ACCESS TO JUSTICE IN ETHIOPIA:

Towards an Inventory of Issues

Editors

Pietro S. Toggia (Prof.)
Thomas F. Geraghty (Prof.)
Kokebe W. Jemaneh

Center for Human Rights
Addis Ababa University
May 2014

Access to Justice Series

Contents

Acknowledgment

The Center for Human Rights is deeply grateful to the Norwegian Ministry of Foreign Affairs who enabled the publication of this book by providing financial assistance including publication costs and honoraria for contributors.

About the Editors

Professor Pietro Toggia (Ph. D.) is an Ethiopian by birth, and has been teaching in the Department of Criminal Justice at Kutztown University of Pennsylvania, United States since 1998. He earned his master's and doctoral degrees in justice studies at Arizona State University in the United States. He is a full professor and teaches Criminology, Comparative Criminal Justice Systems, and Ethics in Criminal Justice. He has also taught graduate-level law and sociology classes in Criminology in the Departments of Sociology and Schools of Law at Addis Ababa University, Bahir Dar University, and the University of Gondar. He gave invitational lectures at the University of Teramo (Italy) and at Kenyatta University (Kenya). He has co-edited two books on the Horn of Africa and Ethiopia; he has also published peer reviewed articles on political violence, indigenous justice system, and ethical code of conduct for Ethiopian Criminal Justice professionals. He has also presented numerous international and national conference papers with a primary focus on Africa on topics ranging from modern policing, and constitutionalism and the rule of law to transitional justice in the American Society of Criminology, Academy of Criminal Justice Sciences, and the African Studies Association. He has published three encyclopedia entries on kidnapping, international guidelines on victimization, and on bail in The Encyclopedia of Criminology and Criminal Justice with Wiley-Blackwell and Sage. Professor Pietro Toggia currently serves as a member of the editorial boards of the *African Journal of Criminology and Justice Studies* (online), the *International Journal of Ethiopian Studies*, and the *Bahir Dar University Journal of Law*.
Email: toggia@kutztown.edu

Professor Thomas Geraghty is a graduate of Harvard College and The Northwestern University School of Law. He is the Class of 1967 James B. Haddad Professor of Law, the Associate Dean for Clinical Legal Education and Director of the Bluhm Legal Clinic at the Northwestern University School of Law. The Bluhm Legal Clinic houses 35 clinical faculty members and enrolls 170 students each year in its various programs. In addition to teaching, fund-raising, and administrative responsibilities, Prof. Geraghty maintains an active caseload at the Bluhm Legal Clinic, concentrating primarily in criminal and juvenile defense, death penalty appeals, child-centered projects dealing with the representation of children and juvenile court reform. Professor Geraghty is a member of The Board of Trustees of The National Institute for Trial Advocacy.
E-mail: tgeraghty@law.northwestern.edu

Kokebe W. Jemaneh (LL.B. & LL.M.) is currently a Research and Publications Officer of the Access to Justice Project at the Center for Human Rights, Addis Ababa University. He has been teaching law at Bahir Dar University School of Law. While working there he has developed various teaching materials and has served as the founding editor-in-chief of *Bahir Dar University Journal of Law* and coordinator of the postgraduate, research and community services program of the Law School.
Email: kokebe318@yahoo.com

Notes on Contributors

Assefa Fiseha (PhD) is an Associate Professor, Center for Federal Studies, College of Law and Governance, Addis Ababa University. He has written extensively in the area of comparative federalism, Management of Diversity, customary dispute resolution mechanisms, legislative executive relations and on the role of the judiciary. Some of his works include: Ethiopia's Experiment in Accommodating Diversity: 20 years balance Sheet, *Regional and Federal Studies* 22:4 (2012) pages 435-473. Legislative –Executive Relations in the Ethiopian Parliamentary System in Ethiopia: Towards Institutional and Legal Reform, book chapter, in 'Constitution making in Africa' ed. Jaap De Visser 2014; Separation of powers and its Implications for the Judiciary in Ethiopia, *Journal of Eastern African Studies* 5:4, (2011): 702-715. He can be reached at: assefafish@yahoo.com

Dr Adem Kassie Abebe is a Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law, Heidelberg, Germany. The Foundation provides capacity building and technical assistance on constitutional, human rights, international law, and other legal issues, mainly to countries emerging out of conflict. Dr Adem is also an Extraordinary Lecturer at the University of Pretoria and a part-time Assistant Professor at the University of Addis Ababa. He has published extensively on comparative constitutional and human rights issues in Ethiopia, Africa and beyond. Dr Adem completed his Bachelor of Laws (LL.B.) at the University of Jimma in Ethiopia, and his masters (LL.M.) and doctoral (LL.D.) studies at the University of Pretoria in South Africa. He may be reached at: adem.abebe@gmail.com

Fasika Hailu has M.A. in Human Rights from Addis Ababa University Center for Human Rights and LL.B. from Addis Ababa University School of Law. She has more than a decade of practical hands on experience in the field of human rights working both in Civil Society Organization named Action Professionals' Association for the People/APAP/ and under a national human right institution: the Ethiopian Human Rights Commission. She has written a number of human rights training manuals and guidelines as well as conducted various action researches alone and in collaboration with colleagues. She has also written various short articles on her organizations' periodic magazines. Currently, she is serving as the head of the Children's Legal Protection Center/CLPC/ established under the Federal Supreme Court in collaboration with African Child Policy Forum. CLPC is mandated to protect the rights of children coming into contact with the justice system through the provision of legal and psychosocial services.

Mr. Kinfe was formerly a lecturer-in-law at Hawassa University Law School. He received his Bachelor of Laws (LL.B.) degree from Addis Ababa University with great distinction in July 2009 and his Master of Laws (LL.M.) degree in Internet Law from the University of Oslo in December 2012. He also studied Internet privacy at the University of Oxford, Oxford Internet Institute in 2012. His earlier research and teachings focused on the Ethiopian tax law regime on which he produced a number of articles published in reputable journals. He recently devotes his time on researching and writing on the intersections of human rights and

technology. He particularly writes on the interplay between privacy and the Internet. Mr. Kinfe is currently a Chevening Scholar at Brunel University London in the UK.

Mohammed Abdo is Assistant Professor, Institute of Federalism and Legal Studies, Ethiopian Civil Service University, and PhD Candidate at the Institute of Human Rights Centre, Ghent University, Belgium. He has been teaching at the Institute of Federalism and Legal Studies, Ethiopian Civil Service University, Ethiopia since 1998. He has published monographs on administrative law and civil procedure, and a number of articles and book chapters on various issues involving human rights, legal pluralism, and international watercourses law. He can be reached at: mohammedza@yahoo.com

Muradu Abdo Srur received his undergraduate degree in law from Addis Ababa University and his LL.M. degree from the University of San Francisco. He has published articles, book reviews, case comments, text-books in the areas of property law, customary law and legal history. He served as a member of editorial committees of law journals as well as edited research papers. Besides holding academic posts, he served on a number of committees tasked to reform aspects of the legal system of Ethiopia including legal education. His research interest is law and development focusing on customary legal systems, land and disability laws. He is currently teaching at Addis Ababa University, School of Law. He is pursuing a PhD in law at the University of Warwick, School of Law - researching land law and policy of Ethiopia. He may be reached at: muradu1@yahoo.co.nz.

Tadesse Melaku has a master's degree in Public and Constitutional Law and he is currently lecturing law at Hawassa University. He has a single-authored book entitled Introduction to Constitutional Law and two research articles —*The Need to Balance Rights of Employees and Religious Autonomy: The Case of Ethiopia* and *Constitutional Adjudication in Ethiopia: Exploring the Institutional System and its Limitations.*

Wondimagegn Gebre is a lecturer in law at University of Gondar with LL.B. degree from Mekelle University (2009) and an LL.M. in Criminal Justice and Human Rights Law from Bahir Dar University (2013). He has co-authored an article on "Enforcement of the Principle of Legality in Ethiopia" published in *Bahir Dar University Journal of Law*, Vol. 2, No.2, May 2012.

Acronyms

- AAU: Addis Ababa University
- ACRWC: the African Charter on the Rights and Welfare of the Child
- ADA: the Americans with Disability Act,
- ADR: Alternative Dispute Resolution
- AFCHPR: African Charter on Human and Peoples' Rights
- ANPPCAN: African Network for the Prevention of and Protection against Child Abuse and Neglect
- APAP: Action Professionals' Association for the People
- CDRMS: customary dispute resolution mechanisms
- CEDAW: the United Nations Convention on the Elimination of All Forms of Discrimination against Women
- CHADET: Organisation for Child Development and Transformation
- CJPO: Child Justice Project Office
- CLPC: Children's Legal Protection Centre
- CRC: Convention on the Rights of the Child
- CSOs: civil society organizations
- CUD: the Coalition for Unity and Democracy
- DIP: Democratic Institution Program
- DNA: Deoxyribonucleic acid
- E.C.: Ethiopian Calendar
- ECLF: Ethiopian Christian Lawyers Fellowship
- ECSU: Ethiopian Civil Service College
- EFA: Education for All
- EHRC: Ethiopian Human Rights Commission
- EIO: Ethiopian Institution of the Ombudsman
- EPRDF: the Ethiopian People's Revolutionary Democratic Front
- ERTA: Ethiopian Radio and Television Agency
- EWLA: Ethiopian Women Lawyers Association
- FDRE: Federal Democratic Republic of Ethiopia
- FFIC: Federal Firs Instance Court
- FSCE: Forum on Sustainable Child Empowerment
- HoF: the House of Federation
- HPR: the House of Peoples' Representatives
- ICCPR: the International Covenant on Civil and Political Rights
- ICESCR: the International Covenant on Economic, Social and Cultural Rights
- IJS: Informal Justice System
- ILO: International Labour Organisation
- JICA: Japanese International Cooperation Agency
- LC: local courts (of Uganda)
- MoU: Memorandum of Understanding
- MSTF: Multi-Stakeholder Taskforce Forum

- NGO: Non-governmental organization
- NHRI: National Human Rights Institute
- OPRIFSC: Organization for Prevention, Rehabilitation and Integration of Female Street Children
- PDRE: People's Democratic Republic of Ethiopia
- PLAIN: the Plain Language Action & Information Network
- SNNPRS: Southern Nations, Nationalities, and Peoples' Region
- TPLF: Tigrayan People's Liberation Front
- UDHR: Universal Declaration of Human Rights
- UN: United Nations
- UNDOC: United Nations Office on Drugs and Crime
- UNDP: United Nations Development Program
- UNESCO: The United Nations Educational, Scientific and Cultural Organization
- UNICEF: United Nations Children's Fund
- US/USA: the United States of America
- USSR: the Union of Soviet Socialist Republic

Introduction

It is not easy to find a precise definition of a wide-ranging term of reference as 'access to justice'. In general, it means that all people should be facilitated with an easier and faster venue to seek remedies for dispute, and harms done to them.[1] According to the United Nations Development Program (UNDP), "[a]ccess to justice is… much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable."[2]

Moreover, marginalized social groups are universally identified as beneficiaries of this fundamental right; these socio-economically disadvantaged groups include the "rural poor, women and children, people with diseases and disabilities, ethnic minorities, among others."[3] Access to justice has formally been recognized as an important constitutional and policy issue in Ethiopia. The challenge, however, is how to realize this right so that people would benefit from it. The former Secretary-General of the United Nations, Kofi Annan, made the following insightful remark at the ministerial meeting of the Security Council on Justice and the Rule of Law: "We must take a comprehensive approach to justice and the rule of law. … But a one-size-fits-all approach does not work. Local actors must be involved from the start — local justice sector officials and experts from government, civil society and the private sector."[4]

Any initiative in Ethiopia, or in any other country, to reform the justice system and enhance access to justice for all needs to be informed by systematic and critical study of how the justice system is functioning. It is only then that reform measures to improve access to justice will be meaningful and attain the intended result. This publication is a modest contribution in this direction.

The contributions in this edition explore a range of important and contemporaneous topics on access to justice in Ethiopia. A wide spectrum of justice issues are covered in this edited volume: Definition of access to justice, access to justice as human right, institutionalism, administration of justice issues, legal aid and *pro bono* services, the integration of the formal justice system and customary dispute resolution systems, the role and function of national human rights institutions in promoting access to justice, legal literacy, rule of law, and the right of children and disabled citizens to access justice. The

---

[1] United Nations Development Program (UNDP), *Programming for Justice: Access for All*, 2005, p.4.
[2] United Nations Development Program (UNDP), *Access to Justice: Practice Note*, September 3, 2004, p.6.
[3] *Id.*, p. 5; UNDP, *Programming for Justice: Access for All*, 2005, p.3.
[4] Kofi Annan, U.N. Secretary-General, Remarks on 'Justice and the Rule of Law: The United Nations' Role,' A Ministerial Meeting of the Security Council, 3 March 2003.

common thread that runs through all of the nine chapters in this volume is that access to justice should be viewed both as substantive and procedural right to individuals, especially to socio-economically disadvantaged social groups.

The central theme in this edited volume is examining access to justice as human rights issue. The main focus is not simply to highlight access to justice as a normative issue (as idealized theory of justice) to be agreed upon as a universal principle, but also to achieve it in practice; ultimately for its satisfactory fulfillment in order to benefit the public. Hence, all the contributors explore it as public policy issue; as administrative and legislative priority to be implemented effectively. Accordingly, each one of the chapters carries either explicit or implicit policy and legislation implications. The contributions draw upon legal, philosophical, sociological, anthropological, and criminological perspectives. Moreover, international and regional laws and declarations, as well as national legislations and policies pertaining to justice and human rights are extensively covered. In this respect, this edition is the first attempt to present a few of the specific studies conducted on access to justice in Ethiopia. However, it should be clear that this edited volume is neither exhaustive nor conclusive on access to justice in the context of human rights. Nonetheless, it is still a preliminary but significant attempt to zoom in the conceptual focus, studying access to justice as human rights in Ethiopia.

In *chapter one* Kokebe Wolde discusses the need to reconsider access to justice in Ethiopia in light of human rights-based approach. Kokebe starts with a brief discussion of the statement of the problem of access to justice in Ethiopia. He further highlights the genesis of the international access to justice movement and the common barriers to effective access to justice across jurisdictions. Kokebe also inquires into the fundamental elements of access to justice seen through the lens of human rights standards. The inquiries focus on three key issues: (1) what does access to justice mean as seen in light of human rights standards? (2) how and in what ways does access to justice as fundamental right relate to and reciprocate human rights? And (3) how could the concept of human rights-based approach to access to justice be useful as a road map to social justice? Furthermore, Kokebe provides a highlight of the gaps in policy, law and practice as regards access to justice in Ethiopia, and he places due emphasis on the need to adopt a human rights-based approach to access to justice for a far-reaching and broader socio-economic benefits.

Adem Abebe's contribution, in *chapter two*, on access to constitutional justice in Ethiopia, underscores the immeasurable benefits of constitutional adjudication in protecting the constitutional rights of the people and ensuring constitutionalism. He emphasizes that an

independent and vibrant constitutional adjudication system is vital to ensure constitutionalism in Ethiopia, particularly in view of the weak control mechanisms between the legislative and executive organs of the parliamentary form of government framed by the Constitution. Adem stresses that the existing constitutional adjudication system is insubstantial and hidden from the public; constitutional issues are invariably discussed in the political and academic fora. Adem has discussed at length the factors on the 'supply' and 'demand' side of the constitutional adjudication process that have limited access to constitutional justice. Adem then recommends for an independent, active, and legitimate constitutional adjudication system for the sake of further ensuring the constitutional rights of the people, as well as the regulation or limitation of intrusive government power.

In *chapter three,* Kinfe Michael Yilma and Tadesse Melaku deliberate on the topic of petitioning justiciable issues directly to the federal executive branch through the Prime Minister's Office. They claim that, for a number of reasons, citizens increasingly see petitioning the executive as an alternative venue for justice in lieu of litigating their cases in court. They discovered that the petitioning process in the Federal Government has not yet been formalized or institutionalized, and is often done in a haphazard manner. Kinfe Michael and Melaku assert that facilitating the venue for the public to petition the executive branches at the federal and state levels could be seen as one way of enhancing access to justice. They also note that there is an important lesson to be learnt from the emerging petitioning system in the Southern Nations, Nationalities, and People's Regional State in Ethiopia (SNNPR) which has been formalized by the regional Government. The authors emphasize that while establishing a system for making petitions to the executive could serve as a supplementary avenue to address public grievance, in addition to the Human Rights Commission and the Institution of the Ombudsman, it cannot be a substitute for revitalizing the judiciary.

Chapters four and five cover how the informal and customary justice systems in Ethiopia could be effectively utilized to facilitate access to justice. In *chapter four* Assefa Fisseha draws attention to the exigency of harmonizing the traditional Customary Dispute Resolution Mechanisms (CDRM) with the formal justice system. This urgency is even more pronounced with the fact that the Ethiopian judiciary is inaccessible to the majority of rural residents as well as its slow pace of adjudication due to heavy caseloads. CDRMs that are widely used at the grassroots level as a preferred method of disputes resolution may not necessarily yield to justice that conforms to universally agreed human rights principles; harmonization is still an urgent factor to look into to bring CDRMs under a closer scrutiny of the courts as the custodian of human rights. Assefa further observes that the FDRE

Constitution (Articles 34 and 78) recognizes the traditional institutions to adjudicate disputes in civil matters. Hence, he notes, the harmonization of CDRMs with the formal justice sectors is imperative, and the administrative and organizational details to this effect have to be worked on. Assefa also notes that, as the *de facto* mandate of CDRMs extends as well to have jurisdiction over criminal cases, the harmonization of CDRMs with the formal justice system has to address this issue and outline clearly the cases that CDRMs need to deal, not only *de facto* but by virtue of formal authorization.

In similar vein, Wendmagegn Gebre, in *chapter five*, emphasizes the role that traditional and informal justice systems would play in enhancing access to criminal justice, particularly to marginalized social groups in rural Ethiopia. Wendmagegn's contribution is a comparative analysis in which he draws upon lessons from South Africa and Uganda regarding the use of traditional and informal justice systems in the settlement of criminal matters. South Africa has formally recognized the traditional institutions since 1996, and further established their legal mandate and jurisdictions with the issuance of the Policy Framework on Traditional Justice System in 2009. Similarly, Uganda has instituted Local Council Courts with the aim to enhance community justice for better public access in the administration of justice at grass roots since 1988. According to Wendmagegn, although FDRE's Constitution (Articles 34(5) and 78(5)) has recognized Alternative Dispute Resolution (ADR), the recognition is limited only to personal and family matters and does not extend to criminal matters. Therefore, with regard to the role that traditional and informal dispute resolution mechanisms can play in the settlement of criminal cases there are serious limitations due to lack of applicable guidelines and integration with the formal justice system.

Mohammed Abdo's focus in *chapter six* is on the role of national human rights institutions in promoting access to justice. In particular, he closely examines the legislated roles and the practices of the Ethiopian Human Rights Commission (EHRC) in advancing access to justice as part of its broader mandate to protect and promote human rights. Mohammed notes that, while the Commission's mandate is not defined specifically in terms of access to justice, its functions such as the provision of legal aid service, awareness-raising initiatives, and investigation of complaints advance access to justice. Mohammed's assessment of the practice of EHRC in advancing access to justice is that, while it has made significant progress in this regard as a young institution, its independence has yet to be practically guaranteed and there is much that it should do to enhance access to justice for Ethiopians. He further recommends that EHRC should serve the community by expanding its out-reach in various parts of the country

In *chapter seven*, Pietro Toggia investigates legal awareness as one of the important ways of guaranteeing access to justice in Ethiopia. He claims that the awareness of individuals about their legal rights, and the public knowledge of how the legal system is structured and functions, as well as how they can navigate through the legal process are critical issues. He further asserts that individuals should have the capacity or competency to claim and exercise their due process rights as human rights. Pietro's contribution highlights that basic legal knowledge is imperative for effective access to justice in Ethiopia.

The topic covered in *chapter eight* is disability and access to the criminal justice system in Ethiopia. Muradu Abdo critically explores to what extent the special needs of people with physical and mental disabilities have been addressed or not. His conclusive response is that much is desired from the criminal justice system to accommodate people with disability. He argues that both procedural and substantive criminal laws are inadequate to address the special needs of persons with disabilities and as a result the accessibility of the criminal justice system for persons with disabilities is curtailed. Muradu notes that there should be reasonable accommodation in the criminal justice system in light of the differential and specific needs of people with disability. Moreover, he recommends proper enforcement of the existing laws, their revision to address existing gaps, and the curricular use of legal education to sensitize students to avert bias or prejudice against individuals with disabilities.

The last chapter in this edited volume contributed by Faskia Hailu deals with the realization of access to justice for children in Ethiopia. Fasika documents the experience of Children's Legal Protection Center (CLPC) under the Federal Supreme Court in providing comprehensive services to realize access to justice for children. CLPC's legal aid center especially and exclusively caters the needs of children by providing legal aid services and legal information, referral services, psycho-social support services, and expediting legal cases which involve children in the justice system. The chapter highlights the mechanisms used by CLPC and the challenges encountered in working to ensure access to justice for children. Fasika underscores that the provision of psycho-social support, in addition to the legal aid service makes the service provided for children by CLPC unique and complete compared to access to justice initiatives provided by other similar institutions.

The contributions in this edited volume bring into focus pertinent and timely topics within the conceptual framework of 'access to justice'. Hence, the editors and the contributors of this volume strongly believe that this publication would initiate further discussion and empirical research among legal scholars, law school students, teaching staff,

as well as human rights advocates, professionals working in the justice sectors, and policy-makers.

Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach

Kokebe W. Jemaneh*

Abstract

It is widely accepted that access to justice is a fundamental right as well as a key means to realize other rights and fight injustice and poverty. Casual observation regarding access to justice in Ethiopia reveals that, despite government efforts in the past years to improve the situation, it is far from being adequately realized. This chapter summarily examines the legal and policy framework regarding access to justice in Ethiopia with a view to identify gaps in policy, law and practice. It concludes by recommending that a human rights-based approach to access to justice should be considered as the way forward and there are lessons to be learnt from the international access to justice movement in this regard.

Key words: access to justice, human rights-based approach, Ethiopia

Introduction

The phrase 'access to justice' embodies an ideal that lies at the heart of any society that aspires to be just. The ideal embodied in the notion of access to justice is based on the proposition that each person should have effective means of protecting his rights or entitlements under the law. This ideal in turn emanates from the fundamental principle that all people should enjoy equality before the law, which itself is based on the notion of human dignity as the foundation of justice.[1]

Because a system for dispensing justice is so central to any society, states put in place a system by which people may vindicate their rights and/or resolve disputes under the general auspice of the state. Ideally it is assumed that such a system is equally accessible and fair to all members of the society and leads to results that are individually and socially just.

