends, *in rem*, to all individuals. From the perspective of duty bearers every single person has a duty to refrain from killing another. And from the point of view of the holder of the right she has a negative right not to be interfered with. And since *in rem* rights bestow upon the right holder a consequent right to defend the right from third party interference, the scope of the right could be said to include a right to preserve and defend life. The right to preserve and defend life could additionally be based on the principle of legitimate self-defense. After all, the Criminal Code allows the taking of another's life in circumstances of necessity and self-defense as long as the killing is the only proportionate alternative at the time.³⁴ Thus one who repels a threat to her own life by ending another's is not only licensed to do so but might even be considered as doing justice a favor.³⁵

Rev., Vol. 1 (2012), p.1 (fn.2 of this article also contains a reference to other publications on the topic).

³² Art. 93 (4) (c) of the FDRE Constitution.

³³ See Kiflew, *supra* note 3, *passim*; Ali, *supra* note 31, pp. 17-19; Belay Frenesh Tessema, 'A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique', Submitted in partial fulfilment of the requirements of the degree LL.M. at the Center for Human Rights of the Faculty of Law University of Pretoria Ch.4 (Unpublished 31 Oct. 2005).

³⁴ Criminal Code Articles 75 and 78.

³⁵ See Philippe Graven, *An Introduction to Ethiopian Penal Law* (Oxford Univ. Press 1965) p. 220.

On the same principle we may also justify the society's (or the state's) use of coercion, including the destruction of life in order to secure its members from loss of their various guaranteed rights (to life, liberty, security etc...). This is to say that the death penalty may be imposed on those who violate basic interests of society as long as the imposition does not sink below some standards of justice. These standards are set forth in the FDRE Constitution and the International Covenant on Civil and Political Rights. The following is a rough summary of those standards:

- The death sentence can be imposed only for serious crimes that are determined by the law;
- The law cannot impose a death sentence retroactively;
- The death sentence should not be imposed except by a competent court and by a final decision;
- Anyone sentenced to death should have a right to ask for pardon or commutation;³⁶ and
- The death sentence should not be imposed on minors and pregnant women.

Despite the existence of a second optional protocol to the ICCPR,³⁷ which aims at the abolition of death as a criminal sanction, both international and national laws are far from abolishing the death penalty. Nonetheless efforts are being made at limiting the instances in which the sentence is passed and executed. Although Ethiopia is not party to this Protocol, its laws do try to minimize the application of the death sentence. Ethiopian law also tries to mitigate the horrors of execution in addition to complying with the standards noted above.

The Criminal Code provides not only that the death sentence be reserved for grave crimes but to exceptionally dangerous criminals who had completed the crime in the absence of extenuating circumstances.³⁸ It also prohibits the execution of fully or partially irresponsible persons and seriously ill persons.³⁹ Regarding expectant mothers, it provides not only that they should not be executed while pregnant but that their sentence

³⁶ The FDRE Constitution gives the power of pardon to the president of the republic; see Att. 71(7).

³⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989).

³⁸ Article 117 of the Criminal Code.

³⁹ Article 119 of the Criminal Code.

may be commuted to rigorous imprisonment for life if their child is born alive and in need of nursing.⁴⁰ Furthermore, the execution of the death penalty may be limited by operation of laws that allow for amnesty, commutation or pardon as long as the interest of the public is not adversely affected.⁴¹

Note that despite all the care taken to mitigate the ills of the death penalty, the morality of the punishment is taken for granted by the FDRE Constitution under Article 15. The FDRE Constitution deals explicitly with the relationship of the right to life to the death penalty which means that the right of the state to carry out the death sentence is not somehow implied or derivative. The social contractors have therefore, possibly foreseeing future debates, incontestably concluded the legal legitimacy of the death sentence. By way of rationale this article presented the relationship between the right to life and the death sentence as one of the state's legitimate right to defend the rights of its members and protect them against crime and criminals. But this by no means seals all issues concerning the death penalty since it may still be challenged on other, non-legal and especially moral and practical, fronts. We shall not deal with those since our prime concern here is with the right to life and not with the death penalty as such.

B. A Duty to Preserve and Protect Life

The state's duty towards the right to life is not limited to the broad idea of refraining from killing. The state is also required to take positive steps, including legal, policy and institutional measures to preserve and protect life and ensure that any violations are considered and dealt with appropriately. The position here is that states, and in exceptional situations individuals, have a duty that goes beyond restraining from killing and extends to requiring action to protect the life of those in danger of dying.

Criminalizing and prosecuting homicide,⁴² genocide and war crimes that involve killing⁴³ may be considered as a first step towards fulfilling the state's positive obligation to observe the right to life. The state should also go beyond prohibiting direct killing and proscribe acts notorious for leading to direct killing. Such secondary measures towards fulfilling the

⁴⁰ Article 120 of the Criminal Code.

⁴¹ Articles 229-30 of the Criminal Code, Procedure of Pardon Proclamation, Proc. No.395/2004 10th year No. 35 Addis Ababa-17th April, 1994.

⁴² Articles 538 -544 of the Criminal Code.

⁴³ Articles 269-272 of the Criminal Code.

state's positive obligation may take the form of prohibitions against and regulation of weaponry production, distribution and possession.⁴⁴ Or it may be manifested in rules that prohibit unlawful arrest, detention, or torture and ill-treatment by government officials lest such acts should lead to the death of victims.⁴⁵ Rules prohibiting incommunicado detention and providing for *habeas corpus* also provide an additional layer of protection to minimize chances of disappearances and subsequent death.⁴⁶ But criminalizing killings and conditions that increase the likelihood of the loss of life may not suffice since without a criminal justice system, police/security forces, courts and correctional facilities the criminal law may be useless. And again, given an enforcement mechanism, state authorities ought to ensure the functioning of this mechanism as effectively and efficiently as possible.

The duty to prevent death may also, sometimes, lie on private citizens. The law imposes a duty to assist or a duty to rescue a person who is in an imminent and grave danger to her life.⁴⁷ Each individual, therefore, has a duty to assist a person who has been fatally knocked down by a speeding vehicle, an obligation to save a drowning person or a duty not to ignore a visually impaired person who is striding towards the edge of a cliff. The duty to assist becomes even more serious on those who belong to the medical profession or are otherwise under a professional or contractual obligation to lend aid.⁴⁸ Thus provided that there are no risks to one self, all individuals are expected by law to protect the right to life. The law in fact

⁴⁴ Articles 481, 499, 808 of the Criminal Code.

⁴⁵ Articles 423, 424 of the Criminal Code, see, Fact Sheet No.6 (Rev.2), Enforced or Involuntary Disappearances, The Office of the High Commissioner for Human Rights Geneva, Switzerland. Declaration on the Protection of All Persons from Enforced Disappearance, proclaimed by the General Assembly in its resolution 47/133 of (18 Dec. 1992); General Assembly resolution 33/173 on Disappeared Persons 90th Plenary meeting (20 Dec. 1978).

⁴⁶ See *ibid*; also Articles 19 - 21 of the FDRE Constitution and articles 177-179 of Civil Procedure Code of the Empire of Ethiopia of 1965, *Negarit Gazeta* Extraordinary Issue No. 3 of 1965 (Addis Ababa 1965); Article 5 (10) of Proclamation No. 25/1996, *Federal Negarit Gazeta* 2nd Year, No. 13 (15 Feb. 1996). Although it is not relevant anymore Article 7 (3) of Proclamation No. 22/1992, Proclamation Establishing the Office of the Special Prosecutor (1992) had made an exemption to *habeas corpus* for a limited amount of time.

⁴⁷ Article 575 (1) of the Criminal Code.

⁴⁸ Article 575 (2) Criminal Code.

goes as far as punishing the reckless driver who puts the life of others at risk.⁴⁹

C. The Right to Medical Care

That a state should preserve and protect the right to life, as its positive obligation, is not disputed. But what exactly fits the duty may not be as clear. Taken to a logical, although not necessarily a legal, extreme the obligation may be extended to the provision of state funded medical care to those who might not survive without state help. So can the state, as the main supplier of public medical services, be held accountable for the death of those who could not afford private medical care?

The answer to this question is a mixed one. On the one hand the state cannot be expected to respond to and treat every patient whose life may be at risk. Not only will the state's budget be stretched between equally important social needs but its health budget may be allocated in such a way that not all needs are addressed at the same time. Allocation of resources to fight the AIDS epidemic may, for instance, mean that fewer cancer patients will be able to benefit from state funded medication. But this, on the other hand, does not mean that the state is responsible for the health, and therefore life, of its citizens. The state is indeed under a constitutional obligation to provide part of its resources for public health.⁵⁰

Although the FDRE Constitution does not contain detailed and robust provisions on the right to health, and its relation to the right to life, it does provide that the state should allocate "ever increasing resources" to public health.⁵¹ Even if the country has limited resources,⁵² it will be in violation if its health budget diminished every year. We could also say the same if the budget was poorly utilized or if it was not utilized at all.⁵³ Even though this

⁴⁹Article 572 of the Criminal Code. See also, Neil A.F. Popovic, 'In Pursuit of Environmental Human rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', Columbia Human rights Law Review, Vol. 27 (1996) p. 515.

⁵⁰Article 41(4) of the FDRE Constitution.

⁵¹Ibid.

⁵²Whether the country has addressed its health needs is immaterial because according to article 90 (1) of the Constitution it will be held accountable only to the extent its resources permit.

⁵³The nexus of the right to life with the state's budget (or fiscal policy) points to an indirect link or conflict with other rights that require the state's positive attention. For example, every cent spent on a school, an orphanage or a museum might have also been used in saving lives via the

much is clear about the state's obligations, the specific application of the duty is not as clear. Therefore, it is expected that this aspect of the right to life is a field yet to evolve and to grow through judicial practice and jurisprudence.

The positive claim or a right to life *in personam* can also be raised by a malformed child against its parents or guardians. The law is clear on whether a mother can abort a fetus with a serious and incurable deformity.⁵⁴ But could the same rule be applied to a child with such a malformation after it has been delivered? It is certainly the case that once the malformed child is born it will be entitled to a negative right to life in the sense that it cannot be administered with a lethal injection. But it is a difficult matter to decide if the child will be entitled to a positive right to medical treatment without which it would die.

Jeffrey Parness and Roger Stevenson suggest that we should look into whether the child needs a 'life-saving' or a 'life-prolonging' medical treatment.⁵⁵ In the former case the child would die if it were not for the medical treatment, but it would subsequently survive on its own. In the second case, on the other hand, the life of the child depends on the constant supply of medical treatment without which the child would die. The core of the suggestion is that the child ought to have a claim to medical treatment in the former case but not in the later. Although the Parness-Stevenson position can be adopted as a general precept through which to set the parameters of the right to life, homicide and infanticide, the nuances of its application should be carefully dealt with. For example, while the principle can be clearly applicable to a vegetative patient who would die if cardiovascular device is turned off from a patient who would die if her insulin treatment is stopped but would nonetheless live a complete life by taking insulin or asthma medication.

construction of hospitals or the purchase of nutrition rich food and medicine for a poverty or drought stricken village.

⁵⁴ Article 551(c) of the Criminal Code.

⁵⁵ Jeffrey A. Parness and Roger Stevenson, '*Let Live and Let Die: Disabled Newborns and Contemporary Law*,' Univ. of Miami L. Rev Vol. 37 (1982) p. 70.

D. The Right to a Safe and a Healthy Environment

It is often said that human rights are interdependent and interrelated. The violation of one right usually entails the violation of another set of rights and it is usually the case that many rights cannot be respected unless some other rights are also respected. For example if the freedom of expression were abolished one could hardly imagine how the right to religion, assembly or democracy could have any value. Likewise, the right to life and the right to a clean and a healthy environment are inter-linked. Similar to the right to medical care, the right to a clean and a healthy environment can be seen as part of the positive duties imposed on the state for the protection of life.

One of the most likely effects of environmental pollution on humans is the deterioration and even destruction of life and health. Radioactivity, contaminated drinking water, and toxic waste are most certainly the deadly ingredients of our environment.⁵⁶ The link between the right to life and the right to the environment is so close that it has been suggested to derive the right to the environment from the right to life.⁵⁷ Those countries whose constitutions do not contain the right to a safe and healthy environment have often resorted to these rights in order to afford protection to the environment. The Indian Supreme court has ruled that:

It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Indian constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and

⁵⁶ Marquita K. Hill, *Understanding Environmental Pollution: A Primer* (Cambridge Univ. Press 2004), *passim*.

⁵⁷ Conor Gearty & Adam Tomkins, *Understanding Human Rights* (Printer: 1999) p. 435. It has also been argued that the right to shelter and the right to conscientious objection are derivatives of the right to life. See Marc-Oliver Herman, 'Fighting Homelessness: Can International Human Rights Law Make a Difference?', *Georgetown Journal on Fighting Poverty*. Vol. 2. (1994) p. 60. Emily N. Marcus, 'Conscientious Objection as an Emerging Human Right', *Virginia Journal of International law*, Vol. 38 (1998) p 518.

*spoliation should also be regarded as amounting to violation of Article 21...*⁵⁸

Similar solutions have also been reached by the respective judiciaries of Bangladesh, Pakistan, Tanzania and the Inter-American Commission of Human Rights.⁵⁹ This approach is hinged around the fact that the right to a certain standard of environment is unrecognized and environmental degradation does indeed adversely affect substantive rights such as the right to life. Whether it is the right to a healthy environment, the right to life, the right to property, to residence, to health, the right of indigenous peoples or socio-cultural rights, environmental degradation and global climate change are bound to cross the line to human rights and many a time that of life itself.

Although the link between the right to life and the right to a safe and a healthy environment can be established with relative ease the relation is somewhat narrow. This is because the former operates in the time dimension of the present while the later in the time dimension of both present and future. This begs the question: Can future generations have the right to life? Ethiopian law, or at least the country's constitutional system, provides an incredibly diverse opportunity to protect not just the life of living human beings but that of future generations in addition to providing for a separate right to a safe and healthy environment.⁶⁰ While it is interesting that the FDRE Constitution also provides the environment itself rights independent of the rights of human beings that is a separate topic that will not be taken up here.⁶¹

E. The Right to a Potential Life

We have seen that the right to life may be infringed by actions that pollute and destroy our immediate environment. But another aspect of the right to

⁵⁸ Quoted by: Shyam Divan & Armin Rosencranz, *Environmental Law and policy in India: Cases, Materials, and Statutes* (Oxford Univ. Press, 2nd ed. 2002), p. 51.

⁵⁹ Ibid, p.435; see Yanomami Case, The Human Rights Situation of the Indigenous People in the Americas, Inter-Am. OEA/Ser.L/V/II.108, Doc. 62 (2000); Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁶⁰ See Arts. 44 & 92 of the FDRE Constitution.

⁶¹ See Art. 92 (4) FDRE Constitution, declaring that "Government and citizens shall have the duty to protect the environment." One of the ways this can be interpreted to mean is that the environment as a corresponding right to be protected against the government and citizens.

a clean and healthy environment is that it raises the issue of time and space. Does the FDRE Constitution recognize this right to presently living persons or does it also recognize the right of future generations?

Protecting the right to a clean and healthy environment requires states, among other things, to incur astronomical costs in preventing, controlling and reversing the effects of pollution. Developing countries have, therefore, found their need to develop (and develop fast) at odds with the protection of the environment. Thus there is a real conflict between the right to development and the right to the environment.

The solution adopted by the Ethiopian Constitution is that of “sustainable development.”⁶² According to what has come to be known the “Brundtland Report” sustainable development is a concept that implies development that meets the needs of the present generation without compromising the ability of future generations to meet theirs.⁶³ Therefore, by accepting the right of the peoples of Ethiopia to a sustainable development, the FDRE Constitution does not only try to solve the conflict between the right to a healthy environment and that of development. It throws into the fray the right of future generations to meet their needs of development and at the same time to live in a safe and a healthy environment.

Although we can argue in support of the right to life of future generations based on the principle of sustainable development and intergenerational equity we are still not in a position to compare this potential right with the right of presently living human beings. Future generations exist only in prospect and that prospect can conflict and often give way to different interests ranging from the need to develop capitalist greed and general indifference.⁶⁴ Nevertheless, it is the duty of the present generations not to act in ways that might impair the same. The criminal law, in fact, aims towards the protection of the environment by criminalizing actions which might destroy the environment.⁶⁵ It is to be noted that the aggravating factor of criminal liability for environmental pollution is the consequence of

⁶² FDRE Constitution Article 20.

⁶³ Report of the World Commission on Environment and Development: Our Common Future Full report: Transmitted to the General Assembly as an Annex to document A/42/427 (4 Aug. 1987).

⁶⁴ See David Worr, ‘The Right to Life and Conservation, Journal of Conservation Biology’, Vol.20 No.4 .937 (2006).

⁶⁵ See articles 517-521 of the Criminal Code

serious damage to the life of persons or to the environment.⁶⁶ This formulation is understandable since damage to a potential life cannot be measured or proven in court. It is rather presumed that any serious harm to the environment is bound to destroy lives in the future.

Another issue which has an element of the time-space dimension concerns the abortion debate. The most common form of the anti-abortion stance is known to hold that human life begins at the moment of conception or implantation. The fetus, as any other human being, has all the rights of humans including the right to life. And for this reason abortion is equated with murder pure and simple. A good example of this stance can be found in the Constitution of Ireland which states that:

*The state acknowledges the right to life of the unborn and, with due regard to the equal rights of the mother, guarantees in its laws to respect and as far as possible, by its laws to defend and vindicate that rights.*⁶⁷

Not everyone opposed to abortion believes that a fetus is a human being. Some argue that the fetus, although not a human being, is a potential human being with a potential right to life. This position is premised on the fact that if nothing is done to prevent its normal development and if nature is allowed to run its course, the fetus would eventually become a human being.⁶⁸

On the other side of the argument are those who reject the moral right to life of a fetus. Since various groups on both sides hold extremely divergent views we will only consider two from this side of the arguments. There are those who argue that abortion is women's moral right to reproductive self-determination. Therefore irrespective of the fetus they are inclined to see things from the women's perspective. While some hold that the fetus cannot be considered a human being until it is born, others hold that it can be considered a human being only if it satisfies some elements of humanness: sensation or physical likeness. McGinn, a moral philosopher who believes

⁶⁶ Article 519 (2) of the Criminal Code

⁶⁷ Article 40 (3) (3°) of Bunreacht na hÉireann (Constitution of Ireland, enacted in 1937 last amended 24 June 2004).

⁶⁸ Dale Jacquette, *Two Kinds of Potentiality: A Critique of MC Ginn on the Ethics of Abortion*, Journal of Applied philosophy, Vol. 18. No.1 (2001) p. 79.

that consciousness and the sensation of pleasure and pain are the determining factors for life writes that:

*What makes a fetus morally valuable is sentience when the fetal organism.....has become complex enough, by the division of cells and so forth, to have feeling and perception-consciousness-that is the time at which it's rights kick in. Awareness is what makes the difference, having an inner mental life. And the closer an embryo is to this insentient condition, no matter what its species, the less moral weight it has. The greater its sentience the more we have to take its interests into account.*⁶⁹

When we look at the laws of Ethiopia we can notice that none of these theories apply to them with ease. We can approach the right of fetuses in Ethiopian law from the perspectives of our civil law and criminal law.

The Civil Code makes it clear that fetuses are not human beings and that they have neither rights nor duties when it declares: “[t]he human person is the subject of rights from its birth to its death.”⁷⁰ The fact that a fetus could be considered as having rights under exceptional circumstances⁷¹ is immaterial in this context because an abortion will have an invalidating effect on the exception. That is, being born alive and viable is a necessary requirement for a fetus to be considered a person. An aborted child cannot be born alive and viable and, therefore, cannot be considered as a person under the provision of the second article of the Civil Code.

But when we look at the Criminal Code it looks as if it is protecting the right to life of the fetus. The title of the section which deals with abortion reads “Crimes against Life Unborn”. This might be a strong indication that the law considers fetuses as humans or at least potential human beings as the penalty for abortion is very small compared to that of homicide. But the moment the child is born it is considered as a full-fledged human being and its intentional murder will be punished with the maximum of the death penalty.⁷² Although the phrasing, “crimes against life unborn” could open

⁶⁹ Ibid.

⁷⁰ Article 1 of the Civil Code of the Empire of Ethiopia, Proclamation No.165/1960.

⁷¹ Ibid Article 2 (Where its interests so demand).

⁷² Id., Arts 544 & 539; The harshest punishment for abortion is preserved for individuals who effect an abortion without the consent of the pregnant woman and the punishment is set at a maximum of ten years (Art 547(2)).

the way for us to argue that the fetus may have a right to life, it should by no means be taken to imply a necessary connection since not everything that has a life has a right to life. It could be for reasons other than the protection of a *right to life* (say morality, social policy etc...) that the life of the unborn is protected.

It is contended here that the Criminal Code does not vest fetuses with a right to life. Fetuses are instead gifted with a potential right to life and are therefore potential human beings with no face and no name. It looks as if the main, if not exclusive, reason for the law maker's criminalization of abortion is on the ground of the moral and religious convictions of our parliamentarians and of society at large.⁷³ The two main numerically dominant religions in Ethiopia abhor abortion not because it is the killing of a human being but because it is seen as tampering with the Gods' creation. This may become evident when we look at the instances in which abortion may be allowed. The Criminal Code does not, for example, criminalize the aborting of a child conceived by rape and incest. Allowing the abortion of a child conceived from incest brings out the moral and/or religious motivation of the legislator since incest is a victimless-moral crime. The code also does not penalize an abortion by a woman who is unfit to bring up the child because she is physically or mentally unfit or even because she is a minor.⁷⁴

Although these exceptions are understandable they also show us that the Criminal Code is not protecting a right inherent in the fetus. If it were, it would not have made sense to set-off the right to life with simple policy considerations. As we have shown throughout this paper the right to life is a very important right to be tampered with only in situations of individual or collective self-defense. So it may be theoretically self-contradictory for the Criminal Code to have claimed to set-off the right to life with, for example, the in-expediency for a minor or an infirm to raise a child. Or is it worth to trade-off the right to life for the shame of having a child of incest? Therefore the trade-off may be understood not if the fetus is considered a human being, but if it is considered a potential human being with a

⁷³ Social research on the issue seems to indicate that there is a direct correlation between the opposition to abortion and conservatism. Even among conservatives the opposition to abortion correlates directly with the frequency of church (Mosque?) attendance. Michael A. Cavanaugh, 'Secularization and the Politics of Traditionalism: The Case of the Right-to-Life Movement', *Sociological Forum*, Vol. 1, No. 2. (1986), p. 252.

⁷⁴ See Article 551 of the Criminal Code.

potential right to life. This conclusion is further confirmed by the fact that these exceptions are no more applicable once the child is born.

Distinguishing birth as a point of departure for the existence and exercise of the right to life could be criticized for being arbitrary; not based on any theoretical or moral grounds of justification. Is there much of a difference between 36 week old fetus and a child that was born on the 35th week? The criticism has a valid point to make. Yet it does not follow from this that the fetus has the right to life before its date and time of birth. It only indicates that the law's choice of a point of reference for bestowing the right to life is an arbitrary one. The fact remains, however, that a fetus does not have a positive right to life. This conclusion is confirmed by the fact that these exceptions are no more applicable once the child is born.⁷⁵

IV. THE RIGHT TO DIE

It is in the nature of most rights that they are claims of the right holder against society at large. In Hohfeld's famous contribution to the language of rights we can see that one of the connotations of "A has the right to X" is that A has a liberty with respect to X.⁷⁶ A as the right holder is at liberty and has the power to effect changes in X. As with most rights it is true that the right holder may do whatever she wishes with the right. If we take a random list from the FDRE Constitution we can see that this connotation is valid for most rights. Take the right to privacy for example. The right holder can if she wishes waive it and allow others to come into the private domain. The boxer could not go into the ring without giving up her physical security. The owner of property can use, utilize and dispose of her property whenever she wishes to do so.

⁷⁵ But then again, there are those who argue that even the infant cannot be considered as an entity that has a right to life. For example Michael Tooley, who conceives of rights as moral entitlements that human beings have because of their conceptual capacity to desire the entitlements, argues that infants are incapable of possessing rights. The incompatibility of Tooley's arguments with the one proposed in this article basically lies in the foundational argument for the existence of human rights. That is, this article's argument is founded on positive laws while Tooley is looking beyond the law for a moral basis of rights. See Michael Tooley, 'Abortion and Infanticide, *Philosophy and Public Affairs*', Vol. 2, No. 1. (1972), p. 37-65. See also Alan Carter, *Infanticide and the Right to Life*, *Ratio* Vol.10 Issue.1 (1997) p. 1-9 for an excellent exposition of Tooley's position.

⁷⁶ Andrew Heard, *Introduction to Human Rights Theories* (1997) available at <<http://www.sfu.ca/~aheard/intro.html>> accessed on 1/12/2014.

The question that we ought to be struggling to answer is whether the same is true to the right to life. We will approach the issue from three different ways, we will first see if the right to refuse medical treatment implies the right to choose to end one's life. Then we will see if the right to life implies the right to commit active suicide. And the last point concerns whether the right to commit suicide carries with it a right to be assisted in the commission of suicide.

Medical treatment usually involves the invasion of bodily integrity. The Civil Code clearly provides that any person may at any time refuse to submit herself to a medical or surgical examination or treatment.⁷⁷ Medical or surgical intervention may also amount to willful injury and assault in criminal law in the absence of the patient's consent.⁷⁸ We may thus argue that a mentally competent adult can effectively refuse medical treatment even if it means that the refusal will eventually result in her death. While the right to die by refusing medical treatment can be easily derived from the law it is not clear how and to what extent the law provides for exceptions.

The law's precept on this matter is therefore that an individual may choose to end her life by refusing medical treatment or refusing to take food. However, compulsory medical treatment may be imposed in epidemic-like emergencies or to prevent such emergencies. According to the Food, Medicine and Health Care Administration and Control Proclamation, any person who is suspected of having or is confirmed to have a communicable disease, or a disease transmitted from plants or animals, can be tested, quarantined and treated.⁷⁹ The Criminal Code also provides that any person who refuses to take steps or cooperate with the demand to cooperate in such a context can be prosecuted.⁸⁰ In situations where a person does not comply and as a result causes the infection of others may be responsible, depending on the circumstances, for negligent or even intentional homicide or bodily injury.⁸¹ While one can imagine that more

⁷⁷ Article 20 of the Civil Code

⁷⁸ See articles 69, 70 and 553.-560 of the Criminal Code.

⁷⁹ Arts. 26-28, Proclamation No. 661/2009, Federal Negarit Gazeta 16th year, No. 9 (13 Jan. 2010); a similar pronouncement is found in the now repelled Public Health Proclamation 200/2000, Federal Negarit Gazeta, 6th Year No. 28, (9 Mar. 2000) (See Art. 17 (2)).

⁸⁰ See Arts. 438, 440, 441, & 806 of the Criminal Code.

⁸¹ See Book V, Title I of the Criminal Code.

sweeping powers can be accorded to the state in epidemic induced states of emergency no law has yet been issued on this matter.⁸²

Let us call the situation in which one dies for refusing medical treatment a “passive suicide”. The term is intended to apply to persons who may wish to die without actively extinguishing their lives. These for example may be people who wish to die in a hunger strike if their demands are not fulfilled (who will eventually need medical attention if they get to that point). Another category of persons who may commit passive suicide are people with religious convictions against any form of conventional or scientific medical treatment. Good examples of the second type are belief groups such as the Jehovah’s Witnesses and some Christian denominations such as the “Christian Scientists”.⁸³

What we will call an “active suicide” is a situation whereby a person, whether sick or healthy, ends her own life by destroying at least one of her vital biological functions. This type of suicide has always been condemned by both religious and secular thinkers around the world. Aristotle, for example, had a synergetic view towards suicide. He argued that the individual is part of the community just as the fingers are part of the body.⁸⁴ Thus a person who kills herself is by effect causing an injury (or say bleeding) to the community at large.⁸⁵ Saint Thomas Aquinas’ argument, as he puts it:

⁸² As a continuation of the discussion on the declaration of states of emergency and derogability of the right to life one could ask if the government can declare an emergency which allows it to kill individuals who are infected with a highly fatal transmittable disease if it is proven that the safety of everyone else may be ensured by such action. It has been contended that the legal community’s position is that the government does not have such power. However, only a specific law or judicial determination will decide this matter.

⁸³ Larry May “Challenging Medical Authority” in *Praying for a Cure: When Medical and Religious Practices Conflict* (Peggy DesAutels et. al. (eds.), Rowman & Littlefield Pub., Inc. 1999) p.71. Although the issue has not been covered in this article consider the fact that the religious freedom of such groups (Constitution Art 27 (4)) can and does clash with the right to life of children (unluckily) born to such families, see Seth M. Asser and Rita Swan, ‘Child Fatalities From Religion-motivated Medical Neglect’, *Pediatrics* Vol. 101 No. 4 (1998).

⁸⁴ David G. Ritchie, *Natural Rights* (George Allen & Unwin: 1952), p.126.

⁸⁵ “[A]nd he who through anger voluntarily stabs himself does this contrary to the right rule of life, and this the law does not allow; therefore he is acting unjustly. But towards whom? Surely towards the state, not towards himself. For he suffers voluntarily, but no one is voluntarily treated unjustly. Aristotle (translated by W. D. Ross), *Nicomachean Ethics* (OverDrive, Inc. 2009) p. 138.

... because naturally everything loves itself, and consequently every thing naturally preserves itself in being, and resists destroying agencies as much as it can. And therefore for anyone to kill himself is against a natural inclination, and against the charity wherewith he ought to love himself. And, therefore, the killing of oneself is always a mortal sin, as being against natural law and against charity.⁸⁶

Plato's argument is based on an analogy to the right holder of some property.⁸⁷ He sees life as a divinely bestowed gift or trust from God.⁸⁸ This would see life as belonging to God, to be used for her benefit, and not to be disposed at by anyone other than her. This view will most certainly rule out suicide (even passive suicide). It would even rule out various risky or unhealthy behaviors which God might regard as misuse of life. Plato's analogy is currently in vogue amongst liberal individualists, although this time the analogy is put in reverse. Similar to the right over property, the owner of life is seen as the absolute master of her right. Chetwynd S.B while making the analogy argues:

If the right to life is like that of property rights understood in a negative sense, then it may be required to help me preserve my property but no one can require me to look after it in any particular way, again with the proviso that my use or lack of care of it does not harm others. If I want my house to fall down around me, and don't think the effort of saving it is worth making, that decision is mine alone, providing of course it does not injure anyone else as it falls down!⁸⁹

Such views of the right to life, which are very individualistic and hold that any interference with one's wish to end one's life would violate the absolute right over life, seem to be anchored in Ethiopian law. Since Ethiopian laws do not prohibit suicide it may be argued that the right to life embraces a

⁸⁶ Ritchie, *supra* note 84, p 126.

⁸⁷ An identical concept can be found in Islamic theology reflected in both the major sources of doctrine and jurisprudence: the Quran and the Hadith. See Seyyed Hussein Nasr, *The Heart of Islam Enduring Values for Humanity*, Harper (2002) p. 278. Dr Mohammad Taqi-ud-Din al-Hilali (et. al) (Trans.) *Translation of the Meanings of The Noble Quran in the English Language*, (An-Nisa 29) p. 111.

⁸⁸ Ibid.

⁸⁹ S.B Chetwynd, 'Right to life, Right to Die and Assisted Suicide', *Journal of Applied Philosophy*, Vol.21, No.2, (2004) p. 178.

right to take away one's life whenever and under any circumstance one wishes. Since the law does not say anything about the reasons of not proscribing suicide and the legislative material explaining the legislator's intents does not explain this point, it leaves the reasons to the reader's imagination. One could argue that the real reason is because the prohibition of suicide is not a practically enforceable rule and there is thus no reason to punish the dead or the survivor who needs medical and psychiatric/psychological help. However, granted that moral norms against suicide are prevalent in Ethiopia, there is also a narrative that glorifies martyrdom and suicide as part of Ethiopia's national(istic) fabric. One can cite Emperor Tewodros' suicide which is ceremoniously narrated as a heroic story as evidence of the fact that suicide is not universally condemned in Ethiopian culture.⁹⁰

Although suicide, whether passive or active, is not prohibited by law it is nevertheless unlawful to help another person to end her life. One could be sentenced up to ten years for instigating or assisting a person who had attempted or committed suicide.⁹¹ Furthermore, if one who wishes to die and physically incapable of performing the final act or nonetheless wants another person perform the act, the person who performs the euthanasia will be liable for homicide.⁹² If we interpret these rules in light of our conclusion about active suicide we could point out some social-policy issues that may be behind this law. The first is that we cannot know whether the assistant is acting from ulterior motives, or may have over-persuaded the potential suicide in order to gain from the death. A second one may be that potential murderers may find a convenient way of hiding a crime by claiming to fulfill the wish of their victim thus misleading justice. This may be particularly troubling in a country where investigation methods and technologies are basic.⁹³ It may also be feared that allowing assisted suicide may devalue the worth of life since there will be a score of people, including doctors, who are known to have killed a patient, a spouse, a mother, a friend etc... and is still walking amongst us and sanctioned by the law. Therefore, the right to life in Ethiopian law stretches

⁹⁰ See Taddese Beyene, Richard Pankhurst, Shiferaw Bekele, *KASA AND KASA: Times and Images of Tewodros II and Yohannes IV (1855-1889)*, (Institute of Ethiopian Studies: 1990).

⁹¹ Article 542 of the Criminal Code.

⁹² Articles 538-541 of the Criminal Code, also note that according to Art. 70 of the Criminal Code it is only "upon complaint" crimes that are excused if committed with the consent of the victim and willful killing is not one of them.

⁹³ መፍረስ ገብረ ገብረ ገብረገብ, መፍረስ ገብረ ገብረ ገብረገብ (ገብረገብ 1999 . .) [Trans: Mesfin Mare Wolde-Giorgis, Criminal Investigation Methods and Techniques] p. 1-6.

far enough to include a right to end one's life although it falls short of the right to be assisted to commit suicide.

By way of critique, one has to say that rather than prohibiting assisted suicide and euthanasia the law ought to have allowed them as medical procedures while setting up mechanisms that are less prone to abuse. One can imagine many hypothetical scenarios in which the law as it stands now can be impractical if not immoral. A good example is a person who is terminally ill, is in incredible pain and wishes to die painlessly and rather hastily. Since the law does not allow such a person to be supported to commit suicide or to consent to being euthanized, it is condemning this person to long term, unnecessary and inhumane suffering. Rather than leaving a person who is physically capable of committing suicide to her own means, it would have made more sense to allow her to be assisted to die or euthanized in a more compassionate and less painful way. The situation is comparable for the person who is not physically capable of committing suicide as this will lead to protracted suffering and no other options. Providing mechanisms that avoid the risks associated with abusing suicide and euthanasia laws and allowing assisted suicide and euthanasia should thus be on the agenda of the Ethiopian parliament, policy circles and civil society.