This being said, however, it should be noted that there is no uniform understanding of the concept of access to justice. And no justice system has lived up to the promises encapsulated by the universal ideals of 'access to justice' and escaped criticism. The literature on access to justice is replete with questions related to how, at what price, and for whose benefit justice systems work. Recognition that justice systems have failed to translate people's rights into reality has recently led to the formulation of a human rights-based approach in international access to justice movement. This is based on the implicit and

* LL.B. & LL.M., Research and Publications Officer, Access to Justice Project at the Center for Human Rights (AAU)

[1] Sackville, R., 'Some thoughts on Access to Justice', *New Zealand Journal of Public International Law*, Vol. 2, 2004, p.86.

explicit recognition in a number of international human rights instruments of each and every person's right to have effective access to justice. The right to effective access to justice is seen as a precursor right essential for the protection and enjoyment of other rights.[2]

Considering the situation in Ethiopia, access to justice is one of the rights that is recognized in the 1995 constitution. Ethiopia has also ratified a number of international human rights instruments that guarantee the right of access to justice.[3] However, the real application of the right for Ethiopians is fraught with multitude of legal and practical challenges. Casual observation reveals that the formal civil and criminal justice system in Ethiopian is neither accessible nor responsive to the needs of the poor, vulnerable and disadvantaged. People who had their day in court do not always feel that justice has been done and not without a reason.

Apparently, there are multitudes of factors that militate against meaningful access to justice for Ethiopians. The illiteracy level is high[4] with 84% of the population living in rural areas[5] leading agrarian life. Thus, although regular courts are established at each *wereda* (district) level, local justice remains physically inaccessible and people have to travel at times by foot for long hours, even for days, to reach the nearby first instance court. The perception of the independence of the courts and their efficiency is low. As a result, many people prefer customary dispute resolution mechanisms as these institutions are physically accessible, cheaper and speedier.[6] However, customary dispute resolution mechanisms have the potential to conflict with constitutional and human rights provisions and do not necessarily result in justice that upholds universally cherished human values. The lack of access to legal information is another challenge. Members of the legal profession and government intuitions have problems accessing legislations, let alone the general public. Although Proclamations (the primary legislation) and regulations (delegated legislation by the Council of Ministers) are published in the official gazette, there is no creative and effective means of disseminating

---

[2] UNDP, *Programming for Justice: Access for All: A Practitioners Guide to A Human Rights Based Approach to Access to Justice*, 2005, UNDP Asia-Pacific Rights and Justice Initiative, Bangkok, p. 3.

[3] Pertinent in this regard are: International Covenant on Civil and Political Rights (1966); Convention on the Rights of the Child (1989); Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All forms of Discrimination Against Women (1979); Convention on the Rights of Persons with Disabilities (2007); Universal Declaration of Human Rights (1948); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

[4] The literacy rate in Ethiopia for the age group of 10 years old and older was 42.7% in 2007. The Office of Population Census Commission, *The 2007 Population and Housing Census of Ethiopia: Statistical Report at Country Level*, 2007. Available at <www.csa.gov.et> (accessed on 8 July 2014).

[5] *Id.*, p. 7.

[6] Regarding the dominant role of customary disputes resolution mechanisms in Ethiopia see: Alula P. and Getachew A. (eds.), *Grass-roots Justice in Ethiopia: The Contribution of Customary Disputes Resolution*, French Center of Ethiopian Studies, Addis Ababa, 2008.

them. Directives issued by individual government institutions are even more inaccessible and obscure. The absence of consolidation of laws and the resultant incoherence of laws coupled with inaccessibility of legal texts creates uncertainty as to the prevailing legal norms.

Inaccessibility of legal service is the other challenge of the justice system. The number of practicing lawyers is few. The latest report by the Ministry of Justice (the organ that is responsible for licensing the practice of law at the federal level) indicates that there are only 2189 lawyers licensed to practice law before Federal courts.[7] The Public Defender's Office that is an organ of the Federal Supreme Court is under-resourced and not well organized. The latest activity report by the Public Defender Office shows that it has only nineteen (19) officers to represent indigent defendants at the Federal First Instance Court, Federal High Court and Federal Supreme Court level working under sever material resource constraint, including stationery.[8] The Public Defender Office was able to provide service to a total of 852 defendants only in nine months. This is insignificant compared to the 26,535 charges the Prosecution pressed before the Federal Courts in similar period.[9] Legal aid service is not widely available and is urban centered and uncoordinated. The Ministry of Justice's scheme to provide legal assistance on civil matters for indigent and vulnerable section of the society is little utilized due, in part, to limited public awareness of the service.[10]

In general, although attempts have been made by the government over the past years to improve the situation, much remains to be done to redesign the justice system in a way that is suitable to enforce rights and alleviate injustice, inequality and poverty. Having this in mind, this chapter proposes the adoption of a broader, human rights-based approach to access to justice in Ethiopia.

Thus the purpose of this chapter is to elucidate the elements of the 'access to justice' concept seen through the prism of international human rights standards and to illustrate the need for the adoption of a broader approach to access to justice in Ethiopia. In short, the essay will illustrate what access to justice means when conceptualized in light of human rights law. This approach, called the human rights-based approach to access to justice, is a strand of the human rights-based approach to development theory, which uses relevant

---

[7] Nine Months Performance Report of Ministry of Justice for the Fiscal Year 2006 E.C., p. 43 (Report on file with the author).

[8] Nine Months Performance Report of Public Defenders Office under the Federal Supreme Court for the Fiscal Year 2006 E.C. (Report on file with the author).

[9] Nine Months Performance Report of Ministry of Justice, *supra* note 7, pp. 29-33.

[10] In its branch offices that operate in Addis Ababa and Dire Dawa city, the Ministry was able to provide legal aid service to 328 individuals only in nine months (*ibid.*).

human right standards as a roadmap to bring change in overall social justice.[11] Thus, the chapter will provide overview of the human rights-based approach to access to justice, charting its origins, identifying its basic elements, and pinpointing the basic features that distinguish the human rights-based approach from other approaches in order to illustrate the value that it adds to achieving access to justice goals. This chapter will also highlight legal and policy documents pertaining to access to justice in Ethiopia and will provide recommendations for a broader approach to access to justice.

The analysis is based on review of international human rights standards, legal and policy documents, and relevant literature on the subject. The aim is to pose to Ethiopian policy makers the need to adopt a comprehensive approach to access to justice that is normatively based on human right standards and operationally directed at creating a justice system that yields results that are individually and socially just. Given the breadth and depth of the issue of access to justice, the chapter does not pretend to present an exhaustive analysis of the subject matter from Ethiopian context. Rather, it is intended to raise the agenda, provide a snapshot of the problems to effective access to justice in Ethiopia and suggest that a broader, human rights-based approach to the problem is appropriate.

Accordingly, the chapter is divided into three main sections. Section one is devoted to general discussion of the notion of access to justice, its significance, historical development of the access to justice movement and common barriers to effective access to justice. Section two discusses the human rights-based approach to access to justice. The nature of human rights-based approach to access to justice and the elements of effective access to justice according to the human rights-based approach are discussed at length. Section three provides a general discussion of the legal and policy framework in Ethiopian pertaining to access to justice. It highlights gaps in law, policy and practice that stand in the way of effective access to justice for Ethiopians. Finally, the chapter closes with concluding remarks.

1. Access to Justice: Some Preliminary Remarks

1.1. The Concept of Access to Justice

It has been long since the idea that rule of law is central to a properly functioning state is widely accepted. Although there are differences in understanding of the concept of rule of law, it is now widely accepted that the notion of rule of law requires that government officials

[11] UNDP, Programming for Access to Justice for All, *supra* note 2, p. 3; See also Sudarshan, R., 'Avatars of Rule of Law and Access to Justice: Some Asian Aspects' in Ayesha Dias and Nina Berg (eds.), *Justice for the Poor: Perspectives on Accelerating Access*, Oxford University Press, New Delhi, 2009, pp. 668-681.

and citizens be bound by and act in accordance with written, publicly disclosed laws which are consistent with universally accepted human rights norms and standards and which should be enforced in accordance with established procedures.[12] The rule of law is a fundamental protection to people guaranteeing that the society's laws will be respected and upheld. It is a guarantee that, if adhered to strictly, will enable society to live in the most fulfilling social order. It underpins economic and social cooperation and is fundamental to ensuring economic development, political stability and social justice.[13] The rule of law means less corruption, protected and enforceable legal rights, due process, good governance, transparent and accountable government.[14]

At the core of the rule of law principle is to be found access to justice, for otherwise rule of law will lose its validity and significance if citizens are unable to access justice services to address grievance and limit governmental authority.[15] It is not enough to formally state that government officials and citizens must act in accordance with established rules; there must be a mechanism to seek justice and redress where rights are not protected and promoted or have been violated. This highlights the central place that access to justice assumes in the modern state. It is perhaps the most inspiring ideal of any society and one of the reasons for which entire legal systems exist.

Despite its prominent importance in the modern democratic state, there is no uniform understanding of the term 'access to justice'. Like other companion concepts in the study of law and justice, it is a term that is used without precise and clear definition. Although some of its elements are clearly protected, it is not a term that is often expressly used or defined by international human rights conventions.[16] Review of literature and policy papers on the issue of access to justice reveals that there are two approaches to the meaning of the term.

---

[12] Bedner A. & Jaquelin A.C.Vel, 'An Analytical Framework for Empirical Research on Access to Justice', *Law, Social Development & Global Development Journal (LGD)* e-journal, 2010(1), p. 20; available at: <http://www.go.warwick.ac.uk/elj/lgd/20010_1/bedner_vel>.

[13] The link between rule of law and economic prosperity is clear from the World Economic Forum's Global Competitiveness Index which uses elements of rule of law as part of the requirements for global economic competitiveness. World Economic Forum, *Global Competitiveness Report 2008-2009*, World Economic Forum, Geneva, 2008, p. 4.

[14] Domingo, P., *Why the Rule of Law Matters for Development*?, Overseas Development Institute (ODI), London, 2009, p. 131.

[15] Davis W. & Turku, H., 'Access to Justice and Alternative Disputes Resolution', *Journal of Dispute Resolution*, Vol.47, no. 1, 2011, P. 49.

[16] Note, however, that recent international instruments that establish principles for the administration of justice employ the term 'access to justice' explicitly and extensively. See for example, United Nations Principles and guidelines on Access to Legal Aid in Criminal Justice Systems, Resolution adopted by UN General Assembly, June 2013(Res. No. 67/187); Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, April 2005, Adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Res. No. 60/177); Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their

The first sense in which the term access to justice is used equates it with access to judicial remedies to vindicate rights recognized by law and/or resolve disputes. In many instances it is used to refer to particular procedural elements of access to justice such as access to courts, the right to fair hearing, access to legal services, adequate redress, and timely resolution of disputes. This is the narrower understanding of the concept of access to justice. Programming designed to enhance access to justice according to this conception focuses on developing means of overcoming the obstacles faced by individuals in making use of the formal justice process established to provide redress. In the past these have included legal advice and representation, the adoption of special procedures (such as class action and public interest litigation) to represent diffuse group and public interest, the simplification of procedures, and the promotion of alternatives to the formal judicial process to settle disputes.[17]

Reformers and commentators on access to justice have, however, noted the apparent inadequacies of this conception of access to justice. They called for a broader and comprehensive conception of access to justice which goes beyond formal aspects of access to legal services and justice dispensing institutions and reflects better all aspects of the justice process that guarantees not merely formal justice (equality in accessing the justice system) but substantive justice. While for a long time access to justice has been understood as access to courts and the availability of legal service, this approach is changing. This is premised on the idea that expanding access to the court will not necessarily help the poor and vulnerable if the law does not address their concerns.[18] It was also realized that courts are not necessarily the only suppliers of justice.[19]

Thus access to justice has increasingly been defined in a boarder manner than the essentially access to court approach, with the focus being more on ensuring that dispute resolution outcomes are just and equitable.[20] The broader conception of access to justice is concerned with the substantive aspect of justice: the use of the legal system as a tool to achieve overall social justice. This broader approach to access to justice is a result of a

---

Development in a Changing World, April 2010, Adopted by the Twelfth United Nation Congress on Crime Prevention and Criminal Justice (Res. No. 65/230); The Lilongwe Declaration on Access to Legal Aid in Criminal Justice System in Africa, November 2004, Adopted by participants of the Conference on 'Legal Aid in Criminal Justice'. See also Article 13 of the Convention on the Rights of Persons with Disabilities.

17 Cappelletti , M.& Garth, B., 'Access to Justice: The Newest Wave in the World Wide Movement to Make Rights Effective', *Buffalo Law Review*, Vol. 27, 1977-1978, pp. 181- 292.

18 Sinnar, S., 'Access to Justice-Topic Brief' (World Bank), available at <www.worldbank.org>. (Accessed on March 14, 2014).

19 UNDP, *Access to Justice: Practice Note*, 2004, p. 4; available at: <http://www.undp.org>. (Accessed on October 13, 2013).

20 *Id.*, p. 6.

growing international movement to re-conceptualize access to justice in a comprehensive manner based on human rights standards. It is an integral part of a human rights based approach to development theory that is normatively based on international human rights standards and operationally directed at ensuring social justice and will be discussed below(in *section 2*).[21]

1.2. The Significance of Ensuring Access to Justice

The importance of the effective realization of access to justice cannot be over emphasized. Where access to justice is not properly protected, rule of law is compromised, with the attendant negative consequences to security and development. Access to justice contributes to security and development in a number of ways.

First, the enforcement of a body of rules and rights which govern the relationship between the state and individuals, and among individuals, depends on citizens' access to and confidence in the justice system. In order to create a stable social, political and economic environment a state must be able to provide dispute resolution mechanisms to all citizens.[22] A strong justice system is necessary for the promotion and protection of social justice. If a properly functioning and responsive justice system is lacking, individuals will take the law into their own hands, thereby resulting in the loss of legitimacy of the state[23] and the breakdown of law and order. Access to justice can also help to hold governments accountable and transparent thereby preventing them from degenerating into tyrannical regimes. Thus, access to justice helps to consolidate peace and support reconciliation by creating the necessary conditions that allow people to resolve legitimate grievances which might otherwise lead even to broader social conflicts.

Second, improving, facilitating, and expanding individual and collective access to justice supports economic and social development. As the World Development Report indicates, "legal institutions play a key role in the distribution of power and rights. They also underpin the forms and function of other institutions that deliver public service and regulate market forces."[24] It is increasingly recognized that lack of effective access to justice is a major impediment to eradicate poverty.[25] The International Commission on Legal Empowerment of the Poor also identifies the link between poverty and the absence of legal

---

[21] See *supra* note 11.
[22] Davis & Turku, *supra* note 15, p. 48.
[23] *Id.*, pp. 48-49.
[24] World Bank, *World Development Report 2006: Equity and Development*, New York: Oxford University Press, 2005, p. 156.
[25] UNDP, *Programming for Justice: Access for All, supra* note *2*, p. 3.

protection for the poor.[26] Development is increasingly understood not as increase in per capita income, but "…as a process of expanding the real freedoms that people enjoy".[27] Thus development or eradication of poverty is about enhancing the capability of disadvantaged section of the society. Certain sections of the society are considered as disadvantaged because their inability to access justice remedies in existing systems increases their vulnerability to poverty, and in turn their poverty hinders them from accessing justice systems to assert their rights.[28] A justice system that is accessible for the disadvantaged segment of society helps them to enforce their rights which will further enhance their ability to have control over factors that affect their life such as security, livelihood, access to essential resources, and participation in public decision making process. This is particularly important in the context of power inequalities. An effective system for access to justice that responds to the needs of the poor, can hold governments and private actors accountable, and can address power imbalances that permit the elite to capture resources and the disempowerment of the poor.[29]

1.3. Historical Development of the Access to Justice Movement

It is interesting to note that the concept of access to justice, a core concept in functioning justice systems, has only drawn the attention of legal scholars since the mid- 20th century. Although the issue of access to justice was recognized by Roscoe Pound as early as 1906, it is only since the 1960s that worldwide movement to enhance access to justice began.[30] Since the 1960's critical legal scholars have advocated changes in national legal systems to promote and secure access to justice to make people's rights effective.[31] 1978/79 saw the publication of the research report entitled "Access to Justice – A World Report", in six books/four volumes under the general editorship of Mauro Cappelletti. The study was inspired by the need to make peoples' rights effective considering that people are the primary beneficiaries for whom law and the legal system exist. These publications, which form an important part of the access to justice movement, a phenomenon of the 1970s, served as a refreshing impetus to rethink the achievements and effectiveness of legal systems in different countries in translating rights into reality. The central concern of the access to justice

---

[26] Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, UNDP, New York, 2008, Vol. 1, p. 33.
[27] Sen, A., *Development as Freedom*, Alfred A. Knopf, New York, 1999, p.3.
[28] UNDP, Programming for Justice: Access for All, *supra* note 2, p. 4.
[29] Commission on Legal Empowerment of the Poor, *supra* note 26, pp. 31-32.
[30] Tomasic, R., 'A Review: Access to Justice', *Legal Services Bulletin*, Vol. 5, 1980, p. 100.
[31] Sinnar, S., 'The Access to Justice Movement' (Topic Briefs: legal Institutions Thematic group), Washington Online Publications, <www.worldbank.org>. (Accessed on March 14, 2014).

movement and the analysis of the issue of access to justice in the aforementioned scholarly work is considered as "evolutionary continuum linking the French Revolution, the Universal Declaration of Human Rights, and the internationalization of the human rights movement particularly during the post-war period…."[32] The conclusion reached is the need to find new ways and means of making the rights that individuals have more effective.[33]

In their classic and concluding work to the aforementioned publication Cappelletti and Garth described the three waves of reform undertaken since 1960 to promote access to justice.[34] The first wave of the reform movement identified by Cappelletti and Garth focused mainly on problems concerning legal aid for the poor. Attempts were made by states to make the system of justice more accessible to the economically disadvantaged, especially through the creation of more efficient systems of legal aid.[35] The emphasis of the first wave of the reform movement was on overcoming the economic as well as non-economic barriers to poor and disadvantaged people's access to legal advice and representation.[36]

The second wave of access to justice reform measures on access to justice aimed at representing group and public interests in litigation.[37] Reform measures were designed to address the obstacles to rights enforcement brought about as a result of changes in the structure of social relations due to the phenomenon of mass production, distribution and consumption.[38] In such situations there are possibilities for individual claims/interests to be fragmented – individuals acting alone lack the resources to take action to enforce rights. There may be individuals who have suffered small losses and therefore individual actions are not economically viable which makes judicial protection for the individual inefficient. There are also interests that at the same time belong to no one and to everyone such as environmental and minority right concerns. The reforms in the second wave thus included more liberal rules of standing in court; the creation of specialized regulatory agencies to protect diffuse interests; the recognition of class action and public interest litigation.[39]

The third wave included measures that went further than the earlier reform measures. In its approach to access to justice the third waive focused on barriers to access to justice in a more articulate and comprehensive manner, placing the emphasis on procedures, rules, and

---

[32] Economides, K., 'Reading the Waves of Access to Justice', *Bracton Law Journal*, Vol. 31, 1999, p. 66.
[33] *Ibid*.
[34] Cappelletti and Garth, *supra* note 17, pp.196 - 289.
[35] *Id.*, pp. 197- 209.
[36] Sackville, *supra* note 1, pp. 90-91.
[37] Cappelletti & Garth, *supra* note 17, p. 209.
[38] *Id.*, pp. 209 – 210.
[39] *Id.*, pp. 209 – 222.

institutions comprising the justice machinery. Unlike the previous two waves of reform, the third wave of the access to justice reform movement incorporated, in addition to measures of a procedural nature, measures that addressed substantive aspects of the justice system.[40] The noteworthy procedural reform measures included changes in court structure and the introduction of new methods of dispute resolution mechanisms within the state structure (such as small claims courts, social courts, consumer tribunals) and alternative dispute resolution mechanisms (such as mediation and arbitration) that help to resolve dispute speedily and at less cost than the courts. On the substantive side, measures were taken aimed at changing the body of law to make it up to date, clear and understandable to all.[41] It was thought that these measures would address the barriers that make the legal system inaccessible to ordinary citizens.

Parker has identified a fourth wave of access to justice reform measure that advocated the application of competition policy to the regulation of legal service provision.[42] Pursued through the 1980s and 1990s by many countries particularly in the West, the purpose of the fourth wave of the access to justice reform was to do away with restrictive and monopolistic practices in legal service market with a view to make legal service available to the consumers more cheaply and accessibly.[43]

The rights conscious approach to access to justice that evolved in the welfare state era of the 1960s and aimed at avoiding the obstacles faced by ordinary individuals in accessing the justice system faced set-backs with the ascendance of neo-liberalism in the 1980s.[44] The rise of neo-liberal doctrine emphasized the resource constraints of the state and resulted in cuts in social spending and an emphasis on efficiency and deregulation. Access to justice programs were no immune to the spending cut measures inspired by the economic rationalism of the neo-liberal state in many countries. Funding for access to justice programs, particularly legal aid, declined substantially in many countries.[45]

The call in 1997 by the UN Secretary General to all agencies of the UN to mainstream human rights into their various activities has resulted in a new wave of access to justice reform measures. Following the call of the Secretary General, UNDP adopted a human

---

40 *Id.*, p. 222.
41 *Id.*, pp. 228 – 289.
42 Parke, C., *Just Lawyers: Regulation and Access to Justice*, Oxford University Press, Oxford, 1999, p. 38.
43 *Id.*, P. 39.
44 Mattei, U., 'Access to Justice: A Renewed Global Issue?', *Electronic Journal of Comparative Law*, vol. 11.3 2007, p. 3. Available at: <http://www.ejcl.org>. (Accessed on February 2014); Sinnar, Access to Justice-Topic Brief, *supra* note 18.
45 Sackville, *supra* note 1, pp. 104-106.

rights-based approach to its development programming, including access to justice reform programs.[46] Since then there is a renewed interest among international development actors in expanding access to justice that is based on a broader conception of the idea of justice, not just justice as the mere access to dispute resolution bodies but in terms of guaranteeing that the legal system deliver legal and judicial outcomes that are just individually and to society as a whole.[47] This approach, which has human rights as its frame of reference, is part of the human rights-based approach to development.[48] It is referred to as human rights-based approach to access to justice and is increasingly gaining acceptance among international organizations and states.[49] Its essential features will be described below after a review of the literature on barriers to effective access justice.

1.4. Common Barriers to Effective Access to Justice

Thanks to the valuable socio-legal and comparative research on the issues of access to justice,[50] we now better understand the factors that hinder effective access to justice, although there are variations in the characteristics of the problems across jurisdictions.[51] Studies since the 1960s, along with the groundbreaking work of Mauro Cappelletti in 1978/79 have identified the various factors that impeded effective access to justice. These obstacles to access to justice can be categorized as operational and structural factors.[52] Barriers to access to justice are classified as operational if they relate to the efficiency and effectiveness of the administration of the justice system. Structural barriers to access to justice are problems that have their roots in the basic social organization, i.e. the underlying social, political and economic conditions/context.[53]

---

[46] Sudarshan, Avatars of Rule of Law and Development, *supr*a note 11, pp. 675.

[47] *Id.*, pp. 672-675. For the increasing tendency of adopting human rights based approach in development programming see Hamm, B., 'A Human Rights Approach to Development', *Human Rights Quarterly*, Vol. 23, 2001, p. 1011.

[48] UNDP, Programming Access to Justice for All, *supra* note 2, p. 3; Sudarshan , Avatars of Rule of Law and Development, *supra* note 11, p. 675.

[49] For instance Bangladish, India, Indonesia, Sri Lanka and the Philippines have access to justice programs that are influenced by UNDP's access to justice programs. See Sudarshan , Avatars of Rule of Law and Development, *supra* note 11, p.682.

[50] Mattei has said that a comparative study on access to justice "was well ahead of other areas in which Comparative Law was still suffering from severe Euro-American centrism." Mattei, *supra* note 44, p. 2.

[51] Galanter, M., 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change', *Law and Society Review*, Vol. 9, 1974, p. 95.

[52] Martin, A., 'Barricades or Obstacles: The Challenges of Access to Justice', in Rudolf Van Puymbrpeck (ed.), *Comparative Judicial and Legal Development: Towards an Agenda for a Just and Equitable Society in the 21st Century*, Washington, World Bank, 2001, pp. 69-85.

[53] *Ibid*.

One obstacle to ensuring access to justice is reluctance, particularly of the poor and disadvantaged, to make use of the formal justice system.[54] This attitude towards the formal justice system has various causes. Chief among these causes is the complexity and the bureaucratic nature of the formal justice system. Courts or criminal justice institutions are normally not comfortable places to be. Most people would prefer not to have anything to do with them. By and large the formal justice system is primarily anchored in the state-centered adversarial system with no effort to make it clear or comprehensible to the average litigant. It often appears that the system is made by and for the lawyers. Indeed, "for most people the experience of going to court is ordeal enough, with its adversarial culture in which challenge is merciless and the prize goes to those who shout loudest".[55] Added to this is the alien jargon of the law and arcane procedure that are difficult for the lay person to understand.[56] These factors mystify the system that is supposed to serve the people. When these factors are combined with poor service and lack of integrity, the confidence of the public in the justice system is undermined.

Living in condition of illegality is the other factor that inhibits the poor from meaningfully accessing the formal justice system.[57] The poor are exposed to living in condition of illegality (e.g., as outlaw settlers, informal economic activity in violation of the law). As such, "…they are not likely to draw attention to that fact by voluntarily seeking help from the formal justice system."[58]

Even when individuals have confidence in the justice system, there are a number of other factors that deter them from bringing their cases to the formal justice system. The first such factor is lack of awareness of rights. The fact that the law is written in unfamiliar and cumbersome language and is often scattered in different pieces of legislation makes the law inaccessible to the poor and uneducated. It is said that in most developing countries because of outdated and poor quality official legal publications, knowledge of the law largely depends on personal contact and proximity to the large cities, even for judges and lawyers.[59] In such situations it is unrealistic to expect the ordinary men and women to know their legal rights and defend themselves in court of law.

---

[54] Anderson, M., 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs', Paper for Discussion at World Development Report Meeting, 1999, p. 20. Available at: <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/DfiD-Project-Papers/anderson.pdf>. (Accessed on October 25, 2013).

[55] Hayes, M., 'Access to Justice', *Studies: An Irish Quarterly Review*, Vol. 99, no. 393, 2010, p. 29.

[56] Rhode, D., *Access to Justice*, 2004, Oxford University Press: Oxford, New York, p. 14.

[57] Anderson, *supra* note 54, p. 20

[58] *Ibid.*

[59] *Id.*, p. 21.

Another hurdle that makes it difficult for citizens to have their day in court is the lack of legal representation. Even those who know their basic rights and duties are unlikely to be able to navigate the judicial system. They need advice to explain the steps necessary to file law suits and defend their interests in court (in case of litigation). As the pattern of life has become more complex and interdependent, the need for legal regulation of an increasing aspect of life has become greater.[60] Everyday life is increasingly affected by laws. As law becomes increasingly complex, access to legal services becomes increasingly important. Without access to legal services, the ordinary man will not be able to sort out his rights from the continually swelling law books. Litigants without lawyers face complex procedures that they cannot understand. To make matters even worse some jurisdictions prohibit *pro se* litigation.[61] Yet lawyers are often in short supply and their services are financially and physically inaccessible to the poor and to those who live in rural areas. The legal profession, the organized bar in particular, is accused of resisting reforms to ensure more access to legal services or self-representation, just to ensure their members' business at the expense of effective access to justice for the many.[62] One observer has noted that "the daily experience of lawyers and their proximity to 'justice' may have perhaps blinded them to the plight of many to access to legal services and justice".[63] The problem is further exacerbated by the poor functionality of state funded legal aid schemes that may exist in some countries, usually restricted to criminal cases.[64]

Another major barrier that prevents individuals from taking their claims to courts is the high cost of litigation, which includes attorney and court fees and costs assessed against the losing party.[65] Such costs are usually unaffordable, particularly for the many in developing countries who struggle to make a living.

Undue delay of proceedings also affects access to justice. According to the European Court of Human Rights, access to justice can be rendered illusory when disputes are not resolved in a timely manner.[66] Unfortunately, in most countries, particularly in the

---

60 Rhode, *supra* note 56, p. 8.
61 Anderson, *supra* note 54, p. 21.
62 *Ibid.*; Rhode, *supra* note 54, p. 14-15; Hammergen, L., 'Access to Justice: Reflections on the Concept, the Theory and its Application to Latin America's Judicial Reforms', p. 4, available at: <http://www.realinstitutoelcano.org/analisis/535/ARI-109-2004-I.pdf>. (Accessed on October 23, 2013).
63 Economides, *supra* note 32, p. 67.
64 Rhode, *supra* note 56, pp. 10-11;
65 Cappelletti and Garth, *supra* note 17, pp. 186 –190.
66 *Darnell v. United Kingdom* (1994) 18 E.H.R.R., p. 205; *Robin v. United Kingdom* (1998) 26 E.H.R.R., p. 572; *Scudery v. Italy* (1995) 19 E.H.R.R., p. 187.

developing world, court proceedings are very slow[67] which serves as a disincentive for people to bring their cases to court. Delays in legal proceedings have the effect of keeping litigants in a protracted state of doubt that may be considered equal to denial of justice.[68] Justice delayed may indeed be justice denied.

Another barrier to effective access to justice by the poor and disadvantaged is the absence of pertinent laws favorable to the disenfranchised.[69] Many laws dating from colonial and authoritarian periods are designed to protect property, concentrate power in the hands of the ruling elite, and to manage social unrest.[70] Narrow rules of standing that restrict the ability to pursue a claim; unduly restrictive statutes of limitation; laws requiring excessive court fees to be paid upfront to lodge a claim; are some of the practices and rules that militate against the poor and disadvantaged.[71]

The marginal place that legal systems accord to informal dispute resolution mechanisms is another factor that accounts for the denial of effective access to justice for those on the economic and social margin. It goes without saying that providing justice as a public good is the responsibility of the state since time immemorial. But this responsibility does not necessarily require that all justice be dispensed through the formal state justice apparatus. In fact, courts are not the primary means by which people meet their justice needs. Informal dispute resolution mechanisms form a key part of individual and community justice experience. This is apparent from the fact that in some countries 80% of disputes are resolved through informal justice mechanism.[72] Galanter has noted that the importance of the formal justice system as a means of justice dispensation has been overrated.[73] Informal dispute settlement mechanisms are more accessible to poor and disadvantaged people and provide a speedy and relatively inexpensive justice in accordance with locally accepted notions of justice.[74] Despite the important role of informal justice mechanism in addressing the justice needs of communities, they do not feature in justice reform programs to strengthen their

---

67 Anderson, *supra* note 54, p. 22.

68 Edel, F., *The Length of Civil and Criminal Proceedings in the Case Law of the European court of Human Rights*, Council of Europe Publishing, Strasburg, 2007.

69 Anderson, *supra* note 54, p. 15.

70 *Id*., p. 16.

71 *Ibid*.; Mcbride, J., 'Access to Justice and Human Rights Treaties', *Civil Justice Quarterly*, 1998, pp. 2-15.

72 Wojkowska, Ewa, *How Informal Justice Systems Contribute*, Oslo, United Nations Development Program, Oslo Governance Center, 2006.

73 Galanter, M., 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law', *Journal of Legal Pluralism*, Vol. 19, 1981, p. 1- 48.

74 UNDP, *Access to Justice: Practice Note*, *supr*a note 19, p. 4.

integrity to effectively meet the justice needs of all.[75] Thus, many, particularly the poor and marginalized, continue to make use of various informal disputes settlement mechanisms and do not necessarily get justice as the informal disputes settlement systems are not updated to uphold human rights and rule of law principles.

2. Human Rights-Based Approach to Access to Justice

2.1. The Essence of Human Rights-Based Approach

The human rights-based approach to access to justice is part of the human rights based approach to development theory that uses human rights norms as a guiding principle in development planning and practice. The human rights-based approach to development is concerned both with the process as well as the outcomes of development initiatives. It puts human rights standards at the center of the development process and uses them as a measure to assess the process as well as the outcome of development work. The human rights-based approach to development is a conceptual framework for the process of human development that is normatively based on, and operationally directed to, the development of capacities to realize human rights.[76] It uses the norms, principles and standards deriving from the Universal Declaration of Human Rights and other international human rights instruments "as the scaffolding of development policy" and practice.[77]

The human rights-based approach to development requires that all development programming should facilitate the realization of human rights, not just incidentally but as a matter of purpose having the fulfillment of human rights in view.[78] Human rights principles contained in the various international human rights instruments should guide development policies and activities. The key human rights principles in this regard are: universality and inalienability; indivisibility; interdependence and inter-relatedness; equality and non-discrimination; participation and inclusion; and accountability.[79]

The re-conceptualization of development in terms of human rights norms brings added values to development efforts which were missing in traditional development approaches.

---

[75] *Ibid.*; Fombad, C., 'The Context of Justice in Africa: Emerging Trends and Prospects' in *Rethinking the Role of Law and Justice in Africa's Development*, UNDP: Addis Ababa, June 2013, pp. 14-15.

[76] UNDP, Programming for Justice: Access for All, *supra* note 2, p. 3.

[77] Overseas Development Institute (ODI), 'What Can We Do with A Rights-Based Approach to Development?', *ODI Briefing Papers*, London, 1999, p.1.

[78] 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies', Common Understanding Adopted at the Interagency Workshop on a Human Rights based Approach in the context of UN reform 3-5 May, 2003.

[79] Van Weerelt, P., A Human Rights-Based Approach to Development Programming in UNDP- Adding the Missing Link, 2001, pp. 6-8. Available at: <http://www.handicap-international.fr>. (Accessed on January 16, 2014).

The rights-based approach to development is based on a framework of rights and obligations.[80] In a human rights-based approach, human rights determine the relationship between individual and groups with valid claims (right-holders) and states with correlative obligations (duty-bearers). The legal and normative character of rights enables and empowers individuals to claim their rights. Thus, what were previously seen as 'needs' are translated into 'rightful claims' to be demanded from the duty-bearer.[81] The human rights-based approach "describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals, empowers people to demand justice as a right, not as a charity…."[82] Here lies one of the important distinction between a rights-based approach and the traditional 'needs based approach' to development. Central to the rights-based approach is that human beings have inalienable rights. And "[a] right is something to which a person is entitled solely by virtue of being a person [without the need to be grateful to others]… and entails obligation on the part of the government. A need on the other hand is an aspiration that might be legitimate, but it is not necessarily associated with an obligation on the part of the government [and as such its enforcement cannot be demanded]."[83]

A related advantage of rights-based approach is it focuses on raising the level of accountability and transparency in the development process by identifying the obligations of duty-bearers towards claim-holders.[84] A rights-based approach also provides for the development of adequate laws, policies, institutions and procedures for redress and accountability that can ensure the realization of entitlements and respond to the violation of rights.[85] Accountability is the key to improve efficiency and transparency of actions; facilitating monitoring of programming and inducing duty-bearers to act.[86]

The other important feature of the rights based-approach to development is that it requires an all-inclusive participation of the claim-holders in the development process in an

---

80 *Ibid*.

81 International Human Rights Internship Program and Asia Forum for Human Rights and Development, *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource*, Washington D.C., IHRIP, 2000.

82 UNDP, *Integrating Human Rights with Sustainable Development*, UNDP, New York, 1998, paras. 173-174.

83 IHRIP, *Circle of Rights: Economic, Social and Cultural Rights Activism*, *supra* note 81.

84 Van Weerelt, Patrick, A Human Rights-Based Approach to Development Programming in UNDP, *supra* note 79, p. 2.

85 UN Office of the High Commissioner for Human Rights, 'What is a Rights Based Approach to Development?' in *Human Rights in Development*, Geneva, 2005.

86 Van Weerelt, Patrick, *The Application of A Human Rights Based Approach to Development Programming: What is the Added Value?*, UNDP, New York, 2000, p. 9.

active, free, and meaningful way.[87] Participation has been found to bring many advantages to the development process: using indigenous knowledge; identification of local needs; raising efficiency of resource allocation; and creating a sense of ownership of development process thereby guaranteeing sustainability of the development endeavor.[88]

2.2. The Nature and Elements of a Human Rights-Based Approach to Access to Justice

A human rights-based approach to access to justice is part of the human rights-based approach to development process. Thus in a human rights-based programming to access to justice human rights standards serve as a qualitative parameter for both the type of justice outcomes and the process undertaken to reach such outcomes.

Although direct reference to access to justice is rare, a number of international instruments establish principles and standards for the administration of justice. The human rights instruments that stipulate guarantee of access to justice are the International Covenant on Civil and Political Rights; the Convention on the Elimination of All forms of Discrimination; the Convention on the Elimination of Discrimination against Women; the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities. Of all these instruments, it is only the Convention on the Rights of Persons with Disabilities that has a provision specifically referring to the concept of access to justice.[89] However, apart from providing the specific obligation to promote training and to provide procedural and age-appropriate accommodations, this provision does not indicate the substantive contents of effective access to justice. The content of the right to effective access to justice is to be ascertained through the interpretation and application of a wide range of other provisions in human rights treaties and such soft instruments as the United Nations

---

[87] Van Weerelt, Patrick, A Human Rights-Based Approach to Development Programming in UNDP, *supra* note 79, p. 7.

[88] Marry Robinson as UN High Commissioner for Human Rights, UN Office of the High Commissioner for Human Rights, *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies*, OHCHR, Geneva, 2002, p. 15.

[89] Article 13 of the convention specifically refers to the concept of access to justice, stipulating that:-

1. States Parties shall ensure effective access to justice for persons with disabilities on equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigation and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the Lilongwe Declaration on Access to Legal Aid in the Criminal Justice System in Africa.

Although the term 'access to justice' is not expressly mentioned in other human rights treaties,[90] a guarantee of access to justice arises primarily by virtue of provisions guaranteeing the right to a fair hearing,[91] equality before the law,[92] the right to liberty and security of the person and in particular the right to challenge the legality of detention,[93] and the right to effective remedy.[94] Moreover, the right to effective access to justice is considered as effective element of economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights.[95] Thus, apart from indications of some elements of access to justice none of the international human rights treaties provide definition of, or an indication of the scope of the concept of access to justice. Its meaning and essence is to be understood through an examination of the *raison d'être* of the body of international human rights norms and the specific content of the various international human rights treaties.

There exists a strong logical basis for fusing the issue of a broader notion of access to justice with the human rights normative framework. The purpose of adoption of human rights norms at the international level and their ratification by nation states is to protect the dignity and worth of the person and to advance social progress and better standards of life. The realization of this grand objective has to be in the most practical and meaningful way. States that have assumed human rights obligations under international law have the obligation to respect, protect, and fulfill human rights. Obviously this includes the provision of justice remedies. The justice mechanism that is to be devised should not be limited only to providing judicial remedies for violations of specific human rights, but should be conceived in terms of giving effect to the underlying rationale of the human rights norms- the protection of human

---

[90] See *supra* note 16 and accompanying text for the current increasing trend in use of the term 'access to justice' in declarations and guidelines adopted under the auspice of UN.

[91] Article 14 of the International Covenant on Civil and Political Rights; Articles 12 and 40 of the Convention on the Rights of the Child; Article 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination; Article 15(2) of the Convention on the Elimination of All forms of Discrimination Against Women; and Article 13 of the Convention on the Rights of Persons with Disabilities.

[92] Articles 7, 8, and 10 of the Universal Declaration of Human Rights; and Articles 14(1) and 26 of the Convention on Civil and Political Rights.

[93] Articles 9 and 4 of the International Covenant on Civil and Political Rights; Article 37(d) of the Convention on the Rights of the Child; Article 5(b) of the Convention on the Elimination of All Forms of Racial Discrimination; and Articles 12(4) and 14 of the Convention on the Rights of Persons with Disabilities.

[94] Article 3 of the International Covenant on Civil and Political Rights; Article 5(b) of the Convention on the Elimination of All Forms of Racial Discrimination; and Articles 12 - 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[95] Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties' Obligations', E/1991/23, 14 December 1990, para. 5.

dignity. This requires that the justice system to be devised should be one that facilitates the realization of overall justice.

Justice, however it is defined, is about fairness. And human rights standards serve as parameters of fairness in three dimensions of justice: normative, procedural, and structural. The normative aspect requires that the substantive set of rules protect the needs and concerns of all sections of the society, in particular the poor and vulnerable. The procedural dimension requires that disputes be adjudicated by independent and impartial bodies in a transparent and fair process. The structural aspect of justice requires effective public participation in and accountability of the justice system: the justice system should not directly or indirectly reinforce existing discrimination or marginalization of disadvantaged groups such as women, minorities, persons with disability, and children.

Based on this understanding, UNDP has issued the leading and path-breaking international policy document on access to justice. The policy document defines access to justice as "the ability of people to seek and obtain a remedy through formal and informal institutions of justice, and in conformity with human rights standards."[96] This definition, which is consistent with a human rights-based approach, distinguishes the demand and supply side of the justice process and emphasizes that the justice obtained should be respectful of human rights standards. This definition adopts a broader approach to incorporate a process, including both formal and informal systems, which ensure that the poor, disadvantaged, and marginalized population gain knowledge, understanding, confidence, and the physical access to appropriate and effective means of meeting their justice needs and furthering their rights. Thus, access to justice is much more than guaranteeing individual access to courts or to legal services.[97] It is about ensuring that the entire system is just and equitable for all.[98] The UNDP policy document clearly indicates that effective access to justice involves addressing issues relating to normative legal protection, particularly of the disadvantaged and vulnerable; awareness of rights among the public; access to legal services; access to adjudicating bodies; effective enforcement of adjudication outcomes; and civil society involvement in and parliamentary oversight of the justice system. If justice has to be served in a real and practical way that is meaningful to the disadvantaged as human rights principles would require, then these prescriptions form the perfect recipe. These are generally regarded as fundamental elements for effective access to justice and will be dealt in detail in the following pages.

---

[96] UNDP, Programming for Justice: Access for All, *supr*a note 2, p. 5.
[97] UNDP, Access to Justice: Practice Note, *supr*a note 19, p. 6.
[98] *Ibid.*

1. Legal Protection

A fair and comprehensive legal framework is essential to ensure access to justice as it has the capacity to protect and defend the interest of the disadvantaged and vulnerable. The legal framework refers to the set of legal rules that define rights and duties, and layout the channel for asserting rights.[99] It consists of both formal and informal sets of rules. Formal rules are those made by the designated law making body, be it national or international in origin, and consists of international treaties and other set of norms; constitutions; national legislation; regulations and court decisions. Informal norms are set of rules that are developed and applied in a given community outside of the state apparatus to regulate social interactions.[100] So long as such customary or traditional norms do not contradict with human rights standards and basic notions of justice, allowing customary norms to apply alongside formal set of rules is "a way to improve the quality of governance and to democratize both the form and content of legal regulation."[101] It is also a way of giving effect to the social and cultural rights of communities.[102]

A human rights-based approach to access to justice requires that the legal framework be reflective of human rights standards.[103] It should give the poor and marginalized a voice and power to improve their condition. Laws that discriminate the poor, and are insensitive to the needs of the marginalized and disadvantaged sections of society need to be identified and revised accordingly.[104] Overall, the normative framework that is necessary to usher a system of effective access to justice is that which sets progressive set of rules in conformity with internationally agreed human rights standards, inclusive of disadvantaged groups' concerns and set standards for scrutiny and accountability of government conduct.[105] This normally requires review of the existing normative framework, both formal and informal, to see if there are gaps and biases in protecting the needs of the disadvantaged, enhance the capacity of law making organs; increase the participation of the community in policy making and the

---

[99] UNDP, Programming for Justice: Access for All, *supra* note 2, pp. 38- 52.

[100] *Ibid*.

[101] Faundez, J., 2001, 'Legal Reform in Developing and Transition Countries: Making Haste Slowly', in Rudolf Van Puymbroeck (ed.), *Comparative Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century*, Washington, World Bank, 2001, p. 376.

[102] Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, states the following:-

> 5. States Parties should pursue national strategies the objective of which includes the following… (e) To ensure respect for, and recognition of the traditional systems of justice of the indigenous peoples, in conformity with international human rights law.

[103] UNDP, Programming for Justice: Access for All, *supra* note 2, p. 39.

[104] *Ibid*.

[105] *Id.*, pp. 39-40.

legislative process; and ensure that administrative regulations and other subsidiary legislation do not contradict rights in primary legislation and human rights instruments.[106]

2. Legal Awareness

The provision in the law books of the perfect set of rules that address the concerns and needs of all sections of the society is not the end of the matter to ensure social and individual justice. Eloquently written rights, particularly those in favor of the poor and disadvantaged, may be subverted by powerful interests and not yield the intended results. Other measures are required to address injustices that may result despite the existence of the desired set of rules to address the needs of the socio-economically unprivileged.

Creating awareness of legal rights and the avenues for redressing them is a critical element of the fight against injustice.[107] Enforcement of rights depends on awareness of the existence of rights and knowledge of the means for enforcing them. Lack of knowledge of the content of the law represents a practical obstacle, in particular for the poor and underprivileged. Poor and disadvantaged groups often fail to make use of their rights simply because they may not be aware of them.

Individuals need to be educated about their rights and duties under the legal framework, and how to obtain remedies to their problems using the formal or informal justice systems. Publication of laws in the official legal gazette is not an effective means of informing the public about the content of the laws. Largely illiterate populations, particularly in the developing world, and that traditionally laws are drafted in a convoluted and technical language means, the mere publication of laws in the official gazette is not a feasible way of transmitting information about rights and duties to the public. Even the publication in the official gazette of laws is made in one or two languages only, in countries where many languages are used. In countries where the culture of access to information is not well developed there may also be reluctance of government officials to share legal texts with the public.