SOME CONCLUSIONS

Although a claim cannot be made for an exhaustive exposition of all the legal aspects of the right to life, we have touched upon the main issues concerning the subject. While bigger topics such as the derogability of the right to life will require separate treatment, among the issues discussed in some detail included the issue of whether the right to life entails a negative duty on society and state, first, to abstain from wanton killing, and second, not to interfere with the liberty of individuals concerning the disposition of their lives. While the first of these conclusions is the least controversial (if at all) the second will go down for many very slowly and begrudgingly. It is hoped then that the second conclusion, as well as other conclusions and arguments in the article, will stir enough disagreement to start scholarly debates on Ethiopian law and policy. Given how we borrow most of our laws, lest we should reinvent the wheel, it is unlikely that serious debates have taken place in what the public views are on many of these issues.

Another issue that has been discussed includes that of whether the right to life entails some positive duties. The first of these duties is that of preserving and protecting life, imposed primarily on the state and also on

private citizens (albeit in a limited way). We have also seen that the state has a positive duty to provide medical care to its citizens; a duty that it could relieve itself of by providing and efficiently unitizing an ever-increasing health budget. The third set of positive duties concerns the state's duty to keep the environment safe and healthy. We saw that despite the fact that environmental concerns are considered as human rights of their own kind, their protection is inseparably interwoven with the protection of the right to life.

Yet another interesting issue that we pursued concerned the fact that the right to life operates in a time-space continuum of the present and the future. In other words, the same way we can talk of our claim emanating from our right to life, so can we of the right to a potential life of potential human beings and of future generations. Yet the salient difference between us and potential humans, such as future generations and fetuses, is that they are incapable of standing up for their right and are, therefore, at the mercy of those of us who wish to make a claim in their stead. Furthermore, the law itself distinguishes between “us” (of the present) and “them” of the future by giving a better protection to us.

Finally, a significant take away of this article is an observation of how the right to life is interconnected with other rights and is also intricately woven into the legal system. Life is, to start with, at the base of all other rights as most rights can be exercised and claimed only where one is alive. Additionally, the right to life is interconnected with other rights such as the right to a safe and healthy environment, sustainable development, the right to medical care, and women's rights. The right to life also includes the right to have access to judicial remedies to punish violators or to protect one's self from violations or to deter fatal crime. The fact that the right to life is not a mere hortatory international or constitutional declaration comes out when one sees how as it is connected to a web of legal issues in all fields of the law and policy.

In addition to international law, constitutional law and a plethora of law related ethical and policy issues, the article has touched upon domestic human rights law, civil law, criminal law, law of persons, police/military codes of conduct, humanitarian law, administrative law, medical law, amnesty/pardon law and environmental law. It is then for this reason that any legislative work on human rights protection, human rights education, or the study of the field, needs a thorough and a holistic approach. Without such an approach neither the enforcement of human rights nor their study would be complete.

What If a Quarter of a Loaf Is Not Much Better Than None? The Role of the Social Health Insurance Scheme in Promoting Access to Medicines in Ethiopia - An Overview

Abdulkader Mohammed Yusuf

Abstract

Hundreds of millions of people worldwide do not have access to essential medicines, particularly in Africa and many parts of Asia, and hence, millions of people avoidably die every year. Moreover, as people in these countries pay for their own medicines, the expenditure on medicines coupled with their high prices is pushing people to poverty. This forces us to see enhancing access to medicines by all means as not only a major component in realizing the right to health/life, but also as a tool in contributing its share in the fight against poverty. One of the means through which access to medicines may be enhanced and out-of-pocket spending may be avoided is by introducing health insurance schemes with medicines forming part of the benefit package. Proclamation No. 690/2010 establishes a Social Health Insurance Scheme in Ethiopia, which contains medicines as one of the benefits of the scheme. Although it suffers from certain shortcomings, the system is a commendable step in enhancing access to medicines for its beneficiaries. This article looks into some of the major shortcomings of the scheme, and tries to assess the role of donors, pharmaceutical companies and NGOs in terms of enhancing the formulary and accordingly improve access to medicines to the beneficiaries of the scheme.

Key Words:

[Social] health insurance schemes, access to medicines, generic drugs/medicines, pharmaceutical companies, out-of-pocket spending

Introduction

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The right to health is one of the fundamental rights in both international and domestic human rights instruments. The fact on the ground, however, and particularly in developing and least developed countries, leaves much to be desired. States have the primary responsibility to see it to that all the necessary measures are taken to ensure the realization of the right, most notably by bringing health care services within the reach of their citizens. However, as states are not delivering, millions of people continue to die every year across the globe either due to lack of, among other things, basic health services and/or medicines.

Needless to say, medicines play a significant role in realizing the right to health. However, one-third of the world's population lacks access to the most basic essential drugs and, in the poorest parts of Africa and Asia, this figure climbs to one half.⁹⁴ A World Health Organization (WHO) estimate shows that ten million people die every year because of lack of access to medicines.⁹⁵ The reason for this lack of access to medicines may vary. Poverty, national laws and international agreements such as the TRIPS Agreement, which requires that pharmaceuticals are to enjoy a minimum of twenty years patent protection, are some of the important reasons for the access gap in most countries. Patent on pharmaceuticals, whose prices may go as high as ten thousand percent as compared with their generic counterparts, is often justified as a means to enable the pharmaceutical companies recover their expenses on their R&D. Indeed, some drugs take years and cost millions of dollars before they are put on the market. However, according to the Fortune 500, the pharmaceutical industry remains by far the most profitable in the world, well ahead of companies in all other sectors, and that profits far exceed what is necessary for a "reasonable" return on their R&D.⁹⁶ Be that as it may, while brand medicines are obviously not affordable for the poor, pharmaceuticals

⁹⁴ Ellen F. M. 'T Hoen, 'TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond' (2003) p.42

<www.who.int/intellectualproperty/topics/ip/tHoen.pdf>' accessed 17 July 2013'.

⁹⁵ 'Equitable Access to Essential Medicines: A Framework for Collective Action', World Health Organization, (2004) Geneva
<http://whqlibdoc.who.int/hq/2004/WHO_EDM_2004.4.pdf>' accessed 17 July 2013'.

⁹⁶ See "The 2002 Fortune 500". Fortune Magazine, April 2002, in Richard Elliott and Marie-Hélène Bonin, 'Patents, International Trade Law and Access to Essential Medicines' Medecins Sans Frontieres (2002)
<www.umich.edu/~spp638/Coursepack/ipr-msf.pdf>' accessed 4 November 2013'.

produced since 1994 are protected, out of which no generic drugs may be produced, save in certain exceptional circumstances.

Given most essential drugs are not affordable and in most cases not available, states need to seek ways to enhance access to medicines. One such way is introducing health insurance schemes with a view to pooling risks, which may relieve members of the scheme from out-of-pocket spending on medicines and also ensure, to some extent, their availability. Although, a number of insurance companies have had private insurance schemes for a couple of years now, the introduction of social health insurance scheme in Ethiopia is a fairly new experience. The Ethiopian social health insurance scheme covers employees and pensioners (and their families) as beneficiaries of the system, where a number of health care services are available, including medicines. The fact that the social health insurance scheme incorporates medicines as part of its benefit, regardless of the shortcomings, inspires optimism in ensuring access to medicines for the portion of the population covered by the system.

The main objective of the article is to bring the Ethiopian health insurance scheme to light and its role in enhancing access to medicines. In doing so, it attempts to discuss some of the shortcomings of the scheme and opportunities available. The other objective of the article is to lay a foundation for future research and dialogue on health insurance and access to medicines.

The article is divided into four sections. This short introduction is followed by an overview of health insurance schemes and some of the major challenges on access to medicines. The second section, by starting with an introduction of the Ethiopian social health insurance scheme, goes on to briefly highlight the contributions of the system in terms of ensuring access to medicines. Section three examines some of the shortcomings of the social health insurance scheme. The last section explores the roles of donors, pharmaceutical companies and NGOs in helping the Agency possess a well off depository and bringing the beneficiaries of the system a step closer to essential medicines.

It should be noted that the author's persistent requests to get information from the Agency were repeatedly rejected, even after producing a support letter from the Center upon the request of the Deputy Director of the Agency himself. Failure to acquire the necessary information from the Agency has seriously impacted on the outcome of the piece. The article, therefore, chiefly relies on survey of literature and analysis of the Social

Health Insurance Scheme Proclamation and Regulations and other relevant laws.

1. [Social] Health Insurance Schemes and Access to Medicines

1.1. [Social] Health Insurance Schemes

Health insurance is a mechanism for spreading the risks of potential health care costs over a group of individuals or households, with the goal of protecting the individual from a catastrophic financial loss in the event of serious illness.⁹⁷ The system is designed in such a way that its beneficiaries are relieved from out-of-pocket expenses in respect of the health service packages the insurance covers. Hence, health insurance is attracting more and more attention in low- and middle-income countries as a means for improving health care utilization and protecting households against impoverishment from out-of-pocket expenditures.⁹⁸

A number of health insurance models exist worldwide. Among these, the following are common:

Private Health Insurance refers to schemes that are financed through private health premiums, which are usually (but not always) voluntary.⁹⁹ As private health insurance is provided by private entities, the money can be paid directly to the insurance company.¹⁰⁰ Because of its characteristics, most notably high premiums, private health insurance is out of the reach of the poor.

Community-based health insurance schemes (mutuelles de santé) are voluntary, not-for-profit health insurance schemes organized at a

⁹⁷ John Chalker, 'Pharmaceutical Benefits in Insurance Programs' in Management Sciences for Health. MDS-3: Managing Access to Medicines and Health Technologies. Arlington, VA: (2012)
<<http://apps.who.int/medicinedocs/documents/s19588en/s19588en.pdf>>
'accessed 29 October 2013'.

⁹⁸ 'The impact of health insurance in Africa and Asia: a systemic review', Bulletin of the World Health Organization (13 June 2012)
<www.who.int/bulletin/volumes/90/9/12-102301/en/> 'accessed 28 August 2013'.

⁹⁹ Chalker (n 4 above) p.14.

¹⁰⁰ *ibid.*

community level that specifically target those outside the formal sector.¹⁰¹ Common in most developing and least developed countries, this kind of insurance is introduced to cover populations that live in rural areas and work in informal sectors.¹⁰²

Social Health Insurance is a kind of health insurance where a designated group of the population is included.¹⁰³ Key features of a successful social insurance plan include:

- compulsory or mandatory membership;
- prepayment contributions from payroll deductions based on income;
- cross-subsidization and coverage of a large proportion of the population;
- benefit based on need;
- arrangement of social assistance to cover vulnerable populations;
- collected revenue administered by a quasi-independent body.¹⁰⁴

Hence, social health insurance schemes are generally understood as health insurance schemes provided by governments to their citizens, especially to low and middle income populations.¹⁰⁵ At this juncture, it is important to differentiate social health insurance from 'tax based financing' where the latter typically entitles all citizens (and sometimes residents) to services thereby giving universal coverage.¹⁰⁶ In other words, membership to a social health insurance scheme is reserved for certain portions of the

¹⁰¹ Ceri Averill, 'Universal Health Coverage: Why health insurance schemes are leaving the poor behind' (2013) p.9
<www.oxfam.org/sites/www.oxfam.org/files/bp176-universal-health-coverage-091013-en.pdf> 'accessed 6 November 2013'.

¹⁰² Chalker (n 4 above) p.12.

¹⁰³ *ibid*, p.11.

¹⁰⁴ *ibid*.

¹⁰⁵ Arnab Acharya et al, 'Do Social health insurance schemes in developing country settings improve health outcomes and reduce the impoverishing effect of healthcare payments for the poorest people?' Cochrane Database of Systematic Reviews, p.2
<<http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/FINAL-Q40-Social-Health-Insurance-Protocol-DFID-LSHTM.pdf>> 'accessed 28 August 2013'.

¹⁰⁶ *ibid*, p.3.

population as stipulated in the particular social health insurance scheme concerned.

Social health insurance schemes are gaining much attention, both in national systems and at the international level, as a viable option to finance health care needs of the public, particularly the poor. The WHO in 2005 passed a resolution that it would support a strategy to mobilize more resources for health, for risk pooling, increase access to health care for the poor and deliver quality health care in all its member states but especially low income countries.¹⁰⁷ This strategy is also supported by the World Bank.¹⁰⁸

1.2. Access to Medicines and its Challenges

As guaranteed and reiterated by the major human rights instruments across the globe, both international¹⁰⁹ and municipal,¹¹⁰ the right to health of people is a very important right in the human rights discourse. The realization of the right has, however, proved rather difficult to come by, particularly in Africa and many parts of Asia as well as in other poor parts of the world. The poor health condition in these parts of the world is further exacerbated by the lack of access to medicines, as medicines play an enormous role in the realization of the right.¹¹¹

¹⁰⁷ WHO Sustainable Health Financing, Universal Coverage, and Social Health Insurance in 58th World Health Assembly Agenda Item 13.16 Edition Geneva, 2005, in Acharya et al. (n 12 above) p.2.

¹⁰⁸ Hsiao W, Shaw RP, 'Social Health Insurance for Developing Nations', The World Bank Washington, D.C. 2007 in Acharya et al. (n 12 above) p.2.

¹⁰⁹ International human rights instruments that guarantee the right to health include the UDHR (Article 25), ICESCR (Article 12 See also the Economic Social and Cultural Rights General Comment 14), CEDAW (Article 12), ACHPR (Article 16 See also ACHPR Res. 141), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 14).

¹¹⁰ According to Perehudoff, by 2009, 135 countries had incorporated aspects of the right to health in their national constitutions. See S.K Perehudoff, 'Health, Essential Medicines, Human Rights and National Constitutions', Geneva, WHO in Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade (2008) < www.who.int/medicines/areas/human_rights/Perehudoff_report_constitutions_2008.pdf > 'accessed 27 April 2012'.

¹¹¹ As has been said above, in the poorest parts of Africa and Asia, about half of the population lack access to the most basic essential drugs.

The situation becomes unthinkable if one considers the United Nations Development Group's definition of access, i.e. having medicines continuously available and affordable at public or private health facilities or medicine outlets that are within one hour's walk from the homes of the population.¹¹² Yet, in the majority of places in the developing countries, which gets worse in the least developed ones, the practicability of this definition is not in sight and remains a mere desire.

Both the availability and price of medicines are beyond the reach of the majority of the people in developing and least developed countries. One can come up with a number of factors that stand in the way of access to medicines in these countries. In addition to the factors mentioned above, such factors include lack of equity in the supply of essential medicines, high prices, informal payments and out-of-pocket payments for the medication required exclude the poor and vulnerable, and do not facilitate the realization of the right to health.¹¹³

Among the factors mentioned above, poverty, coupled with the high cost of medicines is one of the biggest challenges. Pfizer's study shows that approximately 4 billion people, 72 percent of the world's population, live on less than three dollars a day, of which, between 50 to 90 percent of annual total health care expenditures by the world's poorest people, approximately \$30 billion annually, goes to pay for medicines.¹¹⁴ Moreover, Leisinger et al. study shows that average availability of generic medicines is only 38 percent in the public sector in low- and middle-income countries, and, although private sector availability is higher – on average 64 percent – medicines in private pharmacies are often not affordable.¹¹⁵

¹¹² United Nations Development Group, Indicators for Monitoring the Millennium Development Goals: Definitions, Rationale, Concepts and Sources p.81 (United Nations, New York, 2003).

¹¹³ See Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade WTO, WHO, WIPO <www.wto.org/english/res_e/publications_e/who-wipo-wto_2013_e.htm> 'accessed 18 October 2013'.

¹¹⁴ Pfizer, Access to Medicines, 2009 Corporate Responsibility Report, p.29 <www.pfizer.com/files/corporate_citizenship/cr_report/access_meds.pdf> 'accessed 31 October 2014'.

¹¹⁵ KM Leisinger, et al, Improving Access to Medicines in Low and Middle Income Countries: Corporate Responsibilities in Context. Southern Med Review Vol 5, Issue 2; (2012) p.3.

Lack of R&D in developing countries is also another problem. A number of justifications may be raised for the lack of involvement in R&D in pharmaceuticals in these countries. Lack of the necessary fund to undertake the tedious R&D in pharmaceuticals is one justification, as it sometimes takes hundreds of million dollars and years to develop a certain drug. The problem of lack of R&D in such countries is magnified by the fact that many research based pharmaceutical companies in most cases are profit oriented and thus not interested in developing medicines essential for the poor living in these parts of the world.¹¹⁶ This and many other reasons force us to see the issue as an injustice to the poor.¹¹⁷

The other important challenge on access to medicines is the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS).¹¹⁸ The TRIPS Agreement, which was born out of the Uruguay Round of Negotiations and forms part of WTO's single undertakings,¹¹⁹ brought about minimum standards for the protection of intellectual property, including patents on pharmaceuticals. While incorporating an agreement on intellectual property amid the existence of other international

¹¹⁶ This should not be taken to mean that pharmaceutical companies are not wary of the lack of access to medicines of the poor. As Section 4.2 below illustrates, many pharmaceutical companies have been engaged in donating, even developing certain drugs for the needs of the poor in Africa and other parts of the world.

¹¹⁷ Yamin, for example, states that "viewing access to medicines as a matter of fundamental human rights forces us to face the momentous suffering and loss of life that is occurring in developing countries due to HIV/AIDS, tuberculosis, malaria, and other diseases as not just a tragedy; it forces us to recognize it as a horrific injustice". See Alicia Yamin, 'Not Just a Tragedy: Access to Medications as a Right under International Law', Boston University International Law Journal, Vol. 21:325, (2006) p.370.

¹¹⁸ The basic objective of the TRIPS Agreement is to give adequate and effective protection to intellectual property rights, so that the owners of these rights receive the benefits of their creativity and inventiveness, and are thereby also encouraged to continue their efforts to create and invent. The TRIPS Agreement covers copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, undisclosed information.

¹¹⁹ As can be seen from the Annex to the WTO Agreement containing the different Agreements, Annex I contains the multilateral agreements on Trade in Goods, Services and Intellectual Property. As a country cannot opt to sign one and reject others from these Multilateral Agreements, they are commonly referred to as single undertakings. Such an option, however, is available in the Plurilateral Agreements, found under Annex IV of the Agreement.

agreements¹²⁰ raised many eyebrows by itself, TRIPS required WTO members to offer patents on pharmaceuticals for the first time under the intellectual property protection regime. Article 27 provides that ‘patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’. Members are, therefore, required to amend or adopt patent laws incorporating the minimum standards set forth in the TRIPS. Regardless of the flexibilities under the TRIPS Agreement and some other options outside the TRIPS, the Agreement is bad news for the majority of the poor worldwide, for whom medicines keep going in the other direction.

As an importer of generic medicines, Ethiopia will be one of the countries highly affected by the TRIPS Agreement.¹²¹ As will be discussed in the subsequent sections, in the absence of a strong and an all-inclusive health insurance schemes in Ethiopia, this is bad news for the majority of

¹²⁰ Prior to the TRIPS Agreement, the Paris Convention was the main international instrument governing patents at the international level but it contains few binding rules. There was for example no obligation to make available patents for any particular technology; nor was there a set of exclusive rights to be conferred on patent holders. There was also no minimum term of protection prescribed by the Paris Convention. Indeed, several countries used to exclude pharmaceutical products and processes from patent protection and preserved different patent policy that fit into their socioeconomic needs. See Fikremarkos Merso, ‘Ethiopia’s Accession to the WTO: Does It Imply Anything on Access to Affordable Medicines in Ethiopia? In Fikremarkos Merso (ed) ‘WTO Accession: Assessing the Benefits and Costs for Ethiopia’, Ethiopian Business Law Series, Vol. 2 157 (2008) p.163.

¹²¹ It is worth noting that as a generic importer (mostly from India), the impacts of the TRIPS Agreement on access to medicines in Ethiopia will be significant even if Ethiopia stays out of the WTO. As Fikremarkos rightly notes, “until recently, drug importing countries like Ethiopia have the option of importing supplies from generic companies, principally in India, because India did not recognise patents for pharmaceutical products until the time when the TRIPS Agreement came into force and even after the coming into force of the TRIPS Agreement the country was given a transition period (of five years) until 2005 to implement the Agreement. In 2005, India introduced a new patent law in compliance with the TRIPS Agreement where new drugs and those for which patent applications were submitted after 1994 have become patentable, and as a result the opportunity for generic imports will likely diminish gradually”. See Fikremarkos (n 27 above) pp.169-170. The same holds true as the other prominent generic producing companies are found in China, Brazil, South Africa, which are members of the WTO.

Ethiopians where health services and medicines form part of out-of-pocket expenses.¹²² To make matters worse, a considerable number of the population is dying from communicable diseases such as HIV/AIDS and TB, as well as non-communicable diseases such as hypertension, diabetes and heart disease. This certainly distorts Ethiopia's efforts towards the realization of the right to health of the people envisaged in the FDRE Constitution, as well as the human rights instruments of universal and regional application to which Ethiopia is a party.

2. The Ethiopian Social Health Insurance Scheme

2.1. An Overview of the Ethiopian Social Health Insurance Scheme

Proclamation No. 690/2010 (Proclamation) establishes a social health insurance scheme.¹²³ As with the objectives of social health insurance scheme in most systems, the objective of the social health insurance is to 'provide quality and sustainable universal health care coverage to the beneficiary through pooling of risks and reducing financial barriers at the point of service delivery'.¹²⁴ The Proclamation further provides that it does not affect additional medical benefits granted under collective agreements concluded in accordance with the Labour Proclamation No. 377/2003 and additional medical benefits granted by police health institutions to members of the police.

Pursuant to Article 6 of the Proclamation, members' and employers' contributions, investment income and other related sources are the sources of finance of the social health insurance. Although some systems do not

¹²² The exception in this regard is the existence of public hospitals and health institutions which offer health services at low cost, which play a significant role in cutting expenditures on health services. Watal notes that expenditures on medicines can represent up to 66% of total health spending in developing countries and could be a major cause of household impoverishment, as 50-90% of such expenditures are out-of-pocket expenses. Jayashree Watal, 'Access to Essential Medicines in Developing Countries: Does the WTO TRIPS Agreement Hinder It?' Science, Technology and Innovation Discussion Paper No. 8, (2000) Center for International Development, Harvard University. <www.cid.harvard.edu/archive/biotech/papers/discussion8.pdf> 'accessed 9 March 2012'.

¹²³ Social Health Insurance Proclamation No. 690/2010, 16th Year, No. 50 (2010) *Federal Negarit Gazeta*, Article 3.

¹²⁴ *ibid*, Article 4. As will be discussed later on, the use of the term "universal" in the objective is, however, confusing since both the health care services and the drugs offered for the beneficiary are limited.

require contributions from members in social health insurance scheme, members' and employers contributions are common in most social health insurance scheme. Investment as a source of finance for the social health insurance is not, however, as common, and not clear, regardless of the Regulation's scant attempt to answer the 'why' question.¹²⁵

The health care benefits stipulated under the health service package¹²⁶ may be obtained from the health facilities which have concluded a contract with the Agency.¹²⁷ These health facilities are to 'provide services to the beneficiaries in accordance with the required quality standards, and with the tariff stated in the contractual agreement entered into with the Agency.'¹²⁸ Any health facility which fails to comply with this [obligation] will be subject to criminal and civil liability, on the basis of relevant law.¹²⁹ Moreover, for periodic evaluation of the Agency, health facilities are obligated to furnish information on the provision of their services as per the required quality standards and their fulfilment of other quality requirements.¹³⁰

A health facility is expected to submit its aggregate health service bills to the Agency within 45 days after the end of the month in which the service is provided, failing which it will be liable to a fine of 1% of the amount of the late claim.¹³¹ Upon taking receipt of the bill, the Agency verifies and pays

¹²⁵ Article 4 (5) of the Regulation reads "The Agency may, to strengthen the financial sources of the Social Health Insurance Scheme, invest, pursuant to directive of the government, accumulated contribution remaining after deducting reserve funds". Yet, as the author was not able to acquire information from the Agency, at the time or writing it is unknown whether the directive which is to regulate the manner in which the Agency engages in investment activities has been issued or not. One would wonder the activities that the Agency chooses to invest on, as it will have a huge impact (positive if it succeeds and negative if it fails) on the health care package in general and on access to medicines in particular. This is because, as Article 4 (5) states, the objective of the investment is to strengthen the financial sources of the social health insurance scheme. Pursuant to Article 3 (3) of the Regulation, the fact that the Agency is in a strong financial status means it will be in a position to recommend to the government to expand the health service package laid down under the provisions of Article 3 of the Regulation.

¹²⁶ Social Health Insurance Scheme Regulation No. 271/2012, Article 3.

¹²⁷ Proclamation No. 690/2010, Article 3 (1).

¹²⁸ Regulation No. 271/2012, Article 6 (1).

¹²⁹ *ibid.* Article 6 (3).

¹³⁰ *ibid.* Article 6 (2).

¹³¹ *ibid.* Article 7 (1) & (3).

the amount to the health facility no later than three months from submission of the bill.¹³² The Agency is liable to pay interest (on the unpaid amount at the prevailing bank lending interest rate) if it fails to settle accurate health service bills, in accordance with Article 7 (2).¹³³ Apart from settling bills after the delivery health care service, the Regulation also envisages prepayment, the particulars of which are left to be dealt with a directive to be issued by the Agency.¹³⁴

The Ethiopian Health Insurance Agency is the body charged with implementing the health insurance system. It is established in accordance with Regulation No. 191/2010. Apart from the expansive powers and duties it is endowed with its constitutive instrument, the Agency also bears a range of powers and duties pursuant to the Proclamation and the Regulation.

2.2.Contributions of the Social Health Insurance Scheme to Access to Medicines

Many insurance systems were developed with the primary focus on reducing catastrophic health expenditures, especially those associated with hospitalization.¹³⁵ However, given high out-of-pocket spending on pharmaceuticals, an insurance scheme with no or limited medicines coverage may not prevent cost-induced poverty from medicine expenditures.¹³⁶ According to Faden, evidence from high-income countries suggests that higher medicines out-of-pocket co-payments result in lower utilization and poorer health outcomes; reducing or eliminating out-of-pocket medicines payments through insurance coverage in low- and middle-income countries should translate into greater access to medicines,

¹³² *ibid.* Article 7 (2).

¹³³ *ibid.* Article 7 (4).

¹³⁴ *ibid.* 7 (5).

¹³⁵ Laura Faden et al, 'The Role of Health Insurance in the Cost-Effective Use of Medicines', WHO/HAI Project on Medicine Prices and Availability, Review Series on Pharmaceutical Pricing Policies and Interventions, Working Paper 2 (2011) p.2. <
www.haiweb.org/medicineprices/05062011/Health%20insurance%20final%20May2011.pdf> 'accessed 27 October 2013'.

¹³⁶ Yip W, Hsiao WC, 'Non-evidence-based policy. How effective is China's New Cooperative Medical Scheme in reducing medical impoverishment'. *Social Science & Medicine*, 68: 201 (2009), in Faden et al (n 42 above) p.2.

improved health outcomes and increased satisfaction with the health care system.¹³⁷ In fact, studies undertaken by Dror et al. have shown that consumers place higher value on insurance schemes that include medicines coverage.¹³⁸

Nevertheless, not all health insurance schemes include medicines as one of the benefits of the system. Chalker notes that some insurance schemes will incorporate medicines as part of a comprehensive care package, others will compensate for them separately, and others will not cover them at all.¹³⁹ Yet, as expenses on medicines takes up the lion's share of the annual health care expenditure, it is only logical if health insurance schemes include the provision of medicines in their health services package. Apart from relieving its beneficiaries from out-of-pocket spending on medicines, health insurance schemes also ensure the availability of medicines, since the availability of medicines, at times, is as exasperating as their affordability.

Faden's study, furthermore, shows that there is evidence providing that health insurance can improve consumer access to and utilization of pharmaceuticals as well as health outcomes and that health insurance reduces financial barriers to access.¹⁴⁰ Insurance is associated with a decreased likelihood of paying for medicines, decreased consumer expenditures on medicines, decreased out-of-pocket spending on medicines as percent of total health expenditure, and decreased reported financial barriers to purchasing medicines.¹⁴¹

As part of their health services package, most social health insurance contains the provision of certain pharmaceuticals for their beneficiaries. The health services package of the Ethiopian social health insurance scheme is no exception in this regard. It says any beneficiary of the social health insurance scheme has the right to receive from health facilities generic drugs included in the drug list of the Agency and prescribed by medical practitioners.¹⁴²

¹³⁷ Faden (n 42 above) pp. 2-3.

¹³⁸ DM Dror et al. 'Health Insurance Benefit Packages Prioritized by Low-Income Clients in India: Three Criteria to Estimate Effectiveness of Choice' *Social Science and Medicines* 64 (4) (2007) in Faden (n 42 above) p. 3.

¹³⁹ Chalker (n 4 above) p.8.

¹⁴⁰ Faden et al (n 42 above) p.9.

¹⁴¹ *ibid.*

¹⁴² Regulation No. 271/2012, Article 3 (1) (e).

The fact that medicines are part of the benefit package of the social health insurance means that beneficiaries of the system are relieved from out-of-pocket expenditures on drugs. Moreover, as the membership of the system is extended to encompass families of employees and pensioners, it means, if implemented to the fullest, that a certain portion of the population is covered. Thus, out-of-pocket expense for medicines by the beneficiaries is done away with, at least in respect of the drugs found on the drug list of the Agency. This would certainly have a positive impact on the percentage of out-of-pocket expenditure on medicines in the country, however small the number may be. It will certainly do its beneficiaries a world of good in terms of enhancing access to medicines and ensure their right to health.

3. Shortcomings of the Social Health Insurance Scheme

3.1. Beneficiaries of the System: Membership - not Universal Coverage

Only employees¹⁴³ and pensioners¹⁴⁴ may become members of the social health insurance scheme in Ethiopia.¹⁴⁵ Accordingly, an employee or a pensioner registered for the social health insurance scheme and paying contributions thereto is entitled to receive the benefit package¹⁴⁶ under the

¹⁴³ An employee is defined as any employee having a three month and above period of service and includes public officials, management staff, judges, prosecutors, members of the police, members of House of Peoples' Representatives, salaried members of the House of the Federation and salaried labor union officials. Members of the Defense Forces, however, are excluded. See Proclamation No. 690/2010, Article 2 (2).

¹⁴⁴ A pensioner is defined as any person receiving monthly pension payments from the Social Security Agency and includes survivors of a pensioner. See Proclamation No. 690/2010, Article 2 (3).

¹⁴⁵ Proclamation No. 690/2010, Article 5.

¹⁴⁶ Pursuant to Article 8 (1) of the Proclamation, the health service package to be provided to beneficiaries includes essential health services and other critical curative services. As envisaged by the Proclamation, the Regulation gives a list of health services to be obtained from health facilities which have entered into a contract with the Agency. The health services the beneficiary is entitled to receive are outpatient care; inpatient care; delivery services; surgical services; diagnostic tests and generic drugs included in the drug list of the Agency, and prescribed by medical practitioners. On the contrary, the following health services are excluded from the health service package: any treatment outside Ethiopia; treatment of injuries resulting from natural disasters, social unrest, epidemics, and high risk sports; treatments related to drug abuse or addiction; periodic medical check-up unrelated to illness; occupational injuries, traffic accidents and other injuries covered by other laws; cosmetic surgeries; organ transplant; dialysis except acute renal failure; provision of eyeglass and contact

social health insurance scheme, along with his/her families.¹⁴⁷In accordance with the guidelines developed by the Agency, every employer¹⁴⁸ is required to register all its employees with the Agency for the social health insurance scheme.¹⁴⁹ Similarly, the Social Security Agency is required to register all pensioners (including the survivors of the pensioners) with the Agency. Furthermore, the Law obliges members to provide accurate information about their family composition and use the service properly.¹⁵⁰

In line with Article 6 of the Proclamation, which states that members' and employers' contributions are two of the sources of finance for the social health insurance, both the Proclamation and Regulation stipulate detailed rules with regard to such contributions. Accordingly, members (i.e. employees) and employers each contribute to the social health insurance in the amount of 3% of the member's gross salary.¹⁵¹ Employers are required to transfer the contributions of their employees which they withhold from their monthly salaries together with their own contributions within a month.¹⁵² With respect to pensioners, the amount of contribution to the social health insurance scheme to be made by them and the government is

lenses; in vitro fertilization; hip replacement; dentures, crowns, bridges, implants and root canal treatments except those required due to infections; provision of hearing aids; health services provided to any beneficiary free of charge. See Regulation No. 271/2012, Articles 3 (1) (a-e) and 3 (2) (a-n).

¹⁴⁷ Family in the Proclamation comprises the spouse (a person married to a member) and children (natural, adopted or stepchild of a member who has not attained the age of 18 years and includes any child who is under the guardianship of the member in accordance with the law) of a member and includes mentally or physically impaired children of the member who have attained the age of 18 years but cannot sustain themselves. See Proclamation No. 690/2010, Article 2 (10).

¹⁴⁸ A public office, a public enterprise or any person that employs at least ten employees.

¹⁴⁹ See Proclamation No. 690/2010, Articles 5(2) and (4).

¹⁵⁰ *ibid*, Article 7(2).

¹⁵¹ Regulation No. 271/2012, Article 4 (1). This meets the terms of Article 9 (2) of the Proclamation, which states that 'an employee and employer shall make equal percentage contributions based on the salary of the employee'.

¹⁵² Regulation No. 271/2012, Article 4 (3). Although Article 4 (3) of the Regulation specifies one month as the time limit for the transfer of the contributions of employees and employers, Article 9 (3) of the Proclamation employs a rather vague term, i.e. "timely". The Regulation sure will clear any confusion in respect of transferring contributions to the Agency.

1% each.¹⁵³ The Social Security Agency is required to transfer to the Agency the monthly contributions of pensioners together with the matching contributions of the government within one month.¹⁵⁴

This shows that, as membership in the social health insurance scheme is only reserved for employees and pensioners upon payment of contributions on a regular basis, the majority of the people in Ethiopia remain uncovered.¹⁵⁵ It is in the nature of social health insurance scheme to incorporate a certain portion of the population, and the Ethiopian system is not different. Indeed, this is one of the main elements which differentiate social health insurance from private or universal health insurance schemes. In the process, however, the lack of access to medicines of the majority of the people in Ethiopia continues unresolved, since a large majority of the population is engaged in the informal sector, not to forget the vast unemployment and, thus, are excluded from the membership of the scheme. Put otherwise, with over 90 million people, the majority of which lives below the poverty line and with various health concerns, the contribution of the social health insurance scheme is undermined. The fact that only 20,390 employees have been registered for the social health insurance scheme in the Ethiopian Fiscal Year of 2006¹⁵⁶ (2013/2014, i.e. about four years into the entry into force of the Social Health Insurance Proclamation) out of a staggering total population of over 90 million speaks volumes on how the scheme has left millions of people behind.

¹⁵³ Proclamation No. 690/2010, Article 9 (1) and Regulation No. 271/2012, Article 4 (2).

¹⁵⁴ Proclamation No. 690/2010, Article 9 (4) and Regulation No. 271/2012, Article 4 (2).