Different mechanisms have to be used to create public awareness of legal rights and duties. Chief among these are popular legal literacy campaigns, a method that ensures that sufficient and relevant information reaches the community at the grassroots level in a form that can be understood. The mass media is useful in this regard. Popular legal literacy methods include radio/television shows, legal information flyers, legal information centers,

---

[106] *Id.*, pp. 54-58.
[107] UNDP, Access to Justice: Practice Note, *supra* note 19, p. 12.

and legal texts and resources on the internet. Legal literacy programs will be successful if they focus on issues affecting the day-to-day life of the community.[108] Piece meal and unpredictable patterns in legal literacy campaigns have to be avoided and they have to be sustained and large scale in order to yield desired results. Although it is the responsibility of the government to create legal awareness of rights, national human rights institutions, civil society, and the media play important role in creating legal awareness.

The use of plain language in legal drafting and the issuance of standard-form documents for common legal transactions may also increase the ability of the people to use the justice system and enforce their rights.[109] Training of government officials to sensitize them to the need to disseminate legal information, the use of information communication technology, and the involvement of paralegals in community legal literacy programs can increase the accessibility and utility of legal information to the public.[110]

3. Access to Legal Services

Even if people know their legal rights and duties and the process for redress, it is unlikely that individuals will be able to navigate the judicial process on their own. As legal systems are complex to navigate, people seeking to enforce their rights need the assistance of persons trained in law to make informed decisions and choice in asserting their rights. They need advice to explain the steps necessary to file a claim and to protect their interest in the litigation stage and even to enforce a favorable judgment. Without that service accessing courts is meaningless and tantamount to a denial of justice. Yet, it is a common fact that availability and affordability of legal services continue to be the major obstacles faced by the poor and disadvantaged.

Lawyers, who have the professional monopoly are often limited in number and are often located in urban centers where there is good opportunity to do business. Even when they are physically accessible, the fees they charge are unaffordable for the poor and disadvantaged. Thus, relying on the bar as it currently functions to ensure accessibility of legal service is unreliable means of providing access to legal service. Even when professional tradition or legal requirements require lawyers to render service for free or at a reduced fee, such services are still largely unavailable to the poor or to those in rural areas.

---

[108] Maru, V., Access to Justice and Legal Empowerment: A Review of World Bank Practice, *Justice and Development Working Paper Series*, 2009.
[109] Commission on Legal Empowerment of the Poor, *supra* note 26, p. 88.
[110] UNDP, Programming for Justice: Access for All, *supra* note 2, pp. 141-142.

Where individuals are unable to afford legal advice and representation, alternative mechanisms should be provided to enable them obtain legal service free of charge or at a reduced fee. As a matter of principle it is the responsibility of government to provide legal services to those who cannot afford the service of private lawyers. For this reason government funded legal aid schemes exist in a number of countries. Such schemes, however, tend to be limited only to criminal cases, unsustainable, and underfunded, meeting only some of the demand.[111] The United Nations Principles and Guidelines on Access to Legal Aid in criminal Justice Systems provides that states adopt different models such as public defenders, private lawyers, contract lawyers, *pro bono* schemas, bar associations, and paralegals to make legal service accessible for the indigent defendant.[112]

There are a range of other mechanisms for providing legal service for the poor outside of the state-funded legal aid schemes. Community based paralegals, law school legal clinics, and legal aid NGOs are important source of legal service. It is necessary, however, to address the issue of accessibility and sustainability and lack of coordination among the service providers which are often cited as shortcomings of such types of schemes.[113] Devising support system for *pro se* litigants is another mechanism to address the inaccessibility of the service of lawyers.

4. Access to Justice Institutions

The term 'justice institutions' refers to the broad spectrum of public fora that are used to adjudicate dispute and dispense justice. It includes justice dispensing entities that function under the auspice of the state (referred to as the formal justice system), informal disputes settlement mechanisms that are recognized by the state, and traditional or religious dispute settlement mechanisms that operate with/without sanction of the state.[114] The formal justice system is represented by the courts, quasi-judicial bodies and tribunals such as human rights commissions, ombudsman institution, labour relations boards, and tax appeal tribunals that are established by the state and have lawful authority to adjudicate disputes and render justice remedies.

---

[111] See Rhudy, R., 'Expanding Access to Justice: Legal Aid Models for Latin America', in Bibosheimer and Meija (eds.) *Beyond Our Borders: Judicial Reform for Latin America and the Caribbean*, Inter-American Development Bank, 2000.

[112] UN Principles and Guidelines on Access to Legal Aid in criminal Justice Systems, *supra* note 16, p.7.

[113] UNDP, Programming for Justice: Access for All, *supra* note 2, p. 141.

[114] *Id.*, pp. 71- 100.

It is well recognized that "[a] strong and impartial judiciary is a corner stone of access to justice."[115] There are, however, a number of problems in practice, particularly in most developing countries, that make the judiciary inept in rendering justice that is fair, predictable, and effective. It may be that the judiciary may not have the human resources, that the quality of personnel is poor, or that the system is overloaded with cases. The judicial system may also lack integrity, accountability, and independence. The accessibility and utility of the courts may also be hindered by geographical, economic, linguistic and cultural barriers that justice seekers face in accessing the court.[116] In most cases the same holds true to quasi-judicial bodies and tribunals. Ensuring access to justice requires addressing these problems that thwart the formal justice system from fulfilling its critical function in delivering justice.

Various forms of informal justice systems also provide alternative low-cost and accessible justice. Broadly speaking, informal justice system refers to the process of resolving disputes outside the state-centered justice system. These mechanisms range from those more structured informal dispute resolution mechanisms that are recognized by the state such as arbitration, mediation, and conciliation to those that are more traditional and outside of the state structure such as clan chiefs, village elders and religious fathers.[117] Given that informal and traditional justice mechanisms are more accessible to the disadvantaged and vulnerable and have potential to provide speedy, affordable and culturally acceptable justice, recognizing the importance of informal and traditional justice mechanisms is essential to create a sustainable system that ensure equal access to justice for all.[118]

Informal justice mechanisms, however, have their own limitations and are not always just and fair in the justice they deliver. Research has shown that informal justice mechanisms tend to discriminate against the disadvantaged and vulnerable; entrench unequal power relations and result in elite capture of the system.[119] Moreover, the procedures they follow and decisions they make sometimes conflict with human rights principles; are unsuitable for certain disputes that are important for security or economic development reasons, and lack effective enforcement mechanisms.[120] Harnessing the potential of informal justice mechanisms to ensure sustainable access to justice for all requires addressing these shortcomings. Creating regulatory mechanisms for informal justice mechanisms, integrating

---

[115] UNDP, Access to Justice: Practice Note, *supra* note 19, p. 16.
[116] UNDP, Programming for Justice: Access for All, *supra* note 2, pp. 72-89.
[117] *Id.*, p.97.
[118] UNDP, Access to Justice: Practice Note, *supra* note 19, p. 4.
[119] Wojkowska, *How Informal Justice Systems Contribute*, *supra* note 72, pp. 20-23.
[120] *Ibid*.

informal justice mechanisms with the formal justice system, and providing training on human rights standards for actors in the informal justice system are some of the measures that need to be taken to enhance the role of informal justice systems to serve as effective alternative fora for accessing justice.[121]

5. Effective Enforcement of Decisions

Access to justice is not complete until a decision given by a justice institution is enforced. A favorable judgment that is not properly enforced is of no use. The existence of effective enforcement systems is essential to create a sense of security, particularly for the disadvantaged and vulnerable.

A persistent problem, in many instances, is that decisions and judicial orders handed down by formal and informal justice systems are not properly enforced.[122] Corruption, lack of professionalism and sense of public service on the part of police, prison and judgment execution officers in many instances contribute to poor performance in enforcement of remedies obtained from justice institutions.[123] Sometimes law enforcement officials may even engage in misuse of power to intimidate and harass the very people they are obligated to serve. This highlights the need to establish a clear legal structure and accountability systems to enhance effective enforcement of judgments that gives security for all section of society including the poor and disadvantaged.

6. Monitoring and Oversight of Justice Sector Institutions

Public oversight and monitoring of formal and informal justice systems is essential to ensure that they are providing proper justice to all people, especially for those who are vulnerable and disadvantaged. Oversight and monitoring can serve to ensure that justice sector institutions are held accountable for their activities and empower the people so that they demand from the justice institutions the remedies they need. The known bodies that can exercise this power are parliament, national human rights institutions, such as human rights commissions, ombudsman institution, and civil society organizations.[124] Therefore, enhancing the functioning of justice institutions requires strengthening the legal as well as resource capacity of such institutions to undertake effective oversight of the activity of justice institutions.

---

[121] UNDP, Programming for Justice: Access for All, *supra* note 2, pp. 103-105.
[122] Alffram, H., *Equal Access to Justice: A Mapping Experience*, Sida, 2011, p. 23.
[123] *Ibid*.
[124] UNDP, Programming for Justice: Access for All, *supra* note 2, p. 109

3. Call for a Broader Approach to Access to Justice in Ethiopia

A primary document to look at for any guidance on a theory of access to justice in Ethiopia is the Constitution of the Federal Democratic Republic of Ethiopia. Concerning the right to access to justice Article 37 of the Constitution stipulates the following:

> Right of Access to Justice
>
> 1. Everyone has the right to bring justiceable matter to, and to obtain a decision or judgment, from a court of law or any other competent body with judicial power.
> 2. The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:
>
> (a) Any association representing the Collective or individual interest of its members; or
>
> (b) Any group or person who is a member of, or represents a group with similar interests.

According to this provision, it is clear that access to justice is couched in its narrower and formal sense, as the right to bring a justiceable matter to judicial or quasi-judicial bodies and obtain remedies. Other aspects of effective access to justice outlined above are not addressed in this provision of the Constitution. The good thing is that, although Article 37 of the Constitution is the provision that is expressly dedicated to providing the right of access to justice, it is not the only provision in the Constitution that is relevant to the issue.

Indeed, a closer look at the letter and spirit of the Constitution reveals that the Constitution supports a broader and more substantive approach to access to justice. The Constitution has as its objective the establishment of political society founded on the rule of law.[125] It contains elaborate provisions regarding human rights. In addition to this, the Constitution incorporates all international human rights agreements into the law of the land[126] and stipulates that the human rights provisions of the Constitution be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, international covenants on human rights and international instruments adopted by Ethiopia.[127] All these add up to ensure the potential applicability of the whole gamut of international human rights in Ethiopia. The significance of this from access to justice perspective is that, as indicated above, the very recognition of human rights standards entails ensuring effective access to justice, because without effective access to justice their recognition is meaningless. Their recognition entails the guarantee of effective access to justice with its requisite elements

---

[125] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. no. 1/1995, *Fed. Neg. Gaz*., Year 1, no. 1, preamble.
[126] *Id.*, Art. 9(4).
[127] *Id.*, Art. 13(2).

explained above. Also, as indicated in the preceding pages, human rights standards serve as parameters of justice.

Apart from the general gist of the Constitution, there are specific provisions in it that support a broader, more substantive approach to access to justice. In this regard, the Constitutional provision for the extension of protection for the poor and vulnerable is relevant.[128] So too are the recognition of the need for the regulation of customary and religious forms of disputes settlement,[129] the stipulation that the basic aim of development activities (which obviously should include activities in the legal and justice sector) is to enhance the capacity of citizens for development,[130] the guarantee of public participation in the crafting of government policies,[131] the guarantee of fair trial,[132] the establishment of independent judiciary,[133] the right to be represented by legal counsel of one's own choice or to be provided with legal representation at the state's expense,[134] and the recognition of the right to equality before the law.[135]

All of these lead to the conclusion that the Constitution has laid the foundation for effective access to justice that goes much further than formal access to justice and guarantees substantive justice. However, a serious limitation to this stance of the Constitution that may be considered anomalous is that the Constitution has not setup effective enforcement mechanism for the guarantees that it has laid down. In the absence of effective enforcement mechanism the rights that are provided in the Constitution are rendered non-sensical.[136]

Turning to the realm of state policies and programs for the justice sector, the first document that should be noted is the Implementation Capacity Building Strategies and Programs document of the Government of Ethiopia.[137] This document provides, among other things, strategic direction regarding the reform of the system for the administration of justice. Dubbed as the Justice Administration System Reform Program, it explicitly states two purposes that the justice system should pursue and achieve. These are: promoting democratic

---

[128] *Id.*, Arts. 35, 36, and 41(5).
[129] *Id.*, Article 34(5) recognizes the use of customary and religious forms of dispute resolution for family and personal matters.
[130] *Id.*, Art. 43(4).
[131] *Id.*, Art. 43(2).
[132] *Id.*, Art. 20.
[133] *Id.*, Art. 78.
[134] *Id.*, Art. 20(5).
[135] *Id.*, Art. 25.
[136] see Adem K., 'A Constitution without a Guardian: Is the Ethiopian Constitution really Supreme?', *Ethiopian Human Rights Law Series,* Vol. 5, 2013, p.9-35.
[137] *የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ መንግስት የማስፈጸም አቅም ግንባታ ሰትራተጂ እና ፕሮግራሞች፤ የማስታወቂያ ሚኒሰቴር፣* አዲስ አበባ፤ 1994 (Implementation Capacity Building Strategy and Programs of the Government of Federal Democratic Republic of Ethiopia, Ministry of Information, Addis Ababa, 2002).

governance and enhancing the efficiency of economic activities thereby speeding up economic development.[138] This, according to the document, requires not only that laws that take these objectives into account be promulgated but also ensuring that the interpretation and application of same is in conformity with those objectives.[139] The policy document also states that, in addition to having the necessary comprehensive legal framework, a fair and efficient judicial system is key component of the justice sector reform program.[140]

However, nowhere in this document the issue of access to justice, be it in the formal sense of guarantee of access to courts or in its substantive sense is addressed. It may be contended that the proposed program measure to create a fair and efficient judicial system addresses this concern. But, as explained earlier in this chapter, fair and efficient judicial system is just one requirement to create a system that ensures effective access to justice. The issue of effective access to justice lacks a well thought-out plan in the grand document that sets out the strategies and programs to reform the justice sector. Access to justice is not a trivial issue not to deserve a place in such kind of strategic documents.

The FDRE Criminal Justice Policy adopted in March 2011[141] is not also oriented in line with the requirements of a human rights-based approach programming to access to justice. Conspicuous in this regard is the absence of reference, despite the policy document being detailed, to the need to raise the legal awareness of the public and the issue of accessibility of legal service to those who come in contact with the criminal justice system. There is only reference to the right of accused and arrested persons to be represented by advocate of their own choosing and establishing independent and well organized public defense office to represent those who cannot afford to hire their own lawyer if miscarriage of justice would result should they not have representation.[142] Certainly this is a clear gap. The criminal justice process will not be fair and will not achieve its objective if the public is not made aware of condemned behaviors and rights of persons in contact with the criminal justice process.

Availability of effective legal service for the suspect, not only during the trial stage but also in the pre- and post-trial stages, is important. It is regrettable that policy directions regarding public legal awareness creation and alternative ways for provision of legal service are not included into the policy document. Of course the policy document provides for the

---

[138] *Id.*, pp. 283 – 294.
[139] *Id.*, pp. 283 - 285.
[140] *Id.*, p. 286.
[141] Criminal Justice Policy of The Federal Democratic Republic of Ethiopia, Council of Ministers, March 2011.
[142] *Id.*, P. 42.

Prosecutor General to establish a system for the provision of *pro bono* legal service by legal professionals.[143] The policy document also envisages the noble idea of representation at state expense for victims of serious crimes in their effort to claim compensation, provided that they cannot afford to hire lawyer of their own choice and if miscarriage of justice would occur should they not have representation. Strengthening and promoting the provision of legal service by civil society and university based legal aid clinics should have been mentioned in the policy document. Stipulation regarding the oversight and supervisory mechanisms for the criminal justice system is the other notable missing element in the Criminal Justice Policy.

The other relevant document regarding the issue of access to justice in Ethiopia is the Comprehensive Justice System Reform Program Baseline Study produced by the then Ministry of Capacity Building in February 2005 to guide the Comprehensive Justice System Reform Program launched in 2002. Based on analysis of the working methods and procedures of individual justice institutions and the functional linkage among them, and examination of the legal framework governing the justice sector, it outlines series of recommended measures that should be taken to revamp the justice machinery. The recommendations relate to the law making procedure, the judiciary, public prosecution, police, penitentiary system, and legal education.[144] It is commendable that the reform program document looks at the whole panoply of the justice system and is based on study of the existing conditions, although the study is limited to the supply side of justice and does not analyze the system from the demand side, i.e., justice seekers' needs. There is no doubt that understanding the types of justice needs and the causes that give rise to disputes/grievances is an invaluable input necessary to devise policies for the justice dispensing machinery.

From the access to justice point of view, although the recommended measures in the Base Line Study have far reaching implications, there are a number of issues pertaining to access to justice that are not addressed or are touched upon only tangentially. The recommended measures in the reform document do not directly address the web of issues and problems surrounding informal justice mechanisms and Social Courts. While it is a common fact that these are the institutions that provide daily justice in Ethiopia, no meaningful reform measures are recommended in a document that is meant to be the basis for comprehensive justice system reform. Ensuring the accessibility of legal services, public legal awareness raising, and the role that civil societies should play in enhancing the justice system are the

---

[143] *Ibid*.

[144] *Federal Democratic Republic of Ethiopia Comprehensive Justice System Reform Program Baseline Study Report*, Ministry of Capacity Building, Amsterdam, 2005, pp. 206 – 291.

other issues that are not properly addressed in the reform program document. That the proposed reform measures were not pursued to the end to date is the other problem.

Another document of relevance to access to justice in Ethiopia is the National Human Rights Action Plan launched in November 2013.[145] The Action Plan sets out an action plan for the implementation of the various human rights enunciated in the Constitution and international human rights instruments which Ethiopia has pledged to adhere to. One of the rights for which implementation plan is outlined is the right to access to justice. That there is an action plan for human rights implementation and the right to access to justice has earned its place in this plan is a welcome initiative. Moreover, unlike the other policy documents described above, the Action Plan takes a broader view of access to justice by putting clear emphasis on the accessibility of legal services, the creation of legal awareness and dissemination of legal information, and stepping up the role that alternative dispute resolution mechanisms play in making justice accessible. Despite the fact that the Action Plan is more comprehensive in its approach, it still lacks some of the elements of a human right-based approach to access to justice.

First, the human Rights Action Plan does not envisage, as a human the rights-based approach requires, revising laws that stand in the way of effective access to justice and enacting laws that empower the poor and marginalized. Further, the proposed action plan is not based on study of conditions on the demand and supply side of justice. Rather it is based, in large part, on an impressionistic account of access to justice needs. That this kind of approach may result in misdirecting resources and misguide reform measures is clear. The assertion that the Action Plan is not informed can be exemplified by the stipulation on alternative dispute resolution mechanisms. It states that, as part of the effort to realize the right to access to justice, alternative dispute resolution mechanisms will be put to extensive use and a law on alternative dispute resolution will be enacted and implemented.[146] As the Action Plan states, launched just in November 2013, all these will be implemented in the following two years (the Action Plan is meant to be implemented in the years 2013 – 2015). There are a number of issues that normally have to be addressed to put in place a vibrant alternative dispute resolution system that will enhance effective access to justice. The various types of alternative dispute resolution mechanisms that exist in the country have to be studied and identified. How they can be used in a human rights compliant way to ensure effective access to justice has to be further sorted out and their interface with the formal justice system

[145] Federal Democratic Republic of Ethiopia National Human Rights Action Plan, 2013-2015.
[146] *Id.*, p. 52.

has to be further studied. All these do not seem to have been taken into account in formulating the Action Plan, a testament to the assertion that the Action Plan, particularly on access to justice, is not a properly thought-out (informed) document.

Turning to the legal framework of the country, we can note some piecemeal reform measures taken by the government of Ethiopia over the past years. Notable in this regard are the enactment of revised family law that guaranteed the equality of women and the protection of their interest in marital relations and a revised criminal code, which among other things, addressed the issue of domestic violence and harmful traditional practices that in particular affect women and children. Also, the introduction of no-fault vehicle insurance system[147] helps to widen access to remedies (payment of compensation) at less cost and without the inconvenience of bringing law suit before court of law. The establishment of special tribunal to deal with consumer related claims[148] is also a welcome development to provide speedier and cheaper remedy for the consumer, although the system is invisible and public awareness of its function is low.

Without losing sight of the piecemeal reform measures taken by the government to improve access to justice, we can note that there are outstanding issues in the existing normative framework that render it unsuitable to a broader, substantive approach to access to justice. Although time and space will not allow an exhaustive analysis of active laws in light of this issue, we can mention the case of jurisdiction ouster clauses- provisions in some laws that strip of jurisdiction from the courts and vest in executive organs;[149] the absence of comprehensive set of laws that regulate informal dispute resolution systems; high cost of litigation; the absence of legal aid policy and law; lack of clear legal framework on public interest litigation; the absence of administrative procedure law that guide administrative justice; and new charities and societies law that has the effect of curbing the role that civil societies can play in facilitating access to justice for the poor and vulnerable.[150] While the establishment of Ombudsman institution and Human Rights Commission is a welcome development, there is a long way to go to ensure that these intuitions are robust, earn the trust

---

[147] Vehicle Insurance Against Third Party Risks Proclamation, 2008, Proc. No. 559/2008, *Fed. Neg. Gaz.*, 14th Year, no. 7.

[148] Trade Practices and Consumer Protection Proclamation, 2010, Proc. No. 685/2010, *Fed. Neg. Gaz.*, 16th Year no. 49.

[149] For a survey of the increasing body of ouster clauses see: Assefa F., 'Some Reflections on the Role of the Judiciary in Ethiopia'; *Ethiopian Bar Review*, Vol. 3 No. 2, 2009.

[150] On the negative effect of this new charities and societies law see: Kumlachew D. and Debebe H., *Assessment of the Impact of Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia*, Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, June, 2012.

and confidence of the public, and relevant to the need of the common people in the quest for justice.

Thus, perusal of the relevant legal and policy documents pertaining to access to justice in the Ethiopian legal system reveals that there is no coherent and comprehensive conceptual framework of access to justice. By and large, what appears from a closer examination of the pertinent documents, as shown above, is that access to justice is understood as a vague notion referring to how rights are applied and enforced in the legal system. The concept used is not comprehensive enough as access to justice is understood in a limited way as referring to access to courts and quasi-judicial remedies. Thus, it can be seen that next to the generous opening of the Constitution, there is limited development of Ethiopian policy, program and laws supporting a substantive approach to access to justice.

Conclusion

It is widely accepted that access to justice is a key to ensuring social justice by expanding people's choices and capabilities. Effective access to justice is the most basic requirement of a modern legal system that purports to give effect to, not merely proclaim, the legal rights of all. Despite its enormous significance as an instrument to achieve social justice, tackling barriers and ensuring effective access to justice continues to be a daunting task. No legal system has satisfied the quest for effective access to justice and the search for solution to the problem continues. As part of this effort, in recent years, the human rights based approach to access to justice has emerged. The human rights-based approach to access to justice that is based on the normative framework of the international human rights regime, takes a much broader view of access to justice than the traditional, essentially formal approach to access to justice. It views access to justice not just simply as access to courts or quasi-judicial organs, but takes into account all factors that have impact on effective access to justice. It views access to justice not just as an avenue for disputes settlement but as a vehicle for just and equitable outcomes of the social order. The advantage of a human rights-based approach for justice seekers is that, unlike traditional justice approaches, it empowers justice seekers, brings accountability and transparency on the supply side of justice, and is participatory.