¹⁵⁵ The fact that a small portion of the population is covered by the social health insurance, however, is not peculiar to the social health insurance scheme in Ethiopia when one sees the situation in other similar countries. According to Berkhout and Oostingh, in low- and middle-income countries, where the majority of the population are employed in the informal sector (which in some countries absorbs 80 per cent of the economically active population) and where there are large rural populations, weak administrative capacity, and a lack of government stewardship, social health insurance is generally not considered a viable option. Esmé Berkhout and Harrie Oostingh, 'Health insurance in low-income countries: Where is the evidence that it works?' Joint NGO Briefing Paper (2008) p.13 <http://oxfam.qc.ca/sites/oxfam.qc.ca/files/2008-05-07_health_insurance.pdf> 'accessed 29 October 2013'.

¹⁵⁶ Federal Democratic Republic of Ethiopia, Ministry of Health, HSDP Annual Performance Report, EFY 2006 (2013/2014) Version 1 p.90.

This, however, should not be taken to undermine the contribution of the Scheme on access to medicines. The social health insurance and its benefit package, regardless of its shortcomings, is commendable on the part of the government in bringing the beneficiaries a step closer to health care services. However, as has been said above, with the small number of employees and pensioners as compared with the total number of population in Ethiopia, it is easy to conclude that the majority of the population still remains outside the scheme. The government is, therefore, challenged to build on this and expand the social health insurance with a view to using it as a transition to universal health coverage, however difficult the transition appears.¹⁵⁷ It is also expected to keep an eye on the Agency, which appears to be moving at a snail's pace, so that it can act faster and enable the beneficiaries of the system enjoy what they are entitled to.

3.2. Formulary: The Drug List of the Agency

It is acknowledged that the inclusion of drugs as a benefit in the Ethiopian social health insurance scheme is admirable, irrespective of the genre of the drugs. Indeed, beneficiaries of the system are relieved from out-of-pocket spending on the drugs that have made it into the drug list of the Agency. Yet, the fact that a restricted formulary is employed means that there are still a whole lot of medicines that the beneficiaries have to find and purchase on their own. The availability and affordability of drugs outside the Agency's formulary endangers the access to medicines of the beneficiaries and puts a question mark on the entire system in terms of ensuring access to medicines.

Indeed, limiting the available drugs amid their inclusion in the benefit package is common in most health insurance systems. Carapinha et al. state that most insurance programs come up with a list of the medicines covered under the system and others use a negative list, i.e. medicines excluded

¹⁵⁷ One can appreciate that achieving universal coverage through social health insurance is not an easy process. Carrin and James state that many countries that currently have a universal coverage system often needed decades to implement it: as at 2005, twenty-seven countries have established the principle of universal coverage via social health insurance. Guy Carrin and Chris James, 'Social Health Insurance: Key Factors affecting the Transition towards Universal Coverage', *International Social Security Review*, Vol. 58, 1 (2005), pp. 1 & 3. www.who.int/health_financing/documents/shi_key_factors.pdf 'accessed 28 October 2013'.

from reimbursement.¹⁵⁸ This is to say that Article 3 (1) (e) of the Regulation has not brought about something new by stating the benefit includes drugs only included in the drug list of the Agency.

Whether common or exclusive to the Ethiopian system, a drug list has its own disadvantages. One of the disadvantages of a drugs list, and as shown in Engelbrecht's study, is the fact that some drugs are included in the list for their price per tablet but not based on evidence of their essentiality.¹⁵⁹ Thus, it will be interesting to see the criteria¹⁶⁰ the Agency has taken in including the medicines in the drug list. Furthermore, the list is expected to be updated on a regular basis taking into account the medicines the Agency is in possession of.¹⁶¹ If this is the case, the Agency is again expected to make such an update known to the beneficiaries.

Therefore, in ensuring access to medicines to its beneficiaries, the criteria taken by the Agency in developing the drugs list are all the more important. With a view to avoiding the blunder of some other systems on their respective formularies, such criteria should be based on the essential

¹⁵⁸ See Carapinha JL, et al, 'Health insurance systems in five Sub-Saharan African countries: Medicine benefits and data for decision making' Health Policy(2010) <www.afro.who.int/en/downloads/doc_download/6154> 'accessed 27 October 2013'.

¹⁵⁹ See Susanna G Engelbrecht, 'Adherence to the Medicine Code List in Primary Health Care Military Clinics in Gauteng' (MA dissertation, University of Limpopo 2010).

¹⁶⁰ In studies undertaken by Carapinha et al. in five Sub-Saharan countries, it can be observed that different kinds of criteria have been employed in deciding the medicines the benefit covers. Such criteria are regulatory authority approval; being on the market for a certain time; being listed on insurance formulary; being listed on national essential medicines list; being shown to be cost-effective; being available at certain negotiated price. See Carapinha et al, (n 65 above) p.5. Needless to say, some of the criteria mentioned above do not solve the access gap and seem to have missed the whole point of including drugs in the benefit package. After all, a medicine should be included in a formulary not to increase the list of the medicines found therein, but obviously to enhance the health status of the beneficiaries of the system and help in the availability and affordability of medicines.

¹⁶¹ The frequency that it takes to update a formulary depends on the system and varies from one another. Again Carapinha et al. state that the experiences in the five Sub-Saharan countries show that some systems update their formularies more frequently than once a year; others update them yearly; every 2-5 years; less frequently than every 5 years. See Carapinha et al, (n 65 above) p.5.

medicines list¹⁶² and definitely not based on the medicines available to the Agency.

3.3. Category of Medicines: Generic

As part of the health care package of the social health insurance scheme, only generic drugs, included in the drug list of the Agency and prescribed by medical practitioners, are available.¹⁶³ The Regulation defines a generic drug as 'any drug marketed under its scientific and chemical name without trade name protection'.¹⁶⁴ On its part, the WHO defines generic drugs as:

a pharmaceutical product, usually intended to be interchangeable with an innovator product, that is manufactured without a license from the innovator company and marketed after the expiry date of the patent or other exclusive rights. Generic drugs are marketed under a non-proprietary or approved name rather than a proprietary or brand name.¹⁶⁵

Thus, as generic drugs involve no R&D of any sort for their development, the drugs are exceptionally cheaper than their brand counterparts. It may sometimes happen that brand medicines may be a thousand percent expensive than generic ones. As a result, brand medicines are way out of the reach of the poor. Hence, the fact that generic drugs are explicitly referred to under the Ethiopian social health insurance Regulation is understandable. The Agency, with the available fund, includes generic drugs into its formulary, as it seeks to address the access gap in the country by covering as many members as it can.

¹⁶² Essential medicines are those that satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. World Health Organization, 'Equitable Access to Essential Medicines: A Framework for Collective Action', (2004) Geneva (WHO Policy Perspectives on Medicines) <www.who.int/hq/2004/WHO_EDM_2004.4.pdf>. Hence, an essential medicines list contains the list of medicines that are vital to the health care needs of the public and the Agency is expected to follow suit in developing the drugs list.

¹⁶³ Regulation No. 271/2012, Article 3 (1) (e).

¹⁶⁴ Regulation No. 271/2012, Article 2 (3).

¹⁶⁵ Generic Drugs, (World Health Organization, 2014) <<http://who.int/trade/glossary/story034/en/>> 'accessed 26 September 2014'.

As has been discussed elsewhere, generic drugs are not to be produced from those drugs produced since 1994, except for the transition periods granted to developing country members of the WTO. As all the major generic producing countries are members of the WTO, the availability of generic medicines is diminishing by the day, since they cannot produce generic drugs out of the brand ones whose respective patents are pending.

Apart from difficulties associated with intellectual property rights, generic drugs also have another problem relating to its effectiveness. McIntyre claims that it is difficult to be sure about the quality and strength of some generic drugs.¹⁶⁶ This is irrespective of the fact that all the active ingredients of a generic drug are the same as that of the brand. This, therefore, does not help in realizing the right to health of at least the members of the scheme.

4. Towards a better Formulary: The Role of Donors, Pharmaceutical Companies and NGOs

The public has the right to health, and the primary responsibility of ensuring the right falls on the state. This responsibility is assumed by states based on their respective national laws as well as international laws, both customary and conventional. The state needs to explore every possible option for that to happen. The argument throughout is that medicines have a big role to play in the realization of the right to health, and that it is the government that is supposed to ensure their availability. This section tries to assess the roles of donors, pharmaceutical companies and NGOs in helping the Agency in its bid to possess medicines, both in quality and quantity, by working in close contacts with development partners.¹⁶⁷

4.1. Aid

The role of aid in enhancing access to medicines may not sound plausible, as the major causes of the problem are also the major partners.

¹⁶⁶ Peter McIntyre, 'Drug donations: treat or treatment?' (Cancer World December 2006-January 2007 Special Issue) p.24 <http://axios-group.com/index.php/download_file/view/102/107/> 'accessed 4 November 2013'.

¹⁶⁷ According to the HSDP IV Annual Performance Report, pharmaceuticals, medical supplies and equipment worth of Birr 3.77 billion were donated by development partners and received at the Pharmaceutical Fund and Supply Agency warehouses in the Ethiopian Fiscal Year of 2006 alone. This clearly shows how big a role development partners play in this regard.

Industrialized countries, where most of the aid comes from, continue to put pressure on developing and least developed countries' endeavor to ensuring access to medicines to their public.¹⁶⁸ That said, it is maintained that the role of aid should not be dismissed under the circumstances. Apart from aid from governments, aid may also be sought from international organizations such as the WHO, the World Bank and others working on the area.

The modality of aid in this context may take the form of financial aid to the Agency's fund or the supply of medicines directly into the Agency. Indeed, the supply of medicines instead of financial aid seems a better alternative, for all the right reasons. That way, the Agency would be in a position to have a better supply of medicines, as well as expand its formulary, at least on a momentary basis. Hence, much is expected from the Agency in terms of soliciting both the financial aid and the pharmaceuticals from the donors.

If the Agency succeeds in securing an ever increasing aid, it will certainly play a significant role in reducing the access gap in Ethiopia. As has been discussed above, only generic medicines are available as part of the health service package of the social health insurance scheme in Ethiopia, the availability of which continue to be threatened by the day. If the Agency succeeds in soliciting aid and harbours a well-off depot of drugs, it would be a great contribution to access to medicines, at least for the portion of the population the system is designed to cover.

4.2. Access Initiatives of Pharmaceutical Companies: Donations and Price Reductions

Money being lost by pharmaceutical companies was the driving force for the negotiation of intellectual property agreement at the Uruguay Round. Industrialized countries, which are home to these research-based pharmaceutical companies, continue to put pressure on countries even long after the entry into force of the WTO Agreement. As much as they are the sources of the access problem, however, and whatever their motives may

¹⁶⁸ A very good example of this is the United States Section 301 of the Trade Act, which the US applies to impose trade sanctions under any trade agreement (whether bilateral or multilateral) where US interests are "being denied" by the act, policy or practice of another country.

be,¹⁶⁹ pharmaceutical companies do contribute in promoting access to medicines in developing and least developed countries. Such contributions made by pharmaceutical companies may take the form of donations of a given drug[s] or it may involve a price reduction of a given drug to the needy that cannot otherwise afford the drugs.

With regard to donations, one may come up with a number of instances whereby pharmaceutical companies lend their support to enhance access to medicines to the needy. Among these donations, Boehringer-Ingelheim's offer to provide Nevirapene, a drug proven to reduce the mother-child transmission of HIV drastically, free for a limited period of time¹⁷⁰ is one notable example. Moreover, under the WHO sponsored Alliance to Eliminate Filariasis, GlaxoSmithKline agreed to donate all needed supplies of its drug, albendazole, and Merck similarly agreed to donate ivermectin free of charge until the disease is eliminated.¹⁷¹ Pfizer, on its part, has agreed to provide free fluconazole to South Africans affected by cryptococcal meningitis.¹⁷²

Apart from the donations they make, pharmaceutical companies also introduce price reductions on their products for some of the poorest people of the world. Bristol-Myers Squibb, for instance, announced to reduce the prices of two widely used AIDS drugs, ddI and d4T, to about USD 500 in Senegal.¹⁷³ Merck provided a USD 50 million donation, primarily in the form of a price reduction (matched by another USD 50 million by the Gates Foundation) to Botswana.¹⁷⁴ Johnson & Johnson made its first HIV/AIDS medication available to patients in sub-Saharan Africa and other less

¹⁶⁹ See University of Pretoria, Access to Medicines Course Book (Reader), (unpublished) Advanced Human Rights Course on Intellectual Property, Trade, Human Rights and Access to Medicines in Africa, Centre for Human Rights, May 2012, p.188. Pharmaceutical companies share a duty to ensure adequate health standards in poor countries... However such moves by pharmaceutical companies are geared at improving their image amid accusations of their materialistic goals.

¹⁷⁰ UdoSchüklenk and Richard E Ashcroft, 'Affordable access to essential medication in developing countries: conflicts between ethical and economic imperatives' *Journal of Medicine and Philosophy*; 27(2): (2001) p.179. <www.udo-schuklenk.org/files/access.htm> '4 November 2013'.

¹⁷¹ Access to Medicines Course Book (n 76 above) p.188.

¹⁷² Schüklenk and Ashcroft, (n 77 above).

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

developed nations at a price that is 85 percent lower than the U.S. commercial price.¹⁷⁵

As with aid, the Agency needs to pull the strings in creating strong ties with pharmaceutical companies with a view to expanding its drugs list. This is of course in line with target 8 (17) of the MDGs, which states that ‘in co-operation with pharmaceutical companies, provide access to affordable, essential drugs in developing countries’, which is measured by ‘proportion of population with access to affordable essential drugs on a sustainable basis’.¹⁷⁶ Although, aid as well as donations and price reductions are unilateral in nature and thus may be withdrawn at anytime, it is maintained that the Agency may do a remarkable job in bringing the beneficiaries of the system a step closer to important medicines.

4.3. NGOs working on Access to Medicines/the Right to Health

NGOs have done a remarkable job in alleviating various problems of societies virtually in all corners of the world. Similarly, many NGOs have been engaged in promoting access to medicines through different ways. VSO, Oxfam, Christian Aid, The Essential Drugs Project, Action Aid, Save the Children Fund and many others have been working on access to medicines and related issues for several years.¹⁷⁷

There are countless NGOs in almost all parts of the world that have positively impacted the promotion and protection of human rights. The same applies when it comes to access to medicines. NGOs have been integral to promoting a rights-based approach to pharmaceutical policy and pressing for more comprehensive corporate awareness of, and responsibility for, access to medicines.¹⁷⁸ In recognition of NGOs’ value, the

¹⁷⁵ Johnson & Johnson, Access to Medicines<www.jnj.com/responsibility/ESG/Social/Global_Health/Access_to_Medicines> (11 January 2013)

¹⁷⁶ Millennium Development Goal 8 (17) + (46).

¹⁷⁷ ‘Increasing access to essential medicines in the developing world: UK Government policy and plans’ Department for International Development (2004) p.18.

¹⁷⁸ Leisinger et al (n 22 above), p.4.

Millennium Declaration recommends that greater opportunities be given to NGOs to contribute towards global health goals.¹⁷⁹

A number of international NGOs have been working towards ensuring access to medicines to the poor. Examples include Health Action International (HAI) The Access to Medicine Foundation (ATM), VSO, Oxfam International, Christian Aid, The Essential Drugs Project, Médecins sans Frontières (MSF), Action Aid, Save Alliance, Rockefeller Foundation, Bill and Melinda Gates Foundation, Carter Center, Lions Clubs International, USAID, Plan, Action for Global Health. These organizations, either on their own or in collaboration with national NGOs, may contribute in bringing medicines within the reach of the poor. In the Ethiopian context, with all the problems the Charities and Societies Law¹⁸⁰ poses with regard to the involvement of NGOs in ensuring access to medicines in Ethiopia, it is acknowledged that they have a lot to offer.

¹⁷⁹ UN General Assembly Resolution 55/2. United Nations Millennium Declaration in Leisinger (n 22 above) p.4.

¹⁸⁰ Although the advancement of human rights is included as charitable purposes under the Proclamation, only Ethiopian charities/societies may engage in such activities. Access to medicines, as a basic component of the right to health, may fall in the category which is open to only a limited number of NGOs. However, access to medicines is not only a major component of the right to health, but also plays an important role in the poverty reduction endeavours. As is known, ill-health is one of the factors enhancing poverty. According to Xu et al., worldwide every year 150 million people face catastrophic health-care costs because of direct payments, while 100 million are pushed into poverty – the equivalent of three people every second. See Xu et al, 'Protecting households from catastrophic health spending' (2007) *Health Affairs*, 26(4): 972, in Averill, (n 8 above) p.11. Furthermore, a study undertaken by Pfizer shows that between 50 to 90 per cent of annual total health care expenditures by the world's poorest people, approximately \$30 billion annually, go to pay for medicines. See Pfizer (n 21 above) p.29. The WHO estimates that diseases associated with poverty account for 45 per cent of the disease burden in the poorest countries. WHO, *World Health Report*, (2002) <www.who.int/whr/2002/>. Although the total expenditure of poor countries like Ethiopia on medicines is too low as compared with industrialized countries, expenditures on medicines remain one of the highest. Arguably, NGOs working on poverty reduction and alleviation should be allowed to contribute, in collaboration with the Agency, in reducing the access gap in Ethiopia, not only as a major component of the right to health/life, but also in terms of alleviating poverty in the country. This is of course, as noted above, in line with the Millennium Declaration's recommendation that greater opportunities be given to NGOs to contribute towards global health goals.

The forgoing discussion goes to show that NGOs, along with their efforts in campaigning¹⁸¹ against western influence, may also contribute in expanding the drug list and availability of the formulary of the Agency. Thus, it is interesting to see the extent to which the Agency makes use of NGOs in its endeavour to endow the members of the insurance scheme with vital medicines essential for their health. Needless to say, this helps not only in ensuring the right to health of people, but also reduces the out-of-pocket expenses (for those who are able to pay) which in turn positively impacts the fight against poverty.

Concluding Remarks

Medicines play an enormous role in ensuring the right to health. In the poor parts of the world, especially in many parts of Africa and Asia, the challenges on access to essential medicines are, however, as enormous. One may point his fingers on a number of factors on access to medicines. Poverty, national laws and policies and international agreements are some of the factors that keep medicines out of the reach of the majority in many parts of the world.

The access gap gets worse in countries like Ethiopia as people pay for their medicines. It really is ironical to witness the fact that people in such countries cannot even afford to pay for generic drugs, the price of which is, in most cases, extremely low than the corresponding brand medicines. Ways to mitigate the out-of-pocket expenditures on health care services in general and medicines in particular should be sought and implemented.

One such means is employing health insurance schemes, which incorporates medicines as one of the benefits in the package. Ethiopia had recently introduced a social health insurance scheme through the Social Health Insurance Scheme Proclamation No. 690/2010 as implemented by

¹⁸¹ A number of NGOs have been campaigning against pharmaceutical companies and their respective governments for increasing the access gap. The campaign by Médecins Sans Frontières is one such example. According to Ford, its campaign is firmly rooted in, and guided by, the experience of its medical professionals working throughout the developing world, it is the injustice seen at local level among some of the most marginalized groups in the world, who die because they cannot access basic medicines, that drives advocacy at international level. See Nathan Ford, 'Patents, access to medicines and the role of non-governmental organizations', *Journal of Generic Medicines* Vol. 1 No 2. (2004) p.139.

the Social Health Insurance Scheme Regulation No. 271/2012 and the Ethiopian Health Insurance Agency which is established by Regulation No. 191/2010. Although the Council of Ministers immediately issued the Regulation which established the Agency, it took more than twenty seven months for the Council of Ministers to issue the implementing Regulation.

The fact that the social health insurance scheme includes medicines as part of its health service package inspires optimism in terms of enhancing access to medicines to the beneficiaries of the system. That said, the social health insurance scheme is not a finished article in ensuring access to medicines in the sense that it also suffers from certain shortcomings. In order for one to benefit from the social health insurance scheme, s/he has to be a member, which is not of course exclusive to the Ethiopian system, which is only reserved for employees and pensioners (and their families). In a country like Ethiopia where an overwhelming majority of the population is engaged in the informal sector together with the vast unemployment, it is safe to conclude that the system has left tens of millions of people behind. These people are, therefore, required to make out-of-pocket spending on important lifesaving medicines, which, because of its enormous amount, is a setback to the fight against poverty. Issues associated with a drug list as well as generic medicines are also problems to reckon with.

Moreover, to make matters worse, the Agency is moving too slowly in implementing the laws, and is, therefore, aggravating the problem. Five years into the entry into force of the Proclamation and the Agency seems to be boasting about the 20,000 plus people it has registered, the number of new employees it has recruited, the trainings and meetings it holds week in week out and so on. It is only logical to rely on organs of the government having oversight on the Agency (such as the Ministry of Health and the House of Peoples' Representatives, among others) to make proper assessments of the Agency's activities so far and maintain a close follow-up.

The Agency is expected to actively engage in activities that would enhance the access to medicines of the members the social health insurance scheme covers. It should work hard in terms of utilizing the available options in the generous arrangements of aid agencies/governments, NGOs, research-based pharmaceutical companies as well as other organs. It should expand its formulary, both in quality and quantity, using the options discussed in above and others.

Revitalizing the Role of Non-Governmental Human Rights Organizations in Ethiopia

Fasil Mulatu Gessesse* and Rubiyat Mohammed Seid**

Abstract

In the year 2009, Ethiopia introduced Charities and Societies Proclamation, a law that regulates the activities of non-governmental human rights organizations among others. This law announced the birth of a new era in the operation of non-governmental human rights organizations. Due to the long established culture of foreign fund dependency, poor culture of philanthropy, fear and lack of confidence resulting from this unprecedented change in the operating environment, carrying out in line with the law has been overwhelming. Thus, most non-governmental human rights organizations have been forced to take drastic measures to survive. Those that continued advocating for human rights have been forced to downsize or cut their programmes, operating areas and employees. Others that are passionate to contribute in the promotion and protection of human rights have been discouraged. As a result, the contributions of national non-governmental human rights organizations have reduced significantly. This article provides ways to revitalize the role of these non-governmental human rights organizations in Ethiopia within the bounds of the law.

Keywords: Ethiopian Charities and Societies Law, Civil Society Regulation, Non-governmental Human Rights Organizations, Promotion and Protection of Human Rights, Civil Society Revitalizing Strategies in Ethiopia, Human Rights Advocacy, Human Rights and Civil Society, Civil Society Law.

Introduction

Ethiopia is party to various international and regional human rights instruments. It is also a member state of intergovernmental organizations such as the United Nations, the African Union and other organizations established for the promotion and protection of human rights. The Constitution of Ethiopia has allocated a third of its provisions to human

rights norms and principles.¹⁸² It also recognizes that international human right instruments, to which Ethiopia is a party, are part and parcel of the law of the land. The interpretations of human rights laws should also be guided by taking into account international human rights norms and principles.¹⁸³

By becoming party to various human rights instruments the country has vested itself with the duty to work for the realization of the human rights within its territory. Though the primary duty to protect human rights is vested upon the State, the move towards the realization cannot be undertaken by it alone. It requires the collaborative efforts of States and non-States actors. Particularly, the support of non-governmental human rights organizations is fundamental to inculcating the culture of human rights. In Ethiopia following the introduction of Charities and Societies Law in 2009, the contributions of these organizations have reduced radically.¹⁸⁴

This article aims at providing strategies that would boost up the role of non-governmental human rights organizations. With this aim, the article is organized into six sections beside this introduction. It starts by briefly discussing the bases and legitimacy of non-governmental human rights organizations in the protection and promotion of human rights obligations. It further deals with the role and contribution of non-governmental human rights organizations prior to the coming into force of the Charities and Societies Law. It also provides an overview on the Charities and Societies Law followed by the outcome it has on the operation of non-governmental human rights organizations. Subsequently, the article deals with strategies that would revitalize the roles these organizations in the promotion and

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¹⁸² Federal Democratic Republic of Ethiopia Proclamation No.1/1995(hereafter FDRE Constitution)Chapter 3, the FDRE Constitution allocated Chapter 3 to Human Rights under the title Fundamental Rights and Freedoms. The Constitution has 103 articles among which 33 are on directly on substantive human rights

¹⁸³FDRE Constitution, art 9(4) & 13(2)

¹⁸⁴Charities and Societies Proclamation No. 621/2009 came into effect in 13 February 2009

protection of human rights in the country. Finally, the article provides conclusions. The article primarily relies on secondary data sources and where appropriate it uses key informant interviews. In place of focusing on legal analysis and gaps in the law, the article takes a practical view point in dealing with issues.

1. The Emergence and Bases for National Non-Governmental Human Rights Organizations

Non-governmental human rights organizations (NGHROs) have long standing and distinguished history in the protection and promotion of human rights starting from the Anti-Slavery Society that was founded in 1838.¹⁸⁵ In the mid 20th century with the advent of different organizations that aim at upholding the higher norms of human rights such as the United Nations, human rights organizations became more visible.¹⁸⁶ Following these developments at the international level, various human rights instruments came into power with the recognition that though, the primary duty and responsibility to protect and promote human rights falls on States, NGHROs also play a vital role.¹⁸⁷ The Universal Declaration of Human Rights (UDHR), the benchmark in the development of human rights, provides that non-state actors are versed with a responsibility towards the realization of human rights within their territory.¹⁸⁸ One of these non-state actors is NGHROs regardless of their national and international status.¹⁸⁹ Other international human rights instruments state that NGHROs have the responsibility to support the protection and promotion of human rights through: empowerment, capacity building, monitoring States' and other stakeholders' adherence to human rights obligations, supporting the State's and other inter-governmental organizations initiative in their effort to comply with their duties and implementation of human rights and

¹⁸⁵Magdalena Sepúlveda and others, *Human Right Reference Handbook*, (3rd Edition, University for Peace, Costa Rica, July 2004), p 471

¹⁸⁶Ibid, p 471

¹⁸⁷All human rights instruments indicate the primary role of States.

¹⁸⁸Universal Declaration of Human Rights adopted and proclaimed by the UN General Assembly in Resolution 17 A (III) of 10 December 1948 at (hereafter UDHR) Preamble, para 8

¹⁸⁹The list of non -state actors include indigenous and minority groups; (semi-) autonomous groups; human rights defenders; terrorists; paramilitary groups; autonomous areas; internationalized territories; multinational enterprises; and, finally, individuals; Magdalena Sepúlveda and others, note 1above, p 474

fundamental freedoms.¹⁹⁰ At the regional level, even though it does not specifically recognize the role of non-governmental human rights organizations, the African Charter on Human and People's Rights (ACHPR) indirectly acknowledge the importance of non-governmental human rights organizations.¹⁹¹

In addition, international and regional human rights instruments recognize the right to freedom of association, assembly and expression which form part of the legal framework for the operation of NGHROs.¹⁹² Individuals are entitled to come together to follow and advance collective benefits in groups.¹⁹³ Accordingly, individuals have the right to establish and become member of groups at will.¹⁹⁴ In order to be fully enjoyed, this right requires absolute freedom of groups from undue intrusion from government.¹⁹⁵ Individuals are also entitled to embrace thoughts, ideas, and beliefs without

¹⁹⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by General Assembly Resolution 53/144 of 9 December 1998 (hereafter Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society), art 1,16 &18; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) entered into force Nov. 29, 1999 (hereafter ACRWC), art 14(2) I; Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993(hereafter Vienna Declaration and Program of Action), para 13,15,18; The Declaration of Responsibilities and Human Duties adopted by a high-level group chaired by Richrad J. Goldstone under the auspices of the City of Valencia and UNESCO initiated and organized by the Valencia Third Millennium Foundation Globalization 2002(hereafter The Declaration of Responsibilities and Human), art 2(5)&16;Consultative Relationship between the United Nations and Non-governmental Organizations adopted at the 49th plenary meeting of the UN Economic and Social Council on 25 July 1996 Resolution e/1996/31; the Charter of the United Nations specifies in art 71 that the Economic Social Council (ECOSOC) can create consultation forums for NGOs in operating in line with the council's mandate seems to leave a room for NGOs to partake in human rights issues

¹⁹¹African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (hereafter ACHPR), art 45 (1) (a), (c) and 55; Magdalena Sepúlveda and others, note 1 above, p 473

¹⁹²UDHR, art19 & 20, 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 entry into force 23 March 1976, in accordance with art 49 (hereafter ICCPR), art 19,21 &22; ACHPR art 9, 10 &11; The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society, art6 & 7

¹⁹³Magdalena Sepúlveda and others, note 1 above, p 302

¹⁹⁴ibid

¹⁹⁵ibid

intrusion.¹⁹⁶ They are entitled to the right to freely search, obtain and communicate thoughts, ideas and beliefs without restriction as to place or medium of communications.¹⁹⁷

The legal basis for freedom of association, assembly and expression are firmly entrenched in the legislative framework of Ethiopia. The FDRE Constitution recognizes the freedom of association, expression and assembly.¹⁹⁸ Moreover, Ethiopia is party to core international and regional human rights instruments which provide for freedom of association, expression and assembly.¹⁹⁹ These international human rights instruments ratified by the country are also part of the law of the land and their interpretation should primarily rely on international norms and principles holistically.²⁰⁰

In ratifying human rights instruments, States have committed themselves to guarantee the full enjoyment of individual and group right to freedom of association, assembly and expression.²⁰¹ This commitment entails the duty to respect, protect and promote the right to freedom of association, assembly and expression.²⁰² Hence, State Parties are duty bound to refrain from any acts that has the tendency of violating these rights.²⁰³ They should also safeguard these rights from violations by third parties.²⁰⁴ In addition, States are required to take positive steps towards the advancement of these rights.²⁰⁵ These steps take on various forms including the creation of enabling environment for the full enjoyment of the right.²⁰⁶

Despite NGHROs vital role in the protection and promotion human rights, it has been very difficult to come up with a term that defines them. This is mainly due to the fact that, NGHROs come in different size, shape, resource, capacity, constituencies, specializations, constructions, ideologies

¹⁹⁶ICCPR, art 19(1)

¹⁹⁷ *ibid*, art 19(2)

¹⁹⁸FDRE Constitution, art 29,30& 31

¹⁹⁹Ethiopia acceded to ICCPR in 11 June 1993 and ratified ACHPR in 15 June 1998

²⁰⁰FDRE Constitution, art 9(4) & 13(2)

²⁰¹ICCPR, art 2; Declaration on Human Rights Defenders, art 2(1)

²⁰²Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (hereafter HRC General Comment No. 31)

²⁰³*ibid*

²⁰⁴HRC, General Comment No. 31(2004), para 8

²⁰⁵*ibid*

²⁰⁶*ibid*; Declaration on Human Rights Defenders, art 2(1); ICCPR, art 2

and schemes.²⁰⁷ Due to these diverse, wide ranging and differing factors providing a single definition remains to be a challenge.²⁰⁸ But, a common denominator that is shared by all NGHROs can be deduced. These may include non-profit making, autonomous, motivated to promote and protect the dignity of human kind by addressing social, development and human rights issues of the society they serve.²⁰⁹ They are also known for being a channel and voice for those who are marginalized, disadvantaged and vulnerable.²¹⁰

The emergence of NGHROs in Ethiopia is a recent occurrence.²¹¹ These organizations came into existence only after the change of military regime in the year 1991.²¹² Prior to 1991 the legal environment together with resources and opportunities were not conducive for the operation of human rights organizations.²¹³ Thus, NGOs were exclusively involved in relief and delivery of social services.²¹⁴ The 1991 transitional government of Ethiopia's move towards building a democratic society opened more space for the engagement of NGOs in governance, human rights, legal service and advocacy initiatives.²¹⁵ Since then human rights advocacy NGOs have

²⁰⁷Magdalena Sepúlveda and others, note 1 above, p 471 & 474

²⁰⁸ibid, p 474

²⁰⁹ibid

²¹⁰ibid

²¹¹Konjit Fekade, "Civil Society in Kenya, South Africa and Uganda: Lessons for Ethiopia" in Taye Assefa and Bahru Zewde (eds) *Civil Society at the Crossroads: Challenges and Prospects in Ethiopia* (Forum for Social Studies, 2008), p 38-39

²¹² Ibid, p 39

²¹³*Assessment of the Operating Environment for CSO/NGOs in Ethiopia*, (Consortium of Christian Relief and Development Association, Addis Ababa, December 2006), p 7 available at <http://www.crdaethiopia.org/Documents/Assesment%20of%20NGOs%20Operating%20Environment%20in%20Ethiopia.pdf> (accessed 24 October 2014)

²¹⁴Jeffrey Clark, *Civil Society, NGOs, and Development in Ethiopia: A Snapshot View* (World Bank, Washington DC, 2000), p 5

²¹⁵Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, *CSOs/NGOs in Ethiopia, Partners in Development and Good Governance: A Report Prepared for the Ad Hoc CSO/NGO Task Force* (Consortium of Christian Relief and Development Association, Addis Ababa 2008) p 79 available at <http://www.crdaethiopia.org/Documents/CSOs-NGOs%20in%20Ethiopia%20-%20Partners%20in%20Development.pdf> (accessed 23 September 2014)

increase in numbers, expanded in geographic coverage and diversify their thematic areas.²¹⁶

2 The Role of National Non-governmental Human Rights Organizations Prior to the Charities and Societies Law of Ethiopia

Since their emergence local NGHROs in Ethiopia have made commendable contribution in the country's effort towards the realization of human rights through empowering the society to claim rights; providing support to public institutions; and advocate for change of policies, laws, programs, plans measures and actions of the State that may undermine the human rights obligations.²¹⁷

2.1 Empowering the Society to Claim Rights

National NGHROs have been engaged in enlightening the society with special emphasis to vulnerable, marginalized and disadvantaged sections of the society to use their rights and the law to change and gain control over their lives.²¹⁸ They have been executing this mission through human rights education, enhancing the level of participation, ensuring accessibility of legal aid.²¹⁹ In order to reach the general public, empowerment programs mainly targeted grass root, religious, mass based and community based organizations.²²⁰

²¹⁶Dessalegn Rahmato, "The Voluntary Sector in Ethiopia: Challenges and Future Prospects" in Taye Assefa & Bahru Zewde (eds) *Civil Society at the Cross Road*, (Forum for Social Studies and The European Union, Addis Ababa, 2010) p 98-102

²¹⁷The writers categorized non-governmental human rights advocacy organizations' contribution based on the definition of advocacy provided in "A practitioners' Guide to Human Rights Monitoring: Documentation an Advocacy" (The Advocates for Human Rights, Minneapolis, 2011), p 83-84

²¹⁸Sisay Gebre-Egziabher, *The Role of Civil Society Organization in the Democratization Process in Ethiopia*, paper presented in the Fifth International Conference of the International Society for the Third Sector Research (ISTR), on the theme 'Transforming Civil Society, Citizenship and Governance: The Third Sector in an Era of Global (Dis)Order', University Of Cape Town Cape Town, South Africa, 7-10 July 2002, p 7