The state of access to justice in Ethiopia is far from satisfactory. Although the adoption of the FDRE Constitution in 1995 created the foundation for a broader approach to access to justice (despite its defect on constitutional adjudication), subsequent reform measures have

been piecemeal and have not been broadly effective. It is obvious that many barriers to effective access to justice exist in today's Ethiopia: poor operational efficiency of courts and tribunals, physical inaccessibility of courts, unavailability and poor quality of legal services, lack of information about legal rights and the procedure to seek remedies, the high cost of litigation, monster jurisdiction ouster clauses that strip jurisdiction from courts and vest in administrative agencies, undue length of proceedings, the bureaucratic nature of court proceedings, and lack of clear policy and law regarding standing for diffuse and public interest litigations are some of the common barriers to effective access to justice.

There is, therefore, pressing need to take reform measures that aim at guaranteeing effective access to justice, not just in terms of guaranteeing access to formal adjudication of disputes but in terms of ensuring just and equitable outcome of the system for all. There is no reason why the concept of access to justice in Ethiopia cannot be expanded and updated to the current standard and trend in international access to justice movement. A broader perspective on access to justice is needed in Ethiopian legal system for broader socio-economic reasons. The constitutional promises should benefit everyone. The policy approach to access to justice should move beyond the current formal sense, i.e., guaranteeing equal opportunity of accessing the formal adjudication system, and incorporate substantive goal aiming at ensuring just and equitable outcomes of the justice system for all sections of the society including vulnerable and disadvantaged groups. This requires the framing of a broader notion of access to justice in light of universally agreed human rights standards and principles. The stipulations in the FDRE Constitution and the various international human rights instruments adopted by Ethiopia serve as the normative framework for a renewed and broader approach to access to justice. It is also important to bear in mind that programming for access to justice has to be supported by empirical studies of the supply-side (the condition of the justice system) and demand-side (the justice needs of the people, i.e., the causes of disputes and when and how people turn to the law) of justice so that resources will not be misdirected if reform measures are based on impressionistic account of barriers to access to justice. And, in formulating the reform measures, the frame of reference should be human rights standards as such approach empowers the justice seekers to have their say, focuses on the marginalized and disadvantaged and brings accountability and transparency in the administration of justice. Then, the justice system will be instrumental in the effort to alleviate poverty, injustice and inequality.

Access to Constitutional Justice in Ethiopia

Adem Kassie Abebe*

Abstract

The Ethiopian Constitution guarantees a robust Bill of Rights, enshrines other normative standards and establishes clear procedures to access constitutional justice. This combination creates the expectation that constitutional litigation should play a significant role in ensuring constitutionalism. In practice, however, the role of litigation in vindicating constitutional justice has been insignificant. This chapter discusses the necessary factors for ensuring access to constitutional justice. It also investigates the historical, social and political factors that have hindered access to constitutional justice. The chapter further identifies hindrances to access to justice in both the "demand" and "supply" side of the constitutional adjudication chain.

Key words: constitutional justice, constitutional adjudication, access to constitutional justice

Introduction

The current Ethiopian Constitution was adopted in 1994 and entered into force in 1995.[1] It is the fourth written constitution in modern Ethiopian history.[2] In stark departure from its predecessors, and as a reflection of the essentiality of ethnicity in the ideology of the political parties constituting the ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the Constitution establishes a federal form of government with regional states drawn primarily along ethnic lines.[3] It also establishes a parliamentary form of government with two chambers. The House of Peoples' Representatives (HPR), the Lower Chamber, is the principal federal legislative organ composed of members directly elected by the people.[4] The House of Federation (HoF), the Upper Chamber, is the organ in charge of adjudicating constitutional disputes and has some legislative functions.[5]

* LL.B, LL.M, LL.D; Post-Doctoral Fellow, University of Pretoria, Pretoria, South Africa.

[1] Federal Democratic Republic of Ethiopia Constitution, 1995, Proc. No. 1/1995, *Fed. Neg. Gaz.* No. 1, (hereinafter FDRE Constitution).

[2] The other three written constitutions are the 1931 Constitution, the 1955 Revised Constitution and the 1987 Constitution of the Peoples' Democratic Republic of Ethiopia. The fact that there were no written constitutions prior to 1931 does not imply that there were no constitutions at all. Prior to 1931, several aspects of the Monarchy, including succession, were governed by unwritten rules which may be characterized as constitutional rules.

[3] FDRE Constitution, Arts 46 and 47.

[4] FDRE Constitution, Art 54.

[5] FDRE Constitution, Articles 62(1) and 83(1). The HoF is composed of representatives of nations, nationalities and peoples (ethnic groups). Each ethnic group has at least one representative and an additional one more for every one million of the population. The regional legislative councils have the option to organize elections for the purpose of electing the members (Article 61(3)). However, as of December 2013 no regional state has ever organized elections to elect its representatives in the HoF. Although the HoF is considered as a parliamentary organ, it barely has any legislative powers. The legislative functions of the HoF relate to constitutional

The Constitution is the supreme law of the land.[6] Any law, customary practice or a decision of an organ of the state or a public official that violates the Constitution is, therefore, invalid. To ensure its supremacy, the Constitution establishes a unique system of constitutional adjudication. The institutional design for constitutional review in Ethiopia is different from the American (diffused) or European (centralized) constitutional review models common around the world.[7] The Constitution empowers the HoF to adjudicate "all constitutional disputes."[8] Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining the need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.[9] As such, although the Constitution vests all federal judicial powers in an independent federal judiciary,[10] it reserves the power of constitutional adjudication to the HoF and the Council. The role of regular courts in the constitutional adjudication process is largely limited to referring constitutional issues to the Council.[11] Under Article 62, 83 and 84 of the Constitution, whenever a constitutional issue arises in judicial proceedings, courts must stay the proceeding before them and refer the constitutional matter to the Council. If the Council rules that there is indeed a constitutional issue, it forwards its recommendations to the HoF for a final decision. If the Council rules that there is no constitutional issue involved, it refers the matter back to the court that referred the constitutional issue.

Besides dividing state power between the federal government and the states, the Constitution dedicates a third of its provisions to articulating a robust catalogue of human rights, encompassing "civil and political," "economic, social and cultural" and "group"

---

amendment and determination of civil matters to be placed under the legislative jurisdiction of the federal government . FDRE Constitution, Arts 62(5) and (8), 105(1)(c) and 105(2)(a).

[6] FDRE Constitution, Art 9(1).

[7] In the European (centralized or concentrated) constitutional review system, only a constitutional court or council is granted the first and final power of constitutional review. In countries with the American or diffused constitutional review system, all courts are allowed to invalidate laws and other government measures as unconstitutional subject to appeal to the final court. See Cappelletti, M., *Judicial Review in the Contemporary World*, the Bobbs-Merrill Co. Inc., Indianapolis, 1971; Jackson, V. and Tushnet, M., *Comparative Constitutional Law*, 2nd edition, Foundation Press, New York, 2006; Dorsen, N. *et al* (eds) *Comparative Constitutionalism: Cases and Materials*, 2nd edition, West Publishing, New York, 2010; Geck, K, 'Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices', *Cornell Law Quarterly* Vol. 51, No. 2, 1965, p. 250.

[8] FDRE Constitution, Arts 62(2) & 83(1).

[9] See FDRE Constitution, Arts 82-84. The Council is composed of eleven members including the President and Vice President of the Federal Supreme Court, six legal experts with "proven professional competence and high moral standing" appointed by the President of Ethiopia upon the recommendation of the HPR, and three others nominated by the HoF from among its members.

[10] FDRE Constitution, Art 79(1).

[11] FDRE Constitution, Art 84(2&3). See also Council of Constitutional Inquiry Establishment Proclamation, 2001, Proc. No. 250/2001, *Fed. Neg. Gaz.*, No. 40, Arts 17-23.

rights.[12] The emphasis on human rights is reflected in the fact that the Constitution conditions the success of its socio-political objectives on the full respect and protection of human rights.[13] It also declares that international instruments ratified by Ethiopia become an integral part of the law of the land.[14] The human rights provisions of the Constitution must be interpreted in line with the "principles" recognized in international human rights instruments adopted by Ethiopia.[15]

The adoption of a democratic constitution with a reasonably robust and justiciable Bill of Rights and the express vesting of the power of constitutional interpretation in the Council and the HoF create the expectation that constitutional adjudication should play an important role in fostering constitutional justice and in building and sustaining a culture of constitutionalism.[16] In addition to establishing clear procedures for seeking constitutional justice, Article 37 of the Constitution guarantees access to justice, including constitutional justice, as a fundamental right and value. The expectation on the constitutional adjudication system in Ethiopia in ensuring constitutionalism is particularly high because of the absence of separation of powers between the legislature and the executive, which is a consequence of the parliamentary system of government structure established at the federal level.[17] Constitutional adjudication is the primary, if not the sole, institutional safeguard to ensure compliance with constitutional requirements.[18] However, access to constitutional justice in Ethiopia has been a major challenge, and the constitutional adjudication system has not played much of a role in constraining government power.

---

[12] FDRE Constitution, Chapter Two. For a discussion of the human rights provisions in the Ethiopian Constitution, see Adem K., 'Human Rights in the Ethiopian Constitution: An Overview', *Journal of African and International Law*, Vol. 3, No.3 2010, p. 639; Tsegaye R., 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, Vol. 3, No.2, 2009, p.287; Girmachew A.. and Sisay Y. (eds), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects*, Addis Ababa University Press, Addis Ababa, 2009; Fasil N., *A Constitution for a Nation of Nations: The Ethiopian Prospect*, Red Sea Press, Asmara, 1997, Chapters 8 & 9.

[13] The Constitution articulates the common objective of "building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing a democratic order." It notes that "the full respect for individual and people's fundamental rights" is a foundational principle and condition-precedent for the success of this ambitious objective – FDRE Constitution, Preamble, paras 1, 2, & 5.

[14] FDRE Constitution, Art 9(4). Ethiopia has ratified several international human rights instruments including the African Charter on Human and Peoples' Rights (African Charter, ratified 15 June 1998), the International Covenant on Civil and Political Rights (ICCPR, ratified 11 June 1993), and the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified 11 June 1993).

[15] FDRE Constitution, Art 13(2).

[16] Prempeh, K, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa', *Tulane Law Review*, Vol. 80, No.4, 2006, p. 1295.

[17] FDRE Constitution, Arts 45, 55(17&18), and 56.

[18] Of course, in addition to the institutional safeguards provided by organs in the state structure (checks and balances), there are direct or vertical safeguards of constitutionalism such as elections. For a discussion of the potential "guardians" of (ways of enforcing) the Ethiopian Constitution and their effectiveness, see Adem K., 'A Constitution without a Guardian: Is the Ethiopian Constitution really Supreme?', *Ethiopian Human Rights Law Series*, Vol. 5, 2013 p.9-35.

While constitutional review has been used to challenge legislative acts and executive measures, and to ensure the realization of human rights in many African countries that adopted their constitutions in the 1990s, roughly at the same time as Ethiopia,[19] its role in Ethiopia has largely been inconsequential and insignificant. Despite its enormous potential, the constitutional justice system in Ethiopia has largely been invisible. Actual disputes on constitutional issues are often discussed in political and educational forums without any final resolution. Very few, if any, of the most intriguing constitutional disputes have reached the forum established to authoritatively and finally resolve such disputes. For example, some recently enacted laws, such as the Electoral Law,[20] Anti-Terrorism Law,[21] the CSOs Law,[22] have been criticized for allegedly restricting and violating constitutional standards; yet, none of them has so far been challenged as unconstitutional. In particular, the constitutional adjudication system in Ethiopia has not been actively engaged in the adjudication of constitutional rights. Also, there have been very few successful constitutional cases.[23]

More than seventeen years since the Constitution entered into force in 1995, the total number of constitutional cases submitted to the Council has been insignificant. Notably, almost all constitutional cases have been dismissed on procedural grounds and lack of need to interpret the Constitution. The Council has rejected constitutional claims relating, among others, to the right to bail,[24] suspension of rights during emergencies,[25] and jurisdictional

---

[19] For example, the Constitution of Ghana entered into force in 1992 and the Supreme Court has been active in enforcing constitutional standards. For a discussion of the role of courts in the development of Ghanaian constitutional law and vindicating constitutional justice, see Bimpong-Buta, S., *The Role of the Supreme Court in the Development of Constitutional Law in Ghana*, Advanced Legal Publications, Accra, 2007.

[20] Electoral Law of Ethiopia Amendment Proclamation, 2007, Proc. No. 532/2007, *Fed. Neg. Gaz.*, No 24, and the Revised Political Parties Registration Proclamation, 2008, Proc. No. 573/2008, *Fed. Neg. Gaz.*, No. 62. These laws restrict, among others, access to resources of political parties and ban anonymous donations of funds to political parties (Art 54(2), Proc. No. 573/2008). Given the social, economic, and political context in Ethiopia, individuals and organizations are unlikely to make financial donations to opposition parties if they know that the government will know about the donations. The laws also give the Electoral Commission an absolute discretion, which is not subject to judicial review, in allowing CSOs to conduct voters' education and observe elections (Arts 79 and 90, Proc. No. 532/2007).

[21] Anti-Terrorism Proclamation, 2009, Proc. No. 652/2009, *Fed. Neg. Gaz.* No. 57. This law criminalizes, among others, any form of publication that is "likely" to directly or indirectly "encourage" terrorism. The law also allows gathering information through surveillance and interception of all forms of communication. Such information obtained through surveillance and interception must be kept in secret, and is, therefore, inaccessible to suspected terrorists.

[22] Charities and Societies Proclamation, 2009, Proc. No. 621/2009, *Fed. Neg. Gaz.* No. 25. The most restrictive aspect of this law relates to the prohibition of activities related to human rights and democratization issues if a CSO receives more than 10% of its funds from "foreign" sources.

[23] For a discussion on selected cases, see Getahun K., 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System', *Africa Focus* Vol. 20, 2007, p.88. As far as the author is aware, only one constitutional case has been referred by the Council to the HoF for final decision since 2007 – see *infra* note 30.

[24] Case concerning the constitutionality of the law which excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author) where the Council dismissed a challenge to the constitutionality of a law that automatically precluded bail in relation to all corruption offences.

ouster clauses.[26] The Council has so far referred for final determination by the HoF only four cases.[27] There have only been three successful constitutional challenges so far – one relating to language requirements to stand for elections,[28] another relating to the subjection of a woman without her consent to the jurisdiction of religious courts,[29] and the third one relating to the right to appeal.[30] Although many of the cases challenged the constitutionality of laws, only one case has resulted in the invalidation of a law as unconstitutional.[31] Simply stated, despite the adoption of potentially unconstitutional laws, decisions and other measures, the number of constitutional challenges has been significantly low.

This chapter investigates the potential and normative and practical challenges to access to constitutional justice in Ethiopia. It also examines the problems in the demand and supply chain of the constitutional adjudication system. Studying access to constitutional justice is important in many respects. First, constitutional justice provides the necessary tool to remedy rules and practices that are procedurally unfair and substantively unjust. More specifically, constitutional justice is necessary to prevent and reverse normative and practical bottlenecks to access to justice in general. Second, despite its potential significance, the demand for constitutional justice in the form of constitutional complaints has been low. This lack of demand for constitutional justice has not attracted academic interest. There is currently no systematic study that investigates the possibilities as well as the ideological, normative, institutional, and procedural barriers to constitutional justice. This chapter seeks to make contributions to understanding access to justice in general and constitutional justice in particular. With this purpose, section one discusses the necessary preconditions that make

---

[25] Emergency declaration case, Council of Constitutional Inquiry (14 June 2005) (on file with author) where the Council ruled that the Prime Minister had the power to declare a state of emergency, and that the determination of whether the facts that justified the emergency actually exist is not subject to review.

[26] Case concerning the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author) where the Council upheld the constitutionality of judicial ouster clauses.

[27] The Council has been criticized for arrogating the legitimate powers of the HoF by rejecting cases for lack of need for constitutional interpretation while interpreting the Constitution. The Council generally confuses the lack of need for constitutional interpretation with the finding that there is no constitutional violation. As a result, it does not refer to the HoF a "no violation" decision for confirmation – Takele Seboka, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory', *African Journal of International and Comparative Law*, Vol. 19, No. 1, 2011, pp. 119-120.

[28] *Benishangule Gumuz* case, House of Federation (March 2003), House of Federation of the Federal Democratic Republic of Ethiopia, *Journal of Constitutional Decisions* Vol. 1, (July 2008) 1, pp. 14-34.

[29] *Kedija Beshir* case, House of Federation (May 2004), House of Federation of the Federal Democratic Republic of Ethiopia, *Journal of Constitutional Decisions* Vol 1, (July 2008), pp. 35-41.

[30] Case Concerning the Right to Appeal of the Highest Officials of the State in Criminal Cases, Decided by the Council of Constitutional Inquiry (2 December 2013) (on file with Author). The Council ruled that granting first instance jurisdiction over criminal cases involving the highest officials of the state to the Federal Supreme Court violates the right to appeal and equality guaranteed in the Constitution. The House of Federation approved the decision of the Council in January 2014.

[31] *Ibid*.

constitutional justice a reality. Section two assesses the Ethiopian system in light of the discussion in section one. The last section presents the concluding remarks

1. Realizing Constitutional Justice through Litigation

Access to justice certainly includes access to constitutional justice in the form of remedies to alleged constitutional violations.[32] One of the main tools to ensure constitutional justice is constitutional litigation/adjudication/review.[33] Experiences from around the world, including in Africa, demonstrate that constitutional review may establish practical procedures to tackling constitutional violations, in particular the human rights provisions. However, the fact that constitutional review has been more successful in vindicating constitutional justice in some countries than in others indicates that there are certain minimum preconditions for its success. Drawing on the conceptual framework developed by Charles Epp,[34] this section discusses the basic normative and institutional prerequisites that determine the success of constitutional litigation in fostering access to constitutional justice. As the discussions below reveal, the success of litigation in ensuring constitutional justice requires at a minimum the existence of (1) substantive constitutional guarantees, in particular justiciable fundamental rights, (2) an independent and accessible constitutional adjudicator, and (3) litigants including

[32] Access to justice may be broadly understood to refer to the redressing of legal complaints through formal and informal mechanisms. Constitutional justice may be achieved through mechanisms and institutions other than constitutional litigation, such as amicable negotiation, mediation, arbitration, and even informal mechanisms. In the Ethiopian context, complaints of human rights violations may, for instance, be addressed by the Human Rights Commission, or the Ombudsperson. This chapter focuses on the use of constitutional adjudication in vindicating constitutional justice. As such, constitutional justice refers to the provision of redress to constitutional grievances (alleged violations of constitutional standards) through constitutional litigation.

[33] It should, however, be noted that, despite its importance, constitutional litigation as a strategy has certain limitations, the most important of which is its reactive nature. Although injunction orders and other legal procedures may help to prevent a constitutional violation, constitutional litigation in general comes into picture after an alleged violation has occurred. Litigation may be and is employed when a legislative provision will restrict or abolish constitutional rights. Litigation may also attract social and political backlash. Politicians may amend the constitution and other laws to reverse constitutional decisions. Interest groups may also organize themselves to rally support against constitutional decisions. See Klarman, M., '*Brown* and *Lawrence* (and *Goodridge*)', *Michigan Law Review*, Vol. 104, No. 3, 2005, p. 453 (observing that progressive judicial decisions can have "unpredictable, and occasionally perverse, consequences"). See also L Krieger, L., 'Afterword: Socio-Legal Backlash', *Berkeley Journal of Employment and Labor Law*, Vol. 21, No. 1, 2000, p. 477 (observing that "backlash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance"). The existence of such limitations and challenges necessitates a sparing resort to litigation and the need to employ other alternative and complementary mechanisms such as lobbying within the democratic process. Constitutional review should not be considered as an end itself. It rather sets the foundation for and reinforces advocacy strategies and future litigation initiatives, if necessary.

[34] Epp, C., *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago University Press, Chicago, 1998.

most importantly organized litigants with the resources to engage in repeated and strategic litigation.

1.1. Justiciable Constitutional Rights and other Substantive Standards

The first logical precondition that determines the success of constitutional litigation in achieving constitutional justice is the constitutional establishment of substantive guarantees, particularly pertaining to fundamental human rights, which serve as critical standards against which legislative, executive and other measures are tested.[35] The constitutional recognition of justiciable rights guarantees determines "the extent of judicial policy making on rights."[36] Obviously, litigation can be useful only if the rights and other substantive standards are justiciable in the sense that litigants are able to invoke the constitutional rules in courts or other organs exercising constitutional review powers whenever aggrieved by the decisions of the entities that are bound to comply with the standards.[37] By establishing few substantive standards and restricting the catalogue of rights that are justiciable, constitutions can limit constitutional claims against the state, and therefore access to constitutional justice.[38] If there is no instrument guaranteeing rights, or if the guaranteed rights are mere guiding principles beyond the ambit of judicial scrutiny, constitutional adjudication will have little or no role in ensuring the realization of human rights and constitutional justice. The existence of justiciable rights, therefore, determines whether there is a potential for constitutional litigation in achieving constitutional justice.[39] However, although the existence of justiciable constitutional rights is necessary for the success of constitutional litigation, it is clearly not

---

[35] In addition to serving as the basis for constitutional review and supporting litigation, the constitutional entrenchment of human rights creates expectations of compliance that can spark political mobilization and effect elite-initiated agenda. Simmons identifies similar effects that flow from human rights treaty ratifications – Simmons, B., *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, New York, 2009, Chapter 4.

[36] Epp, *supra* note 34, p. 12. Epp further observes that constitutional guarantees provide the necessary "rallying symbols for social movements and may provide the footholds for lawyers' arguments and foundations of judicial decisions" (*Ibid*, p. 5).

[37] The duty bearer is often the state (vertical application). However, in some domestic systems even private entities may be required to comply with human rights guarantees (horizontal application) – see, for instance, the Constitution of the Republic of South Africa, 1996, Section 8.

[38] It should be noted that some creative judiciaries have innovated mechanisms to use justiciable rights to enforce non-justiciable principles. In India, for instance, the Supreme Court interpreted civil and political rights, mainly the right to life, to enforce socio-economic rights which are recognized as non-justiciable Directive Principles of State Policy. As such, even when a right is not recognized as justiciable, constitutional adjudicators can find a way to enforce it. See Bhagwati, P., 'Judicial Activism and Public Interest Litigation', *Columbian Journal of Transnational Law,* Vol. 23, No. 3, 1985, p. 561, and Circle of Rights "Economic, social and cultural rights activism: A training resource: Justiciability of ESC rights – the Indian experience". Retrieved from <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (Accessed 28 August 2013).

[39] Harris, B., 'Judicial Review, Justiciability and the Prerogative of Mercy', *Cambridge Law Journal*, Vol. 62, No.3, 2003, p. 631.

sufficient. The mere existence of justiciable constitutional rights does not lead to the success of constitutional review. Indeed, as Epp aptly observes, "the fate of a bill of rights [and other constitutional standards] depends on forces outside of it."[40]

1.2. An Independent and Impartial Constitutional Adjudicator (the "Supply" Side of Constitutional Justice)

The existence of justiciable constitutional standards implies that there is an institutional structure – a constitutional adjudicator − that receives complaints against allegations of violations of these standards. Constitutional adjudication requires the establishment of an organ charged with the power to ultimately decide on the constitutional validity of decisions.[41] A constitutional review system can only be successful in achieving constitutional justice if the constitutional adjudicator is institutionally independent from the organs it is designed to control and monitor.[42] An autonomous and independent adjudicator capable of controlling the constitutionality of legislative and executive acts or omissions is a precondition for successful constitutional litigation.[43] Anyone whose constitutional rights have been violated will want to have his case decided by an organ that is independent, impartial and competent. Independence, particularly from direct political pressure, is a necessary precondition that enables constitutional adjudicators to meaningfully check political power.[44] In addition to institutional autonomy, the personal independence and impartiality of the members of the constitutional adjudicator should be guaranteed.[45]

---

[40] Epp, *supra* note 34, p. 13.

[41] *Ibid*, p.14 (observing that "rights revolutions undoubtedly cannot happen without rights-supporting judges").

[42] UN Human Rights Committee, General Comment no 32, CCPR/C/GC/32 (2007) para 21 (observing that constitutional adjudicators should "appear to a reasonable observer to be impartial"). For a detailed appraisal of judicial independence, see Burbank, S., 'What do we Mean by 'Judicial Independence'?', *Ohio State Law Journal*, Vol. 64, No. 1, 2003, p.323.

[43] Carias, A., *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings*, Cambridge University Press, New York, 2009, p. 87.

[44] Epp, *supra* note 34, p. 11.

[45] Despite their interrelatedness, it is possible to identify some conceptual differences between "independence" and "impartiality". Independence relates to the absence of improper or inappropriate interference or influence in the conduct of judicial affairs from an external source, in particular from the political organs. Independence essentially requires that judges are the authors of their own views. On the other hand, impartiality denotes neutrality and objectivity, the absence of favor, prejudice or bias on the part of judges towards the parties or the matter under consideration. An organ is not independent if some other organ influences what it does; a person is impartial if his or her decision is influenced by his or her interest in the case or his or her relationship to any of the parties – see generally Fiss, O., 'The Limits of Judicial Independence', *University of Miami Inter-American Law Review,* Vol. 25, No. 1, 1992, p.58; A succinct summary of the distinction between "independence" and "impartiality" was provided by the Canadian Supreme Court. The Court observed that "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship

Judicial independence is "a core component of democracy, the rule of law and good governance."[46] Independence requires that constitutional decisions are taken fairly and impartially solely based on the law and facts presented, "not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll."[47] Judicial independence refers to the degree to which judges decide cases "free from the coercion, blandishments, interference, or threats from governmental authorities or private citizens".[48] Judicial independence sometimes means making unpopular decisions, "whether unpopular with the legislative or executive branch, the public, or judicial colleagues."[49]

Independent adjudicators are believed to be "forceful mechanisms for the defense of constitutionalism and justice". In the absence of independence, constitutional adjudicators are easily manipulated "from questioning the illegal or arbitrary acts of state actors".[50] A constitutional adjudicator and its members should, therefore, be institutionally insulated particularly from the political actors. Only an organ beyond the control of the political actors can reasonably be expected to effectively patrol the activities of political organs.

The independence of constitutional adjudicators does not imply that judges should be absolutely absolved from accountability. Judicial independence and accountability "are not discrete concepts at war with one another, but rather complementary concepts that can and should be regarded as allies."[51] Judicial independence does not mean that a judge is free to shoot "in any direction s/he wishes."[52] There are several mechanisms and arrangements that help to ensure constitutional adjudicators account for their judgments. First, judges must decide cases based on law and facts presented before them. Judges should also provide reasoned decisions which are subject to the possibility of appeal to a higher court − with the exception of decisions of the highest court.[53] The fact that judicial proceedings are open to

---

with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees" – *R v Valente* [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193 (Can. 1985), pp. 201-202.

[46] Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/14/26, 25 (March 2010) para 17.

[47] Abrahamson, S., 'Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence', *Ohio State Law Journal*, Vol. 64, No. 3, 2003, p. 3; Shapiro, N., *Courts: A Comparative and Political Analysis*, Chicago University Press, Chicago, 1981, pp. 1-8.

[48] Rosenn, K, 'The Protection of Judicial Independence in Latin America', *University of Miami Inter-American Law* Review, Vol. 19, No. 1, 1987, p. 7.

[49] Abrahamson, *supra* note 47, p. 4.

[50] Larkins, C, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law*, Vol. 44, No.4, 1996, p. 606.

[51] Burbank, *supra* note 42, at pp. 330 − 332.

[52] Abrahamson, *supra* note 47, p. 4.

[53] Lever, L., 'Democracy and Judicial Review: Are They really Incompatible', *Perspectives on Politics*, Vol. 7, No. 4, 2009, p. 811 observing that revealing the reasoning behind a judgment fosters "accountability as well as political participation".

anyone including mainly the media and other interest groups is another essential accountability mechanism.[54] Open proceedings create a transparent judicial environment where courts and judges are judged. Comments on judicial decisions by the media, politicians and authors and scholars of diverse backgrounds and orientation provide sufficient incentive for judges to remain within their legitimate terrain. Moreover, states often adopt rules in domestic constitutions and legislation, that are more rigorous than the rules that apply to other civil servants, with a view to protect judicial independence, through which judges may be removed, transferred, disciplined or held accountable. Judicial administration councils which govern judicial appointment, dismissal, transfer and discipline are often established to ensure a depoliticized delicate balance between judicial independence and accountability.[55]

In sum, the effectiveness of constitutional rights litigation to a large extent depends on the independence, capacity, and activism of the entities established to ensure compliance with constitutional rights.[56] Often, an independent judiciary or a constitutional court represents such an institution. An "independent judiciary with judicial review power" is one of the principal structures designed to promote constitutionalism.[57] In the absence of a constitutional adjudicator beyond the control and influence of political actors, constitutional review is unlikely to foster constitutional justice.

1.3. Litigation Support Structures: Informed, Capable and Organized Litigants: (the "Demand" Side of Constitutional Justice)

The existence of justiciable rights and an independent and activist constitutional adjudicator are necessary but not sufficient conditions for achieving constitutional justice through litigation. A constitutional review system will only be effective in achieving constitutional justice if there are litigants that actively lodge constitutional complaints before the constitutional adjudicator.[58] Constitutional complaints are "the lifeblood and enabling prerequisites of judicial review."[59] Constitutional complaints are necessary to set

---

[54] Michelman, F., *Brennan and Democracy*, Princeton University Press, New Jersey, 1999, p. 59 observing that the duty to give reasons which are subject to public scrutiny contributes to the democratic accountability and legitimacy of courts.

[55] See Garoupa, N. and Ginsburg, T., 'Guarding the Guardians: Judicial Councils and Judicial Independence', *American Journal of Comparative Law*, Vol. 57, No. 1, 2009, p.103.

[56] Sepluveda, M. et al., *Human Rights Reference Handbook*, University for Peace, Costa Rica, 2004, pp. 489-508.

[57] Jain, M., *Indian Constitutional Law*, Wadhwa, Agra/Nagpur, 1994, pp. 3-4.

[58] See generally, Epp, *supra* note 34.

[59] Ip, E., 'Constitutional Review as Political Investment: Evidence from Singapore and Taiwan', 2011, P. 18, Institute of Law, Economics and Policy, Political Economy Working Paper No 2. Retrieved from <http://instituteleap.org/Documents/Constitutional%20Review%20as%20Political%20Investment%20-%20Evidence%20from%20Singapore%20and%20Taiwan.pdf>. (Accessed 7 August 2013).

constitutional adjudicators in motion. The success of constitutional adjudication depends on the fact that those whose rights have been violated are able to articulate their concerns and voice their rights as legal claims, or have someone do so on their behalf.[60]

Whether or not constitutional litigation can lead to successful legal and social change depends on the awareness, ability and resources of victims of violations, in particular the poor and other marginalized groups who are often subjected to systematic deprivation.[61] The social, educational, political and economic context in a particular country determines the extent to which individual victims of violations will lodge constitutional complaints.[62] Beyond individual complainants, the success of litigation in achieving constitutional justice largely depends on the extent to which human rights advocates, CSOs, opposition parties and the media actively resort to it. It depends on the existence of a consistent and organized public demand for rights. Experiences from several countries indicate that the major architectures behind successful constitutional litigation are CSOs and social movements.[63] By ensuring the continuous flow of constitutional complaints to the constitutional adjudicator, organized litigants constitute the principal "support structures for legal mobilisation".[64] Organized groups provide the expertise, organization, resources and consistency necessary for the success of constitutional litigation in bringing about progressive and incremental legal and social changes.[65]

---

[60] Gloppen, G., 'Courts and Social Transformation: An Analytical Framework', *in* Gargarella, R. et al. (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate, Aldershot, 2006, p. 46. The existence of constitutional rights can create a popular rights culture which in turn creates a rights-demanding citizenry necessary for successful human rights litigation. The authors observe that observing that "surely the growing attention paid by supreme courts to rights claims would not have developed in the absence of the concept of "rights" or the extension of that concept to areas of life previously untouched by it. Protection of women's rights, for example, depended in part on a growing recognition that gender discrimination is a problem" (Ibid, pp. 15-17).

[61] *Id.*, p.35.

[62] Susman, S., 'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation', *Wisconsin International Law Journal* Vol. 13, No.1, 1994/1995, p. 63; Barber, N, "Prelude to Separation of Powers", *Cambridge Law Journal*, Vol. 60, No.1, 2001, p. 77.

[63] Epp, *supra* note 34. See also Tate, N. and Vallinder , T., *The Global Expansion of Judicial Power*, New York University Press, New York, 1995 (observing that interest groups and political organizations around the world increasingly resort to courts).

[64] Epp, *supra* note 34, p.8 (observing that "the presence and strength of a support structure for legal mobilization enhances the information, experience, skill and resources of rights claimants and thus likely affects the implementation of judicial decisions on rights").

[65] Epp, *supra* note 34, p.18-19 observing that "successful rights litigation usually consumes resources beyond the reach of individual plaintiffs – resources that can be provided only by an ongoing support structure. The judicial process is time-consuming, expensive, and arcane; ordinary individuals typically do not have the time, money, or expertise necessary to support a long-running lawsuit through several levels of the judicial system. ... Moreover, successful rights litigation depends on a steady stream of rights cases that press toward shared goals, for changes in constitutional law typically occur in small increments. A support structure can provide the consistent support that is needed to move case after case through the courts"; see also Epp, C., 'External Pressure and the Supreme Court's agenda', *in*, Clayton, C., and Gillman, H. (eds), *Supreme Court Decision-making: New Institutionalist Approaches,* University of Chicago Press, Chicago, 1999, p. 261

The participation of CSOs and advocates of constitutionalism in constitutional litigation can take three distinct but related forms. First, constitutional advocates provide legal assistance to those willing but unable to pursue constitutional cases for several reasons, that is the provision of legal assistance. The role of CSOs in providing legal aid services to needy victims of human rights violations is common knowledge and is not discussed in great detail in this chapter. Secondly, constitutional advocates can, when the rules of standing allow it, institute public interest litigation in relation to matters relevant to the general public, without having any direct or indirect vested interest in the issue. Thirdly, CSOs can participate in constitutional litigation as *amicus curiae*, friends of the court.

Public interest litigation[66] plays a significant role in ensuring that disadvantaged groups' access constitutional justice, and that courts do not become the domains of a privileged few.[67] As the Indian Supreme Court succinctly observed, public interest litigation ensures that a court does not merely become "an arena of legal quibbling for men with long purses."[68] Almost all the major constitutional decisions in the US, such as on racial desegregation, rights of sexual minorities and women's rights, were litigated by organized social groups.[69] The history of litigation during and after apartheid South Africa also demonstrates that the vibrancy of CSOs determines to a large extent the success of constitutional rights litigation.[70] South African CSOs played a paramount role in the

---

(observing that constitutional litigation depends on interest groups that provide "institutional mechanisms that overcome cost barriers to individuals and plaintiffs").

66 Public interest litigation/lawyering refers to the practice of lawyers seeking to precipitate legal and social change through court ordered decisions with a view to reform legal rules, enforce existing laws, and articulate public norms – Chayes, A., 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, Vol. 89, No.7, 1976, p. 1281.

67 CSOs and other organized groups particularly dominate supra-national rights litigation, especially in the African Commission on Human and Peoples' Rights − see generally Mbelle, N., 'The Role of Non-Governmental Organisations and National Human Rights Institutions at the African Commission', *in*, Evans, M. and Murray, R., (eds) The *African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006*, Cambridge University Press, Cambridge, 2008. The active role of NGOs in the African system has been enhanced by the robust standing regime before the African Commission which allows anyone to institute a communication – see generally Viljoen, F., 'Communications under the African Charter: Procedure and Admissibility', Evans, M. and Murray, R., (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006*, Cambridge University Press, Cambridge, 2008.

68 *Kesavnanda Bharathi v State of Kerala* (1973) 4 S.C.C. 225 at 947.

69 Epp, *supra* note 34, p. 21 (observing that litigation support groups "organised, financed, and provided legal counsel for many of the most important civil rights and liberties cases to reach the United States Supreme Court").

70 It is sarcastically noted that one of the best legacies of apartheid in South Africa is the evolution of a strong and vibrant civil society. See McQuoid-Mason, D, 'Access to Justice in South Africa', *Windsor Yearbook of Access to Justice*, Vol. 17, 1999, p. 245 observing that "one of the rare benefits of the oppressive apartheid system was the development in South Africa of a vibrant NGO community, which included several organisations engaged in public interest lawyering". Retrieved from http://law.gsu.edu/ccunningham/LegalEd/SouthAfrica-McQuoid-Mason-Windsor.pdf (Accessed 12 September 2013).

transition to constitutional democracy.[71] Together with advocacy, litigation provided the principal mechanism to challenge and mitigate the impacts of unjust apartheid laws, procedures and practices.[72] The tradition of relying on litigation to achieve constitutional and social justice has continued in the post-apartheid era and CSOs and constitutional advocates are at the center of it. Indeed, Jagwanth observes that "the majority of the cases decided by the [Constitutional] Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard."[73]

However, strict standing rules may constrain the active involvement of CSOs in constitutional litigation in the public interest. Standing rules determine access to constitutional justice and "the grip of constitutional rules on public behavior."[74] Traditional "vested interest" standing requirements highly stultify access to judicial bodies, especially of the underprivileged. Access to courts is a quintessential element of an independent judiciary.[75] Sarat notes that "autonomy [of courts] without accessibility would produce an arid, scholastic irrelevance."[76] Individuals may not be interested in the outcome of a case especially when the potential benefits of the outcomes of litigation are widely diffused, but nevertheless important for society as a whole, such as cases relating to environmental pollution.[77] One way, although only a partial solution, to solve the problem is to allow public interest litigants to institute action in such instances.[78] Public interest litigation is particularly allowed where a case deals with a matter of interest to a wider segment of the population.[79] Standing rules should not, therefore, be too strict to exclude legitimate claims against human

---

[71] See generally Jagwanth, S., 'Democracy, Civil Society and the South African Constitution: Some Challenges', Management of Social Transformations (MOST), Discussion Paper 65, 2003. Retrieved from <http://unesdoc.unesco.org/images/0012/001295/129557e.pdf>. (Accessed 5 August 2013).

[72] See generally Davis, D. and Le Roux, M., *Precedent and Possibility: The (Ab)use of Law in South Africa*, Juta, Cape Town, 2009.

[73] Jagwanth, *supra* note 71, pp. 15-16.

[74] Kay, S., 'Standing to Raise Constitutional Issues: Comparative Perspectives', *in*, Kay, S. (ed), *Standing to Raise Constitutional Issues: Comparative Perspectives*, Bruylant, Brussels, 2005, p. 1.

[75] Bedner, A., 'An Elementary Approach to the Rule of Law', *Hague Journal of the Rule of Law*, Vol. 2, No. 1, 2010, p. 69 observing that "[i]f they are to be effective, judiciaries must not only be independent but also accessible."

[76] Sarat, A., 'Going to Courts: Access, Autonomy, and the Contradictions of Liberal Legality', *in*, Kairys, D. (ed), *The Politics of Law: A Progressive Critique*, Basic Books, New York, 1998, p. 97.

[77] Barber, *supra* note 62, p. 78.

[78] This is in no way the only solution –Elhauge, E., 'Does Interest Group Theory Justify more Intrusive Judicial Review?', Yale *Law Journal*, Vol. 101, No.1, 1991, p. 32. Elhauge argues that weak interest groups in society will also have a weak force before courts. Hence, merely opening up standing rules may not necessarily bring about the desired result in relation to constitutional litigation.

[79] In purely individual cases, on the other hand, there is often a requirement to prove some kind of direct interest in the action or omission challenged − a state may not expose and address a private dispute when the parties are not willing to admit their differences –Barber, *supra* note 62, p.75.

rights and other constitutional violations.[80] The rules should rather be designed to ensure efficiency,[81] and not to exclude public interest litigants. Nevertheless, mere legislative changes in the rules governing standing, without a strong tradition of public interest lawyering, do not necessarily enhance resort to litigation to vindicate constitutional rights.[82]

Amicus curiae procedures provide another important avenue for CSOs and human rights advocates to engage in constitutional rights litigation in the public interest. *Amicus* intervention has become an important public interest lawyering strategy.[83] *Amicus* intervention by public interest litigants improves the judicial decision-making process by providing background and relevant information which enables courts to make decisions confident of their social, legal and factual context and consequences.[84] Loux similarly notes that the intervention of interest groups should be welcomed by courts as "[w]ithout the participation of pressure groups in litigation, the decisions of the judiciary could suffer from the paucity of fact and argument that may be presented by individual parties to a particular piece of litigation".[85] In addition, the submission of *amicus* briefs fosters "democratic input to the judicial area."[86] Because extensive *amicus curiae* participation broadens the range of parties and interests represented, it furthers democratic and constitutional values and has the effect of ameliorating the democratic legitimacy deficit that particularly haunts judicial policy-making.[87]

Traditionally, the submission of *amicus* briefs was considered as an offer of assistance from a neutral, disinterested by-stander who wishes to genuinely help a court in arriving at

---

[80] Indeed, there is a progression internationally towards recognizing public interest litigation. See Kay, *supra* note 74, p. 1.

[81] One of the major challenges against opening up standing rules is the possibility of litigation explosion that might result in courts becoming "hopelessly overloaded" – Murray, C., 'Litigating in the Public Interest: Intervention and the Amicus Curiae', *South African Journal on Human Rights*, Vol. 10, 1994, p. 241.

[82] Prempeh, *supra* note 16, p. 1297. Prempeh criticizes lawyers in common law African countries for failing to exploit the liberalization of standing rules. He notes that "private attorney generals," individuals or organizations that litigate in the public interest, are absent in these countries, despite the liberalization of standing rules.

[83] For a discussion of the influence of amicus curiae briefs on the US Supreme Court, see Kearney, J. and Merrill, T., 'The Influence of Amicus Curiae Briefs on the Supreme Court', *University of Pennsylvania Law Review* Vol. 148, No.3, 1999-2000, p. 744. Kearney and Merrill observe that *amicus curiae* briefs are submitted in up to 85% of the cases before the US Supreme Court.

[84] Collins, P., Jr., 'Friends of the Court: Examining the Influence of *Amicus Curiae* participation in the U.S. Supreme Court Litigation', *Law and Society*, Vol. 38, No.4, 2004, p. 8 observing that the success of *amicus* intervention depends on the information they present before the courts; Tobias, C., "Standing to intervene" *Wisconsin Law Review*, 1991, p. 419. See also Kearney and Merrill, *supra* note 81, p. 745 observing that lawyers and judges believe that *amicus curiae* submissions are moderately supportive.

[85] Loux, A., 'Losing the Battle, Winning the War: Litigation Strategy and Pressure Group Organization in the Era of Incorporation', *The King's College Law Journal*, Vol. 11, No.1, 2000, p. 92.

[86] Collins, P., Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, Oxford University Press, Oxford, 2008, p. 3.

[87] Garcia, R, 'A Democratic Theory of Amicus Advocacy', *Florida State University Law Review*, Vol. 35, 2008, p. 315.

the right decision.[88] Increasingly, however, interest groups join cases as *amicus curiae* not merely to assist courts but to advocate for particular causes or views − *amicus curiae* intervention has become a formidable tool for advocacy.[89] CSOs and human rights advocates should, therefore, actively seek to join human rights cases as *amicus curiae*.

Constitutional litigation can be successful in vindicating constitutional justice only if there is an organized demand for it in the form of constitutional complaints. The ability of a formally independent constitutional review system to ensure the realization of justiciable rights largely depends on a continuous demand for constitutional justice from CSOs and organized advocates. Organized demand is a significant factor in raising constitutional claims. However, many claims originate from individual grievances. Those grievances are often supported by organized groups after a case reaches a higher court. Organized litigants provide the prerequisite litigation support structure for the effective coordination, continuity and success of constitutional litigation.[90]

In summary, constitutional review has the potential to ensure the realization of human rights when all the aforementioned three preconditions exist. Logically, the existence of one generally facilitates the emergence and strength of others. For instance, if a constitution guarantees justiciable rights and establishes an independent constitutional adjudicator, individuals and organized groups will likely resort to constitutional litigation to vindicate constitutional justice. Independent constitutional adjudicators play a significant role in creating demand for rights through their decisions.[91]

---

[88] Krislov, S., 'The Amicus Curiae Brief: From Friendship to Advocacy', *Yale Law Journal*, Vol. 72, No.4, 1962-1963, p. 695 describing the traditional role of the amicus as "one of oral "Shepardizing," the bringing up of cases not known to the judge"; Angell, E., 'The Amicus Curiae: American Development of English Institutions', *International and Comparative Law Quarterly*, Vol. 16, No.4, 1967, p. 1017 observing that the *amicus* was "originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make suggestion to the court on matters of fact and law within his own knowledge".

[89] Re, L., 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations', *Melbourne University Law Review*, Vol. 14, No.3, 1983-1984, p. 525 observing that "the device [*amicus*] is increasingly moving from neutral 'friend' of the court to one of the partisanship: the submissions tendered are clearly in support of one or the other of the contending parties"; also see Krislov, *supra* note 86. For Robbins, *amici* have become "false" friends − Robbins, J., 'False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead/Asbestos Doctrine', *Harvard International Law Journal*, Vol. 44, No.1, 2003, p. 317.