²¹⁹*ibid*, p 8-9; Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 81-83; William Emilio Cerritelli, Akalewold Bantirgu and Raya Abagodu, *Updated Mapping Study of Non State Actors in Ethiopia Vol I* (European Commission Civil Society Fund, Addis Ababa, 2008) p 99 available at http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/main_report_en.pdf (accessed 24 December 2014)

²²⁰The Ad Hoc CSO/NGO Task Force, *CSOS/NGOS in Ethiopia: Partners in Development and Good Governance: Summary of Main Report* (Consortium of Christian Relief and

2.1.1 Human Rights Education: the first step to the creation of a just society as well as the ultimate goal of human rights as stated in all human rights instruments is awareness and the development of a human rights culture.²²¹ Where there is awareness there will be attitudinal and behavioral change, which fosters the transformation of a society into one that upholds human rights.²²² This makes human rights education and information dissemination an essential component of the promotion and protection of human rights.²²³

In order to sensitize the society, various NGHROs have been engaged in providing human rights education to various sections of the society. For instance, Ethiopian Women Lawyers' Association (EWLA) has been providing trainings on various topics on the human rights of women to female students and workers.²²⁴ Action Professionals' Association for the People (APAP) used to providing non-formal training to different community based organizations on different human rights thematic areas.²²⁵ The African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), a former child rights advocacy organization, was engaged in providing training on the Family Law, the Revised Criminal Code, the United Nations Convention on the Rights of the

Development Association, Addis Ababa, November 2008), p 5 available at <http://www.crdaethiopia.org/Documents/CSOs-NGOs%20in%20Ethiopia%20-%20Partners%20in%20Development%20-%20Summary%20of%20Report.pdf> (accessed 25 January 2013)

²²¹*World Programme for Human Rights Education: Second Phase, Plan of Action* (United Nations, 2012), p 2

²²²*ibid*

²²³*ibid*

²²⁴The Ethiopian Women Lawyers' Association (hereafter EWLA) is a private, non-profit and non-partisan, voluntary organization founded by a group of Ethiopian women lawyers to pursue the legal, economic, social and political rights of Ethiopian women. EWLA was founded in 1995, immediately following the ratification of the Constitution of the Federal Democratic Republic of Ethiopia. EWLA, Activity Report, November 1999-December 2000

²²⁵Action Professionals' Association for the People (hereafter APAP) was an indigenous non-profit human rights organization established in the year 1993 with the view to create a just society where human rights are protected and promoted. Since 2010 APAP changed its focus area due to the ChSP

Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), child development, child abuse, neglect and exploitation.²²⁶

These organizations have also been conveying knowledge about human rights and the skills required to promote, defend and apply human rights in a daily life through information and education materials such as leaflets, posters and brochures. In this regard, APAP had an educational biannual magazine that targeted community based organizations known as "*Fitih Lehulum*"-which stands for justice for all. EWLA also had biannual magazine known as "*Dimtsachen*" (*Our Voice*), in English and Amharic and '*Birchi*' which stands for "*you can do it...keep up the struggle*", the annual Journal of the Ethiopian Women's Association.²²⁷ ANPPCAN Ethiopia used to organize radio and television talk shows, documentaries, newsletters, booklets, brochures, posters and bill boards in line with ANPPCAN Ethiopia's thematic areas of focus including children's rights, child participation, child trafficking, harmful traditional practices (HTP) and HIV/ AIDS.²²⁸

NGHROs have also utilized print media as another strategy particularly newspapers such as 'The Reporter' to publish articles on various human rights issues.²²⁹ Radio based human rights education in collaboration with different radio stations have also been employed as a strategy to disseminate human rights information to the general public. Panos Ethiopia and EWLA had programs on national radio broadcasts on gender based violence (GBV) and women's rights; Ethiopian Human Rights and Civic Education Promotion Association (EHRCEPA) on the other hand, used to broadcast programs on child rights, women's rights and gender, HIV/ AIDS and civic education every two weeks through the Amhara Mass Media

²²⁶The African Network for the Prevention and Protection against Child Abuse and Neglect (hereafter ANPPCAN) *Annual Report 2007*, p 8 available at <http://www.anppcan.org/newsite/files/ANPPCAN%20Annual%20Report%202012%209.pdf> (accessed 16 February 2014)

²²⁷*Dimtsachen* aims to bring to the fore the wide range of issues that affect the rights and well-being of women in Ethiopia, expose the gender bias and discrimination that women suffer, build awareness of these fundamental issues among women and the population at large, and encourage efforts towards realization of the principles of gender equity. The magazine on the other hand is geared towards encouraging Ethiopian women. EWLA, Annual Activity, November 1999-December 2000

²²⁸ANPPCAN, note 45 above, p10

²²⁹Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 82

Agency since August 2004.²³⁰ Forum for Social Studies (FSS) has radio programs on FM 97.1 in Addis Ababa and FM 100.9 in Awassa that deal with a variety of public issues.²³¹

NGHROs have also employed other convenient means to educate the society. In the year 2001, for instance APAP held human rights awareness raising program that educated more than 25,000 people on human rights and corruption, mainly through stage drama, puppet show and public speech.²³²

2.1.2 Enhancing Public Participation: increasing the level of public participation in matters that affect their lives has been another engagement area of NGHROs. This is a very crucial intervention as enhancing public participation is the means as well as the end of rights-based approach.²³³ ANPPCAN, “*Ethiopia Goji Limadawi Dirgitoch Aswegaje Mahiber*” (EGLDAM), Forum for Street Children-Ethiopia (FSCE), EWLA, Integrate Family Services Organization (IFSO) and Organization for Child Development and Transformation (CHADET) have played vital role in the establishment and functioning of child right clubs that have been instrumental in enhancing children’s participation.²³⁴ These child rights clubs functioned on different thematic issues such as HTPs/female genital mutilation or cutting (FGM/C), violence against girls and corporal punishment.²³⁵ As a result of this initiative child rights clubs have been recognized as extra-curricular structures in primary schools.²³⁶ ANPPCAN-Ethiopia and Mary Joy, on the other hand, have established networks of child rights clubs, children’s councils and children’s parliaments to create a forum for children outside of the school setting.²³⁷ These structures have created a platform for children to participate in decision making on matters

²³⁰ibid

²³¹The Forum for Social Studies (hereafter FSS) was set up by a group of academics and professionals in 1998. Two main objectives underscored the establishment of FSS: the pursuit of independent policy research and the provision of public forum for debates and consultations on policy issues. In carrying out its program activities, FSS aims to contribute its share to the fostering and expansion of the democratization process. Forum for Social Studies, No. 21 June 2009 Policy brief available at <http://www.fssethiopia.org/publicationfile/no.%2021e.pdf> (accessed 08 October 2014)

²³²Sisay Gebre-Egziabher, note 37 above, p 7

²³³Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 83

²³⁴ibid

²³⁵ibid

²³⁶ibid

²³⁷ibid

affecting them and also in the affairs of the community outside of the school environment.²³⁸

The establishment and efficiency of various youth, women, people living with disability (PLD), and people living with HIV/AIDS (PLHA) and other associations of the poor and vulnerable sections of the society could also be owed to NGHROs' initiative.²³⁹ Organizations such as APAP were renowned for empowering "Idirs"²⁴⁰ and other community based organizations to take part in the decision making processes affecting their lives, and implementation, monitoring and evaluation of projects in their locality.²⁴¹

2.1.3 Provision of Legal Advice and Representation: legal aid is a vital component of realization of the right of access to justice which is one of the core norms of human rights.²⁴² Particularly in criminal cases, States are vested with the primary duty to provide free legal aid to the indigent.²⁴³ NGHROs have been engaged in ensuring accessibility of justice by introducing free legal aid provision schemes. Among civil societies, EWLA and APAP are pioneer organizations in introducing free legal aid provision schemes in the country.²⁴⁴ This scheme has been taken by different government institutions like the Ethiopian Human Rights Commission (EHRC), Ministry of Women, Children and Youth Affairs (MoWCYA) and Law Schools of public academic institutions.²⁴⁵ EWLA has been engaged in the provision of direct service through paid or volunteer staffs whereas APAP was engaged in the provision of legal aid through paralegals. EWLA has been providing legal advice, counseling and representation to victims of GBV/VAWC in criminal and civil cases.²⁴⁶ APAP established community

²³⁸ibid

²³⁹ibid

²⁴⁰APAP, Annual Reports (2007-2010)

²⁴¹Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 83

²⁴²UDHR, art 11

²⁴³ICCPR, art 14(1) d

²⁴⁴Debebe H/Gabriel, *Contributions of Charities and Societies for the Achievements of MDGS and PRSP in Ethiopia*, (Poverty Action Network in Ethiopia, Addis Ababa, 2012), p 16

²⁴⁵ibid

²⁴⁶Ghetnet Mitiku Wolde Giorgis, *The Role and Contributions of Ethiopian Civil Society in the Provision of Free Legal Aid Services*, p 2 available at <http://www.slideshare.net/gmgiorgis/role-contributions-of-ethiopian-cs-os-in-legal-aid-english> (accessed 8 October 2014)

based resource centers in collaboration with “*Idirs*”.²⁴⁷ They provided general information on human rights, legal matters, free legal advice and representation to community members. Moreover, legal aid centers were established in different correctional centers to provide legal advice through the trained paralegals.²⁴⁸ From the year 2005-2007, more than 4,000 people have benefited from these centers.²⁴⁹ The former Ethiopian Bar Association (EBA) and Addis Ababa University Faculty of Law used to provide free legal aid services through the two legal aid centers established in the premises of Federal First Instance Court *Lideta* and *Arada* branch in collaboration with APAP.²⁵⁰

ANPPCAN – Ethiopia has established a help line for victims of child abuse called ‘Reporting Center’ in Addis Ababa that works for 10 hours per day. The Report Center provided counseling and legal services for victims of child abuse.²⁵¹ It also used to provide counseling and legal advices to children traumatized by exploitation and neglect.²⁵² The former EBA, the African Child Policy Forum (ACPF) through its Children’s Legal Protection Center (CLPC), have been providing legal advice, counseling and representation to children and other vulnerable portion of the society based on their priority target groups.²⁵³ In general, in the year 2007 alone, 30,025 have benefited from free legal aid services of APAP, ANNPCAN, ACPF and EWLA.²⁵⁴ It should also been noted that FSCE, ANNPCAN, ACPF, the then Save the Children Sweden and Norway were vital in introducing Children Protection Units (CPU) in the police structure as well as child

²⁴⁷Ten human rights resource centers have been established in Addis Ababa, Awassa, Assela, Bahir-Dar, Dire-Dawa, Debrebrehan, Harar, Jimma, and Adama Towns

²⁴⁸Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 83

²⁴⁹ *ibid*

²⁵⁰Ghetnet Mitiku Wolde Giorgis, *Access to Justice and Legal Aid in Ethiopia*, available at <http://abyssinialaw.com/our-blog/entry/15-access-to-justice-and-legal-aid-in-ethiopia> , p 9 (accessed 8 October 2014)

²⁵¹Dessalegn Rahmato, Akalewold Bantirgu Yoseph Endeshaw, note 34 above, p85

²⁵²Ghetnet Mitiku Wolde Giorgis, note 65 above, p 2

²⁵³In the year 2007, 7,226 poor section of the society, 663 Child victims of abuse and neglect, 4123 Children deprived of their liberty and child victims of abuse, 18013 Women and girl victims of GBV have received legal aid from APAP, ANPPCAN, Children’s Legal Protection Center of the African Child Policy Forum (ACPF/CLPC), EWLA respectively Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 85

²⁵⁴Ghetnet Mitiku Wolde Giorgis, note 65 above, p 2

friendly bench in the courts.²⁵⁵ These mechanisms have played a very essential role in increasing the societies' level of awareness and empowerment by using the law.²⁵⁶

2.2 Providing Support to Public Institutions: The promotion and protection of human rights particularly relies on the competence and good organization of the law making, the administrative, the judiciary, the law enforcement and other government agencies.²⁵⁷ Even where good laws and policies that take into consideration the needs of the poor, disadvantaged and vulnerable sections of the society are in place, the enforcement and implementation capacity of the government organs is prerequisite for attaining the good of the public.²⁵⁸ In Ethiopia such problem is severe at the lower levels of governance and justice administration organs.²⁵⁹ NGHROs have also been engaged in ameliorating the State through creating common platforms and undertaking joints projects.²⁶⁰ Further they have been able to bring remarkable change by conducting capacity building trainings, establishment of structures targeting law enforcement officials, judges, legislators and administrative officials.²⁶¹ FSCE has been providing training targeting the police.²⁶² On the other hand, APAP has been providing human rights education and trainings for judges, prosecutors, administrators and police officials in different parts of the country.²⁶³

2.3 Advocate for a change of policies, laws, programs, plans measures and actions o that may undermine the human rights obligations of the State
NGHROs have also been supporting the role of the State by identifying challenges that have not been recognized by the government through advocacy, monitoring and evaluation.²⁶⁴ By utilizing the then existing

²⁵⁵Debebe H/Gabriel, note 63 above, p16; at end of 2012 the seven members of Save the Children were merged and became a single Save the Children International; *see also* 'If not Aid then What' , Interview with John Graham Country Director of Save the Children International, Addis Fortune Newspaper, Published on November 24, 2013 [Vol 14, No 708] available at <http://addisfortune.net/interviews/if-not-aid-then-what/> (accessed 15 October 2014)

²⁵⁶Debebe H/Gabriel, note 63 above, p16

²⁵⁷Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 89

²⁵⁸ibid

²⁵⁹ibid

²⁶⁰ibid

²⁶¹ibid

²⁶²Sisay Gebre-Egziabher, note 37 above, p10

²⁶³ibid

²⁶⁴ibid, p 9

mechanisms NGHROs have undertaken various advocacy initiatives to bring change in polices, laws, government structures to make them more open to the needs of the poor sections of the society.²⁶⁵ In this regard, EWLA had the opportunity to get a seat in the Parliament in its move for the revision of the Family of 1999.²⁶⁶ These organizations have produced research reports addressing the different human rights issues of the poor, disadvantaged and vulnerable sections of the society.²⁶⁷ Although most of these activities were conducted with the purpose of feeding internal initiatives, some have been important in informing decision making process at the government level.²⁶⁸ APAP, EWLA, Society for the Advancement of Human Rights Education (SAHRE) and Peace and Development Committee (PDC) are good examples in this aspect.²⁶⁹

NGHROs have also been undertaking human rights monitoring activities. Ethiopian Human Rights Council (EHRCO) has been reporting on human rights violations such as extra-judicial killings, arbitrary detention, torture, forced disappearances, unlawful and arbitrary confiscation of property, violation of privacy, unlawful dismissal of employees, and denial of the freedom of conscience, religion, expression and association.²⁷⁰ The organization has the mandate to issue reports yearly on 'The Human Rights Situation in Ethiopia,' and special investigations reports on specific issues. In the year 2008, EHRCO documented 9,000 reports of human rights abuse.²⁷¹

In 2009 a civil society coalition was formed to submit parallel reports to the Universal Periodic Review (UPR) process. The coalition was supported by United Nations Office High Commissioner for Human Rights (UNOHCHR) and Ethiopian Human Rights Commission (EHRC). The coalition comprised of APAP (Chair), EHRCO, EWLA, EBA and OSJI.²⁷²

²⁶⁵Dessalegn Rahmato, Akalewold Bantirgu and Yoseph Endeshaw, note 34 above, p 87

²⁶⁶*ibid*, p10

²⁶⁷*ibid*, p 87

²⁶⁸*ibid*, p 87

²⁶⁹Sisay Gebre-Egziabher, note 37 above, p 9

²⁷⁰*ibid*, p 11

²⁷¹Amnesty International, *Stifling Human Rights work: The Impact of Civil Society Legislation in Ethiopia*, 1st edition (Amnesty International, London, 2012), p 24

²⁷²APAP was the Chair of the Civil Society Coalition for Parallel Reporting under the UPR process: Fasil Mulatu Gessesse, (the then Project Officer at APAP and the Coordinator of the Civil Society Coalition for Parallel Reporting under the UPR process)

NGHROs' scope of intervention covered all segments of the community, all sectors and structures of government organs. They also networked with other Human Rights NGOs at the domestic, regional and international levels which has enabled them to avoid duplications and introduce better human rights protection and promotion mechanism such as rights-based approach and free legal aid provision schemes. They have been able to empower right holders to use the law to bring change in their lives. The capacity of duty bearers in the executive, legislative and judiciary starting from lower strata of administration- the kebele- have been enhanced through their intervention. Through their advocacy efforts they have been able to bring the attention of the law makers to address loopholes in the laws. They have contributed to the promotion of accountability and transparency in the government operation.

3 An Overview of the Charities and Societies Law in light of Non-Governmental Human Rights Organizations in Ethiopia

In February 2009, the government of Ethiopia issued the Proclamation of Ethiopian Charities and Societies No. 621/2009 (hereafter ChSP) which regulates, among others, the establishment and function of national NGHROs in Ethiopia. ChSP has introduced two classifications of organizations: Charities and Societies.²⁷³ Charities are basically established entirely for charitable purposes to benefit the society.²⁷⁴ On the other hand Societies focus on advancing the rights and interest of its members and other lawful objectives.²⁷⁵ Charities and Societies are further classified into Ethiopian Charities and Societies, Ethiopian Resident Charities and Societies, and Foreign Charities and Societies.²⁷⁶ In addition, ChSP recognizes five categories of Charities: Charitable Endowment, Charitable Institution, Charitable Trust, Charitable Society and Charity Committee.²⁷⁷

The ChSP sets criteria that should be fulfilled puts steps by Ethiopian Charities so as to be recognised as established and operate legally.²⁷⁸ These are formation, registration and licensing.²⁷⁹ Formation refers to the actual gathering of the founders to work on the basic requirements for the

²⁷³Charities and Societies Proclamation No. 621/2009 (hereafter ChSP), art 2(2), 14, 55

²⁷⁴ibid, art 14

²⁷⁵ibid, art 55

²⁷⁶ibid, sec 3 & 4

²⁷⁷ibid, art 15 & 46

²⁷⁸Ibid, sec 5

²⁷⁹ibid

establishment of an Ethiopian Charity.²⁸⁰ Organizations are considered to be formed when they fulfil all the registration requirements set by the ChSP.²⁸¹ Once they are formed organizations need to apply for registration within three months.²⁸² Ethiopian Charities that commence operating in Ethiopia without registration shall not be recognized before the law.²⁸³ In other words, mere formation does not grant legal personality.²⁸⁴ It is only through registration that organizations can assume legal personality.²⁸⁵ If the organization incurs debts prior to registration and before assuming legal personality, it will accrue on its founders until it's legally recognized.²⁸⁶ Moreover, before assuming legal personality Ethiopian Charities are prohibited from generating more than 50,000 birr.²⁸⁷ Applicants are required to submit application and fulfil requirements.²⁸⁸ Following the registration, Ethiopian Charities will get a license which will be valid for three years.²⁸⁹ The organ assigned to govern the registration, licensing, functions of Ethiopian Charities is the Charities and Societies Agency (the Agency).²⁹⁰ The Agency is a Federal organ vested with the power to regulate functions of NNGHROs starting from their establishment.²⁹¹

During their operation, all Ethiopian Charities also have the duty to ensure at least 70% of their budget is spent in the implementation of their programmes and the remaining 30% for administrative costs.²⁹² Administrative cost is defined as “costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainments necessary for the administrative activities of a charity or society”.²⁹³ Moreover, Ethiopian Charities are required to keep records of

²⁸⁰User's Manual For charities and Societies Law (CSO Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, Addis Ababa, 2011), p19; ChSP art 64

²⁸¹ChSP, art 64(1)

²⁸²ibid, art 64(2)

²⁸³ibid, art 65(2)

²⁸⁴ibid, art 65(1)

²⁸⁵ibid, art 65(2)

²⁸⁶ibid, art 65(2)

²⁸⁷ibid, art 65(3)

²⁸⁸These requirements are prescribed in ChSP art 64(1), 68(3) & (4)

²⁸⁹ibid, art 76(1)

²⁹⁰ibid, art 6(1)

²⁹¹ibid art 2(6) cum 4(2), 5& 6,7; 64, 65(4), 68(2), 104(1),104 (2), 104 (3)

²⁹²ibid, art 88(1)

²⁹³ibid, art2(14)

their accounts.²⁹⁴ These records should indicate the daily financial transactions of the organization as well as purpose of the transactions including assets and liability of the organization and identification of the source of their finance.²⁹⁵ They are also required to submit activity and financial reports to the Agency on annual basis in line with standard provided by it.²⁹⁶ In addition, they have to notify the Agency about their bank accounts annually or upon request.²⁹⁷ The Agency has been given the power to investigate the activities of Ethiopian Charities every now and then.²⁹⁸ Besides that the Agency can request information regarding any aspect of an organization and search the document.²⁹⁹ During the investigation if the Agency is convinced that there has been maladministration of the resources it can take measures such as suspending the responsible person or order the organization to change its manner of management.³⁰⁰ Until the Ethiopian Charity implements the recommendations of the Agency, it can enforce sanctions such as banning the organization from making financial commitments.³⁰¹ Besides that, the organizations have the duty to inform the Agency about any meetings of the General Assembly.³⁰²

4 Impact of the Charities and Societies Proclamation on National Non-Governmental Human Rights Organizations

Previously, besides the Civil Code of Ethiopia and the Associations Registration Regulation of 1966, there was no other law in the country that accommodated the growing nature and types of non-governmental organizations in the country.³⁰³ It can be said that the ChSP contributes to addressing the challenges faced in the administration of national NGHROs

²⁹⁴ibid, art 77

²⁹⁵ibid, art 77(2) & 77(3)

²⁹⁶ibid, art 78(1) & art 80(1)

²⁹⁷ibid, art 83

²⁹⁸ibid, art 84(1)

²⁹⁹ibid, art 85(1)

³⁰⁰ibid, art 90 (1) a & b

³⁰¹ibid, art 90(2) a & b

³⁰²ibid, art 86

³⁰³Comments of Ethiopian Civil Society Organizations on the Charities and Societies Draft Proclamation

presented to the FDRE Ministry of Justice (13th May 2008)

operating in the country.³⁰⁴ It would also heighten the level of transparency and accountability of national NGHROs.³⁰⁵ Moreover, as a result of this law there is an Agency along with a Board that registers and supervises the activities of Charities and Societies.³⁰⁶ Individuals also have alternatives on how to organize themselves.³⁰⁷ The law acknowledges the formation of consortium by NGOs. It also vests government organs with the responsibility to foster the activities of respective charities and societies and allows income generating activities by NGOs.³⁰⁸ Though the existence of a system of regulation is a commendable development, the requirements introduced by the ChSP creates restricting environment for the operations of national NGHROs. This is due to, among others, taking the present economic situation of the country, culture and values of the society and the capacity and attitude of national NGHROs themselves.³⁰⁹

One of the hand the classification introduced by the ChSP has its own impact on the types of activities that can be undertaken.³¹⁰ The advancement of human rights is restricted only to Ethiopian Charities.³¹¹ These organizations are established under Ethiopian laws composed of Ethiopians with a financial means based in Ethiopia; raising not more than 10% of their budget from sources abroad and under total management of Ethiopians.³¹² As a result organizations are prohibited from engaging in the promotion and protection of human rights work by soliciting much of their funds from abroad.

Factors such as the long standing history of poverty, absence of culture of supporting advocacy organizations and lack of skills and knowhow to generate fund from local sources has been a challenge to adapt to the

³⁰⁴ibid

³⁰⁵*Analysis of Ethiopia's Draft Civil Society Law*, (Human Rights Watch, 13, October, 2008) available at <http://www.hrw.org/news/2008/10/13/analysis-ethiopia-s-draft-civil-society-law-0> (accessed 12 June 2014).

³⁰⁶Bekalu Tilahun, "Implications of the Ethiopian Charities and Societies Proclamation for the Current Operations of CSOs/NGOs", *Journal of Ethiopian Civil Society Organizations* Vol 1, No 1(2011), p 38

³⁰⁷ibid

³⁰⁸ibid

³⁰⁹Amnesty International, note 90 above, p 5

³¹⁰Wondemagegn Tadesse, "Rights-based Approach and CSOs in Ethiopia: Not totally lost", *Journal of Ethiopian Civil Society Organizations* Vol1, No1 (2011), p 51

³¹¹ChSP, note 92 above, art 14

³¹²ibid, art 2(2)

existing cumbersome legal environment.³¹³ According to a World Bank Report, Ethiopian is among the countries that comprise 70% of the world's extreme poor.³¹⁴ The 2014 Human Development Report further indicates that 96% of the population residing in the rural parts of Ethiopia is poor whereas for the urban population the percentage of poverty is 54%.³¹⁵ Despite the current reported progress made in growth, the country has a long way to go to eradicate extreme poverty.³¹⁶ Moreover, the short history of NGHROs is tied with foreign funding. Except for some community based organizations that have narrow scope of applications, NGHROs have been either established or function with the engagement of foreigners and foreign funds.³¹⁷ It can be said that, local institutions were not at the forefront in promoting the initiatives to advocate for human rights. Due to this fact Ethiopian local institution, non-governmental sectors and the community at large are not well acquainted with the culture of supporting the works of non-governmental advocacy organizations.

Besides, NGOs are new to soliciting funds from domestic funds. They lack the experience, the skills, knowledge and research regarding raising domestic funds. Moreover, the culture of professional volunteerism has not been developed in the country.³¹⁸ Besides that, the traditional community based organizations such as "*Idirs*" that are established to help one other mostly in funerals and mourning have not evolved to advocate for the betterment of public services, democracy, governance and human rights. The long established culture of foreign fund dependency together with poor culture of philanthropy has made operating within the new environment overwhelming to those working as national NGHROs.

³¹³Abera Hailemariam, "The Implication of Charities and Societies Proclamation No. 621/2009 for Freedom of Association", *Journal of Ethiopian Civil Society Organizations* Vol 1, No1 (2011), p 21

³¹⁴Global Monitoring Report 2014/15 (A world Bank Group Flagship Report), available at http://www.worldbank.org/content/dam/Worldbank/gmr/gmr2014/GMR_2014_Full_Report.pdf (accessed on 12 August 2014)

³¹⁵Human Development Report (UNDP, 2014) available at <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (accessed 12 August 2014)

³¹⁶Ethiopia's Economic Overview, available at <http://www.worldbank.org/en/country/ethiopia/overview> (accessed 12 August 2014)

³¹⁷Bekalu Tilahun, note 125 above, p 33

³¹⁸ibid

Moreover, it is discouraging factor to those who are interested to engage in human rights advocacy.³¹⁹

ChSP provides that organizations cannot allocate more than 30% of their fund for administrative costs. Administrative costs refer to expenses that will be incurred by the simple existence of an organization disregarding the existence of program activities.³²⁰ This expense include office rent, telephone, electricity, water bills, salaries for the administrative staffs as well as cost of stationery and equipment utilized by the administrative office.³²¹ Program costs on the other hand are related to the costs incurred by an organization while implementing its program activities.³²² These costs include salaries of program staff, cost of equipment, goods and services procured for the implementation of the organization's program activities, including consultancy services as necessary.³²³ However, the ChSP tends to include salaries of program staff and payment for consultancy services as administrative but not as operational costs.³²⁴ Moreover, costs that will be incurred while conducting training such as refreshments costs for the participants, venue rental, facilitators' per diem, lodging and travel expenses; consultants fee which also include professional fee, per diem, lodging and travel expense are termed as administrative costs.³²⁵ Besides that baseline surveys conducted through staff or consultants and

³¹⁹UPR Submission by Ethiopian Human Rights Council (hereafter EHRCO) April 2009, para 7. *See also* Yalemzewd Bekele Mulat, Cherice Hopkins, and Liane Ngin Noble, *Sounding the Horn, Ethiopia's Civil Society Law Threatens Human Right Defenders*, Center for International Human Rights, North Western University School of Law, November 2009 at p 4; Mahder Paulos, Director EWLA interview with BBC (Posted 06 January 2009) available at <http://news.bbc.co.uk/2/hi/africa/7814145.stm> (accessed 25 June 2013); Yousef Mulugeta, Secretary General EHRCO, interview with the BBC (Posted 26 November 2008) available at <http://news.bbc.co.uk/2/hi/africa/7736417.stm> (accessed 25 June 2013); *see also* Amnesty International, *note 90 above*, p 12

³²⁰Users' Manual for the Charities and Societies Law, *note 99 above*, p 45

³²¹*ibid*, p 45

³²²*ibid*

³²³*ibid*

³²⁴*ibid*; Charities and Societies Administrative and Operational Costs Regulation Directive No.2/2011, art 8 (2/2003)

³²⁵Bezuayehu Temesegen Wale, Ethiopia CSA New Directive is Going to Close NGOs Working in Ethiopia (May 27, 2012) available at <http://www.topix.com/forum/world/ethiopia/TTG025AO2L3DA258M> (accessed 12 June 2014); Directive 2/2003 above

monitoring and evaluation costs are also part of administrative costs.³²⁶ These listed costs account for more than half of the implementation of program activities in national NGHROs.³²⁷ As the only service provided by these organizations is knowledge and professional-service based, it would be impossible to fulfill such requirement and carry out their activities. In other words, the vague definition of administrative costs has made the operation of Charities and Societies challenging.³²⁸ Failure to meet the 70/30 administrative costs allocation requirements results a fine up to 10,000 birr.³²⁹

The unprecedented change in the operating environment has created lack of confidence and uncertainty. As a result, most national NGHROs had been forced to take drastic measure to continue to exist. A number of them that could not raise 90% of their fund from domestic source have been closed.³³⁰ Many have changed their strategic directions, programs, organizational structures and abandoned a rights-based approach. This resulted in the decrease in the number of national NGHROs functioning in the country.³³¹ In the year following the coming into force of the ChSP, 1239 CSOs reregistered as Ethiopian Resident and Foreign Charities while only

³²⁶ibid

³²⁷ibid

³²⁸Debebe Hailgebriel, "Ethiopia" *The International Journal of Not-for-Profit Law* Vol12, Iss 2 (ICNL) (February 2010)available at http://www.icnl.org/research/journal/vol12iss2/special_2.htm ; *The Impact of CSO law on Human Rights Council* (Human Right Council, July 2011), p 5

³²⁹ChSP, art 102

³³⁰*Analysis of Ethiopia's Draft Civil Society Law* (Human Rights Watch, October 13, 2008) at p 4; *Steadfast in Protest: The Observatory for the Protection of Human Rights Defenders: Annual Report 2010* (International Federation for Human Rights and World Organization against Torture,2010), p 50; ICNL, Ethiopia: NGO Law Monitor available at <http://chilot.files.wordpress.com/2011/08/ngo-law-monitor-ethiopia.pdf> (accessed 12 June 2013)

³³¹APAP abandoned it rights-based approach and focused on organizational development of community based organizations and nurturing volunteerism. Similarly Organization for Social Development also engaged in development works. Human Rights Advocates and their role in the realization of Constitutional Rights in Ethiopia Chapter 6, p 14, available at <http://repository.up.ac.za/xmlui/bitstream/handle/2263/23887/06chapter6.pdf?sequence=7&isAllowed=y> (accessed 15 January 2014); see also Amnesty International, note 90 above, p 5; International federation for Human Rights & World Organization against torture; Steadfast in Protest; The Observatory for the Protection of Human Rights Defenders; Annual Report 2010, p 51

203 re-registered as Ethiopian Charities and Societies.³³² At least seventeen organizations have apparently changed their organizations direction towards development including two of the most renowned national NGHROs such as APAP and OSJI.³³³

Those organizations who have decided to remain Ethiopian Charities and Societies are facing huge challenge to function in the existing legal and administrative environment. Their operating capacity has also been greatly diminished.³³⁴ Ethiopian Charities have considerably scaled down their operational areas, minimized their operation and lay off employees and their financial sources dramatically shrunk.³³⁵ EHRC was forced to shut down nine branches out of the twelve branches³³⁶ and had to decrease its employees by 70 per cent and during 2010 and 2011 it had nearly ceased to function.³³⁷ On the other hand, foreign financial partners have also been forced to reconsider their plan to implement long term programs that could bring about an actual impact.³³⁸

³³²Lealem Mersha, *Adaptation Mechanisms of Human Rights NGOs to the Charities and Societies Proclamation*, (Addis Ababa University, School of Law and Good Governance, Centre for Human Rights, unpublished master's thesis, 2013), p 94

³³³APAP and OSJI are two members of a coalition of four of the leading human rights organizations in the country, which submitted a parallel report to the UN Universal Periodic Review process see Amnesty International, note 90 above, p 12. APAP retained it's name but OSJI changed it to Organization for Social Development (OSD)

³³⁴ICNL, Ethiopia: NGO Law Monitor available at <http://chilot.files.wordpress.com/2011/08/ngo-law-monitor-ethiopia.pdf> (accessed 12 June 2013)

³³⁵Seife Ayalew Asfaw, *Collision of Norms-Domestic Politics and International Human Rights Standards: Commentary on the Ethiopian Charities and Societies Proclamation 'in'* Benedek and others (eds) *Ethiopian and Wider African Perspectives on Human Rights and Good Governance*, NWV Verlag, Vienna Graz:2014 p169

³³⁶Rachel Hayman and others, *Legal Frameworks and Political Space for Non-Governmental Organizations: An Overview of Six Countries* (EADI Policy Paper Series European Association of Development and Training Institute July 2013) p15; see also Amnesty International, note 90 above, p 13

³³⁷Amnesty International, note 90 above, p 13

³³⁸Debebe Hailegebriel "Restrictions on Foreign Funding of Civil Society, Ethiopia" *The International Journal of Not-for-Profit Law* Vol 12, Iss 3, (May 2010) available at http://www.icnl.org/research/journal/vol12iss3/special_3.htm (accessed 20 January 2014); Rachel Hayman and others, note 155 above p 16; For instance The Heinrich Böll Foundation ceased operating in Ethiopia due to the restrictive working environment and some USAID-funded NGOs that used to provide capacity building to local NGOs for monitoring and reporting human rights abuses have terminated their programs

The task of protection and promotion of human rights cannot be achieved single-handedly by the State. Moreover, Ethiopia has committed itself to international commitments such as Millennium Development Goals (MDGs) and designed ambitious national plans such as the Growth and Transformation Plan (GTP), which can be effectively met, among others, with the contribution of Charities and Societies.³³⁹

Despite a multifaceted challenges faced by NGHROs due to the ChSP, a new dawn of hope was signaled by the Agency. The Ethiopian Amharic Reporter newspaper on December 03, 2014 announced that, the Agency has revised its 30/70 regulation on administrative and program cost.³⁴⁰ The revision provides that some activities that use to be considered as part of the administrative cost were shifted to be included under program budget. This shift particularly entails purchase of vehicles, transportation and fuel costs for the freight of items for humanitarian purposes, costs for environmental protection and cultivation of seedlings, costs of hiring consultancy firms, and costs for the provision of trainings.³⁴¹

5 Ways to Revitalize Non-governmental Human Rights Organizations in Ethiopia

5.1 Building and Strengthening Constituencies

Establishing and strengthening constituencies can be one strategy to work in line with the ChSP.³⁴² Such membership based strategy has various advantages. Members are believed to have sense of ownership and responsibility to partake in organizations' involvement more than donors.³⁴³ The creation of a bond with the community as a result of greater participation can contribute in ensuring the sustainability of the organizations. Organizations with strong constituencies will not only be separate organizations delivering services to the community but they will

³³⁹Bekaul Tilahun, note 125 above, p 37-38

³⁴⁰ Wudneh Zenebe, The Charities and Societies Agency has revised the Directive on the 30/70 Requirement (30/70) Reporter Amharic Newspaper (Posted 03 December 2014) available at <http://www.ethiopianreporter.com/index.php/news/item/8105> (accessed 10 December 2014)

³⁴¹ibid

³⁴²User's Manual on the Charities and Societies Law, note 99 above, p 66

³⁴³Sasha Daucus, How can memberships benefit my nonprofit organization? available at <http://www.fundraiserbasic.com/library/fruniv/96-how-can-memberships-benefit-my-nonprofit-organization.html> (accessed 23 June 2014)

be part of the community.³⁴⁴ Moreover, the member's financial contributions such as membership fees will help raise funds from domestic sources that will contribute in meeting the financial requirements set by the ChSP.³⁴⁵ It can also serve as a great source of skilled human resource by setting up constituency volunteer schemes.³⁴⁶

Once there is a consensus on the need to build and strengthen constituencies, the next step is targeting members. Ethiopian Charitable Societies can target profit making organizations, community based organizations, youth, women and other associations as well as individuals of different age group, capacity and profession.

In order to make this effective there should be a well-developed promotion strategy. This strategy can include creating a bond between the community, organizations and the human rights activities they carry out. The concept of corporate social responsibility which will be discussed in subsequent sections can also be another strategy in this regard. This promotional work requires the active engagement of all members of the organization including employee and concerned individuals. But Board of Directors of the organization takes the lion's share.³⁴⁷ Board members have the capacity to connect the organization with the community and with all interested individuals and organizations by undertaking various promotional works.³⁴⁸

According to data gathered from the Agency most organizations are registered as Charitable Societies.³⁴⁹ Hence, all provisions pertaining to Societies are applicable to Charitable Societies.³⁵⁰ Charitable Societies refer to organizations established with a General Assembly, an Executive or Boards, auditor and management, led by the Executive Director/General Manager and geared towards serving individuals outside their members.³⁵¹

³⁴⁴ User's Manual for the Charities and Societies Law, note 99 above, p 66

³⁴⁵ *ibid*

³⁴⁶ *ibid*

³⁴⁷ George Lawrence, The Role of Board Members for Nonprofit Organizations, available at <http://smallbusiness.chron.com/role-board-members-nonprofit-organizations-21291.html> (accessed 23 June 2014)

³⁴⁸ *ibid*

³⁴⁹ Users' Manual for the Charities and Societies Law, note 99 above, p 73

³⁵⁰ ChSP, art 47

³⁵¹ Users' Manual for the Charities and Societies Law, note 99 above, p 73

This is a set up similar to what most national NGHROs used to have prior to the coming into force of the law.³⁵²

Building constituencies requires strong membership programs.³⁵³ Strong membership programs consider effective ways to tune to the situation of the community.³⁵⁴ One way of doing so is setting up different levels of membership.³⁵⁵ The membership should have different categories for individuals and organizations. These categories may include honorary membership, ordinary fee based membership, special membership with yearly or monthly contributions in terms of money or items, skill based memberships and other types of memberships based on the needs and focus area of the organization.

In order to ensure lasting membership programs there should be a mechanism to make it attractive with benefits and special recognitions.³⁵⁶ Once the culture of supporting the works of Charitable Societies is entrenched in the society such incentives would not be required. Some of these benefits may include the provision of certificates, awards, recognitions on newsletters, publications and the media, internship and scholarship opportunities, and the opportunity to take part in international conferences, workshops and trainings.

5.2 Promoting Volunteerism and Working with Volunteers

Ethiopian Charitable Societies have been putting efforts to promote volunteerism and work with volunteers.³⁵⁷ Volunteers have strong value to non-profit organizations. Besides members' increment and support to Ethiopian Charitable Societies' programs, the sense of ownership that results from volunteer engagement strengthens Charitable Societies.³⁵⁸ In

³⁵²ibid

³⁵³George Lawrence, note 166 above

³⁵⁴Sasha Daucus, note 162 above; *see also* User's Manual for the Charities and Societies Law, note 98 above p 66-67

³⁵⁵User's Manual for the Charities and Societies Law, note 99 above, p 66

³⁵⁶ibid

³⁵⁷EWLA is delivering its free legal aid program through volunteers. Information from Ethiopian women Lawyers' Association, Activity report, November 1999-December 2000. On the other hand Action Professionals' Association has a program on volunteerism where it promotes and also creates an opportunity for volunteers

³⁵⁸International Erosion Control Association (IECA), IECA Leadership Training; The Role of Volunteers in Non-Profit Organizations, available at https://www.ieca.org/chapter/CLRC/volunteer_management/RoleOfVolunteers.pdf (accessed 03 February 2014)

addition, volunteers provide extra skills, experiences and human resource to undertake activities that would not have been accomplished otherwise.³⁵⁹ Volunteerism is a tangible financial cost saving mechanism.³⁶⁰ It is also a very powerful strategy to cut in public participation of individuals in solving human rights challenges in their society which increases individuals' participation and independence.³⁶¹ Volunteerism can also serve as a great strategy to an effective empowerment program.³⁶²

Engaging volunteers requires strong and effective volunteer programs that result in bringing different individuals with a variety of skills and experiences, and creating strong tie between the community and Ethiopian Charitable Societies.³⁶³ Charitable Societies can access volunteers by setting up their own volunteer programs. In this regard, the first step to successful and long lasting volunteer programs is setting up volunteer policy.³⁶⁴ Designing a policy lays the foundation and ensures the organization's commitment, fairness and consistency when dealing with volunteers; and also enables the volunteers to know what is expected from them.³⁶⁵ In order to develop volunteer policy organizations should conduct a needs assessment. This helps to clearly understand how volunteers fit in the organization's mission, vision and program goals; how volunteers' best meet the program's as well as the organization's goals.³⁶⁶ There are no set standards for volunteer policy but it is advisable to address issues such as recruitment, support and supervision, diversity and expenses.³⁶⁷

³⁵⁹Action Professionals' Association for the People (APAP), *Volunteer Mobilization Guideline* (December 2010), p 7

³⁶⁰Richard D. Young, *Volunteerism: Benefits, Incidence, Organizational Models, and Participation in the Public Sector*, University of South Carolina, College of Liberal Arts, Institute for Public Service and Policy Research, p 5 available at <http://www.ipspr.sc.edu/publication/Volunteerism%20FINAL.pdf> (accessed 12 June 2014)

³⁶¹Action Professionals' Association for the People (APAP), note 178 above, p 7, *see also* Richard D. Young, note 179 above, p 5

³⁶²*ibid*

³⁶³Rick Lynch and Nikki Russell, *Volunteer Management: Challenges and Opportunities Facing Non-Profits* (United Way of King County, 2009) p 3

³⁶⁴The National Center for Volunteering, *Get it Right from the Start Volunteer policies : The Key to Diverse Volunteer Involvement*, p 4 available at <http://www.eyo2011.eu/press-kit/item/download/505> (accessed 15 June 2014)

³⁶⁵*ibid*

³⁶⁶*Starting a Volunteer Program*, p 1-2, available at http://www.handsonnetwork.org/files/resources/BP_StartingVolunteerProgram_2010_HON.pdf (accessed 9 September 2014)

³⁶⁷The National Center for Volunteering, note 183 above, p 5

The next step is to develop formalities which include application modalities, agreements and position records.³⁶⁸ The third step in building good volunteer program is setting up tracking mechanism. In this regard, there is no limit to who can volunteer; anyone be it retirees, experts, amateurs, young people, elders, interns, professional can be a volunteer.³⁶⁹ However, the program focus and the required service may dictate the kind of volunteer to be recruited. In the case of NGHROs, limiting category of the volunteers to advanced students and professionals can be advantageous. Besides academic institutions, organizations such as Voluntary Service Overseas (VSO)-Ethiopia; professionals' association such as Ethiopian Young Lawyers Association and Young Men Christians Associations; clubs such as Rotaract, Toast Masters' Speech Association and the Ethiopian Scouts Association may serve as good starting point and source of volunteers. Similarly such venture needs strong promotion and tracking mechanism. Setting up simple and accessible application procedures to all interested volunteers also helps in attracting volunteers. Organizations should as much as possible make application processes convenient both online, postal application procedures beside the usual office hours where volunteers can drop in their credentials.

So as to systematically manage volunteers, Ethiopian Charitable Societies can adjust the advanced students and the professionals according to their level of education and experience. Such category can be junior students/professionals, intermediate students/professionals and senior students/professionals.

Together with the aforementioned mechanisms, Ethiopian Charitable Societies should embark on promoting volunteerism in Ethiopian. APAP has been working to strengthening the notion of voluntarism in the country. The organization has been undertaking various activities to raise awareness and also create channels for volunteerism. The other option to working with volunteers is signing an agreement with academic institutions. In this regard, it is good to cite the example of Ethiopian Lawyers Association (ELA) that has signed a Memorandum of Understanding with the Addis Ababa University's Centre for Human Rights to work with the post graduate students of the centre to participate

³⁶⁸Developing Your Volunteer Program
<http://www.idealists.org/info/VolunteerMgmt/Developing> (accessed 9 September 2014)

³⁶⁹Action Professionals' Association for the People (APAP), note 178 above p 7

in the free legal aid.³⁷⁰ Taking up this initiative with all the law schools and other academic disciplines both graduate and undergraduate programs by all the Ethiopian Charitable Societies can be one practical solution.

Academic institutions should also help in nurturing volunteerism. These institutions ought to design and incorporate volunteering as part of their teaching-learning, research and community service endeavours. Besides creating a sustainable source of volunteers to Ethiopian Charitable Societies, it will help address the gap in the understanding and value attached to volunteerism in the country.

The other option to access volunteers is establishing a national volunteers' mobilization organization. This organization will have the mandate to promote volunteerism and also avail volunteers to Ethiopian Charitable Societies. This would help to mobilize volunteers in a coordinated, effective and efficient manner.

5.3 Linking and Promoting Corporate Social Responsibility with Supporting Human Rights Causes

Corporate social responsibility (CSR) is a concept that has grown to be an essential feature of corporate business.³⁷¹ CSR has been defined in various ways making it difficult to find universal meaning.³⁷² But the main concern remains to be the social contract between corporations and stakeholders.³⁷³ Nowadays, corporate business organizations are becoming increasingly aware of the fact that the key to remain fruitful and competitive is the duty of being socially responsible.³⁷⁴ Companies' have realised that their relationships with their employees, the community they reside in as well as the market greatly matters in their sustainability.³⁷⁵ There are no agreed areas where companies can engage in building good relationships with the society they reside in besides making profit.³⁷⁶ The EU Commission stated in this regard that CSR is a concept that enables corporate business

³⁷⁰Lealem Mersha, note 151 above, p 72

³⁷¹David Crowther and Guler Aras, *Corporate Social Responsibility* (Ventus Publishing 2008) p 10

³⁷²Olefemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge New York, USA, 2011), p 67

³⁷³David Crowther and Guler Aras note 190 above, p 11-12

³⁷⁴Victoria Baird, Christina Krammer and David Wofford, What is Corporate Social Responsibility: 8 Questions and Answers, CATALYST Consortium, July 2002, p 3

³⁷⁵*ibid*

³⁷⁶David Crowther and Guler Aras, note 190 above, p 11

organizations to address societal and environmental concerns in the society they reside in voluntarily.³⁷⁷ In the United States and Europe thousands of companies are engaged in similar activities.³⁷⁸ The practice of social responsibility is not new to developing countries. Evidence shows businesses in countries such as India, Indonesia, Brazil, Egypt, and the Philippines practice CSR.³⁷⁹

The practice of CSR is not new in Ethiopia either but it's not widely practiced.³⁸⁰ Organizations such as Ethiopian Airlines³⁸¹ Saint George Beer Factory³⁸² and MIDRCO Ethiopia³⁸³ are some examples engaged in relief and service provisions. Besides these pieces of engagements, the CSR is not widely practiced among the corporate world in the country. Moreover, there are no comprehensive policy, guideline and programs that integrate CSR into main strategies and operations of the private enterprises.³⁸⁴

In Ethiopia, there are over 20,000 private business establishments, which show the great potential of the private sector in revitalizing the role of Ethiopian Charitable Societies by mainstreaming CSR.³⁸⁵ These establishments can support the human rights organizations by becoming member of these organizations and making substantial financial contributions. Much should be done by Ethiopian Charitable Societies and other stakeholders to promote CSR as a key to remain fruitful and

³⁷⁷European Commission, Final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Renewed EU strategy 2011-14 for Corporate Social Responsibility (Brussels, 25.10.2011 COM (2011) 681(Final) para 1 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF> (accessed 12 June 2014)

³⁷⁸Victoria Baird, Christina Kraimer and David Wofford, note 193 above, p 4

³⁷⁹*ibid*, p 4

³⁸⁰Users' Manual for the Charities and Societies Law, note 99 above , p 82

³⁸¹Ethiopian Corporate Social Responsibility Newsletter, available at http://www.flyethiopian.com/en/docs/downloads/CSR_newsletter_03_2011.pdf (accessed 14 November 2014)

³⁸²BGI Ethiopian PLC, available at <http://www.addismap.com/bgi-ethiopia> (accessed 14 November 2014).

³⁸³*Corporate Citizenship*, MIDROC Ethiopia PLC, available at http://www.midroc-ethiopia.com.et/md04_citzinship.html (accessed 14 November 2014)

³⁸⁴Mikiyas Belay, "Corporate Social Responsibility" in *Corporate Social Responsibility, Information Bulletin Vol 1*, (August 2014) Organization for Social Development, Addis Ababa, p 9

³⁸⁵*ibid*

competitive in the society. The idea of good relationship with the employees, the community and the market as a foundation for corporate sustainability should be widely entrenched in the corporate society and linked with supporting human rights promotion activities. Similar to the other strategies discussed above, since the idea of linking the concept of CSR with supporting human rights promotional activities is still fresh in the Ethiopian society, there should be strong advocacy in this regard. Civil society coalitions, which will be discussed in the next section, can be a good opportunity to put in place strong advocacy strategies such as those directed towards the development of policy, legislation and coordinating body that govern this undertakings and incentives such as tax reduction. Currently, there are initiatives aimed at promoting CSR by organizations such as Chamber of Commerce, Organization for Social Development, Fana Broadcasting Agency.³⁸⁶ Based on current developments a national steering committee is planned be established to work on the way forward on CSR in Ethiopia.³⁸⁷ Besides undertaking their own endeavours through their coalitions, Ethiopian Charitable Societies should be part of the above mentioned initiatives.

5.4 Strengthening Charities and Societies Coalitions

Another entry point is strengthening network and leadership. The Directive of the ChSP issued in 2011 encourages the establishment of consortiums among organizations with similar identity.³⁸⁸ Networks are platforms where likeminded organizations, associations, individuals come together to further pursue their common aspirations through human resource and materials interchange, sharing information and skills.³⁸⁹ Networks have been effective in creating mutual learning, reinforcing validity and status for members, and build economic power and ability to adapt to unprecedented circumstances.³⁹⁰ Networks play a vital role in

³⁸⁶Workshop on Children and Corporate Social Responsibility on the theme 'Developing Strategic Approach for Child Welfare in the Context of Business', held on the 20th November 2014, Addis Ababa, organized by Organization for Social Development, Chamber of Commerce, Fana Broadcasting Corporate

³⁸⁷ibid

³⁸⁸Charities and Societies Administrative and Operational Costs Regulation Directive No.2/2011, art 9

³⁸⁹Darcy Ashman and others, Supporting Civil Society Networks in International development programs, AED Center for Civil Society and Governance (December 2005), p 7

³⁹⁰Martha Lagace, Non Profit Networking the New Way to Grow May 2005 available at <http://hbswk.hbs.edu/item/4801.html> (accessed 12 September 2014)

accomplishing tasks that will be hard to undertake alone.³⁹¹ Networks are easy way to share information, resources and to design ways to implement programs.³⁹² In the present context networks facilitate the creation of an enabling environment in the function of Ethiopian Charitable Societies in line with the current operational environment.³⁹³ This can create an environment where Ethiopian Charitable Societies come together to further pursue their goals. It may also serve as an opportunity to build constituencies, to attract volunteers and to discuss challenges they face while undertaking their programs and learn from good experiences. It also gives an opportunity to make successful contributions and adequate use of the scarce resources by avoiding duplication of efforts. Despite such benefits previous experiences show that coalitions have not been effective in Ethiopia due to lack of sustainability and consistent participation of member organizations and domination by the organ established to administer them.³⁹⁴ Moreover, engagement in coalition has not been pursued among non-governmental human rights organizations.³⁹⁵

As the other strategies, Ethiopian Charitable Societies should take the first step of duly acknowledging the importance of joining or establishing networks. One manifestation will be the inclusion of building and engaging in networks or coalitions as one of their organizations strategy to achieve their objectives and missions. Once this is acknowledged in their strategic direction, the establishment and maintaining of networks ought to be incorporated in their annual plans.

5.6 Strengthening and Popularizing Government's Support Schemes and Incentives

The government is currently undertaking commendable task by supporting the activities of the Ethiopian Charitable Societies through its funding programs.³⁹⁶ One of these support programs is the European Civil Society Fund which is a European Commission's program designed based on the

³⁹¹ibid

³⁹²Darcy Ashman and others, note 208 above, p 5

³⁹³ User's Manual for the Charities and Societies Law, note 99 above, p 23

³⁹⁴Ibid, p 68

³⁹⁵ibid

³⁹⁶European Commission Civil Society Fund in Ethiopia, CSF News: Supporting Non State Actors Build Partnerships, Vol 1, Iss 1 (December 2007) available at http://www.eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/csf_issue_1_en.pdf (accessed 12 September 2014)

Cotonou Agreement.³⁹⁷ The Civil Society Support Program (CSSP) is another large scale initiative geared towards enhancing the non-state actors' contribution to the countries development and democratization process in line with the government's plan.³⁹⁸ These programs have been able to address and fill some of the financial gaps Ethiopian Charitable Societies are facing. Similar financial support schemes under the auspices of the United Nations and other international and regional intergovernmental organizations could also be another possibility to broaden the financial alternatives of NGHROs in Ethiopia.

The government should further expand and increase its Ethiopian Charitable Societies support schemes. One way of widening these government support schemes is setting up similar channels through the different Ministries that have relevance to human rights. The Ministries have the mandate to take on capacity building activities in its area of jurisdiction.³⁹⁹ By progressively interpreting this mandate to extend to non-governmental entities, the Ministries could conduct capacity building initiatives meant to benefit Ethiopian Charitable Societies including the establishment of Civil Society Fund scheme. However, there should be a stricter rule that could practically govern the maintaining of independency and protection from undue influence by the government.

³⁹⁷The overall objective of the programme is to create an enabling environment by building the capacity of the Ethiopian civil society to increase their participation and contribution in the countries development and democratisation process. It is a five years program (2006-2010) scheduled to be implemented in two phase with a 10 Million Euros budget. The support is planned to be executed through the grant funding on identified issues. The European Commission acts as the contracting party on behalf of the government for the implementation of the programme. Assessment of the Operating Environment for CSO/NGOs in Ethiopia Commissioned by CRDA (December 2006), p 18; *see also* European Commission Civil Society Fund in Ethiopia, EU Civil Society Fund Project Monitoring Strategy, p 1

³⁹⁸It is a five years programme which was recently implemented in the year 2011 through the task force for enabling environment of civil society in Ethiopia. It mainly focuses on building the capacity of civil society organizations serving marginalized, disadvantaged and vulnerable groups of the society. The programme has a 35 Million Euros budget which has been solicited from a number of partners; Denmark, the Netherlands, Norway, Sweden, and the United Kingdom and led by Ireland. Civil Society Support Programme, Annual Report 2012-13, p 9

³⁹⁹A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Proclamation No. 691/2010) art10 (1) d

5.7 Strengthening the Support of National Human Rights Institution

The Ethiopian Human Rights Commission (EHRC) has been supporting legal aid activities of Ethiopian Charities and Societies through project based small grants.⁴⁰⁰ A joint steering committee has been established by the Commission to promote its partnership with CSOs.⁴⁰¹ The Commission expressed its devotion to taking up initiatives to increase its engagement with NGOs.⁴⁰²

EHRC vested with wide competence to promote and protect human rights.⁴⁰³ This wider mandate also includes the indirect duty to promote non-state actors to actively engage in human rights activities which may requires, among others, the availability of a conducive policy, legal and administrative environmental to function freely. EHRC should collaborate with national NGHROs and the government to find ways and alternatives to revive once again their active role in the promotion and protection of human rights.

Similarly, the Ethiopian Institute of the Ombudsman (EIO) can play a similar role. It has the mandate to undertake activities that are geared towards establishing good governance that ensure human rights, guided by rule of law and with an effective accountability setting mechanism.⁴⁰⁴ Thus it ought to create a program that supports the activities of Ethiopian Charitable Societies' programs that focus on ensuring good governance and other activities related with EIO's duties and responsibilities.

5.8 Conducting Impact Evaluation of the ChSP and Advising the Government

Impact evaluation is an appraisal following the implementation of a law or policy for some time on the short term outcomes and a long term

⁴⁰⁰Ghetnet Metiku Woldegiorgis, note 65 above, p 4

⁴⁰¹ibid

⁴⁰²The speech by Ambassador Tiruneh Zena (Chief Commissioner of EHRC), addressing participants of the Civil Society Forum organized by the Ethiopian Human rights Commission (EHRC) at the Intercontinental Hotel on October 6, 2010, the Chief Commissioner, available at <http://www.ehrc.org.et/NewsEvents/News/tabid/107/Default.aspx> (accessed 23 September 2014)

⁴⁰³*Ethiopian Human Rights Commission Establishment Proclamation No 210/2000 article 6 and see also Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993, art 1*

⁴⁰⁴ Proclamation No. 211 /2000, art 6(7)

predictable and unforeseen outcomes.⁴⁰⁵ Impact evaluation can be undertaken by lawmakers, policy makers, non-governmental organizations and pertinent academic institutions, independent human rights monitoring institutions and other organs and provide recommendations to take appropriate measures based on the evidence and actual impact.⁴⁰⁶ Impact evaluation provides the opportunity to recognise the positive aspects of the law and to come up with workable solutions for the negative effects that resulted from the implementation of the law.⁴⁰⁷ Hence, by conducting an impact evaluation valid information can be collected on the outcome of the ChSP. Based on the outcome of the assessment aspects of the law can be recognized and the negative aspects can be adjusted.

5.9 Organizational Capacity Development and Transformation

The requirements of the ChSP that focus on utilizing domestic resources require self-transformation of the organizations, the creation and nurturing of new the operational behaviours and outlooks. Most of the revitalizing mechanisms mentioned above also reflect such paradigm shift in the organizational culture. They require non-governmental human rights organizations to change their attitudes, beliefs and values as well as change the attitudes of the society towards them. This is completely a different route to what has been the trend in the operations of national NGHROs for long. Transforming oneself and the society is not an easy task. For this to take place, an organizational development strategy is required that can transform NGHROs operational pattern and the overall perception and attitude.

Organization development (OD) has been defined in different ways but the most applied definition is the one made by Richard Beckard, a pioneer leader in the field of OD.⁴⁰⁸ He stated that OD refers to a 'strategic effort led by top management to enhance organizations' overall productivity through scheduled interventions in the organizations programs, activities by applying behavioural science'.⁴⁰⁹ The present understanding of the term OD is owed to Bennis who defined it as a response to change, a complex

⁴⁰⁵Louise Sylwander, Child Impact Assessments, Swedish Experience of Child Impact analyses as a Tool for the UN Convention on the Rights of the Child (Sweden, Ministry of Health and Social Affairs and Ministry of foreign Affairs, 2001), p 22

⁴⁰⁶ibid

⁴⁰⁷ibid

⁴⁰⁸What is Organizational Development?, p 2, available at http://www.sagepub.com/upm-data/41238_1.pdf (accessed 23 September 2014)

⁴⁰⁹ibid

educational strategy to change beliefs, attitudes, values and structures of organizations so that they can better adapt to new technologies, markets and challenges and the dizzy rate of change itself'.⁴¹⁰

OD has three major components; diagnosis, action and program management that involves unfreezing the old behaviour or situation, moving to a new label of behaviours, refreezing the behaviour at a new level through the application of behavioural science.⁴¹¹ Diagnosis focuses on identifying problems and their causes so as to lay the ground for structural, behavioural, technical interventions to enhance the organization's effectiveness.⁴¹² Once the above mentioned issues are identified and cleared, the next step is identifying interventions to enhance the functioning of the organization.⁴¹³ The program management end of the OD consists of managing the implementation of activities designed to improve the activities of the organization.⁴¹⁴ These interventions may involve the above mentioned revitalizing strategies and others depending on the focus area of the organizations.

6 Conclusions

The Charities and Societies law introduced a new setting for the operation of civil societies in Ethiopia. The requirements introduced by the law entail the mobilization and utilization of domestic resources and opt for local financial sources. Due to the pre-existing factors such as absence of culture of philanthropy, volunteerism and limited adaptability experience; Ethiopian Charitable Societies have found it difficult to continue contributing to the protection and promotion of human rights in Ethiopia. The long walk to the realization of human rights requires non-state actors' contributions and support to the government. This article identified some practical ways to reinvigorate the roles, effectiveness and impacts of national NGHROs once again in the existing legal and policy environment. These methods include, building and strengthen constituencies, promoting volunteerism and work with volunteers, collaborating and networking with

⁴¹⁰Gary N. Mclean, *Organization Development: Principles, processes and performance* (Berrett-Koehler Publishers 2005) p 7

⁴¹¹Pratiksha Patil, *Organizational Development* (2012) available at http://www.slideshare.net/PratikshaDekate/organizational-development-12137618?utm_source=slideshow02&utm_medium=ssemail&utm_campaign=share_slideshow_loggedout (accessed 23 September 2014)

⁴¹²ibid

⁴¹³ibid

⁴¹⁴ibid

themselves, strengthening and popularizing government's support schemes and incentives and strengthening the support of National Human Rights Institutions. Moreover, Ethiopian Charitable Societies ought to widen their horizon, and employ self-transformation modalities to working in line with the law. Conducting an impact evaluation is also another restorative strategy which provides an opportunity to assess the outcome of the law and recommend ways to address some of the negative aspects and effects of the law.

These options could be employed singly or in combination based on the specific organization's need and focus area. However, some strategies such as Organizational Development (OD) are quite fundamental for every organization to adapt to the existing legal and policy environment. Voluntarism is also an important tool to mobilize qualified experts with no or little cost, irrespective of the type and focus area of the organization. Nevertheless, it is recommended that a holistic use of the strategies is essential for successful and sustainable undertakings on human rights advocacy by civil societies in the country.

State Media Coverage of Highly Publicized Criminal Cases in Ethiopia and the Fair Trial Rights of the Accused

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Abstract

The precise role of Ethiopian state media in the administration of justice, particularly their coverage of highly publicized criminal cases, raises serious concerns on the fair trial rights of the accused. Under the guise of freedom of expression and informing the public, the media is at times taking over the sole responsibility of courts of determining the guilt or innocence of persons accused of committing crime, by releasing publications of highly prejudicial nature in violation of the fair trial guarantees of presumption of innocence, privilege against self-incrimination and the right to be tried by an impartial court. Here the important question would be how the media could exercise its freedom without infringing the fair trial rights of the accused. In other words, what the media can and cannot do in reporting criminal cases. The answer to this question is not simple and it requires trading a delicate balance between freedom of expression and the right to fair trial both of which are guaranteed under the FDRE constitution.

Yet, the FDRE constitution does not clearly indicate how the two sets of rights could co-exist without one threatening the existence of the other. Thus, this article tries to elaborate or point out the bounds of media freedom in covering criminal cases under FDRE constitution by examining standards developed by other countries and international jurisprudence on the matter. It also assesses the current practice of Ethiopian state media coverage of highly publicized criminal cases in light of these standards by taking some (in)famous broadcasts of the Ethiopian National Television (ETV) currently renamed as Ethiopian Broadcast Corporation (EBC) as an example. Finally, the mechanisms of controlling and remedying irresponsible media reportage of criminal cases under Ethiopian law as well as their adequacy is also dealt in this article.

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I. Introduction

Media is capable of playing both constructive and destructive roles in the administration of criminal justice anywhere and the Ethiopian state media is no exception in this regard. Concerning Media's positive role in the adjudication of criminal cases, the US Supreme Court in its decision on *Sheppard vs. Maxwell*, succulently noted that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in criminal field".⁴¹⁵ Here the term 'responsible' media should be underscored since it is the only kind of media that aids the course of justice instead of the irresponsible ones. Although there is no clear cut definition of what a responsible media constitutes, authorities have attempted to provide certain key attributes. For instance, the Indian High Court identified 'accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people'⁴¹⁶ as cardinal virtues which responsible media must uphold and live up to.

Such media assists the administration of criminal justice by performing various functions at different stages of the criminal proceedings. Prior to arrest, media could assist the capture of a crime suspect who is not apprehended yet and it serves to notify the public of the possible dangers posed by him/her so that they could take the necessary precautions.⁴¹⁷ Following the arrest and until the commencement of trial, media reporting of proceedings gives the public the confidence that the law enforcement officials are properly carrying out their responsibility of safeguarding the public.⁴¹⁸ Additionally, media scrutiny during this period also helps the accused to appear in court within the prescribed time instead of languishing in police detention.⁴¹⁹

Once trial gets going, coverage of the trial proceedings by the media helps to ensure the accountability of judges, prosecutors, lawyers and other parties involved in the trial.⁴²⁰ Thus, attention by the media reminds these

⁴¹⁵ *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir.1965), rev'd, 384 U.S. 333 (1966).

⁴¹⁶ *Mother Dairy Foods & Processing Ltd v. Zee Telefilms* (IA 8185/2003 in Suit No. 1543/2003)

⁴¹⁷ AMERICAN BAR ASSOCIATION (hereinafter ABA), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 47(1966).

⁴¹⁸*Id.*, at 48

⁴¹⁹*Id.*, at 49

⁴²⁰ Giorgio Resta, *Trying Cases In The Media: A Comparative Overview*, 71 LAW AND CONTEMPORARY PROBLEMS, 35-36(2008).

participants that they are being closely watched by the eyes of the public which motivates them to perform their duties to the highest level. Further, fair criticisms of court decisions after the completion of the trial contributes for the improvement of the criminal justice administration system⁴²¹ by indicating the weakness, errors or irregularities committed in the process. Hence, these are the benefits derived from responsible media's coverage of criminal cases.

In contrast, irresponsible media's reporting in criminal cases is an obstacle to the effective administration of justice. Rather than being accurate, objective and fair in their reporting, irresponsible media are biased and lopsided to one of the parties. They are often known for distorting facts and taking allegations as facts.⁴²² Without due consideration of the impacts of their reporting in the administration of justice in general and the possible influence they might create in judicial proceedings, they tend to disclose carelessly whatever information they have at their disposal without regard to its prejudicial nature to the undertaking of independent judicial function. Hence, the only concern of such kind of media reporting is not revealing what is 'in the interest of the public rather what the public is interested in'.⁴²³

Such unhealthy media reporting of criminal cases will have the effect of undermining the fair trial rights of the accused intended to safeguard the individual from arbitrary and unlawful deprivation of his other fundamental rights and freedoms.⁴²⁴ Some of these fair trial rights include:

⁴²¹*Ibid*

⁴²² Regional Workshop on 'Reporting of Court proceedings by media and administration of justice' At the High Court of Maharashtra and Goa, Mumbai (October 19, 2008).

⁴²³LAW COMMISSION OF INDIA, 200TH REPORT ON TRIAL BY MEDIA FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE 1973,(hereinafter LAW COMMISSION OF INDIA) 14 (2006). The public might be interested or curious to hear certain stories even if the information has no relevance to whatsoever to it day to day life as such. On the other hand, the dissemination of some information might be beneficial to the public or society to a large extent and contribute for the common good. For a detail discussion of the difference between 'what the public is interested 'and 'what is in the interest of the public' See Information Commissioner's Office, *The Public Interest Test* , http://www.ico.org.uk/media/for-organizations/documents/1183/the_public_interest_test.pdf, (last visited on May 26, 2015).

⁴²⁴LAWYERS COMMITTEE FOR HUMAN RIGHTS,WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 1 (2000).

the defendants' right to a presumption of innocence, prohibition on self incrimination and the right to independent and impartial tribunal.⁴²⁵ In this section, only a general account of these rights is made. The status of these rights in the FDRE constitution and other human right treaties ratified by Ethiopia vis-à-vis the right to freedom of expression will be explored in depth in subsequent sections.

Accordingly, to begin with the right to be presumed innocent; it stipulates that "a person is considered innocent as long as there is no final judgment proving him /her guilty"⁴²⁶. Hence, *anyone* including the *media* is expected to respect this right by refraining from proclaiming the guilt of a person suspected of committing a crime before his/her guilt is determined by final judgment of a court.⁴²⁷ Further, this right is believed to have laid the foundation for all other procedural rights belonging to the accused.⁴²⁸

Historically, the right to presumption of innocence began to get recognition at the end of 18th century together with the 'beyond reasonable doubt standard of proof'.⁴²⁹ Consequently, the accused is not expected to prove his innocence. Rather, the prosecution is required to prove the guilt of the accused beyond reasonable doubt by adducing sufficient evidence. If there is a doubt regarding the innocence of the accused after the production of evidence by the prosecution, that doubt would be interpreted in favor of the accused pursuant to the principle in *dubio pro reo*.⁴³⁰

Another fair trial right of the accused potentially affected by irresponsible media reporting is the right not to incriminate one self. This right guarantees that no person "shall be compelled in any criminal case to be a witness against himself"⁴³¹. As such, the accused has the right to remain silent in pre-trial criminal investigation and the right not to give evidence at trial. Until late 18th century, the fundamental safeguard for an accused person was not the right to remain silent rather the opportunity to speak.⁴³² During this period, the prime objective of criminal trials was to give a

⁴²⁵*Id* at 13,15 &19

⁴²⁶*Id*, at 15

⁴²⁷*Ibid*

⁴²⁸ Gabriela C. Nicoleta et al., *Short essay on Presumption of innocence. ECHR precedent*, LEGAL PRACTICE AND INTERNATIONAL LAW 193 (Christinel L. Murzea ed..2011).

⁴²⁹John H. Langbein, *The Historical Origins of the Privilege against Self-incrimination at Common Law*, 92 MICHIGAN LAW REVIEW 1047, 1070, (2002).

⁴³⁰ See, Nicoleta *supra* note 14, at 195

⁴³¹ See Langbein, *supra* note 15, at 1047

⁴³²*Ibid*

defendant the chance to respond to the accusations brought against him/her.