[90] Epp, C., 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms', *American Political Science Review*, Vol. 90, No.4, 1996, p. 765.

[91] Ginsburg, T., 'The Global Spread of Constitutional Review', *in,* Whittington, K, *et al* (eds), *Law and Politics*, Oxford University Press, New York, 2008, p. 90.

2. Challenges to Access to Constitutional Justice in Ethiopia

Despite the fact that the FDRE Constitution declares its supremacy and establishes procedures to expunge unconstitutional laws, policies, decisions and practices, access to constitutional justice has largely been a mirage. In particular, the role of constitutional litigation in ensuring constitutionalism and challenging potentially unconstitutional laws, policies and decisions has been insignificant at best. This section analyses the law, practice and context of constitutional litigation to identify the factors that have hindered access to constitutional justice.

2.1. Historical, Social and Political Factors

Constitutional litigation is little known in Ethiopian constitutional history. Under the previous two regimes of Emperor Haile-Selassie and the military *Dergue*, the concept of monarchical and government supremacy reigned. During the imperial regime, the Emperor was supreme and above the constitution. He was not only the head of the legislature and the executive but also the ultimate umpire sitting in the *Zufan Chilot* (Crown Court). Although the 1955 Constitution declared its supremacy and the invalidity of all legislation, decrees, orders, judgments, decisions and acts that were inconsistent with its provisions,[92] it did not empower any independent organ to check and where necessary invalidate laws and other government decisions that were incompatible with the Constitution. Indeed, it was inconceivable for any court to invalidate decisions of the Emperor, who had the ultimate power to reverse their decisions. Nevertheless, the Federal Proclamation of 1953, which led to the conjoining of Ethiopia and Eritrea under a federal arrangement, provided that

> [a] final determination by a Federal court that any legislation or administrative, executive, or judicial order … is invalid in terms of conformity with Our Constitution or the Federal Act, shall have as a consequence that such legislation, order, decree, judgment … shall be held throughout Our Empire as null and void and unenforceable and inapplicable by any official or courts of Our Empire.[93]

This Proclamation clearly empowered all federal courts (and not just the highest court) to invalidate laws and other government decisions that violated the Constitution and the Federal Act. Although there are no recorded instances where the courts invalidated primary legislation (laws made by the Imperial Parliament), courts of the time indeed quashed a few

---

[92] The 1955 Constitution of Ethiopia, Art 122.

[93] Referred to in Minase H., 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's" – *cucullus non facit monachum*', *Cardozo Journal of International and Comparative Law* Vol. 13, No.1, 2005, p. 46.

regulations and decisions of public authorities that were incompatible with the Constitution and the law.[94]

Following the overthrow of the last Emperor of Ethiopia in 1974, the military *Dergue* (Military Junta) for most of its time ruled without a constitution. After a thirteen-year constitutional lacuna, the Peoples' Democratic Republic of Ethiopia (PDRE) Constitution was adopted in 1987. Although the Constitution declared its supremacy and denied validity to any law or decision contrary to its provisions,[95] it did not establish independent procedures through which the constitutionality of legislation and other government decisions could be challenged. Indeed, reminiscent of socialist ideology, the power of interpreting the Constitution was granted to the Council of State which was a purely political or executive organ headed by the President of the Republic.[96] There was no independent and genuine constitutional adjudication system in the PDRE Constitution. Nevertheless, courts were given the power to enforce legally guaranteed rights, freedoms and interests of citizens, and mass organizations and other associations.[97] But the term of office of judges depended on the term of the *National Shengo* (Assembly) that elected them.[98] Moreover, the *Shengo* had the power to recall any judge it appointed without any reason.[99] Indeed, courts functioned as elements of the repressive machinery of the state.[100]

Despite some examples of judicial review of administrative decisions under the 1955 Revised Constitution, constitutional adjudication had had little impact on the development of constitutionalism and constitutional law in Ethiopia. Historically, the idea of constitutional supremacy and limits on government power were mere rhetoric and all state organs, including courts, were conceived to serve the governing regime, not to challenge it.[101] This popular conception of the judicial role largely continues and has undermined the relevance of constitutional adjudication in the current system. The historical lack of judicial independence and experience in constitutional litigation has a negative effect on the status and role of constitutional litigation in contributing to the development of a culture of constitutionalism.

---

[94] For instances of such cases, see Minase, *supra* note 93, pp. 47-54.
[95] PDRE Constitution, Art 118.
[96] PDRE Constitution, Art 82(1) (b).
[97] PDRE Constitution, Art 100(2).
[98] PDRE Constitution, Art 101(2)
[99] PDRE Constitution, Art 101(3).
[100] This is partly why the EPRDF-led government dismissed more than 300 judges immediately after taking power.
[101] Adem K. 'Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical', *CGHR Working Paper 1*, Cambridge: University of Cambridge Centre of Governance and Human Rights, April 2012, pp. 9-11.

Indeed, as noted earlier, the contribution of constitutional adjudication to the development of constitutional law in Ethiopia has been insignificant.

The social context presents another challenge. Although the principle of limited government is a fundamental underpinning of constitutionalism, the popular legal and political conception in Ethiopia is that the government prevails above the law and the people. Obedience and respect to authority are hallmarks of Ethiopian political and legal thinking.[102] Laws are valid by the mere virtue of the fact that they are made by the state. In short, the validity of a law depends on the ability of the lawgiver to enforce it.[103] As a result, the idea of challenging the validity of laws is largely unimaginable. A popular Ethiopian adage captures this conception of law, justice, and political power: "*semay ayitarus nigus ayikeses"*(roughly "you cannot plough the sky nor sue a king [government]").[104] These perceptions inhibit any expectations of constitutional behavior, contradict the idea of constitutionalism and limited government, and reinforce the low popular demand for constitutional justice today and during the previous regimes.

Also, the current political context is not favorable to constitutional justice. The FDRE Constitution was drafted and adopted in 1995 by the dominant political group, i.e., the EPRDF. As a result, it is largely a reflection of the philosophical and ideological stance and perspectives of this group.[105] Discounting the legitimacy of electoral outcomes, the dominance of the EPRDF has increased over time. Indeed, the party and its affiliates control more than 99.6% of the seats in the HPR and 100% of the seats in the HoF.[106] Experience from other countries reveals that, even in countries with a strong and independent constitutional adjudicator, the absolute dominance of a single political group reduces the capacity and willingness of constitutional adjudicators to boldly enforce constitutional

---

[102] Clapham, C., 'The Challenge of Democratization in Ethiopia', *in* Cobbold, R. and Mills, G. (eds), *Global Challenges and Africa: Bridging Divides, Dealing with Perceptions, Rebuilding Societies*, The Royal United Services Institute for Defence and Security Studies, White Paper 62, 2004, pp. 74-76.

[103] This is captured in John Austin's definition of law as the command of a supreme sovereign, who enjoys habitual obedience, backed by threats of sanctions. Austin, J., *The Province of Law Determined,* 1832. The book may be accessed at http://www.koeblergerhard.de/Fontes/AustinJohnTheprovinceofjurisprudencedetermined1832.pdf (Accessed 28 August 213).

[104] However, this does not detract from the fact that Ethiopians traditionally sought justice as established in the law. Another Ethiopian adage "*behig kehedech bekloye yalehig yehedech doroye"* (roughly "A hen taken illegally is more valuable than a horse taken legally") captures the value attached to law. Nevertheless, this adage only confirms the conception of law as unchallengeable and does not imply the rejection of laws that are incompatible with a higher law, such as constitution.

[105] For a detailed discussion, see Adem K., 'From the 'TPLF Constitution' to the 'Constitution of the People of Ethiopia': Constitutionalism and Proposals for Constitutional Reform', *in,* Mbondenyi, M. and Ojienda, T., (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Pretoria University Law Press, Pretoria, 2013, pp. 51-87.

[106] These numbers are according to the 2010 election outcomes.

standards.[107] For a constitutional adjudicator operating under a dominant political group to be able to effectively enforce constitutional standards, it must be at least formally independent and must have a strong judicial constituency among the people and civil society which actively submit cases to it.[108] However, as the next sections reveal, these are both lacking in Ethiopia.

2.2. Supply Side Problems

Perhaps the main challenge to access to constitutional justice in Ethiopia is the Constitution does not establish a formally independent and impartial constitutional adjudicator. The final power of constitutional adjudication is vested in the HoF. The HoF is a political organ dominated by the same groups as the HPR and therefore the executive. Since the HoF is a political body, there is absolutely no requirement, in the Constitution or any other law, that the members be independent from political considerations in determining the constitutionality of any legislative or executive measures. Quite simply, the HoF is designed to be part of and work in harmony with whichever political group is in power. In fact, the possibility that the HoF might almost exclusively be composed of members of a single political group is very real. The members of the HoF are nominated by the party controlling the majority in the regional legislative councils. It is almost inevitable that the winning political party will not appoint members of other parties to the HoF. Hence, the HoF is more likely to be an extension of the winning political party in either the HPR or the regional legislative councils. That is why since the adoption of the Constitution, the HoF has been composed only of members of the EPRDF and its affiliates, even when the opposition won some seats in the HPR. As a political organ under the influence of the legislature and executive, the HoF cannot be expected to independently decide sensitive constitutional issues.[109]

---

[107] Hirschl, R., 'The Nordic Counter-narrative: Democracy, Human Development, and Judicial Review', *International Journal of Constitutional Law*, Vol. 9, No.2, 2011, p. 465 observing that "little or no judicial empowerment has taken place in countries ... where a single political force has controlled the political system".

[108] This is for instance the case in South Africa where, despite the dominance of the political organs by the African National Congress, the Constitutional Court has actively invalidated several important laws and executive measures – see Roux, T., 'Principle and Pragmatism on the Constitutional Court of South Africa', *International Journal of Constitutional Law*, Vol. 7, No.1, 2009, p. 106.

[109] Assefa Fiseha notes that the basic question is "[h]ow could the HoF, a political body, adjudicate constitutional issues in an impartial manner?" – Assefa F., 'Some Reflections on the Role of the Judiciary in Ethiopia', *Recht in Afrika*, Vol. 14, No.1, 2011, p. 5. See also Twibell, T., 'Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems', *Loyola of Los Angeles International and Comparative Law Review*, Vol. 21, No.3, 1999, p. 447; and Minase, *supra* note 91, p. 59.

Regrettably, there is also no constitutional or legal requirement that members of the Council, the advisory organ to the HoF largely consisting of legal experts, be independent and impartial while adjudicating constitutional issues.[110] Moreover, the Federal Judicial Administration Council, which plays a major role in the nomination process of federal judges, does not have any role in the appointment process of the members of the Council. In addition, there are no prescribed qualifications for members of the Council. The appointment process for the members of the Council is, therefore, purely political and does not provide procedural safeguards against partisan appointments.[111]

The purely political process of appointment breeds, especially in the absence of any legal duty to be independent, dependency and partiality among the members of the Council. As a result of the absence of a requirement to be independent, as of December 2013, the special advisor to the former Prime Minister, a former Minister, a Prosecutor General of the Customs and Revenue Authority, members of the HPR, and members of the EPRDF were at one point or another also members of the Council. The three members of the Council are always politicians from among the members of the HoF. Besides the President and Vice President of the Supreme Court, therefore, the nine other members of the Council can be and have been active politicians or members of (or otherwise associated with) the ruling party. It is hard to expect these members to invalidate laws and government decisions in contradiction of the stated position of their superiors in the party and state apparatus, particularly on issues of importance to the ruling party. The HoF and the Council may be competent and politically legitimate organs to resolve politically sensitive constitutional disputes amongst government organs.[112] They cannot, however, be expected to independently resolve disputes between

---

[110] See FDRE Constitution, Arts 82-84.

[111] Principle 10 of the Basic Principles on the Independence of the Judiciary, 1985, requires that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives". See also the African Commission on Human and Peoples' Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa", 2001, Principle A (4) (h). The Special Rapporteur on the Independence of Judges and Lawyers expressed concern that "the involvement of the legislature in judicial appointments risks their politicization" – A/HRC/11/41 (2009) para 2. The Special Rapporteur also expressed concern over instances where the executive branch has a decisive say in the selection and appointment of judges − para 26. Drawing from the jurisprudence of the UN Human Rights Committee, the Special Rapporteur recommended the establishment of an independent authority in charge of the selection of judges – para 27.

[112] Assefa F., 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation', *Mizan Law* Review, Vol. 1, No.1, 2007, p. 1, observing that "over the years evolved as a legitimate body for the settlement of disputes at least as far as issues of high political and constitutional significance are concerned". In addition, the HoF may also be suitable to resolve a dispute concerning ethnic groups as it is composed of representatives of such groups. However, given the numerical superiority of the representatives of the larger ethnic groups, the interests of the smaller groups may be undermined, especially when the dispute is between a small and large ethnic group.

those in government and those outside of it, which is the principal concern of constitutional justice and constitutionalism.[113]

Furthermore, the members of the Council, except the President and Vice President, stay in office only as long as the office of the nominators last.[114] Hence, the three members of the Council, who are nominated by the HoF, last only as long as the HoF which nominated them lasts (for five years), and the six members appointed by the President, last six years just as the President can.[115] In fact, the HoF, which has the final say on constitutional issues, is elected every five years. This essentially means that the winners of each election actually constitute their own constitutional adjudicators. The members of the Council, except the President and Vice President, may also be removed by the body that nominated them "subject to good causes".[116] The "good cause" standard is far below the standard established for the removal of ordinary judges.[117] So far, problems related to unfounded dismissals have not arisen. In fact, most of the members of the Council have been members for at least two terms. Had the members of the Council disappointed the political organs by deciding against their wishes in sensitive issues, there would have been a good chance of them not serving for more than one term, or even finishing their terms. In addition, their decisions would simply have been reversed by the HoF.

In addition to the lack of an independent constitutional adjudicator, strict standing rules governing constitutional adjudication hinder access to constitutional justice by precluding litigation in the public interest.[118] According to the rules governing standing concerning the

---

[113] In addition to the lack of independence, some authors have questioned the competence of the HoF to resolve constitutional disputes. Takele observes that "the competence of the individual HoF members to understand and interpret the Constitution in a manner sensitive to due process guarantees and substantive human rights is … suspect" – Takele, *supra* note 27, p. 122; Yonatan T. Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', *African Journal of International and Comparative Law*, Vol. 14, No.1, 2006, p. 73 *et seq.* See also Whittington, K., 'Legislative Sanctions and the Strategic Environment of Judicial Review', *International Journal of Constitutional Law*, Vol. 1, No.3, 2003, p. 452 observing that legislators lack the expertise necessary to deconstruct the content and implications of complex constitutional rules. Perry similarly observes that in politically heterogeneous societies "[legislative] regime in which incumbency is (inevitably?) a fundamental value seems often ill suited ... to a truly deliberative, dialogic specification of the indeterminate constitutional norms" - Perry, M., *The Constitution in the Courts: Law or Politics?*, Oxford University Press, Oxford, 1994, p.107.

[114] Proc. No. 250/2001, Art 7. This provision is strikingly similar to Art 101(2) of the PDRE Constitution which similarly tied the term of judges to the term of the National *Shengo* which appointed them.

[115] The term of the HoF is five years; and the term of the President of the Republic is six years and a person may not serve more than two terms as President – Arts 67(2) & 70(4) respectively of the FDRE Constitution.

[116] Proc. No. 250/2001, Art 8(1). The decision to remove a member should be supported by the HoF – Art 8(2).

[117] See FDRE Constitution, Art 79(4).

[118] Ginsburg and Moustafa observe that authoritarian regimes can use standing rules to constrain judicial activism without directly impinging on judicial autonomy and independence –Ginsburg, T. and Moustafa, T., 'Introduction', *in*, Ginsburg, T. and Moustafa, T. (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge, 2008, pp. 14 & 19.

enforcement of constitutional rights, it is only those whose rights have allegedly been violated that may approach the Council. The Proclamation constituting the Council provides as follows: [119]

> Any person who alleges that *his* fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the Council of Inquiry for constitutional interpretation. (Emphasis added)

This provision upholds the traditional standing rule, which only allows those whose rights have been directly affected to have the standing to apply for constitutional interpretation.[120] The mere fact that a person is adversely affected, directly or indirectly, by a particular act or omission does not suffice unless he or she can show that they have a constitutional right which has been violated. Similarly, indirect individual access through judicial referral is also limited to those who are parties to a case who must, under Article 33(2) of the Civil Procedure Code, have a vested interest in the subject matter under consideration.

Moreover, the Ethiopian Constitution does not have any provision addressing *amicus curiae* submissions. Nevertheless, the proclamations consolidating the HoF and the Council anticipate procedures whereby the Council or the HoF may be engaged in "gathering professional opinions" on the issue under determination. The Council or the HoF may "call upon pertinent institutions, professionals, and contending parties to give their opinions" on the issues under consideration.[121] A pertinent federal or state government institution, particularly the institutions which consult the government in adopting laws, may also be required to submit its views over relevant constitutional issues.[122] This procedure for hearing a wide variety of individuals or groups is particularly necessary as the decisions of the HoF have binding effects on similar cases in the future.[123]

Furthermore, the Council is not a permanent constitutional organ. It only has four regular sessions per year and may also call extraordinary meetings when necessary. As a

---

[119] Proc. No. 250/2001, Art 23 (1).

[120] For a detailed discussion on the standing rules governing constitutional adjudication in Ethiopia and the impact on the role of CSOs in constitutional litigation, see Adem K., 'Towards more Liberal Standing Rules for the Enforcement of Constitutional Human Rights in Ethiopia', *African Human Rights Law Journal*, Vol. 10, No.2, 2010, p. 407.

[121] Proc. No. 250/2001, Article 27; Consolidation of the House of Federation and the Definition of its Powers and Responsibilities Proclamation, *Fed. Neg. Gaz.*, No 251/2001, Article 10. The House has collected views of experts on some occasions. Note that the HoF and the Council are not bound to hold oral hearings. The HoF may only hear the parties when it deems it necessary.

[122] Proc. No. 250/2001, Art 26; Proc. No.251/2001, Arts 9(2 & 3).

[123] See Re, *supra* note 89 p. 533 observing that "as the major purpose of the *amicus* brief is to ensure that a precedent is sound, the use of the brief is of particular importance in courts where a decision is likely to constitute a precedent".

result, it may not be able to timely resolve constitutional issues submitted to it. Although this has so far not been a problem, due to the fact that there have not been many constitutional complaints, it is likely to hinder access if and once the Council starts to receive more cases. Under its current structure and procedures, the Council may not be able to issue an injunction order against impending violations of the Constitution. For instance, the Ethiopian government has a general tendency to broadcast "documentaries" about issues pending before courts. These documentaries tend to justify government decisions and measures. This was, for instance, the case in relation to people charged under the Anti-terrorism Proclamation and also in relation to individuals who were arrested in connection with the protests against alleged government interference in religious affairs, especially by the Muslim community.[124] If the Council is not coincidentally in session at the time of application, such individuals will not be able to receive a timely injunction order to prevent the government or any other person from broadcasting on issues that may contradict the constitutional principle of presumption of innocence, unless the Council is sitting at that particular time. The fact that the Council does not sit regularly may therefore hinder access to constitutional justice.

Another important concern is the prevalent conservative legal and judicial culture. Due to their historical subordination to the executive, and as a legacy of the civil law legal tradition, Ethiopian judges follow an extremely legalistic and positivist approach to legal interpretation strictly focused on applying legal texts to particular facts regardless of the implications to constitutional rights.[125] The judicial mentality focuses on enforcing laws rather than scrutinizing their implications to human rights and other constitutional standards. This formalistic approach has failed the mainstreaming of constitutional rights in the interpretation and application of laws. Ethiopian courts and judges have been reluctant to recognize their heightened responsibility as guardians of human rights and constitutionalism. Courts have not even been active in referring constitutional issues to the Council of Constitutional Inquiry. Only a handful of the cases considered by the Council were referred to it by ordinary courts.[126]

---

[124] The African Commission has ruled that "negative pre-trial publicity" and public declaration of guilt constitute a violation of the right to a presumption of innocence. See, for instance, *Haregewoin Gebre-Sellasie & IHRDA (on behalf of former Dergue officials) v Ethiopia*, communication no 301/05 (07 November 2011), paras 182-195, retrieved from http://caselaw.ihrda.org/doc/301.05/view/ (accessed 15 September 2013) where the Commission held that "public officials, are allowed to inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect".

[125] Moustafa and Ginsburg observe that "civil law judges may be relatively more constrained than their common law counterparts as a formal matter" − Ginsburg and Moustafa, *supra* note 118, p. 19.

[126] However, courts have referred some important issues to the Council of Constitutional Inquiry. See, for instance, the case on the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on

A cursory look at cases concerning the judicial review of administrative decisions demonstrates the extreme conservatism of contemporary Ethiopian judges and members of the Council. The Cassation Division of the Federal Supreme Court has ruled that courts may review decisions of administrative organs only if the law has not expressly granted another organ the power to settle the relevant issue.[127] As a consequence of this interpretation and statutory stipulations that expressly gives administrative organs the power to finally resolve disputes and/or that precludes judicial review of administrative decisions, courts do not seem to have review powers. Accordingly, the judicial review of administrative decisions is not inherent and must therefore be legislated for.[128] The Court arrived at this conclusion despite the fact that the Constitution clearly guarantees the right to access to justice in a court of law or a competent organ exercising judicial powers (Article 37). Regrettably, the Council similarly held that jurisdiction ouster clauses were not incompatible with the Constitution,[129] notwithstanding that the petitioners' challenge was against an executive regulation (not a statute) which denied employees of the Revenue and Customs Authority from applying for judicial review in cases of dismissal without justification or explanation.[130] In a parliamentary form of government, the Council reasoned, the legislature has the discretionary power to restrict the jurisdiction of courts and therefore access to justice. Accordingly, whether a matter is justiciable is determined by laws enacted by the Parliament. The inclusion of ouster clauses therefore makes an issue non-justiciable. Despite its constitutional status, the right to access to courts can be abridged at the discretion of the political organs through a stroke of legislation. Incidentally, the decision in this case demonstrates the excessive deference of the Council towards both the legislature and the executive.

---

file with author) which was referred to the Council by the Civil Service Administrative Tribunal, and the case concerning the right to appeal of higher officials of the state in criminal cases, *supra* note 30, which was referred to the Council by the Federal High Court. The Council found a violation in the second case.

[127] See, for instance, *Wolday Zeru and Others v Ethiopian Revenue and Customs Authority*, Federal Supreme Court, Cassation Division, File Number 51790 (16 May 2003 E.C). See also *Addis Ababa City Administration Land Management Authority and Another v Dink Sira PLC*, Federal Supreme Court, Cassation Division, File Number 54697 (24 September 2003, E.C).