But in late 18th century the role of defense counsels in criminal trials increased dramatically and prosecutions burden of proving allegations beyond reasonable doubt standard emerged at the same time.⁴³³ These developments changed the objective of criminal trial in to testing the case of prosecution by the defense counsel and the criminal defendant acquired the right to decline to speak against charges against him. Accordingly, confessions of the accused will be accepted as evidence only when it was free, voluntary and not compelled.⁴³⁴ Here, voluntariness impliedly incorporates the right not to answer or confess at all and the right to remain silent. The rationale behind the privilege against self incrimination is the assumption that confessions obtained by compulsion are not reliable as evidence.⁴³⁵ Nonetheless, some media reports of criminal cases could endanger this privilege of defendants by releasing highly incriminating information obtained from them without making sure whether they are obtained voluntarily or not.

Apart from the two fair trial rights discussed above, irresponsible media coverage of criminal cases by the media could also infringe the defendant right to be tried by impartial court. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. However, the negative influence of irresponsible media coverage on judges' ability to adjudicate cases before them impartially is a bone of contention among scholars. With respect to this, some scholars argue that unlike lay men, professional judges that have taken rigorous legal training and sworn to perform their duties impartially should be assumed to have the stamina to withstand the negative effects of prejudicial media publicity.⁴³⁶ In their view it is very unlikely for judges to be influenced by information released by irresponsible media. On the other hand, others contend that we must not forget that judges are also human beings and they are susceptible to influence as their fellow human beings. Hence, even if a judge endeavors to ignore prejudicial media publicity of a pending case and rule impartially,

⁴³³*Id.* at 18

⁴³⁴Pat McNerney, *The Privilege against Self-incrimination from early origins to Judges' Rules: Challenging the 'orthodox view'*, 18 THE INTERNATIONAL JOURNAL OF EVIDENCE & PROOF 112,130 (2014).

⁴³⁵*Ibid*

⁴³⁶ Pascale DuparcPortier, *Media Reporting of Trials in France and in Ireland*, 6 JUDICIAL STUDIES INSTITUTE JOURNAL 1, at 208 (2006)

his/her judgment could be affected by such information without the judge knowing it or sub-consciously.⁴³⁷

Furthermore, despite the actual or objective impartiality of the judge in the adjudication of the case, exposure of judges to biased information by irresponsible media may create the impression among the public that judges are already biased as a result of the publication. This is an important consideration since 'justice must not only be done but it must be seen done'.⁴³⁸ Accordingly, the exposure of judges to prejudicial information by the media erodes subjective impartiality and the confidence of the public in fair and impartial adjudication of cases. Thus, it would be naïve to ignore the negative pressure irresponsible media could exert upon the administration of justice. All in all, as responsible media are allies to fair administration of justice, irresponsible media undermine the fair trial rights of the accused. Because of this, any measure that seeks to minimize the prejudicial effects of media on fair trial must only target irresponsible media and must leave the responsible ones operating space so that they could keep on delivering their beneficial functions for ensuring efficient administration of criminal justice.

II. Balancing Freedom of Expression and the Right to Fair Trial Under the Federal Democratic Republic of Ethiopia(FDRE) Constitution

The FDRE constitution has given recognition to two important fundamental human rights constituting the pillars of a democratic system i.e. Right to Freedom of Expression and the Right to Fair trial.⁴³⁹ Often the two sets of rights go hand in hand one safeguarding the proper exercise of the other. For instance, as noted in the preceding section media scrutiny of criminal proceedings ensure the accountability of actors operating in it. Likewise, courts are supposed to stand against unjustified interferences in the exercise of freedom of expression. Nonetheless, there are times where the two sets of rights may come in to conflict with each other. Such conflict arises when one right is exercised in absolute manner without consideration or even at the expense of the other. To illustrate, if the freedom of the press is considered as an absolute right giving the media the green light to publish any information that damages the fair trial right of the accused ,

⁴³⁷ See LAW COMMISSION OF INDIA, *supra* note 9, at 39-54

⁴³⁸ *Ibid*

⁴³⁹ CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (hereinafter FDRE CONSTITUTION), art.19, 20 and 29 (1995).

recognition of the right to fair trial will become a hallow promise. Similarly, if the right to fair trial bans any kind of media coverage of criminal cases, freedom of the press and the freedom of expression will not be ensured.

However, a closer examination of the FDRE constitution shows that the intention is to create a harmony between the two sets of rights by setting reasonable limitations. These could be inferred from articles 19(2), 19(5), 20(3), 29(2), 29(3), 29(4), and 29(6) of the Constitution. On one hand, the Constitution underscores the indispensable role of the media in a democratic society by serving as a channel for the dissemination of different ideas and viewpoints.⁴⁴⁰ As such, it guarantees freedom of the press from interference and censorship. On the other hand, the Constitution also notes the dangers of an absolute right to freedom of expression. Hence, the Constitution states that legal limitation could be imposed on the freedom of the press to protect the well-being of the youth, public moral, propagation of war and statements capable of damaging human dignity or reputation.⁴⁴¹

Here it should be noted that ensuring fair trial is not expressly stated as one of the legitimate grounds for restricting the right to freedom of expression. Yet, freedom of expression being a fundamental human right, the limitations placed upon it or the grounds for limiting it must be interpreted in conformity with international human right instruments ratified by Ethiopia.⁴⁴² Accordingly, the International Covenant on Civil and Political Rights (ICCPR), besides listing national security, public order, public health or morals also incorporate the need to protect the *other person's right* as a justification for restraining freedom of expression.⁴⁴³ The phrase other persons right would include the right to fair trial. Thus, promoting fair trial is one of the legitimate grounds of limiting free expression.

Notably, the right to fair trial incorporates a number of guarantees ranging from the right to be informed of the charge one is accused of up to the right to appeal against the final judgment of a court.⁴⁴⁴ However, not every guarantee of the right to fair trial is equally threatened by unrestrained coverage of media. Rather, certain key guarantees of the right to fair trial are particularly endangered by irresponsible reporting of the media.

⁴⁴⁰*Id.*, at 29(4)

⁴⁴¹*Id.*, at 29(6)

⁴⁴²*Id.*, at 13(2)

⁴⁴³ International Covenant on Civil and Political Rights (hereinafter ICCPR), Adopted on 19 December 1966 (entered into Force on 23 March 1976)., art.19(3), a

⁴⁴⁴ See FDRE Constitution, *supra* note 25, at 20

Among these guarantees, the first is a person's right to be tried by an independent and impartial court.

This entitlement emanating from the right to fair trial is recognized in the FDRE constitution as well as the ICCPR and the Principles and Guidelines on the Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and People's Rights.⁴⁴⁵ The FDRE Constitution under article 78 provides for the establishment of an independent judiciary. This provision is located outside chapter three of the Constitution which talks about Fundamental Rights and Freedoms. Nonetheless, it has relevance and strong connection with the fair trial right of the accused. The Constitution also elaborates the meaning of independent judiciary as freedom from "any interference of influence of any government body, government, officials or from any other source"⁴⁴⁶. The term 'any other source' indicates that the framers of the FDRE constitution have anticipated in advance that irresponsible media reporting could also come from non-state actors and unduly influence the judiciary or threaten judicial independence. Thus, the Constitution affords protection to the independence of the judiciary not only from the threat posed to it by state media but also from private media as well.

Likewise, the ICCPR speaks with the same tone by stipulating that 'in the determination of any criminal charge against him...everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law'.⁴⁴⁷ The Covenant also stresses that media could be excluded from reporting the whole or part of the proceeding if the court is of the opinion that such publicity obstructs the administration of justice. Similarly, the Fair Trial Guidelines of the African Commission on Human and People's Rights (the Guidelines) also restate the stipulation of the ICCPR.⁴⁴⁸ The Commission adopted the guideline with the objective of strengthening the fair trial provisions of the African

⁴⁴⁵ Constitution of the Federal Democratic Republic of Ethiopia (1995)., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976)., AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).

⁴⁴⁶*Id.*, at 79(2)

⁴⁴⁷ See ICCPR, *supra* note 29, at 14(1)

⁴⁴⁸ AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).art. 1

Charter on Human and Peoples Rights and to make it consistent with international standards of fair trial.

Accordingly, the Guidelines note that one of the guarantees of fair hearing is ensuring the determination of a person's rights and obligations based on solely on evidence presented to the judicial body'⁴⁴⁹. It also defines an impartial tribunal as one that 'bases its decisions only on objective evidence, arguments and facts before it'.⁴⁵⁰ The Guidelines further stress the need to secure independence of the judiciary from restrictions, improper influence, inducement, threats or interference, direct or indirect from any quarter or for any reason'⁴⁵¹. Since the guideline prohibits possible interferences from all directions, media would also fall under its ambit.

The other facet of the right to fair trial threatened by irresponsible media reporting is a person's right to be presumed innocent until proven guilty. Underlying this guarantee, the assumption is that, human beings are good naturally and they do not intend to commit crime or harm each other.⁴⁵² To rebut such presumption whosoever alleges the commission of crime must prove beyond reasonable doubt that the accused has committed the crime.

The FDRE Constitution and the international and regional human rights instruments ratified by Ethiopia have incorporated this guarantee.⁴⁵³ To illustrate, article 20 of the FDRE Constitution states that 'accused persons have the right to be presumed innocent until proved guilty'.⁴⁵⁴ In a similar manner, ICCPR echoes the Constitution's statement by saying that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'⁴⁵⁵. Thus, any information received by the media that determines the guilt or innocence of the accused violates his/her right to be presumed innocent before the final decision of the court.

⁴⁴⁹*Id.*, at 2(h)

⁴⁵⁰*Id.*, at 5(a)

⁴⁵¹*Ibid*

⁴⁵² Joseph C. Cascareli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AMERICAN JOURNAL OF JURISPRUDENCE 4 (1996).

⁴⁵³ CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (1995)., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976).

⁴⁵⁴ See FDRE CONSTITUTION, *supra* note 25, at 20(3)

⁴⁵⁵ See ICCPR, *supra* note 29, at 14(2)

Another component of the right to fair trial endangered by irresponsible media reporting is the protection afforded to the accused of not incriminating or testifying against oneself. With respect to this, the FDRE Constitution provides that 'persons arrested have the right to remain silent'⁴⁵⁶ and they shall 'not to be compelled to testify against themselves'.⁴⁵⁷ A similar guarantee is enshrined in the ICCPR which states a person charged with the commission of an offence is entitled 'not to be compelled to testify against himself or confess guilt'.⁴⁵⁸ The fear here is that confession transmitted by the media might be a coerced one resulting from police interrogation conducted by disregarding the accused right to remain silent and the privilege against self-incrimination.⁴⁵⁹ Thus, if an irresponsible media discloses the alleged confession of the accused or his/her admission of guilt, it would indirectly violate the privilege against self-incrimination.

To sum up, the discussion held in this section demonstrates that freedom of the press or expression is not an absolute right devoid of any limitation. Instead it could be restricted to protect other competing interests such as the right to fair trial. Clearly, unlimited freedom of expression/ press could infringe the fair trial rights of the accused to be tried by impartial court, his/her presumption of innocence and his/her right to protection against self-incrimination. Thus, limitation on freedom of expression is necessary to ensure the integrity as well as trustworthiness of the criminal justice administration system.

III. When is Limitation on Freedom of Expression Justified on Account of Defendants Right to Fair Trial?

As noted above, arguably a combined reading of the FDRE Constitution and different human rights treaties ratified by Ethiopia will lead to the conclusion that protecting the fair trial rights of the accused is one of the grounds for putting a limitation on freedom of expression. But, how do we determine whether a certain broadcast or publication violates fair trial rights of the accused or not? What are the parameters for saying so? The FDRE Constitution and human right treaties adopted by Ethiopia are silent on this issue. Thus, it is necessary to examine the experience of other legal

⁴⁵⁶See FDRE CONSTITUTION, *supra* note 25, at 19(2)

⁴⁵⁷*Id.*, at 20(3)

⁴⁵⁸ See ICCPR, *supra* note 29, at 14(3) g

⁴⁵⁹ Carl Minzer, *China's latest tactic: Confessions on state TV*, <http://www.law.fordham.edu/faculty/21264.htm> Carl November 6, 2013, (last visited on May 22, 2015).

systems on the matter. Accordingly, the approach followed by common law legal systems particularly the United Kingdom (UK) and the approach by the European Court on Human Rights are often cited in the literature as two main models on the area.⁴⁶⁰

To begin with the jurisprudence of the common law legal system, not every type of media coverage of criminal cases is susceptible to restriction. It is only where the publication of the media creates *substantial risk of prejudice* to the administration of criminal justice which is so serious that it is not possible to conduct the proceeding free from bias.⁴⁶¹ Here the tests are two. First, the publication of the media in its nature must be capable of affecting the fair handling of the proceeding. Second, the degree of its effect on the proceeding must not be minimal or unsubstantial. Rather, the consequence of the released prejudicial information must have substantial or serious negative impact on the fair undertaking of the criminal proceeding.⁴⁶²

If a publication disclosed by the media does not meet these criteria, it will not be subjected to restriction and falls within the ambit of freedom of expression. Nonetheless, it is important to admit the imprecision of the term 'substantial risk of prejudice' since it may vary from case to case. However, there is a consensus on some types of media coverage's of criminal proceedings as inherently and substantially prejudicial to the fair trial rights of the accused which would be dealt in detail in the subsequent paragraphs of this section.

Apart from the common law legal system, the European Court on Human Rights (ECHR) has also developed three level cumulative tests for restraining freedom of expression on account of safeguarding the right to fair trial, based on the stipulations of the European Convention on Human Rights.⁴⁶³ Besides recognizing the need to maintain the impartiality of the judiciary as one of the legitimate grounds for limiting media coverage of criminal cases, the European Convention also provides the preconditions

⁴⁶⁰ See Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, NEW YORK UNIVERSITY LAW REVIEW,(2010)., Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, (2010).

⁴⁶¹ UNITED KINGDOM CONTEMPT OF COURT ACT, 1981 § 2(2)

⁴⁶²*Ibid*

⁴⁶³ THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (herein after EUROPEAN CONVENTION, (1950)., art, 10 & *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

that must be met in advance for restriction to take place. These prerequisites for limitation are, it 'must be prescribed by law', it must be 'based on legitimate grounds' and it must be 'necessary in a democratic society'.⁴⁶⁴ The ECHR has elaborated these tests in a number of cases.⁴⁶⁵ Regarding the requirement of the limitation to be 'prescribed by law', it meant that the government cannot restrict medias exercise of freedom of expression unless there is a law that backs its action. In other words, no law means no restriction.

What if a government enacts a law that restrains freedom of expression without citing any justification or legitimate grounds for doing so? Would it be acceptable? The answer would be an obvious no since the second precondition of the European Convention provides that the law that restricts freedom of expression must pursue legitimate aims such as "interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of judiciary*"⁴⁶⁶. Thus, if the government wanted to impose limitation on media coverage of criminal cases it must aspire to achieve the aforementioned solemn objectives particularly the need to ensure the impartiality of the judiciary.

Yet, the limitation must also fulfill the third important requirement which is 'it must be necessary in a democratic society'. This means, restriction on media reporting of criminal cases cannot be imposed unless there exists a pressing social need to do so which is proportionate to the legitimate aim pursued.⁴⁶⁷ To put it simply, the government cannot restrict freedom of expression because it thinks it would be useful or convenient to do so. Rather, it must be sure that limitation of the right to freedom of expression is the only viable option available to safeguard the pressing social need in danger. This test is very crucial to determine which kind of media publications pose the greatest danger to defendants right to fair trial. Further, the proportionality of the measure taken by the government will also be scrutinized in light to the legitimate aim pursued.⁴⁶⁸ Hence, the limitation itself must be limited to extent necessary for safeguarding the

⁴⁶⁴*Ibid*

⁴⁶⁵ *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

⁴⁶⁶ See EUROPEAN CONVENTION, *supra* note 49, at 10(2)

⁴⁶⁷ See *Sunday Times v. United Kingdom*, *supra* note 51

⁴⁶⁸*Ibid*

legitimate aim. If it goes beyond meeting a legitimate aim it will not fulfill the criterion of necessity in a democratic society.

The two approaches on restriction of freedom of expression have more of similarity than a difference since both of them require serious risk of harm to result from the media coverage of the criminal proceeding on the defendant's right to fair trial, which absolutely necessitates restriction. Nonetheless, the determination of whether a publication has a serious prejudicial effect or not may vary from case to case. Yet certain categories of publications were identified to be inherently hazardous at all times. These kinds of publications also meet the standards set by countries following the common law legal system particularly UK as well as by the jurisprudence of the European Court on Human Rights. Among them, publications concerning the character of the accused or previous convictions, disclosures of confession, publications which comment upon the merit of the case, photographs and publication of interview with witnesses are the primary ones.⁴⁶⁹ Further, such publications are mostly released during the period of criminal process that goes from the arrest or formal charge to the beginning of trial and the police is the primary source of prejudicial information for the media at this stage.⁴⁷⁰

i. Publication of Confession

Despite the possible inadmissibility of the alleged confession of the accused given to the police in a court of law, disclosures of such information by the media prior to trial is regarded as one of the most detrimental information threatening the fair trial right of the defendant.⁴⁷¹ The rationale for this is that confession is the most incriminating kind of information that can be adduced against the accused. Further, there is no means for verifying whether such confession is obtained through coercion or other inappropriate methods which makes the confession as unreliable as evidence.⁴⁷² Furthermore, such kind of publications will be retained in the mind of the judge for a longer period impairing his/her capacity to adjudicate impartially.

Although the primary source of confession is the police, the media could also get confession directly from the accused through recording or televised

⁴⁶⁹ See ABA, *supra* note 3, at 17 & see LAW COMMISSION OF INDIA, *supra* note 9, at 195-220

⁴⁷⁰ See ABA, *supra* note 3, at 17

⁴⁷¹ *Ibid*

⁴⁷² *Ibid*

interview under the supervision or approval of the police while the accused is in custody.⁴⁷³ Thus, whenever the media releases confession of the accused, it would seriously violate his/her fair trial right.

ii. Publications Concerning the Character of the Accused or Prior Criminal Record

At times the media goes to the extent of determining the guilt of the accused by snatching the proper province or function of courts. Such kinds of publications by the media have the tendency to trigger the feeling of hostility towards the accused.⁴⁷⁴ The media do so primarily by labeling the accused as a “criminal”, “terrorist” or “corrupt” etc. Characterizing the accused as such goes beyond reporting facts to the public. It also does more harm than good to the public since it challenges the court’s decision on the matter free of bias. Similarly, media also disclose information pertaining to the prior convictions of the accused. Such statements are released by the media with the belief that ‘it is more likely that an accused person committed the offence charged if he has a criminal record and less likely if he has no record’.⁴⁷⁵

Nevertheless, such kind of information is irrelevant to determine the issue whether the accused committed the alleged crime at the moment. Their use is rather confined for the purpose of sentencing. Regarding this, the American Bar Association rightly noted that the issue is not how many crimes the defendant has committed but whether he/she has committed this crime.⁴⁷⁶ To sum up, above publication of information regarding the merit of the case or the prior conviction of the accused constitute inherently prejudicial information and grossly endanger the undertaking fair trial. As such, the media should refrain from publishing such kind of information to the public in violation of the fair trial rights of the accused.

iii. Pre-trial Reports of Evidence and Interview of Witnesses

The other category of seriously damaging statements released by the media which is often a cause for concern involves the display of evidences or oral statements made against the accused. Such kind of information is usually gathered mainly during the search and seizure conducted on the accused. What makes the evidences released by the media hazardous is that there is

⁴⁷³*Id.*, at 30

⁴⁷⁴ See LAW COMMISSION OF INDIA, *supra* note 9, at 195-199

⁴⁷⁵ AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150)

⁴⁷⁶ See ABA, *supra* note 3, at 31

no mechanism for checking whether the prescribed safeguards set by the law for conducting search and seizure are met or not.⁴⁷⁷ If the evidence is obtained through improper ways it would eventually lose its admissibility in a court of law. Nevertheless, exposure of judges to such inadmissible information may seriously affect their impartiality.

Likewise, the media's dissemination of interviews of witnesses against the accused is also troublesome for a number of reasons. First, since the accused is not in a position to defend himself / herself and cross examine the witness, such release by the media only shows one side of the picture which is highly prejudicial to the accused.⁴⁷⁸ Second, the witness may have given such testimony to the media against his will since there is no mechanism for the audience to check the presence of consent on the part of the witness.⁴⁷⁹ Third, the chance of correcting testimony given to the media in a court of law later is very less; since the witness is under pressure to ensure the consistency of his statements at all times.⁴⁸⁰ For all these reasons, the publication of interview of witness tampers with the fair trial right of the accused and requires restriction.

iv. Photographs

In addition to those kinds of publications of the media discussed above, the display of photographs of the accused is also regarded as a serious threat to fair trial of the accused. Particularly, if there is an issue regarding the identity of the accused, the likelihood of prejudice is high. This is because, following the display of the picture of the accused over the media, 'witnesses who have not seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw'⁴⁸¹ and identify him as the suspect. Thus, the witness recognizes not the person who had been seen by him/her, committing the crime but the person he/she saw in the photograph. Further, the display of photographs of the accused by the media may also influence the audience to develop feeling of hostility towards the accused and the presumption of guilt which could create an atmosphere not suited for conducting fair trial of the defendant.⁴⁸²

⁴⁷⁷*Id.*, at 35

⁴⁷⁸ See LAW COMMISSION OF INDIA, *supra* note 9, at 215

⁴⁷⁹*Ibid*

⁴⁸⁰*Ibid*

⁴⁸¹*Id.*, at 203-204

⁴⁸²*Ibid*

IV. State Media Coverage of Highly Publicized Criminal Cases in Ethiopia: The practice vs. the Fair trial Rights of the Accused

Although media are supposed to be handmaiden for effective administration of justice, the role played by some state media in Ethiopia stands in a stark contrast against this objective being highly irresponsible. These media not only release highly prejudicial information against the accused before or during trial in courts but also often determine the guilt or innocence of the accused punching way beyond their weights. This may force one to question whether the rights of accused recognized in the FDRE constitution such as the presumption of innocence, the right to be tried by impartial court and the privilege against self-incrimination are hallow promises or enforceable rights.

In this section an attempt is made to show the problem of irresponsible media coverage of highly publicized criminal cases in Ethiopia in light of the defendant's fair trial rights. Accordingly, the author has chosen four broadcasts of the Ethiopian National Television (ETV) with the belief that they adequately demonstrate the magnitude of the problem. The first three are documentaries entitled "Akeldama"⁴⁸³ (Land of Blood), "Jihadawi Harakat"⁴⁸⁴ (Jihad Movement) and "Hazen Lemdres...Guzo Wede Dessie" (To Mourn....trip to Dessie).⁴⁸⁵ The final is news broadcast of the ETV that reports the undertaking of search and seizure in the residence of government officials suspected of corruption. Each of them will be discussed in detail subsequently.⁴⁸⁶ But it is essential to point out some of the commonalties between them.

The first similarity among the four broadcasts is that the type of information released by them largely constitute confessions of the accused, pre-trial release of evidences, display of photographs, comments on the merits of the case as well as interview of witness which are regarded as

⁴⁸³Akeldama, http://diretube.com/ethiopian-documentary/akeldama-part-1-video_25cf45af1.htm, http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video_30d42597c.html, http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video_086c05142.html (last visited November 1, 2013).

⁴⁸⁴Jihadawi Harakat, <http://www.youtube.com/watch?v=g4SxGOS5y88>, (last visited on august 9, 2013).

⁴⁸⁵Ethiopia-Terrorist attack on sheik NuruYimam, http://www.youtube.com/watch?v=x_8Ypxiz4y8, (last visited on July 7, 2014).

⁴⁸⁶Police Recovered Millions, http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebrewahed-house-video_16585f1c0.html (last visited December 4, 2013).

inherently prejudicial to the defendants right to fair trial both by the standards developed by country's following the common law legal system and the European Court on Human Rights discussed in the previous section. Apart from this, the four documentaries also tamper with various rights of accused persons recognized by the FDRE constitution and human right treaties ratified by Ethiopia. Further, all broadcasts were published following the arrest of the accused and before the beginning of trial. This conforms to the theory that most prejudicial information's against the accused are disclosed in the period between the arrest and the starting of trial which increases the likelihood of prejudice.⁴⁸⁷

Furthermore, with the exception of the documentary "To mourn...trip to Dessie", the media principal source of information were the police. In the two broadcasts i.e. "Akeldama" and "Jihadawi Harakat", the documentaries were made by the collaboration of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU). The news covering search and seizure of persons arrested on suspicion of corruption was broadcasted with the information obtained from the Federal Police. This practice also proves the theory that Police is themajor source of prejudicial information's between the time of arrest and trial.⁴⁸⁸ This being said regarding the common features of the broadcasts detail examination of each broadcast is conducted as follows.

i. Aceldama " Land of Blood"

This documentary was broadcasted by the Ethiopian National Television on November 2012 in cooperation with National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU).⁴⁸⁹ It starts with a warning that the program is not suited for persons below the age of thirteen followed by a title 'Akeldama' in Amharic with blood dropping from each of the letters. Then, very disturbing and shocking pictures of slaughtered children, dismembered dead bodies, droplets of blood across the street, pictures of persons mourning the loss of their loved ones etc are displayed. After these scenes, all of a sudden a narrator appears on a screen with a facial expression and tone that seeks sympathy from the audience. Then, he tells the viewers that the documentary is a three part

⁴⁸⁷ See ABA, *supra* note 3, at 30

⁴⁸⁸ *Id.*, at 28

⁴⁸⁹ See *Akeldama*, *supra* note 69

series showing terrorist networks planning to make Ethiopia land of blood.⁴⁹⁰

Part one of the documentary claims that as a result of terrorist attacks committed in Ethiopia 339 people were killed, 363 sustained bodily injury and 25 people were kidnapped in the past years.⁴⁹¹ The documentary also blames the Eritrean government for sponsoring terrorism through training and infiltration of terrorists to Ethiopia. Additionally, it praises the adoption of the Anti-Terrorism Proclamation by the Ethiopian parliament for playing a key role in combating terrorism in Ethiopia. The documentary also tries to convince that the country would have been a land of blood had it not been for the anti-terrorism proclamation.⁴⁹²

In part two, the documentary mainly shows the organizations declared by the Ethiopian parliament to be terrorist organizations and the justification for this measure. With respect to this, the documentary recalls the decision of the House of people Representatives to declare Ginbot 7, The Oromo Liberation Front(OLF), The Ogaden National Liberation Front(ONLF), Al-shabab and Alqaeda as terrorist organizations after due considerations of evidences presented against them.⁴⁹³ With this as a background, the documentary goes on to display the confessions of individuals arrested on the suspicion of terrorism which is highly incriminating and prejudicial to them. The individuals giving their confessions were alleged to be members of Ginbot 7. Their confessions mainly state that they have taken terrorist training in Eritrea regarding the use of Kalashnikovs, bombs and explosives.⁴⁹⁴ Further, they confessed that 'the purpose of taking those training is to assassinate Ethiopian government officials and bombard different development projects in Ethiopia under the instruction of Ginbot 7 with the belief that peaceful struggle in Ethiopia is hopeless'.⁴⁹⁵

The documentary has also shown interview of witnesses against the accused which is considered as highly prejudicial to the defendant's right to fair trial. Several persons giving confession in the documentary have identified a number of individuals by their name stated their involvement

⁴⁹⁰*Ibid*

⁴⁹¹*Ibid*

⁴⁹²*Ibid*

⁴⁹³*Ibid*

⁴⁹⁴*Ibid*

⁴⁹⁵*Ibid*

in the planned terrorist attack.⁴⁹⁶ Such activity by the media would infringe defendant's right to receive fair trial by depriving them the opportunity to cross examine those witnesses. The third part of the documentary was also dedicated for showing confessions and testimonies of the accused against themselves and others. The manner of presentation of the documentary was in itself interesting. Most of the talking is done by the narrator and the statements of confessions of the accused are presented for a very short time only to corroborate what the narrator has said. No statement was made in the documentary regarding how the interrogation was conducted and whether the accused persons confessed voluntarily. Nonetheless, one of the accused i.e. Debebe Eshetu noted that the police treated him very well and he was teasing with officers who presumably conducted the interrogation.⁴⁹⁷ He was later released without any charge.⁴⁹⁸

However, international human right organizations such as Human Right Watch reported that the accused suffered maltreatment in the hand of the police and their confession could be a coerced one.⁴⁹⁹ In any case, the media practice of broadcasting confessions of the accused and inferring their guilt from those confessions violates the defendant's right against self-incrimination, the right to be presumed innocent and the right to trial by impartial court recognized not only by the FDRE constitution but also by the international and regional human rights instruments in which Ethiopia is a state party. Here, it is noteworthy that the documentary was aired while the case of defendant was being entertained by the court. Their trial was completed in June/July 2012 eight months after the broadcast of the documentary.

ii. "Jihadwi Harakat" (Jihad Movement)

The documentary was aired by the Ethiopian National Television (ETV) in February 2013. It was made with the assistance of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU) as usual.⁵⁰⁰ In the beginning of the documentary, pictures of suspected terrorists under arrest appear one after the other in a stylish

⁴⁹⁶*Ibid*

⁴⁹⁷*Ibid*

⁴⁹⁸Amnesty International, *Eskinder Nega*, <http://www.amnesty.org.nz/eskinder-nega>, (last visited on May 23, 2015).

⁴⁹⁹ Human Rights Watch, "They Want a Confession", 17 October 2013, <http://www.m.hrw.org/ru/node/119814/section/9> (last visited on May 23, 2015).

⁵⁰⁰ See *Jihadawi Harakat*, *supra* note 70

manner, together with background sound truck music capable of terrifying the audience. Then, the narrator tells the audience that Somalia being failed state for the past 20 years had become a fertile ground for the operation of terrorists like *Alshabab*. He further notes that after the defeat of *Alshabab* by Ethiopian and Somalia transitional government forces in 2010, the group has adopted the view of *Saleh Nebha* that calls for the establishment of decentralized terrorist network in east Africa.⁵⁰¹It also accuses an association called '*Daru Bilal*' that operates in Kenya with the plan of accomplishing the above objective.⁵⁰²

Stating these as a background the documentary proceeds to show the confession of suspected terrorists in custody which is highly incriminating. In the documentary, some of the suspected terrorists noted that, they went to Somalia to take basic terrorist training including how to operate and shoot Kalashnikov, military training on choosing and using locations for war, distribution of weapons and man power and digging of fortress.⁵⁰³The suspects also confessed that 'the aim of the training is to conduct a Jihad War in Ethiopia with the objective of taking over the governments control on the people and ultimately establish Islamic state'.⁵⁰⁴

The documentary also televised the confession of other suspected terrorists on the issue of using the questions of Ethiopian Muslims for their own ends. In this regard, the suspects stated that 'they had attended training offered by Dr. Jasim Mustefa on inciting riot with the intent to create conducive environment for conducting Jihad war in Ethiopia'.⁵⁰⁵ With this mission the suspects also confessed that they have established a group called '*Harekatul Shibabel Mujahidin Fi Bidel Hijrateyen*' literally means 'youth Mujahidin'.⁵⁰⁶ Like that of the Akeldama documentary, the publication of ETV on Jihadwi Harakat grossly infringe the defendants right to fair trial since it amount to constitute gravely prejudicial information's pursuant to the standard developed by the UK and European Court of Human Right. Thus, the media should have refrained from broadcasting such kind of documentaries to the public.

⁵⁰¹*Ibid*

⁵⁰²*Ibid*

⁵⁰³*Ibid*

⁵⁰⁴*Ibid*

⁵⁰⁵*Ibid*

⁵⁰⁶*Ibid*

In connection with the documentary Jihadawi Harakat it is important to underscore two points. First, the documentary was broadcasted by the Ethiopian National Television before the completion of trial which is still going at the time of writing up this article. Second, the documentary was transmitted despite an injunction order of the Federal high court fourth criminal bench banning the airing of the documentary.⁵⁰⁷

iii. “Hazen Lemderes... Guzo Wede Dessie” (To Mourn....Trip to Dessie)

Unlike the documentaries discussed above, this documentary was produced by the website called *Ethiopia First* that purports to carry out its own investigation of the case.⁵⁰⁸ However, the documentary was broadcasted by the Ethiopian National Television (ETV). It was aired following the assassination of Sheikh Nuru Yimamin Dessie Ethiopia and just after the arrest of suspects. The author has chosen it for discussion in this article since it is relevant to show how Ethiopian state media are broadcasting other kinds of extremely prejudicial information in highly publicized cases i.e. the publication of photographs of the accused and comments on the merit of the case. Accordingly, the documentary repeatedly showed the photographs of two individuals arrested on suspicion with a tag under their picture saying “*Hired Assassins*”.⁵⁰⁹ Such kinds of disclosures are very hazardous since they pre-judge the guilt of suspects before trial by a court of law and establish presumption of guilt than innocence. A documentary of similar content was broadcasted by the Ethiopian National Television on August 15, 2014 entitled ‘*Sheikheh Nuru Lemen Motu?*’ or why Sheikh Nuru Yimam die?⁵¹⁰ The documentary shows the confession of individuals suspected of killing Sheikh Nuru Yimam and whose photographs was displayed earlier in the documentary ‘To mourn.... trip to Dessie’.

⁵⁰⁷Ayten Girma, *Trial by Media and its Constitutional Implications*, THE REPORTER, Feb. 09, 2013, at 15, Merga Yonas, *Muslim Defendants to Sue Government, ETV on Documentary*, THE REPORTER, Feb. 09, 2013, at 1 & Human Rights Watch, *Ethiopia: Muslim protesters face Unfair Trial*, <http://www.m.hrw.org/news/2013/04/02/ethiopia-muslim-protestors-face-unfair-trial> (last visited on March 25, 2015).

⁵⁰⁸*Ethiopia-Terrorist attack on sheik Nuru Yimam*, *supra* note 71

⁵⁰⁹*Ibid*

⁵¹⁰[Must Watch] ETV Jihadawi Harakat2- Why did Sheikh Nuru Yimam die_ _August 15, 2014. Available at <http://www.ethiotube.net/flvideo/27325.flv> (last visited on March 25, 2015).

iv. News Report of Search Conducted in the Residence of Government officials Suspected of Corruption

Following the arrest of the officials of the Ethiopian Revenue and Customs authority in May 2013 on suspicion of engaging in corruption, their arrest was the talk of the country for many days. This is partly due to the overwhelming media coverage given to the case at times in very prejudicial manner to the defendant right to fair trial. A good example of such publications is the news broadcast of the Ethiopian National Television (ETV) concerning the search conducted in the house of suspected official's i.e. Geberewahid Woldegiorgis and Asmamaw Woldemariam.⁵¹¹ In the news a member of the police shows a search warrant to the camera and list the items recovered from the houses of the two individuals. In the house of Geberewahid Woldegiorgis, the police stated that, 200,000 Ethiopian birr, 26,000 Euro, 560 pound in cash and eight laptops, one iPod and several title deeds in Legedadi and Legetafo area were found.⁵¹² Likewise, in the residence of Asamenew Woldemariam the police noted the recovery of cash 1,947, 675 Ethiopian birr.⁵¹³

As discussed in the section dealing with the standards for restricting freedom of expression above, pre-trial publication of evidences by the media is considered as one of the most serious threats to the defendants right to fair trial by demonstrating an evidence which might not be admissible in court of law with ongoing prejudicial effect though. In the case at hand, the recovered items were shown to the public as evidence pending trial proceeding. Some writers criticized this practice by saying that the media went to determine the guilt of the defendants before their first appearance in a court of law.⁵¹⁴ In the assessment of the author, the reaction of the public who saw that news was also very hostile towards defendants. Some individuals where even calling for those individuals to be executed on the mere sight of the TV news. Here also, the news broadcasts was aired before the completion of trial which is still going at the time of writing this paper

⁵¹¹ See Police Recovered Millions, *supra* note 72

⁵¹² *Ibid*

⁵¹³ *Ibid*

⁵¹⁴ SebeleTeweldebirhan, *Latest Arrest: Fighting Corruption or Political Side Show* (May 17, 2013) <http://www.ezega.com/NewsDetails.aspx?page=news&NewsID=3452> (last visited on July 29, 2014).

The defendants in this case were also very concerned with the media coverage of their case. For instance, the lawyer of the Gebrewhaid Woldegiorgis informed the court that media reports are infringing his client's right to be presumed innocent and could create undue influence in conducting fair proceeding.⁵¹⁵ The lawyer even demanded the court to impose injunction on the media with the intention to prevent the release of prejudicial information. However, the court just advised the media to be impartial, be balanced in their reporting and avoid bias.

V. The Legal Regime for Combating Pre-judicial Media Coverage of Criminal Cases in Ethiopia

Before discussing the legal regimes for combating prejudicial media publicity of criminal cases in Ethiopia, it will be ideal to see the experience of other countries in the area for comparison. Accordingly, the approach followed by the United States and United Kingdom is often discussed in many literatures on the issue. To begin with the US, there is a less tendency for imposing on the media prior restraint on account of safeguarding the fair trial rights of the accused. Prior restraint in the media is only allowed where it is proved that the publication creates a '*clear and present danger*' to the defendant's right to fair trial which is capable of causing presumed or actual harm.⁵¹⁶ Since the standard of proof is high the US courts rarely order restraint on medias to avoid prejudicial publicity. To avoid the release of prejudicial information by the media the US courts use remedial measure such as *voir dire*, instruction to the jurors, gag or injunction order and change of venue.⁵¹⁷

Since the US follows trial by jury *voir dire* involves asking jurors questions to identify whether they are biased or not by the media release of prejudicial information. Following the questioning of jurors those biased would be removed from the case. In addition to *Voir Dire*, US judges also try to minimize the effect of prejudicial media publicity by instructing jurors to ignore what they have heard or seen in the media and decide the case based on the evidence presented to them. Further, US courts also give

⁵¹⁵Mikias Sebsibe, *Court Report: Melaku Fenta etal 2nd Day In Court-Horn Affairs* <http://hornaffairs.com/en/2013/05/court-report-melaku-fenta-et-al-2nd-day/> (last visited July 29, 2014).

⁵¹⁶ Elliot W. Atkinson Jr., *Free Press v. Fair Trial: Insulation Against Injustice*, 43 LOUISIANA LAW REVIEW 3, 556 (1973).

⁵¹⁷ Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, 766-767 (2010).

gag or injunction orders against trial participants such as police and prosecution with the objective of preventing them from disseminating information detrimental to the fair trial rights of the accused. Such orders are found to be very effective in most cases since the media's sources of most prejudicial publications are law enforcement bodies.⁵¹⁸ Furthermore, change of venue is also used in the US to curb the effects of prejudicial media coverage. Change of venue involves the transfer of the defendant's case to another jurisdiction in which the exposure to hazardous information against the accused is very less.

The United Kingdom has a different approach for addressing the problem of prejudicial media publicity interfering with fair trial rights of the accused from that of the US. In UK if a media engages in "an act or omission calculated to interfere with the due administration of justice"⁵¹⁹ the media will be held liable for contempt of court which is a criminal offence and receive adequate penalty. The offence includes direct contempt which deals with contempt in the face of the court or indirect contempt committed outside court. Its purpose is to balance accused persons right to fair trial and the competing freedom of expression.

However, it is important to note that not every publication of the media that could affect fair trial in insignificant way is subjected for contempt. Instead, only those publications "which create substantial risk that the course of justice in the proceeding in question will be seriously impeded or prejudiced"⁵²⁰. Such publications include confession of defendants, photographs of the accused, comments on the merit of the case and interview of witnesses. Further, the Media could escape liability for contempt if it proves that the publication is "fair and accurate report of legal proceedings held in the public, published contemporaneously and in good faith"⁵²¹. Having said this as a spring board, the legal regimes for addressing prejudicial media publicity in Ethiopia will be tackled subsequently.

As discussed in section two of this article fair trial guarantees of presumption of innocence, privilege against self-incrimination, right to

⁵¹⁸ Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, 75 NEW YORK UNIVERSITY LAW REVIEW, (2010).

⁵¹⁹ *Ibid*

⁵²⁰ *Ibid*

⁵²¹ *Ibid*

cross examine and trial by an impartial court incorporated in the FDRE Constitution as well as international human right instruments ratified by Ethiopia. But these guarantees are too general and require the adoption of detail implementation laws if media and responsible authorities are to easily identify publications detrimental to the defendant's right to fair trial and refrain from disclosing them. Besides, when such disclosure happen it will enable the law enforcement officers and court take appropriate measure. Accordingly, the FDRE government has adopted the Broadcast Service Proclamation⁵²², Freedom of Mass Media and Access to Information Proclamation⁵²³ and FDRE Criminal Code.⁵²⁴ These laws seem to have incorporated similar measures for regulating prejudicial media publicity like those in the US and the UK.

To start with the Broadcast Service Proclamation, it recognizes that transmitting programs with diverse and balanced perspectives of is beneficial to the public.⁵²⁵ A corollary of this recognition is the stipulation that "every news shall be impartial, accurate and balanced"⁵²⁶. Accordingly, any person who violates this prescription is liable to punishment with a fine not less than Birr10, 000 and not exceeding Birr 50,000. Likewise, the Mass Media and Access to Information Proclamation underscores in its preamble the crucial role of media in building democratic order in Ethiopia.⁵²⁷ It also provides that, restrictions on freedom of expression and of mass media must be prescribed by law and must be justified on account of "preserving the wellbeing of the youth, honor and reputation of persons, national security, public order and *other overriding rights*"⁵²⁸. The phrase *other overriding rights* could include the accused right to fair trial as stipulated in different international and regional human rights instruments. Further, the Proclamation provides for all persons right including the media to seek, obtain and disseminate information so long as it is not precluded by the exceptions stipulated by the proclamation.⁵²⁹

⁵²²A PROCLAMATION ON BROADCASTING SERVICE(hereinafter BROADCASTING SERVICE PROCLAMATION), Proclamation No. 533/2007,Fed.Neg.Gaz Year 13, No. 39

⁵²³ FREEDOM OF MASS MEDIA AND ACCESS TO INFORMATION PROCLAMATION (hereinafter MASS MEDIA PROCLAMATION), Proclamation No.590/2008, Fed.Neg.Gaz Year 14, No. 64

⁵²⁴ THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA(hereinafter FDRE CRIMINAL CODE,2004, Proc.no.414, Fed.Neg.Gaz

⁵²⁵ See BROADCASTING SERVICE PROCLAMATION, *supra* note 103, art. 30(3)

⁵²⁶*Id*, at 45(2)

⁵²⁷ See MASS MEDIA PROCLAMATION, *supra* note 109, at preamble

⁵²⁸*Ibid*

⁵²⁹*Id*, at 12(1)

One of the exceptions stipulated in the Proclamation is protection afforded to proceedings of law enforcement and legal investigation. Accordingly, it states that “a public relation officer may refuse a request for information relating to an alleged offender whose prosecution is under preparation or even though completed the prosecution is not yet instituted or whose prosecution is pending the disclosure or assuring the existence or non-existence of the requested information would likely....to prejudice or impair the fairness or impartiality of the trial”⁵³⁰. Yet, it does not indicate or give illustration of the kind of information capable of tampering with the defendant’s right to fair trial. Had the proclamation gave an illustrative list of inherently prejudicial information it would have made the job of public relation officers a lot easier. Nonetheless, the limitations of the proclamation resembles the gag or injunction order common in the US which imposes restriction on law enforcement bodies from giving information prejudicial to the right to fair trial.

Notably, the Ethiopian Mass Media and Access to information proclamation does not precisely says trial participants, law enforcement bodies or prosecution, it rather uses the generic term *public relation officer* who is supposed to undertake public relation of the public body including police and prosecution institutions. Further, the Criminal Code imposes a penalty on the officer who is responsible for disclosing such kind of information by stating that “whoever, not being entitled or expressly authorized so to do, publishes in whole or in part deeds, reports, instructions, deliberations or decisions of a public authority, the content of which is required to be kept secret by law or by virtue of an express decision of the competent authority, is punishable with simple imprisonment not exceeding three years or fine”⁵³¹.

Such limitations are very crucial to safeguard the violation of the defendant’s right to fair trial from irresponsible media coverage. To illustrate, in the prejudicial documentaries and News broadcasted by the Ethiopia National Television (ETV) discussed in section four of the article, the media source for confessions of the accused, comments on merits of the case, pre-trial release of evidence and interview of witnesses were the police and law enforcement bodies. Had the police and law enforcement bodies respected the prescriptions of the Mass Media and Access to information proclamation which prevents them from making accessible those kinds of information, the harmful effects of the media publication on

⁵³⁰ *Id*, at 21(2)

⁵³¹ See FDRE CRIMINAL CODE, *supra* note 110, art. 441

the defendants' fair trial would have been avoided. Here it could be argued that the media could still publish prejudicial information without citing its sources but the credibility of its publications would be proportionally reduced.⁵³²

Despite the importance of restricting law enforcement authorities from giving substantially prejudicial information to the media, this measure alone would not eliminate the risk of harmful media publicity. This is because the media could engage in such irresponsible conduct without identifying its sources. Thus, there should be an additional mechanism for holding the media accountable when it publishes hazardous information's hampering the undertaking of fair trial proceeding. To this effect the FDRE Criminal Code has incorporated an offence of contempt of court like in the one in the UK. Accordingly, it provides that "Whoever, in the course of a judicial inquiry, proceeding or hearing, (a) in any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge in the discharge of his duty; or (b) *in any other manner disturbs the activities of the Court*, is punishable with simple imprisonment not exceeding one year, or fine not exceeding three thousand Birr"⁵³³.

Like that of the Mass media proclamation, the FDRE Criminal Code did not make an attempt to indicate the type of information's which could disturb the function of the courts. Had there been explicit indication of inherently prejudicial publications, it would have facilitated continence on the part of the media and imposition of penalty on the judge's part. Nonetheless, disclosure substantially hazardous information's such as confession, evidence, witness interviews and comment on merits by the media would satisfy the requirements of article 449(b) and the media could be punished for contempt since amount to interference in the function of the court. Hence, ETV which broadcasted those documentaries and news discussed in section four could be held for contempt as it disturbs the proper function of the court in impartial manner.

Conclusion

In conclusion, this article has demonstrated that in practice Ethiopian state media reporting of highly publicized criminal cases is endangering the fair trial rights of the accused through the dissemination of inherently prejudicial information such as the confessions of the accused, comments

⁵³² See Brandwood, *supra* note 104, at 1449

⁵³³ See FDRE CRIMINAL CODE, *supra* note 110, art. 449

on the merit of the case, interview of witnesses and display of photographs of suspects under the pretext of exercising freedom of expression. The disclosure of such kinds of hazardous information goes against the fair trial safeguards of presumption of innocence, privilege against self-incrimination, trial by impartial tribunal recognized not only by the FDRE Constitution but also by international and regional human rights instruments to which Ethiopia is a state party. Thus, media in Ethiopia must be accurate and fair in their reporting of criminal cases upholding their professional, moral and legal obligations of non-disclosure of substantially prejudicial information against the accused.

With respect to the Ethiopian legal regime for regulating irresponsible media coverage of criminal cases, it is fair to conclude that there is no significant problem with the adequacy of protective and remedial measures. Yet, the failure of existing laws to explicitly indicate the types of highly prejudicial information was noted as a glitch. A more serious problem, however, is practical implementation of those preventive and remedial measures provided by law. As noted in this article, time and again, the police with the collaboration of some state media have released highly prejudicial information in utter disregard of the negative effects on the fair trial rights of the accused. And yet neither the media nor the police were held accountable for their irresponsible conduct and a culture of impunity has prevailed. Thus, unless this culture of impunity is replaced with a culture of accountability where the police and media are held responsible for their misconduct, the fair trial guarantees of presumption of innocence, the right not to incriminate oneself and right to be tried by impartial court will be hollow promises.

To sum up, if the prevailing culture of impunity is to change the following measures are important. First, being the major source of prejudicial information for the media, the police must obey their legal duty of keeping the secrecy of highly prejudicial records in their hands from the reach of irresponsible media as provided under the Mass Media and Access to Information Proclamation. They must also show their unwavering commitment to investigate and ensure the prosecution of members of the police force breaching their legal duty of secrecy to safeguard a defendant's right to receive impartial trial. Second, the judiciary and law enforcement officials must uphold their constitutional duty of not only respecting fundamental fair trial rights of the accused but also ensuring the respect of these rights by the media.

State Media Coverage of Highly Publicized Criminal Cases in Ethiopia and the Fair Trial Rights of the Accused

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Abstract

The precise role of Ethiopian state media in the administration of justice, particularly their coverage of highly publicized criminal cases, raises serious concerns on the fair trial rights of the accused. Under the guise of freedom of expression and informing the public, the media is at times taking over the sole responsibility of courts of determining the guilt or innocence of persons accused of committing crime, by releasing publications of highly prejudicial nature in violation of the fair trial guarantees of presumption of innocence, privilege against self-incrimination and the right to be tried by an impartial court. Here the important question would be how the media could exercise its freedom without infringing the fair trial rights of the accused. In other words, what the media can and cannot do in reporting criminal cases. The answer to this question is not simple and it requires trading a delicate balance between freedom of expression and the right to fair trial both of which are guaranteed under the FDRE constitution.

Yet, the FDRE constitution does not clearly indicate how the two sets of rights could co-exist without one threatening the existence of the other. Thus, this article tries to elaborate or point out the bounds of media freedom in covering criminal cases under FDRE constitution by examining standards developed by other countries and international jurisprudence on the matter. It also assesses the current practice of Ethiopian state media coverage of highly publicized criminal cases in light of these standards by taking some (in)famous broadcasts of the Ethiopian National Television (ETV) currently renamed as Ethiopian Broadcast Corporation (EBC) as an example. Finally, the mechanisms of controlling and remedying

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irresponsible media reportage of criminal cases under Ethiopian law as well as their adequacy is also dealt in this article.

II. Introduction

Media is capable of playing both constructive and destructive roles in the administration of criminal justice anywhere and the Ethiopian state media is no exception in this regard. Concerning Media's positive role in the adjudication of criminal cases, the US Supreme Court in its decision on *Sheppard vs. Maxwell*, succulently noted that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in criminal field".⁵³⁴ Here the term 'responsible' media should be underscored since it is the only kind of media that aids the course of justice instead of the irresponsible ones. Although there is no clear cut definition of what a responsible media constitutes, authorities have attempted to provide certain key attributes. For instance, the Indian High Court identified 'accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people'⁵³⁵ as cardinal virtues which responsible media must uphold and live up to.

Such media assists the administration of criminal justice by performing various functions at different stages of the criminal proceedings. Prior to arrest, media could assist the capture of a crime suspect who is not apprehended yet and it serves to notify the public of the possible dangers posed by him/her so that they could take the necessary precautions.⁵³⁶ Following the arrest and until the commencement of trial, media reporting of proceedings gives the public the confidence that the law enforcement officials are properly carrying out their responsibility of safeguarding the public.⁵³⁷ Additionally, media scrutiny during this period also helps the accused to appear in court within the prescribed time instead of languishing in police detention.⁵³⁸

⁵³⁴ *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir.1965), rev'd, 384 U.S. 333 (1966).

⁵³⁵ *Mother Dairy Foods & Processing Ltd v. Zee Telefilms* (IA 8185/2003 in Suit No. 1543/2003)

⁵³⁶ AMERICAN BAR ASSOCIATION (hereinafter ABA), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 47(1966).

⁵³⁷*Id.*, at 48

⁵³⁸*Id.*, at 49

Once trial gets going, coverage of the trial proceedings by the media helps to ensure the accountability of judges, prosecutors, lawyers and other parties involved in the trial.⁵³⁹ Thus, attention by the media reminds these participants that they are being closely watched by the eyes of the public which motivates them to perform their duties to the highest level. Further, fair criticisms of court decisions after the completion of the trial contributes for the improvement of the criminal justice administration system⁵⁴⁰ by indicating the weakness, errors or irregularities committed in the process. Hence, these are the benefits derived from responsible media's coverage of criminal cases.

In contrast, irresponsible media's reporting in criminal cases is an obstacle to the effective administration of justice. Rather than being accurate, objective and fair in their reporting, irresponsible media are biased and lopsided to one of the parties. They are often known for distorting facts and taking allegations as facts.⁵⁴¹ Without due consideration of the impacts of their reporting in the administration of justice in general and the possible influence they might create in judicial proceedings, they tend to disclose carelessly whatever information they have at their disposal without regard to its prejudicial nature to the undertaking of independent judicial function. Hence, the only concern of such kind of media reporting is not revealing what is 'in the interest of the public rather what the public is interested in'.⁵⁴²

⁵³⁹ Giorgio Resta, *Trying Cases In The Media: A Comparative Overview*, 71 LAW AND CONTEMPORARY PROBLEMS, 35-36(2008).

⁵⁴⁰*Ibid*

⁵⁴¹ Regional Workshop on 'Reporting of Court proceedings by media and administration of justice' At the High Court of Maharashtra and Goa, Mumbai (October 19, 2008).

⁵⁴²LAW COMMISSION OF INDIA, 200TH REPORT ON TRIAL BY MEDIA FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE 1973,(hereinafter LAW COMMISSION OF INDIA) 14 (2006). The public might be interested or curious to hear certain stories even if the information has no relevance to whatsoever to it day to day life as such. On the other hand, the dissemination of some information might be beneficial to the public or society to a large extent and contribute for the common good. For a detail discussion of the difference between 'what the public is interested 'and 'what is in the interest of the public' See Information Commissioner's Office, *The Public Interest Test*, http://www.ico.org.uk/media/for-organizations/documents/1183/the_public_interest_test.pdf, (last visited on May 26, 2015).

Such unhealthy media reporting of criminal cases will have the effect of undermining the fair trial rights of the accused intended to safeguard the individual from arbitrary and unlawful deprivation of his other fundamental rights and freedoms.⁵⁴³ Some of these fair trial rights include: the defendants' right to a presumption of innocence, prohibition on self incrimination and the right to independent and impartial tribunal.⁵⁴⁴ In this section, only a general account of these rights is made. The status of these rights in the FDRE constitution and other human right treaties ratified by Ethiopia vis-à-vis the right to freedom of expression will be explored in depth in subsequent sections.

Accordingly, to begin with the right to be presumed innocent; it stipulates that "a person is considered innocent as long as there is no final judgment proving him /her guilty"⁵⁴⁵. Hence, *anyone* including the *media* is expected to respect this right by refraining from proclaiming the guilt of a person suspected of committing a crime before his/her guilt is determined by final judgment of a court.⁵⁴⁶ Further, this right is believed to have laid the foundation for all other procedural rights belonging to the accused.⁵⁴⁷

Historically, the right to presumption of innocence began to get recognition at the end of 18th century together with the 'beyond reasonable doubt standard of proof'.⁵⁴⁸ Consequently, the accused is not expected to prove his innocence. Rather, the prosecution is required to prove the guilt of the accused beyond reasonable doubt by adducing sufficient evidence. If there is a doubt regarding the innocence of the accused after the production of evidence by the prosecution, that doubt would be interpreted in favor of the accused pursuant to the principle in *dubio pro reo*.⁵⁴⁹

Another fair trial right of the accused potentially affected by irresponsible media reporting is the right not to incriminate one self. This right guarantees that no person "shall be compelled in any criminal case to be a

⁵⁴³LAWYERS COMMITTEE FOR HUMAN RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 1 (2000).

⁵⁴⁴*Id* at 13, 15 & 19

⁵⁴⁵*Id*, at 15

⁵⁴⁶*Ibid*

⁵⁴⁷ Gabriela C. Nicoleta et al., *Short essay on Presumption of innocence. ECHR precedent*, LEGAL PRACTICE AND INTERNATIONAL LAW 193 (Christinel L. Murzea ed., 2011).

⁵⁴⁸John H. Langbein, *The Historical Origins of the Privilege against Self-incrimination at Common Law*, 92 MICHIGAN LAW REVIEW 1047, 1070, (2002).

⁵⁴⁹ See, Nicoleta *supra* note 14, at 195

witness against himself”⁵⁵⁰. As such, the accused has the right to remain silent in pre-trial criminal investigation and the right not to give evidence at trial. Until late 18th century, the fundamental safeguard for an accused person was not the right to remain silent rather the opportunity to speak.⁵⁵¹ During this period, the prime objective of criminal trials was to give a defendant the chance to respond to the accusations brought against him/her.

But in late 18th century the role of defense counsels in criminal trials increased dramatically and prosecutions burden of proving allegations beyond reasonable doubt standard emerged at the same time.⁵⁵² These developments changed the objective of criminal trial in to testing the case of prosecution by the defense counsel and the criminal defendant acquired the right to decline to speak against charges against him. Accordingly, confessions of the accused will be accepted as evidence only when it was free, voluntary and not compelled.⁵⁵³ Here, voluntariness impliedly incorporates the right not to answer or confess at all and the right to remain silent. The rationale behind the privilege against self incrimination is the assumption that confessions obtained by compulsion are not reliable as evidence.⁵⁵⁴ Nonetheless, some media reports of criminal cases could endanger this privilege of defendants by releasing highly incriminating information obtained from them without making sure whether they are obtained voluntarily or not.

Apart from the two fair trial rights discussed above, irresponsible media coverage of criminal cases by the media could also infringe the defendant right to be tried by impartial court. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. However, the negative influence of irresponsible media coverage on judges’ ability to adjudicate cases before them impartially is a bone of contention among scholars. With respect to this, some scholars argue that unlike lay men, professional judges that have taken rigorous legal training and sworn to perform their duties impartially should be assumed to have the stamina to withstand the

⁵⁵⁰ See Langbein, *supra* note 15, at 1047

⁵⁵¹ *Ibid*

⁵⁵² *Id.* at 18

⁵⁵³ Pat McNerney, *The Privilege against Self-incrimination from early origins to Judges’ Rules: Challenging the ‘orthodox view’*, 18 THE INTERNATIONAL JOURNAL OF EVIDENCE & PROOF 112,130 (2014).

⁵⁵⁴ *Ibid*

negative effects of prejudicial media publicity.⁵⁵⁵ In their view it is very unlikely for judges to be influenced by information released by irresponsible media. On the other hand, others contend that we must not forget that judges are also human beings and they are susceptible to influence as their fellow human beings. Hence, even if a judge endeavors to ignore prejudicial media publicity of a pending case and rule impartially, his/her judgment could be affected by such information without the judge knowing it or sub-consciously.⁵⁵⁶

Furthermore, despite the actual or objective impartiality of the judge in the adjudication of the case, exposure of judges to biased information by irresponsible media may create the impression among the public that judges are already biased as a result of the publication. This is an important consideration since 'justice must not only be done but it must be seen done'.⁵⁵⁷ Accordingly, the exposure of judges to prejudicial information by the media erodes subjective impartiality and the confidence of the public in fair and impartial adjudication of cases. Thus, it would be naïve to ignore the negative pressure irresponsible media could exert upon the administration of justice. All in all, as responsible media are allies to fair administration of justice, irresponsible media undermine the fair trial rights of the accused. Because of this, any measure that seeks to minimize the prejudicial effects of media on fair trial must only target irresponsible media and must leave the responsible ones operating space so that they could keep on delivering their beneficial functions for ensuring efficient administration of criminal justice.

VI. Balancing Freedom of Expression and the Right to Fair Trial Under the Federal Democratic Republic of Ethiopia(FDRE) Constitution

The FDRE constitution has given recognition to two important fundamental human rights constituting the pillars of a democratic system i.e. Right to Freedom of Expression and the Right to Fair trial.⁵⁵⁸ Often the two sets of rights go hand in hand one safeguarding the proper exercise of the other. For instance, as noted in the preceding section media scrutiny of criminal

⁵⁵⁵ Pascale DuparcPortier, *Media Reporting of Trials in France and in Ireland*, 6 JUDICIAL STUDIES INSTITUTE JOURNAL 1, at 208 (2006)

⁵⁵⁶ See LAW COMMISSION OF INDIA, *supra* note 9, at 39-54

⁵⁵⁷ *Ibid*

⁵⁵⁸ CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (hereinafter FDRE CONSTITUTION), art.19, 20 and 29 (1995).

proceedings ensure the accountability of actors operating in it. Likewise, courts are supposed to stand against unjustified interferences in the exercise of freedom of expression. Nonetheless, there are times where the two sets of rights may come in to conflict with each other. Such conflict arises when one right is exercised in absolute manner without consideration or even at the expense of the other. To illustrate, if the freedom of the press is considered as an absolute right giving the media the green light to publish any information that damages the fair trial right of the accused, recognition of the right to fair trial will become a hallow promise. Similarly, if the right to fair trial bans any kind of media coverage of criminal cases, freedom of the press and the freedom of expression will not be ensured.

However, a closer examination of the FDRE constitution shows that the intention is to create a harmony between the two sets of rights by setting reasonable limitations. These could be inferred from articles 19(2), 19(5), 20(3), 29(2), 29(3), 29(4), and 29(6) of the Constitution. On one hand, the Constitution underscores the indispensable role of the media in a democratic society by serving as a channel for the dissemination of different ideas and viewpoints.⁵⁵⁹ As such, it guarantees freedom of the press from interference and censorship. On the other hand, the Constitution also notes the dangers of an absolute right to freedom of expression. Hence, the Constitution states that legal limitation could be imposed on the freedom of the press to protect the well-being of the youth, public moral, propagation of war and statements capable of damaging human dignity or reputation.⁵⁶⁰

Here it should be noted that ensuring fair trial is not expressly stated as one of the legitimate grounds for restricting the right to freedom of expression. Yet, freedom of expression being a fundamental human right, the limitations placed upon it or the grounds for limiting it must be interpreted in conformity with international human right instruments ratified by Ethiopia.⁵⁶¹ Accordingly, the International Covenant on Civil and Political Rights (ICCPR), besides listing national security, public order, public health or morals also incorporate the need to protect the *other person's right* as a justification for restraining freedom of expression.⁵⁶² The phrase other persons right would include the right to fair trial. Thus, promoting fair trial is one of the legitimate grounds of limiting free expression.

⁵⁵⁹*Id.*, at 29(4)

⁵⁶⁰*Id.*, at 29(6)

⁵⁶¹*Id.*, at 13(2)

⁵⁶² International Covenant on Civil and Political Rights (hereinafter ICCPR), Adopted on 19 December 1966 (entered into Force on 23 March 1976), art.19(3), a

Notably, the right to fair trial incorporates a number of guarantees ranging from the right to be informed of the charge one is accused of up to the right to appeal against the final judgment of a court.⁵⁶³ However, not every guarantee of the right to fair trial is equally threatened by unrestrained coverage of media. Rather, certain key guarantees of the right to fair trial are particularly endangered by irresponsible reporting of the media. Among these guarantees, the first is a person's right to be tried by an independent and impartial court.

This entitlement emanating from the right to fair trial is recognized in the FDRE constitution as well as the ICCPR and the Principles and Guidelines on the Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and People's Rights.⁵⁶⁴ The FDRE Constitution under article 78 provides for the establishment of an independent judiciary. This provision is located outside chapter three of the Constitution which talks about Fundamental Rights and Freedoms. Nonetheless, it has relevance and strong connection with the fair trial right of the accused. The Constitution also elaborates the meaning of independent judiciary as freedom from "any interference of influence of any government body, government, officials or from any other source"⁵⁶⁵. The term 'any other source' indicates that the framers of the FDRE constitution have anticipated in advance that irresponsible media reporting could also come from non-state actors and unduly influence the judiciary or threaten judicial independence. Thus, the Constitution affords protection to the independence of the judiciary not only from the threat posed to it by state media but also from private media as well.

Likewise, the ICCPR speaks with the same tone by stipulating that 'in the determination of any criminal charge against him...everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law'.⁵⁶⁶ The Covenant also stresses that media could be excluded from reporting the whole or part of the proceeding if the court is of the opinion that such publicity obstructs the

⁵⁶³ See FDRE Constitution, *supra* note 25, at 20

⁵⁶⁴ Constitution of the Federal Democratic Republic of Ethiopia (1995), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976), AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).

⁵⁶⁵ *Id.*, at 79(2)

⁵⁶⁶ See ICCPR, *supra* note 29, at 14(1)

administration of justice. Similarly, the Fair Trial Guidelines of the African Commission on Human and People's Rights (the Guidelines) also restate the stipulation of the ICCPR.⁵⁶⁷ The Commission adopted the guideline with the objective of strengthening the fair trial provisions of the African Charter on Human and Peoples Rights and to make it consistent with international standards of fair trial.

Accordingly, the Guidelines note that one of the guarantees of fair hearing is ensuring the determination of a person's rights and obligations based on solely on evidence presented to the judicial body'⁵⁶⁸. It also defines an impartial tribunal as one that 'bases its decisions only on objective evidence, arguments and facts before it'.⁵⁶⁹ The Guidelines further stress the need to secure independence of the judiciary from restrictions, improper influence, inducement, threats or interference, direct or indirect from any quarter or for any reason'⁵⁷⁰. Since the guideline prohibits possible interferences from all directions, media would also fall under its ambit.

The other facet of the right to fair trial threatened by irresponsible media reporting is a person's right to be presumed innocent until proven guilty. Underlying this guarantee, the assumption is that, human beings are good naturally and they do not intend to commit crime or harm each other.⁵⁷¹ To rebut such presumption whosoever alleges the commission of crime must prove beyond reasonable doubt that the accused has committed the crime.

The FDRE Constitution and the international and regional human rights instruments ratified by Ethiopia have incorporated this guarantee.⁵⁷² To illustrate, article 20 of the FDRE Constitution states that 'accused persons have the right to be presumed innocent until proved guilty'.⁵⁷³ In a similar manner, ICCPR echoes the Constitution's statement by saying that 'everyone charged with a criminal offence shall have the right to be

⁵⁶⁷AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).art. 1

⁵⁶⁸*Id.*, at 2(h)

⁵⁶⁹*Id.*, at 5(a)

⁵⁷⁰*Ibid*

⁵⁷¹ Joseph C. Cascareli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AMERICAN JOURNAL OF JURISPRUDENCE 4 (1996).

⁵⁷²CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (1995)., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976).

⁵⁷³ See FDRE CONSTITUTION, *supra* note 25, at 20(3)

presumed innocent until proved guilty according to law⁵⁷⁴. Thus, any information received by the media that determines the guilt or innocence of the accused violates his/her right to be presumed innocent before the final decision of the court.

Another component of the right to fair trial endangered by irresponsible media reporting is the protection afforded to the accused of not incriminating or testifying against oneself. With respect to this, the FDRE Constitution provides that 'persons arrested have the right to remain silent'⁵⁷⁵ and they shall 'not to be compelled to testify against themselves'.⁵⁷⁶ A similar guarantee is enshrined in the ICCPR which states a person charged with the commission of an offence is entitled 'not to be compelled to testify against himself or confess guilt'⁵⁷⁷. The fear here is that confession transmitted by the media might be a coerced one resulting from police interrogation conducted by disregarding the accused right to remain silent and the privilege against self-incrimination.⁵⁷⁸ Thus, if an irresponsible media discloses the alleged confession of the accused or his/her admission of guilt, it would indirectly violate the privilege against self-incrimination.

To sum up, the discussion held in this section demonstrates that freedom of the press or expression is not an absolute right devoid of any limitation. Instead it could be restricted to protect other competing interests such as the right to fair trial. Clearly, unlimited freedom of expression/ press could infringe the fair trial rights of the accused to be tried by impartial court, his/her presumption of innocence and his/her right to protection against self-incrimination. Thus, limitation on freedom of expression is necessary to ensure the integrity as well as trustworthiness of the criminal justice administration system.

VII. When is Limitation on Freedom of Expression Justified on Account of Defendants Right to Fair Trial?

As noted above, arguably a combined reading of the FDRE Constitution and different human rights treaties ratified by Ethiopia will lead to the conclusion that protecting the fair trial rights of the accused is one of the

⁵⁷⁴ See ICCPR, *supra* note 29, at 14(2)

⁵⁷⁵ See FDRE CONSTITUTION, *supra* note 25, at 19(2)

⁵⁷⁶ *Id.*, at 20(3)

⁵⁷⁷ See ICCPR, *supra* note 29, at 14(3) g

⁵⁷⁸ Carl Minzer, *China's latest tactic: Confessions on state TV*, <http://www.law.fordham.edu/faculty/21264.htm> Carl November 6, 2013, (last visited on May 22, 2015).

grounds for putting a limitation on freedom of expression. But, how do we determine whether a certain broadcast or publication violates fair trial rights of the accused or not? What are the parameters for saying so? The FDRE Constitution and human right treaties adopted by Ethiopia are silent on this issue. Thus, it is necessary to examine the experience of other legal systems on the matter. Accordingly, the approach followed by common law legal systems particularly the United Kingdom (UK) and the approach by the European Court on Human Rights are often cited in the literature as two main models on the area.⁵⁷⁹

To begin with the jurisprudence of the common law legal system, not every type of media coverage of criminal cases is susceptible to restriction. It is only where the publication of the media creates *substantial risk of prejudice* to the administration of criminal justice which is so serious that it is not possible to conduct the proceeding free from bias.⁵⁸⁰ Here the tests are two. First, the publication of the media in its nature must be capable of affecting the fair handling of the proceeding. Second, the degree of its effect on the proceeding must not be minimal or unsubstantial. Rather, the consequence of the released prejudicial information must have substantial or serious negative impact on the fair undertaking of the criminal proceeding.⁵⁸¹

If a publication disclosed by the media does not meet these criteria, it will not be subjected to restriction and falls within the ambit of freedom of expression. Nonetheless, it is important to admit the imprecision of the term 'substantial risk of prejudice' since it may vary from case to case. However, there is a consensus on some types of media coverage's of criminal proceedings as inherently and substantially prejudicial to the fair trial rights of the accused which would be dealt in detail in the subsequent paragraphs of this section.

Apart from the common law legal system, the European Court on Human Rights (ECHR) has also developed three level cumulative tests for restraining freedom of expression on account of safeguarding the right to fair trial, based on the stipulations of the European Convention on Human

⁵⁷⁹ See Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, NEW YORK UNIVERSITY LAW REVIEW,(2010)., Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, (2010).

⁵⁸⁰ UNITED KINGDOM CONTEMPT OF COURT ACT, 1981 § 2(2)

⁵⁸¹ *Ibid*

Rights.⁵⁸² Besides recognizing the need to maintain the impartiality of the judiciary as one of the legitimate grounds for limiting media coverage of criminal cases, the European Convention also provides the preconditions that must be met in advance for restriction to take place. These prerequisites for limitation are, it 'must be prescribed by law', it must be 'based on legitimate grounds' and it must be 'necessary in a democratic society'.⁵⁸³ The ECHR has elaborated these tests in a number of cases.⁵⁸⁴ Regarding the requirement of the limitation to be 'prescribed by law', it meant that the government cannot restrict medias exercise of freedom of expression unless there is a law that backs its action. In other words, no law means no restriction.

What if a government enacts a law that restrains freedom of expression without citing any justification or legitimate grounds for doing so? Would it be acceptable? The answer would be an obvious no since the second precondition of the European Convention provides that the law that restricts freedom of expression must pursue legitimate aims such as "interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of judiciary*"⁵⁸⁵. Thus, if the government wanted to impose limitation on media coverage of criminal cases it must aspire to achieve the aforementioned solemn objectives particularly the need to ensure the impartiality of the judiciary.

Yet, the limitation must also fulfill the third important requirement which is 'it must be necessary in a democratic society'. This means, restriction on media reporting of criminal cases cannot be imposed unless there exists a pressing social need to do so which is proportionate to the legitimate aim pursued.⁵⁸⁶ To put it simply, the government cannot restrict freedom of expression because it thinks it would be useful or convenient to do so. Rather, it must be sure that limitation of the right to freedom of expression is the only viable option available to safeguard the pressing social need in

⁵⁸² THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (herein after EUROPEAN CONVENTION, (1950)., art, 10 & *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

⁵⁸³*Ibid*

⁵⁸⁴ *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

⁵⁸⁵ See EUROPEAN CONVENTION, *supra* note 49, at 10(2)

⁵⁸⁶ See *Sunday Times v. United Kingdom*, *supra* note 51

danger. This test is very crucial to determine which kind of media publications pose the greatest danger to defendant's right to fair trial. Further, the proportionality of the measure taken by the government will also be scrutinized in light of the legitimate aim pursued.⁵⁸⁷ Hence, the limitation itself must be limited to extent necessary for safeguarding the legitimate aim. If it goes beyond meeting a legitimate aim it will not fulfill the criterion of necessity in a democratic society.

The two approaches on restriction of freedom of expression have more of similarity than a difference since both of them require serious risk of harm to result from the media coverage of the criminal proceeding on the defendant's right to fair trial, which absolutely necessitates restriction. Nonetheless, the determination of whether a publication has a serious prejudicial effect or not may vary from case to case. Yet certain categories of publications were identified to be inherently hazardous at all times. These kinds of publications also meet the standards set by countries following the common law legal system particularly UK as well as by the jurisprudence of the European Court on Human Rights. Among them, publications concerning the character of the accused or previous convictions, disclosures of confession, publications which comment upon the merit of the case, photographs and publication of interview with witnesses are the primary ones.⁵⁸⁸ Further, such publications are mostly released during the period of criminal process that goes from the arrest or formal charge to the beginning of trial and the police is the primary source of prejudicial information for the media at this stage.⁵⁸⁹

i. Publication of Confession

Despite the possible inadmissibility of the alleged confession of the accused given to the police in a court of law, disclosures of such information by the media prior to trial is regarded as one of the most detrimental information threatening the fair trial right of the defendant.⁵⁹⁰ The rationale for this is that confession is the most incriminating kind of information that can be adduced against the accused. Further, there is no means for verifying whether such confession is obtained through coercion or other inappropriate methods which makes the confession as unreliable as

⁵⁸⁷*Ibid*

⁵⁸⁸ See ABA, *supra* note 3, at 17 & see LAW COMMISSION OF INDIA, *supra* note 9, at 195-220

⁵⁸⁹ See ABA, *supra* note 3, at 17

⁵⁹⁰ *Ibid*

evidence.⁵⁹¹ Furthermore, such kind of publications will be retained in the mind of the judge for a longer period impairing his/her capacity to adjudicate impartially.

Although the primary source of confession is the police, the media could also get confession directly from the accused through recording or televised interview under the supervision or approval of the police while the accused is in custody.⁵⁹² Thus, whenever the media releases confession of the accused, it would seriously violate his/her fair trial right.

ii. Publications Concerning the Character of the Accused or Prior Criminal Record

At times the media goes to the extent of determining the guilt of the accused by snatching the proper province or function of courts. Such kinds of publications by the media have the tendency to trigger the feeling of hostility towards the accused.⁵⁹³ The media do so primarily by labeling the accused as a “criminal”, “terrorist” or “corrupt” etc. Characterizing the accused as such goes beyond reporting facts to the public. It also does more harm than good to the public since it challenges the court’s decision on the matter free of bias. Similarly, media also disclose information pertaining to the prior convictions of the accused. Such statements are released by the media with the belief that ‘it is more likely that an accused person committed the offence charged if he has a criminal record and less likely if he has no record’.⁵⁹⁴

Nevertheless, such kind of information is irrelevant to determine the issue whether the accused committed the alleged crime at the moment. Their use is rather confined for the purpose of sentencing. Regarding this, the American Bar Association rightly noted that the issue is not how many crimes the defendant has committed but whether he/she has committed this crime.⁵⁹⁵ To sum up, above publication of information regarding the merit of the case or the prior conviction of the accused constitute inherently prejudicial information and grossly endanger the undertaking fair trial. As such, the media should refrain from publishing such kind of information to the public in violation of the fair trial rights of the accused.

⁵⁹¹*Ibid*

⁵⁹²*Id*, at 30

⁵⁹³ See LAW COMMISSION OF INDIA, *supra* note 9, at 195-199

⁵⁹⁴ AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150)

⁵⁹⁵ See ABA, *supra* note 3, at 31

iii. Pre-trial Reports of Evidence and Interview of Witnesses

The other category of seriously damaging statements released by the media which is often a cause for concern involves the display of evidences or oral statements made against the accused. Such kind of information is usually gathered mainly during the search and seizure conducted on the accused. What makes the evidences released by the media hazardous is that there is no mechanism for checking whether the prescribed safeguards set by the law for conducting search and seizure are met or not.⁵⁹⁶ If the evidence is obtained through improper ways it would eventually lose its admissibility in a court of law. Nevertheless, exposure of judges to such inadmissible information may seriously affect their impartiality.

Likewise, the media's dissemination of interviews of witnesses against the accused is also troublesome for a number of reasons. First, since the accused is not in a position to defend himself / herself and cross examine the witness, such release by the media only shows one side of the picture which is highly prejudicial to the accused.⁵⁹⁷ Second, the witness may have given such testimony to the media against his will since there is no mechanism for the audience to check the presence of consent on the part of the witness.⁵⁹⁸ Third, the chance of correcting testimony given to the media in a court of law later is very less; since the witness is under pressure to ensure the consistency of his statements at all times.⁵⁹⁹ For all these reasons, the publication of interview of witness tampers with the fair trial right of the accused and requires restriction.

iv. Photographs

In addition to those kinds of publications of the media discussed above, the display of photographs of the accused is also regarded as a serious threat to fair trial of the accused. Particularly, if there is an issue regarding the identity of the accused, the likelihood of prejudice is high. This is because, following the display of the picture of the accused over the media, 'witnesses who have not seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw'⁶⁰⁰ and identify him as the suspect. Thus, the witness recognizes not the person

⁵⁹⁶*Id*, at 35

⁵⁹⁷ See LAW COMMISSION OF INDIA, *supra* note 9, at 215

⁵⁹⁸*Ibid*

⁵⁹⁹*Ibid*

⁶⁰⁰*Id*, at 203-204

who had been seen by him/her, committing the crime but the person he/she saw in the photograph. Further, the display of photographs of the accused by the media may also influence the audience to develop feeling of hostility towards the accused and the presumption of guilt which could create an atmosphere not suited for conducting fair trial of the defendant.⁶⁰¹

VIII. State Media Coverage of Highly Publicized Criminal Cases in Ethiopia: The practice vs. the Fair trial Rights of the Accused

Although media are supposed to be handmaiden for effective administration of justice, the role played by some state media in Ethiopia stands in a stark contrast against this objective being highly irresponsible. These media not only release highly prejudicial information against the accused before or during trial in courts but also often determine the guilt or innocence of the accused punching way beyond their weights. This may force one to question whether the rights of accused recognized in the FDRE constitution such as the presumption of innocence, the right to be tried by impartial court and the privilege against self-incrimination are hallow promises or enforceable rights.

In this section an attempt is made to show the problem of irresponsible media coverage of highly publicized criminal cases in Ethiopia in light of the defendant's fair trial rights. Accordingly, the author has chosen four broadcasts of the Ethiopian National Television (ETV) with the belief that they adequately demonstrate the magnitude of the problem. The first three are documentaries entitled "Akeldama"⁶⁰² (Land of Blood), "Jihadawi Harakat"⁶⁰³ (Jihad Movement) and "Hazen Lemdres...Guzo Wede Dessie" (To Mourn....trip to Dessie).⁶⁰⁴ The final is news broadcast of the ETV that reports the undertaking of search and seizure in the residence of government officials suspected of corruption. Each of them will be

⁶⁰¹*Ibid*

⁶⁰²*Akeldama*, http://diretube.com/ethiopian-documentary/akeldama-part-1-video_25cf45af1.htm, http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video_30d42597c.html, http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video_086c05142.html (last visited November 1, 2013).

⁶⁰³*Jihadawi Harakat*, <http://www.youtube.com/watch?v=g4SxGOS5y88>, (last visited on august 9, 2013).

⁶⁰⁴*Ethiopia-Terrorist attack on sheik NuruYimam*, http://www.youtube.com/watch?v=x_8Ypxiz4y8, (last visited on July 7, 2014).

discussed in detail subsequently.⁶⁰⁵ But it is essential to point out some of the commonalities between them.

The first similarity among the four broadcasts is that the type of information released by them largely constitute confessions of the accused, pre-trial release of evidences, display of photographs, comments on the merits of the case as well as interview of witness which are regarded as inherently prejudicial to the defendants right to fair trial both by the standards developed by country's following the common law legal system and the European Court on Human Rights discussed in the previous section. Apart from this, the four documentaries also tamper with various rights of accused persons recognized by the FDRE constitution and human right treaties ratified by Ethiopia. Further, all broadcasts were published following the arrest of the accused and before the beginning of trial. This conforms to the theory that most prejudicial information's against the accused are disclosed in the period between the arrest and the starting of trial which increases the likelihood of prejudice.⁶⁰⁶

Furthermore, with the exception of the documentary "To mourn...trip to Dessie", the media principal source of information were the police. In the two broadcasts i.e. "Akeldama" and "Jihadawi Harakat", the documentaries were made by the collaboration of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU). The news covering search and seizure of persons arrested on suspicion of corruption was broadcasted with the information obtained from the Federal Police. This practice also proves the theory that Police is the major source of prejudicial information's between the time of arrest and trial.⁶⁰⁷ This being said regarding the common features of the broadcasts detail examination of each broadcast is conducted as follows.

i. Aceldama " Land of Blood"

This documentary was broadcasted by the Ethiopian National Television on November 2012 in cooperation with National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU).⁶⁰⁸ It starts with a warning that the program is not suited for persons below the

⁶⁰⁵ *Police Recovered Millions*, http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebrehahed-house-video_16585f1c0.html (last visited December 4, 2013).

⁶⁰⁶ See ABA, *supra* note 3, at 30

⁶⁰⁷ *Id.*, at 28

⁶⁰⁸ See *Akeldama*, *supra* note 69

age of thirteen followed by a title 'Akeldama' in Amharic with blood dropping from each of the letters. Then, very disturbing and shocking pictures of slaughtered children, dismembered dead bodies, droplets of blood across the street, pictures of persons mourning the loss of their loved ones etc are displayed. After these scenes, all of a sudden a narrator appears on a screen with a facial expression and tone that seeks sympathy from the audience. Then, he tells the viewers that the documentary is a three part series showing terrorist networks planning to make Ethiopia land of blood.⁶⁰⁹

Part one of the documentary claims that as a result of terrorist attacks committed in Ethiopia 339 people were killed, 363 sustained bodily injury and 25 people were kidnapped in the past years.⁶¹⁰ The documentary also blames the Eritrean government for sponsoring terrorism through training and infiltration of terrorists to Ethiopia. Additionally, it praises the adoption of the Anti-Terrorism Proclamation by the Ethiopian parliament for playing a key role in combating terrorism in Ethiopia. The documentary also tries to convince that the country would have been a land of blood had it not been for the anti-terrorism proclamation.⁶¹¹

In part two, the documentary mainly shows the organizations declared by the Ethiopian parliament to be terrorist organizations and the justification for this measure. With respect to this, the documentary recalls the decision of the House of people Representatives to declare Ginbot 7, The Oromo Liberation Front(OLF), The Ogaden National Liberation Front(ONLF), Al-shabab and Alqaeda as terrorist organizations after due considerations of evidences presented against them.⁶¹² With this as a background, the documentary goes on to display the confessions of individuals arrested on the suspicion of terrorism which is highly incriminating and prejudicial to them. The individuals giving their confessions were alleged to be members of Ginbot 7. Their confessions mainly state that they have taken terrorist training in Eritrea regarding the use of Kalashnikovs, bombs and explosives.⁶¹³ Further, they confessed that 'the purpose of taking those training is to assassinate Ethiopian government officials and bombard

⁶⁰⁹*Ibid*

⁶¹⁰*Ibid*

⁶¹¹*Ibid*

⁶¹²*Ibid*

⁶¹³*Ibid*

different development projects in Ethiopia under the instruction of Ginbot 7 with the belief that peaceful struggle in Ethiopia is hopeless'.⁶¹⁴

The documentary has also shown interview of witnesses against the accused which is considered as highly prejudicial to the defendant's right to fair trial. Several persons giving confession in the documentary have identified a number of individuals by their name stated their involvement in the planned terrorist attack.⁶¹⁵ Such activity by the media would infringe defendant's right to receive fair trial by depriving them the opportunity to cross examine those witnesses. The third part of the documentary was also dedicated for showing confessions and testimonies of the accused against themselves and others. The manner of presentation of the documentary was in itself interesting. Most of the talking is done by the narrator and the statements of confessions of the accused are presented for a very short time only to corroborate what the narrator has said. No statement was made in the documentary regarding how the interrogation was conducted and whether the accused persons confessed voluntarily. Nonetheless, one of the accused i.e. Debebe Eshetu noted that the police treated him very well and he was teasing with officers who presumably conducted the interrogation.⁶¹⁶ He was later released without any charge.⁶¹⁷

However, international human right organizations such as Human Right Watch reported that the accused suffered maltreatment in the hand of the police and their confession could be a coerced one.⁶¹⁸ In any case, the media practice of broadcasting confessions of the accused and inferring their guilt from those confessions violates the defendant's right against self-incrimination, the right to be presumed innocent and the right to trial by impartial court recognized not only by the FDRE constitution but also by the international and regional human rights instruments in which Ethiopia is a state party. Here, it is noteworthy that the documentary was aired while the case of defendant was being entertained by the court. Their trial was completed in June/July 2012 eight months after the broadcast of the documentary.

⁶¹⁴*Ibid*

⁶¹⁵*Ibid*

⁶¹⁶*Ibid*

⁶¹⁷Amnesty International, *EskinderNega*, <http://www.amnesty.org.nz/eskinder-nega>, (last visited on May 23, 2015).

⁶¹⁸ Human Rights Watch, "They Want a Confession", 17 October 2013, <http://www.m.hrw.org/ru/node/119814/section/9> (last visited on May 23, 2015).

ii. “Jihadwi Harakat” (Jihad Movement)

The documentary was aired by the Ethiopian National Television (ETV) in February 2013. It was made with the assistance of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU) as usual.⁶¹⁹ In the beginning of the documentary, pictures of suspected terrorists under arrest appear one after the other in a stylish manner, together with background sound truck music capable of terrifying the audience. Then, the narrator tells the audience that Somalia being failed state for the past 20 years had become a fertile ground for the operation of terrorists like *Alshabab*. He further notes that after the defeat of *Alshabab* by Ethiopian and Somalia transitional government forces in 2010, the group has adopted the view of *Saleh Nebha* that calls for the establishment of decentralized terrorist network in east Africa.⁶²⁰ It also accuses an association called ‘*Daru Bilal*’ that operates in Kenya with the plan of accomplishing the above objective.⁶²¹

Stating these as a background the documentary proceeds to show the confession of suspected terrorists in custody which is highly incriminating. In the documentary, some of the suspected terrorists noted that, they went to Somalia to take basic terrorist training including how to operate and shoot Kalashnikov, military training on choosing and using locations for war, distribution of weapons and man power and digging of fortress.⁶²² The suspects also confessed that ‘the aim of the training is to conduct a Jihad War in Ethiopia with the objective of taking over the governments control on the people and ultimately establish Islamic state’.⁶²³

The documentary also televised the confession of other suspected terrorists on the issue of using the questions of Ethiopian Muslims for their own ends. In this regard, the suspects stated that ‘they had attended training offered by Dr. Jasim Mustefa on inciting riot with the intent to create conducive environment for conducting Jihad war in Ethiopia’.⁶²⁴ With this mission the suspects also confessed that they have established a group called ‘*Harekatul Shibabel Mujahidin Fi Bidel Hijrateyen*’ literally means ‘youth

⁶¹⁹ See *Jihadawiharakat*, *supra* note 70

⁶²⁰ *Ibid*

⁶²¹ *Ibid*

⁶²² *Ibid*

⁶²³ *Ibid*

⁶²⁴ *Ibid*

Mujahidin'.⁶²⁵ Like that of the Akeldama documentary, the publication of ETV on Jihadwi Harakat grossly infringe the defendants right to fair trial since it amount to constitute gravely prejudicial information's pursuant to the standard developed by the UK and European Court of Human Right. Thus, the media should have refrained from broadcasting such kind of documentaries to the public.

In connection with the documentary Jihadawi Harakat it is important to underscore two points. First, the documentary was broadcasted by the Ethiopian National Television before the completion of trial which is still going at the time of writing up this article. Second, the documentary was transmitted despite an injunction order of the Federal high court fourth criminal bench banning the airing of the documentary.⁶²⁶

iii. *"Hazen Lemderes... Guzo Wede Dessie" (To Mourn....Trip to Dessie)*

Unlike the documentaries discussed above, this documentary was produced by the website called *Ethiopia First* that purports to carry out its own investigation of the case.⁶²⁷ However, the documentary was broadcasted by the Ethiopian National Television (ETV). It was aired following the assassination of Sheikh Nuru Yimamin Dessie Ethiopia and just after the arrest of suspects. The author has chosen it for discussion in this article since it is relevant to show how Ethiopian state media are broadcasting other kinds of extremely prejudicial information in highly publicized cases i.e. the publication of photographs of the accused and comments on the merit of the case. Accordingly, the documentary repeatedly showed the photographs of two individuals arrested on suspicion with a tag under their picture saying *"Hired Assassins"*.⁶²⁸ Such kinds of disclosures are very hazardous since they pre-judge the guilt of suspects before trial by a court of law and establish presumption of guilt than innocence. A documentary of similar content was broadcasted by the

⁶²⁵*Ibid*

⁶²⁶Ayten Girma, *Trial by Media and its Constitutional Implications*, THE REPORTER, Feb. 09, 2013, at 15, Merga Yonas, *Muslim Defendants to Sue Government, ETV on Documentary*, THE REPORTER, Feb. 09, 2013, at 1 & Human Rights Watch, *Ethiopia: Muslim protesters face Unfair Trial*, <http://www.m.hrw.org/news/2013/04/02/ethiopia-muslim-protestors-face-unfair-trial> (last visited on march 25, 2015).

⁶²⁷*Ethiopia-Terrorist attack on sheik Nuru Yimam*, *supra* note 71

⁶²⁸*Ibid*

Ethiopian National Television on August 15, 2014 entitled '*Sheikeh Nuru Lemen Motu?*' or why Sheikh Nuru Yimam die?⁶²⁹ The documentary shows the confession of individuals suspected of killing Sheikh Nuru Yimam and whose photographs was displayed earlier in the documentary 'To mourn.... trip to Dessie'.

iv. News Report of Search Conducted in the Residence of Government officials Suspected of Corruption

Following the arrest of the officials of the Ethiopian Revenue and Customs authority in May 2013 on suspicion of engaging in corruption, their arrest was the talk of the country for many days. This is partly due to the overwhelming media coverage given to the case at times in very prejudicial manner to the defendant right to fair trial. A good example of such publications is the news broadcast of the Ethiopian National Television (ETV) concerning the search conducted in the house of suspected official's i.e. Geberewahid Woldegiorgis and Asmamaw Woldemariam.⁶³⁰ In the news a member of the police shows a search warrant to the camera and list the items recovered from the houses of the two individuals. In the house of Geberewahid Woldegiorgis, the police stated that, 200,000 Ethiopian birr, 26,000 Euro, 560 pound in cash and eight laptops, one iPod and several title deeds in Legedadi and Legetafo area were found.⁶³¹ Likewise, in the residence of Asamenew Woldemariam the police noted the recovery of cash 1,947, 675 Ethiopian birr.⁶³²

As discussed in the section dealing with the standards for restricting freedom of expression above, pre-trial publication of evidences by the media is considered as one of the most serious threats to the defendants right to fair trial by demonstrating an evidence which might not be admissible in court of law with ongoing prejudicial effect though. In the case at hand, the recovered items were shown to the public as evidence pending trial proceeding. Some writers criticized this practice by saying that the media went to determine the guilt of the defendants before their

⁶²⁹[Must Watch] ETV Jihadawi Harakat2- Why did Sheikh NuruYimam die_ _August 15, 2014. Available at <http://www.ethiotube.net/flvideo/27325.flv> (last visited on March 25, 2015).

⁶³⁰ See Police Recovered Millions, *supra* note 72

⁶³¹*Ibid*

⁶³²*Ibid*

first appearance in a court of law.⁶³³In the assessment of the author, the reaction of the public who saw that news was also very hostile towards defendants. Some individuals were even calling for those individuals to be executed on the mere sight of the TV news. Here also, the news broadcasts were aired before the completion of trial which is still going at the time of writing this paper

The defendants in this case were also very concerned with the media coverage of their case. For instance, the lawyer of the Gebrewhaid Woldegiorgis informed the court that media reports are infringing his client's right to be presumed innocent and could create undue influence in conducting fair proceeding.⁶³⁴The lawyer even demanded the court to impose injunction on the media with the intention to prevent the release of prejudicial information. However, the court just advised the media to be impartial, be balanced in their reporting and avoid bias.

IX. The Legal Regime for Combating Pre-judicial Media Coverage of Criminal Cases in Ethiopia

Before discussing the legal regimes for combating prejudicial media publicity of criminal cases in Ethiopia, it will be ideal to see the experience of other countries in the area for comparison. Accordingly, the approach followed by the United States and United Kingdom is often discussed in many literatures on the issue. To begin with the US, there is a less tendency for imposing on the media prior restraint on account of safeguarding the fair trial rights of the accused. Prior restraint in the media is only allowed where it is proved that the publication creates a '*clear and present danger*' to the defendant's right to fair trial which is capable of causing presumed or actual harm.⁶³⁵ Since the standard of proof is high the US courts rarely order restraint on medias to avoid prejudicial publicity. To avoid the release of prejudicial information by the media the US courts use remedial

⁶³³SebeleTeweldebirhan, *Latest Arrest: Fighting Corruption or Political Side Show* (May 17, 2013) <http://www.ezega.com/NewsDetails.aspx?page=news&NewsID=3452> (last visited on July 29, 2014).

⁶³⁴Mikias Sebsibe, *Court Report: Melaku Fenta etal 2nd Day In Court-Horn Affairs* <http://hornaffairs.com/en/2013/05/court-report-melaku-fenta-et-al-2nd-day/> (last visited July 29, 2014).

⁶³⁵ Elliot W. Atkinson Jr., *Free Press v. Fair Trial: Insulation Against Injustice*, 43 LOUISIANA LAW REVIEW 3, 556 (1973).

measure such as *voir dire*, instruction to the jurors, gag or injunction order and change of venue.⁶³⁶

Since the US follows trial by jury *voir dire* involves asking jurors questions to identify whether they are biased or not by the media release of prejudicial information. Following the questioning of jurors those biased would be removed from the case. In addition to *Voir Dire*, US judges also try to minimize the effect of prejudicial media publicity by instructing jurors to ignore what they have heard or seen in the media and decide the case based on the evidence presented to them. Further, US courts also give gag or injunction orders against trial participants such as police and prosecution with the objective of preventing them from disseminating information detrimental to the fair trial rights of the accused. Such orders are found to be very effective in most cases since the media's sources of most prejudicial publications are law enforcement bodies.⁶³⁷ Furthermore, change of venue is also used in the US to curb the effects of prejudicial media coverage. Change of venue involves the transfer of the defendant's case to another jurisdiction in which the exposure to hazardous information against the accused is very less.

The United Kingdom has a different approach for addressing the problem of prejudicial media publicity interfering with fair trial rights of the accused from that of the US. In UK if a media engages in "an act or omission calculated to interfere with the due administration of justice"⁶³⁸ the media will be held liable for contempt of court which is a criminal offence and receive adequate penalty. The offence includes direct contempt which deals with contempt in the face of the court or indirect contempt committed outside court. Its purpose is to balance accused persons right to fair trial and the competing freedom of expression.

However, it is important to note that not every publication of the media that could affect fair trial in insignificant way is subjected for contempt. Instead, only those publications "which create substantial risk that the course of justice in the proceeding in question will be seriously impeded or

⁶³⁶ Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, 766-767 (2010).

⁶³⁷ Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, 75 NEW YORK UNIVERSITY LAW REVIEW, (2010).

⁶³⁸ *Ibid*

prejudiced”⁶³⁹. Such publications include confession of defendants, photographs of the accused, comments on the merit of the case and interview of witnesses. Further, the Media could escape liability for contempt if it proves that the publication is “fair and accurate report of legal proceedings held in the public, published contemporaneously and in good faith”⁶⁴⁰. Having said this as a spring board, the legal regimes for addressing prejudicial media publicity in Ethiopia will be tackled subsequently.

As discussed in section two of this article fair trial guarantees of presumption of innocence, privilege against self-incrimination, right to cross examine and trial by an impartial court incorporated in the FDRE Constitution as well as international human right instruments ratified by Ethiopia. But these guarantees are too general and require the adoption of detail implementation laws if media and responsible authorities are to easily identify publications detrimental to the defendant’s right to fair trial and refrain from disclosing them. Besides, when such disclosure happen it will enable the law enforcement officers and court take appropriate measure. Accordingly, the FDRE government has adopted the Broadcast Service Proclamation⁶⁴¹, Freedom of Mass Media and Access to Information Proclamation⁶⁴² and FDRE Criminal Code.⁶⁴³ These laws seem to have incorporated similar measures for regulating prejudicial media publicity like those in the US and the UK.

To start with the Broadcast Service Proclamation, it recognizes that transmitting programs with diverse and balanced perspectives of is beneficial to the public.⁶⁴⁴ A corollary of this recognition is the stipulation that “every news shall be impartial, accurate and balanced”⁶⁴⁵. Accordingly, any person who violates this prescription is liable to punishment with a fine not less than Birr10, 000 and not exceeding Birr 50,000. Likewise, the Mass Media and Access to Information Proclamation underscores in its preamble

⁶³⁹*Ibid*

⁶⁴⁰*Ibid*

⁶⁴¹A PROCLAMATION ON BROADCASTING SERVICE(hereinafter BROADCASTING SERVICE PROCLAMATION), Proclamation No. 533/2007,Fed.Neg.Gaz Year 13, No. 39

⁶⁴² FREEDOM OF MASS MEDIA AND ACCESS TO INFORMATION PROCLAMATION (hereinafter MASS MEDIA PROCLAMATION), Proclamation No.590/2008, Fed.Neg.Gaz Year 14, No. 64

⁶⁴³ THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA(hereinafter FDRE CRIMINAL CODE,2004, Proc.no.414, Fed.Neg.Gaz

⁶⁴⁴ See BROADCASTING SERVICE PROCLAMATION, *supra* note 103, art. 30(3)

⁶⁴⁵*Id*, at 45(2)

the crucial role of media in building democratic order in Ethiopia.⁶⁴⁶ It also provides that, restrictions on freedom of expression and of mass media must be prescribed by law and must be justified on account of “preserving the wellbeing of the youth, honor and reputation of persons, national security, public order and *other overriding rights*”⁶⁴⁷. The phrase *other overriding rights* could include the accused right to fair trial as stipulated in different international and regional human rights instruments. Further, the Proclamation provides for all persons right including the media to seek, obtain and disseminate information so long as it is not precluded by the exceptions stipulated by the proclamation.⁶⁴⁸

One of the exceptions stipulated in the Proclamation is protection afforded to proceedings of law enforcement and legal investigation. Accordingly, it states that “a public relation officer may refuse a request for information relating to an alleged offender whose prosecution is under preparation or even though completed the prosecution is not yet instituted or whose prosecution is pending the disclosure or assuring the existence or non-existence of the requested information would likely....to prejudice or impair the fairness or impartiality of the trial”⁶⁴⁹. Yet, it does not indicate or give illustration of the kind of information capable of tampering with the defendant’s right to fair trial. Had the proclamation gave an illustrative list of inherently prejudicial information it would have made the job of public relation officers a lot easier. Nonetheless, the limitations of the proclamation resembles the gag or injunction order common in the US which imposes restriction on law enforcement bodies from giving information prejudicial to the right to fair trial.

Notably, the Ethiopian Mass Media and Access to information proclamation does not precisely says trial participants, law enforcement bodies or prosecution, it rather uses the generic term *public relation officer* who is supposed to undertake public relation of the public body including police and prosecution institutions. Further, the Criminal Code imposes a penalty on the officer who is responsible for disclosing such kind of information by stating that “whoever, not being entitled or expressly authorized so to do, publishes in whole or in part deeds, reports, instructions, deliberations or decisions of a public authority, the content of which is required to be kept secret by law or by virtue of an express

⁶⁴⁶ See MASS MEDIA PROCLAMATION, *supra* note 109, at preamble

⁶⁴⁷ *Ibid*

⁶⁴⁸ *Id*, at 12(1)

⁶⁴⁹ *Id*, at 21(2)

decision of the competent authority, is punishable with simple imprisonment not exceeding three years or fine”⁶⁵⁰.

Such limitations are very crucial to safeguard the violation of the defendant’s right to fair trial from irresponsible media coverage. To illustrate, in the prejudicial documentaries and News broadcasted by the Ethiopia National Television (ETV) discussed in section four of the article, the media source for confessions of the accused, comments on merits of the case, pre-trial release of evidence and interview of witnesses were the police and law enforcement bodies. Had the police and law enforcement bodies respected the prescriptions of the Mass Media and Access to information proclamation which prevents them from making accessible those kinds of information, the harmful effects of the media publication on the defendants’ fair trial would have been avoided. Here it could be argued that the media could still publish prejudicial information without citing its sources but the credibility of its publications would be proportionally reduced.⁶⁵¹

Despite the importance of restricting law enforcement authorities from giving substantially prejudicial information to the media, this measure alone would not eliminate the risk of harmful media publicity. This is because the media could engage in such irresponsible conduct without identifying its sources. Thus, there should be an additional mechanism for holding the media accountable when it publishes hazardous information’s hampering the undertaking of fair trial proceeding. To this effect the FDRE Criminal Code has incorporated an offence of contempt of court like in the one in the UK. Accordingly, it provides that “Whoever, in the course of a judicial inquiry, proceeding or hearing, (a) in any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge in the discharge of his duty; or (b) *in any other manner disturbs the activities of the Court*, is punishable with simple imprisonment not exceeding one year, or fine not exceeding three thousand Birr”⁶⁵².

Like that of the Mass media proclamation, the FDRE Criminal Code did not make an attempt to indicate the type of information’s which could disturb the function of the courts. Had there been explicit indication of inherently prejudicial publications, it would have facilitated continence on the part of the media and imposition of penalty on the judge’s part. Nonetheless,

⁶⁵⁰ See FDRE CRIMINAL CODE, *supra* note 110, art. 441

⁶⁵¹ See Brandwood, *supra* note 104, at 1449

⁶⁵² See FDRE CRIMINAL CODE, *supra* note 110, art. 449

disclosure substantially hazardous information's such as confession, evidence, witness interviews and comment on merits by the media would satisfy the requirements of article 449(b) and the media could be punished for contempt since amount to interference in the function of the court. Hence, ETV which broadcasted those documentaries and news discussed in section four could be held for contempt as it disturbs the proper function of the court in impartial manner.

Conclusion

In conclusion, this article has demonstrated that in practice Ethiopian state media reporting of highly publicized criminal cases is endangering the fair trial rights of the accused through the dissemination of inherently prejudicial information such as the confessions of the accused, comments on the merit of the case, interview of witnesses and display of photographs of suspects under the pretext of exercising freedom of expression. The disclosure of such kinds of hazardous information goes against the fair trial safeguards of presumption of innocence, privilege against self-incrimination, trial by impartial tribunal recognized not only by the FDRE Constitution but also by international and regional human rights instruments to which Ethiopia is a state party. Thus, media in Ethiopia must be accurate and fair in their reporting of criminal cases upholding their professional, moral and legal obligations of non-disclosure of substantially prejudicial information against the accused.

With respect to the Ethiopian legal regime for regulating irresponsible media coverage of criminal cases, it is fair to conclude that there is no significant problem with the adequacy of protective and remedial measures. Yet, the failure of existing laws to explicitly indicate the types of highly prejudicial information was noted as a glitch. A more serious problem, however, is practical implementation of those preventive and remedial measures provided by law. As noted in this article, time and again, the police with the collaboration of some state media have released highly prejudicial information in utter disregard of the negative effects on the fair trial rights of the accused. And yet neither the media nor the police were held accountable for their irresponsible conduct and a culture of impunity has prevailed. Thus, unless this culture of impunity is replaced with a culture of accountability where the police and media are held responsible for their misconduct, the fair trial guarantees of presumption of innocence, the right not to incriminate oneself and right to be tried by impartial court will be hollow promises.

To sum up, if the prevailing culture of impunity is to change the following measures are important. First, being the major source of prejudicial information for the media, the police must obey their legal duty of keeping the secrecy of highly prejudicial records in their hands from the reach of irresponsible media as provided under the Mass Media and Access to Information Proclamation. They must also show their unwavering commitment to investigate and ensure the prosecution of members of the police force breaching their legal duty of secrecy to safeguard a defendant's right to receive impartial trial. Second, the judiciary and law enforcement officials must uphold their constitutional duty of not only respecting fundamental fair trial rights of the accused but also ensuring the respect of these rights by the media.