[128] Compare the decisions of judges during the Emperor's era where they held that the judicial review of administrative decisions was inherent and need not be legislated for. See generally Minase, *supra* note 93, pp. 47-54.

[129] Constitutional case on the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author). The constitutional issue was referred to the Council by the Civil Service Administrative Tribunal.

[130] Several other laws that exclude the judicial review of administrative decisions have also been enacted. See, for instance, Income Tax Proclamation, 2002, Proc. No. 286/2002, *Fed. Neg. Gaz.* No 34, Arts 77 and 78; Agency for Government Houses Establishment Proclamation, 2007, Proc. No. 555/2007, *Fed. Neg. Gaz.* No. 2, Art 6(3); Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation, 2005, Proc. No. 455/2005, *Fed. Neg. Gaz.* No 43, Art 11; Proc. No. 532/2007, Arts 79(1&2) and 90(1); and Proc. No. 621/2009, Art 104(2&3).

2.3. Demand Side Problems

For a constitutional adjudicator to deliver constitutional justice there must be demand for it in the form of constitutional complaints. Unfortunately, the level of awareness about constitutional rights in Ethiopia is very low. Most importantly, even those who are aware of their rights do not know of the institutions and procedures through which they can seek constitutional justice. The result is that only a handful of significant constitutional complaints have been submitted to the Council. Most of the cases that have been submitted have been rejected on procedural grounds, which may partly reveal the low level of constitutional understanding of the applicants.[131] Moreover, the social perception discussed above, that citizens cannot sue government further undermines the demand for constitutional justice from ordinary citizens.

However, the lack of awareness of rights and the constitutional adjudication procedures cannot explain the reluctance of CSOs, political parties and the media – the 'usual suspects' – to resort to constitutional litigation. CSOs and opposition parties appear to have opted for disengagement as far as the constitutional adjudication system is concerned. CSOs have not even challenged the constitutionality of the law that directly targets them. The author's discussions with the relevant stakeholders reveal that the main reason why these groups have not made use of the constitutional adjudication process lies in the lack of trust in the constitutional adjudication system.[132] There is a prevalent belief, not entirely unfounded, that the HoF, the Council and even courts are executive-minded, perhaps even more so than the executive itself. The constitutional adjudication system and the courts have yet to claim popular trust and legitimacy. In one case, for instance, the Coalition for Unity and Democracy (CUD) − then the main opposition political party − challenged the suspension of the right to assembly and demonstration in and around Addis Ababa through an emergency declaration.[133] The challenge was initially brought by the CUD in the Federal First Instance Court based on alleged violation of the Proclamation regulating peaceful demonstration and public political meetings.[134] The CUD vainly pleaded the Court not to refer the case to the

---

[131] Getahun, *supra* note 23.

[132] The discussions were conducted with members of the Council, representatives of political parties and prominent CSOs and human rights advocates in Ethiopia in September and October 2011. The discussions also revealed that the general political environment has created a sense of fear among civil society organizations and lawyers. This sense of fear may similarly affect the possibility of resorting to constitutional litigation to challenge government decisions.

[133] Emergency Declaration Case, Council of Constitutional Inquiry (14 June 2004) (on file with author).

[134] Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting, 1991, Proc. No. 3/1991, *Neg. Gaz*. Vol. 50, No. 4.

Council. The plea of the CUD to the Court not to refer the matter to the Council speaks volumes about the fact that political parties distrust and, as a result, avoid resorting to the constitutional adjudication system. Litigants largely avoid resorting to the constitutional review system because the prospect of losing a constitutional case is almost inevitable in relation to matters of interest to the regime. Losing a constitutional case has the potential to provide symbolic legitimacy to the laws and policy choices of the government.

In addition to the lack of trust, the legal restrictions on CSOs working on issues of human rights, democracy and good governance further undermine the capacity and willingness of CSOs to resort to litigation to ensure constitutional justice.[135] Some of the most controversial aspects of the CSOs Proclamation include the restrictions on foreign funding of CSOs working on human rights and democratization issues, direct and indirect control of CSOs by the Charities and Societies Agency which is accountable to the Ministry of Federal Affairs,[136] and the denial of the right to appeal to regular courts against decisions of the Charities and Societies Board, an executive organ all seven of whose members are appointed by the government without parliamentary approval, in relation to Ethiopian resident charities or societies and foreign charities.[137] These legal restrictions on the activities of CSOs working on issues of good governance and human rights have the effect of crippling their role not only in constitutional litigation but also generally in complementing democratization and development efforts.

However, these legal restrictions only came into effect in 2009 and cannot explain the non-existence of litigation-centered CSOs before the enactment of the law. In addition to the lack of trust averred to above, the fact that human rights advocates have had no experience in terms of strategic and repeated constitutional litigation partly explains the restraint from seeking justice from the Council. There has been very little appreciation of the potential role and value of constitutional review in advancing the causes of human rights and constitutionalism and in challenging government decisions. The principal strategic focus of CSOs has almost exclusively been advocacy and education. The author is not aware of any CSO that principally relies on litigation and the threat of litigation to vindicate constitutional rights and other standards.

---

[135] Proc. No. 621/2009. See Debebe H., 'Restrictions on Foreign Funding of Civil Society: Ethiopia', *International Journal of Not-for-Profit Law*, Vol. 12, No.3, 2010, p. 18; and Debebe H., 'Ethiopia', *International Journal of Not-for-Profit Law*, Vol. 12, No.2, 2010, p. 9.

[136] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, 2010, *Fed. Neg. Gaz* No 1, Art 14(2). Under the CSO Proclamation, the Charities and Societies Agency was accountable to the Ministry of Justice.

[137] See the articles by Debebe, *supra* note 135.

Moreover, the strict standing rules governing constitutional adjudication in Ethiopia contribute to the so far miniscule role of organized groups in constitutional rights litigation. The fact that the Constitution and other laws do not expressly provide for public interest litigation in constitutional cases has led to the absence of CSOs who use constitutional litigation as a strategy to enforce human rights and other constitutional standards and the law.[138] Partly as a result of the strict standing rules, there is currently no organization that uses public interest litigation to enforce constitutional and legal standards against the legislature and government administrative agencies.

Conclusion

The value of a constitution should be measured against the extent to which individuals benefit from its guarantees, including through litigation. Access to constitutional justice requires among others, an independent and reliable constitutional adjudication system. An independent constitutional adjudication system is particularly important in Ethiopia due to the absence of effective control mechanisms between the legislative and executive organs emanating from the parliamentary form of government the Constitution establishes. The Ethiopian Constitution does not establish any checks and balances − institutional veto points − within the state structure in the making of laws and policies. The constitutional adjudication system is the only possible avenue to challenge laws and policies and other administrative decisions based on constitutional standards. The entrenchment of justiciable rights and other substantive and procedural limits on government power, combined with the supremacy of the Constitution, provides the necessary normative basis for constitutional justice in Ethiopia. Despite this clear normative basis, and although the Council charges no service fees,[139] the contribution of constitutional review in ensuring constitutional justice has been invisible and almost totally irrelevant. Although the existence of justiciable constitutional rights and other

[138] There are, however, some laws that allow public interest litigation. For instance, Article 11(1) of the Environmental Control Proc. No: 300/2002 allows any person alleging violations of the environmental standards established therein to lodge complaints in the Environmental Protection Agency and, in the Authority's failure, to the courts. However, the author is not aware of any court case against a company (government or private) for contravening relevant laws. Note, however, the case brought in 2006 by Action Professionals' Association for the People (APAP) against the Environmental Protection Authority itself for failing to control private companies. All levels of courts rejected the case for lack of standing saying that the Proclamation only allows cases to be submitted to the Authority and the courts against polluting companies, but not against the Authority itself. APAP never pursued the case against the polluting companies. There is also no other organization that actively resorts to courts to enforce environmental standards. In the absence of organized litigants, this limited liberalization of standing rules has had very little effect.

[139] Proc. No. 250/2001, Art 33.

substantive guarantees is necessary for the success of litigation in vindicating constitutional justice, it is clearly not sufficient.

Access to constitutional justice in Ethiopia has been highly limited. A combination of factors explains the largely irrelevant role of constitutional litigation in ensuring constitutionalism. Perhaps the most important hindrances are linked to the absence of an independent and trustworthy supplier of constitutional justice. The absence of an independent constitutional adjudication system, and therefore the low prospect of success, largely explains the lack of trust and, therefore, non-reliance on the system to challenge laws and executive measures that directly affect the existence and interests of CSOs and opposition parties, let alone other issues of relevance to the wider public. Litigants largely avoid resorting to the constitutional review system because the prospect of losing a constitutional case is almost inevitable in relation to matters of interest to the ruling regime. Indeed, constitutionally controversial issues, such as the Anti-Terrorism and CSO Laws, are often discussed in political forms, academic institutions, and the media. The institutions and procedure established to finally and authoritatively resolve such issues have had very little role in shaping constitutional debate and jurisprudence. Moreover, the legal restrictions on the operation of CSOs and the lack of experience in constitutional litigation have further limited the ability to demand and advocate for constitutional justice.[140]

To foster access to constitutional justice, it is suggested that some constitutional reforms to secure the independence, trustworthiness and accessibility of the constitutional adjudicators is necessary. Empowering ordinary courts to exercise the power of constitutional adjudication or establishing a full-fledged independent constitutional court with the final power on constitutional issues is an important step in promoting constitutionalism. Easing the legal and regulatory restrictions on the operation and activities of CSOs may also lead to an increasing demand for constitutional justice and the creation of specialized CSOs that rely on litigation as the sole or principal strategy in ensuring constitutional justice.

---

[140] It should also be noted that the CSO Law and its broad application as well as the general political environment have had a chilling effect on the activities of civil societies. The general sense of fear and insecurity can of course have an impact on the extent to which civil society organization may challenge the constitutionality of laws and other government measures. For instance, Human Rights Watch reported that "where the Law has been quite successful in creating a huge layer of fear. … It has also been successful in creating a lot of self-censorship among NGOs" – 'One hundred ways of putting pressure' (March 2010) 46, retrieved from http://www.hrw.org/sites/default/files/reports/ethiopia0310webwcover.pdf (accessed 14 January 2014). Nevertheless, it is very difficult to assume that even organizations that actually engage in education and advocacy are deterred by fear from challenging the constitutionality of laws and government decisions that they publicly criticize.

Furthermore, despite the low prospect of success, constitutional litigation may actually contribute to easing some of the legal and regulatory restrictions on the operation of CSOs. Advocates of constitutionalism and human rights should therefore resort to the constitutional adjudicator to challenge these restrictions and other constitutionally controversial government decisions. Although the possibility of winning a constitutional case is admittedly slim, due to the structure of the constitutional adjudication system, it is not entirely impossible, especially on issues that are not central to the survival of the ruling regime.[141] CSOs, human rights advocates and opposition political parties should, therefore, seriously consider resorting to the constitutional adjudication system as part of their strategy to influence and constrain laws, policies and other government decisions. At a minimum, it will contribute to enhancing the prominence of constitutional litigation as a strategy to vindicate constitutional justice.

Moreover, resorting to the constitutional adjudication system is a necessary precondition before a case can be admitted before international tribunals. The principle of exhaustion of local remedies requires that a complainant should first seek remedies within the domestic system. Ethiopia is a party to the African Charter on Human and Peoples' Rights. And, complaints against Ethiopia may be submitted to the African Commission on Human and Peoples' Rights. If CSOs, human rights advocates and opposition groups have any intention of challenging some of the laws, policies and other government measures in the African Commission, it is necessary to first resort to available domestic remedies, including the constitutional review system.[142] In short, seeking domestic constitutional justice is generally a prerequisite for seeking international justice from human rights tribunals.

---

[141] See, for instance, the case on the right to appeal of the highest officials of the state, *supra* note 30 where the Council invalidated a law which gave the Federal Supreme Court the first and final say on criminal cases involving the highest officials of the state violated the right to appeal and equality of the defendants. See also *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal High Court, case no 38472 (11 May 2005); and *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal Supreme Court, file no 19699 (May 2005) (on file with author) where a consortium of CSOs successfully challenged the decision of the National Election Board of Ethiopia that prohibited CSOs from observing the 2005 elections. See also the case on the right to appeal of the highest officials of the state, *supra* note 30.

[142] Indeed, so far, all except one of the communications in the African Commission against Ethiopia were rejected for failure to exhaust local remedies. All the communications submitted to the Commission against Ethiopia may be found at http://caselaw.ihrda.org/acmhpr/search/?c=45. In, for instance, *Anuak Justice Council v Ethiopia*, communication no 299/05 (25 May 2006) the Commission held that it is not sufficient to merely allege that domestic remedies will be ineffective. There should be an attempt to exhaust potential remedies. The Commission observed that "[i]f a remedy has the slightest likelihood to be effective, the applicant must pursue it". The only successful communication against Ethiopia as at September 2013 relates to the right to fair trial of officials of the Dergue – see *Haregewoin Gebre-Sellasie & IHRDA (on behalf of former Dergue officials) v Ethiopia*, *supra* note 124. However, it may be argued that the Council and the HoF cannot be considered "judicial" organs for purposes of exhaustion of local remedies. As such individuals may submit applications directly to the African Commission without first resorting to the Council.

Petitioning the Executive in Ethiopia: Trends, Implications and Propriety of Institutionalizing Petitioning

Kinfe Micheal Yilma* & Tadesse Melaku**

Abstract

Few weeks come to pass without a news headline about petitions filed to the Office of the Prime Minister by aggrieved citizens, members of the business community and political parties seeking redress. More often than not, such petitions concern matters that are potentially justiciable and hence eligible to be brought before regular courts. This chapter analyzes factors that are propelling this trend and the concomitant impact of this emerging trend on rule of law, separation of powers and access to justice. It counsels on the possibilities of institutionalizing petitioning anew or alternatively revitalizing already existing institutions in Ethiopia. In so doing, it draws on important lessons from the emerging petitioning system in the Southern Nations, Nationalities and Peoples Regional State.

Key words: Petitioning, Rule of Law, Separation of Powers, Access to Justice

Introduction

Due to various inter-related factors, citizens appear to increasingly seek recourse to executive organs as opposed to courts to redress grievances that they have as against both government measures and actions of the private sector. Whilst this is becoming an increasingly common paradigm in Ethiopia, it is not all new to the Ethiopian judicial practice. A cursory look at the history of the Ethiopian judiciary reveals that Emperors with full monarchial prerogatives seated at the apex of the administration of justice and received petitions from citizens, including appeals from regular courts.

This chapter aims at discussing the increasing recourse to executives over the judiciary in contemporary Ethiopia. Examining purposively selected sample petitions and empirical sources, it tries to identify factors inducing this growing tendency both at the federal and state levels. It critically examines the implications of this growing trend on the constitutionally envisaged principles of rule of law and separation of powers as well as right of access to justice. The chapter considers the propriety of institutionalizing petitioning at the federal level where there currently exists no such framework. It draws lesson from the experience of

* Lecturer-in-Law, Hawassa University, School of Law.
** Lecturer-in-Law, Hawassa University, School of Law. We would like to thank our colleague Ato Gosaye Ayele for his useful comments on an earlier version of this chapter and our former colleague Ato Adane Gebeyehu for availing documents on the petitioning practice at the SNNPR and all the interviewees for their willingness to share their views.

the Southern Nations, Nationalities, and Peoples' Region's (SNNPR) institutionalized petitioning system.

It will be argued that a petitioning practice that is not properly institutionalized, haphazard and devoid of any clear legal framework might cause arbitrariness and violate principles of rule of law and separation of powers. Given that institutionalization of petitioning might prove to be a demanding venture in terms of man power and other resources, this work further counsels on the possibilities of revitalizing the Ethiopian Human Rights Commission and Institution of the Ombudsman as alternates to and/or complementary for a newer petitions handling body.

The first section of this chapter discusses the constitutional framework for petitioning. The meaning, nature and origin of petitioning in general is explained in section two. A discussion on petitioning as a constitutional right in past and present Ethiopia follows in section three. The fourth section recounts monarchial judicial powers of Ethiopian emperors with the view to provide context to the current paradigm of petitioning. Section five addresses three inter-related topics: it starts by detailing purposively selected sample petitions; and then a discussion on the propelling factors for the currently rising number of petitions and implications of this trend on some constitutional principles. The last section considers the propriety of institutionalizing petitioning by drawing on lessons from the petitioning practice in SNNPR. It also presents the alternative of revitalizing – instead of establishing a new and separate petitioning handling body – the Ethiopian Human Rights Commission and the Institution of the Ombudsman. Finally, the chapter concludes with some recommendations.

1. Overview of the Constitutional Framework

1.1. Separation of Powers and the Role of Courts

The French political philosopher Montesquieu, who is most credited for his theory of separation of powers, wrote 'constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go'.[1] Separation of powers aims to fragment the powers of government so that each of the three governmental responsibilities is given to distinct organs. The reason for separating government into smaller institutions is to prevent power concentration; the ultimate goal being securing the rights and freedoms of the people.

[1] Montesquieu quoted in Heywood, A., *Political Ideas and Concepts: An Introduction*, Macmillan, London, 1994, p. 49.

The Ethiopian Constitution, by creating three branches of government, implicitly and in general terms incorporates the principle of separation of powers within the framework of the parliamentary system. Accordingly, the lower house of parliament (House of Peoples' Representatives /HPR/) legislates on matters assigned to the federal government.[2] As for executive functions, the Prime Minister (together with his cabinet) is responsible for 'the implementation of laws, policies, directives and other decisions' of the legislature.[3] Finally, the document bestows judicial powers in the courts both at federal and state levels.[4]

In Articles 78 and 79, the Constitution declares the independence of the judiciary and it prohibits external interference on its jurisdiction. It also stipulates that federal and state supreme courts have 'the highest and final judicial power' in their respective jurisdictions.[5] The Constitution also contained devices safeguarding judicial independence including secured judicial tenure.[6] At the federal level, the Constitution has created a federal supreme court only; other federal courts owe their creation to the HPR. On the other hand, state supreme, high and first instance courts are constitutionally established.[7] Defining the jurisdiction of both federal and state courts is the mandate of the respective legislatures.

Access to court is directly impacted by various factors, notably, the scope of judicial competence and judicial independence. As Philippe Boillat rightly points out, judicial independence is dependent on the power of courts *vis-à-vis* the other arms of government if judges are to exercise meaningful decision-making powers.[8] The independence of Ethiopian courts must therefore be seen having regard to the broader constitutional system. The power of Ethiopian courts is significantly limited as *the final say* on the meaning of the Constitution belongs to the second legislative chamber (House of Federation /HoF/).[9] In a similar fashion, the second legislative chamber in the SNNPR interprets the State Constitution.[10] Courts in Ethiopia are not capable of controlling constitutionality of legislations. It follows that the right of access to justice is restricted to the extent a complaint raises a constitutionality issue.

---

[2] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. no. 1/1995, *Fed. Neg. Gaz.*, Year 1, no. 1, Art. 55(1). [Hereinafter, Constitution of Ethiopia].
[3] *Id.*, Art 72(1).
[4] *Id.*, Art 79(1).
[5] *Id.*, Art. 80(1) and (2).
[6] *Id.*, Art. 79(4).
[7] *Id.*, Art. 78(2) and (3).
[8] Boillat, P., 'The Independence of the Judiciary: Current Problems and Possible Solutions', in *the Role of Supreme Courts in the Domestic Implementation of the European Convention on Human Rights*, Council of Europe, 2008, p. 28.
[9] Constitution of Ethiopia, *supra* note 2, Arts 62(1), 83(1) and 84(2).
[10] Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State, 2001, Proc. no. 35/2001, *Debub Neg. Gaz.*, Art. 59.

The concept of justiciability has an important qualification despite the status of the Constitution as the 'supreme law of the land'[11] and the entrusting of 'judicial power'[12] in the courts. As a result, the many fundamental rights guaranteed by the supreme law are not apparently producing the intended results. Interestingly, the situation in Ethiopia contrasts with developments in jurisdictions where the trend has been the 'judicialization' of politics.[13] The increasing transfer of judicial matters to the political institutions in Ethiopia suggests the 'politicization of judicial matters'.[14] Constitutional cases are entrusted to the HoF, without clearly defining the role of courts.[15] Besides, the lower house of parliament is the highest lawmaking authority; the legislature is, in effect, a judge in its own case suggesting the absence of independent constitutional review.

In sum, the concepts of 'judicial independence', 'judicial powers' and 'access to court' must be understood within the wider institutional framework under which courts operate and its implications on their ability to decide issues of rights violations.

1.2. Rule of Law and the Courts

As proclaimed in the preamble to the FDRE Constitution, 'building a political community founded on the rule of law' is one of the aspirations of the Ethiopian society. The preamble emphasizes that the realization of values laid down in the document is contingent on 'full respect of individual and people's fundamental freedoms and rights'.[16] Rule of law defines the rules of the game and provides the tool to enforce individual rights. It demands fair, transparent, and evenhanded application of the law.

For the English constitutionalist Dicey, the concept of 'rule of law' contains three distinct aspects. First, an individual is not answerable for his actions 'except for a distinct breach of law established in the ordinary courts of the land'; and this is meant to preclude the exercise of wide, arbitrary, or discretionary powers.[17] Second, rule of law signifies that no person is above the law regardless of his or her rank. Everyone must be subject to the

---

[11] Constitution of Ethiopia, *supra* note 2, Art. 9(1).

[12] *Id.*, Art. 79(1).

[13] 'Judicialization of politics' refers to the transfer of political disputes from the political arena to judicial institutions. Gibson, J., 'Judicial Institutions', *in* Rhodes, R., Binder, S. and Rockman, B. (eds.), *The Oxford Handbook of Political Institutions*, Oxford University Press, Oxford, 2006, p. 514.

[14] It is also worth noting that laws enacted in 2001 have extended the power of the HoF to review constitutionality of not just proclamations but also regulations, directives and decisions of any government organ. See, e.g., Council of Constitutional Inquiry Proclamation, 2001, Proc. no. 250/2001, *Fed. Neg. Gaz.*, Year 7, no. 40, Art. 17.

[15] Constitution of Ethiopia, *supra* note 2, Arts 62(1) and 83(1).

[16] Preamble to Constitution of Ethiopia, *supra* note 2, para 3.

[17] Dicey, A., *Introduction to the Study of the Law of the Constitution*, Liberty Fund, Indianapolis, 1982, p. 147.

ordinary law of the land and amenable to the jurisdiction of ordinary courts.[18] Third, the idea of rule of law is given effect through courts. In their role as arbiters of dispute, courts take the role of protecting personal liberty in deciding specific cases.[19] In a rule of law based system, judicial bodies are instrumental in holding government accountable and protecting the people from exploitation by powerful groups.[20]

Rule of law is very much linked to an independent and functioning judiciary. As the World Bank noted:

> a judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law. If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced.[21]

The Ethiopian Constitution has certain overarching principles that contribute to the establishment of a system of rule of law. One such principle is the duty of state organs 'to respect and enforce' the Constitution's fundamental rights provisions.[22] The legislative, executive and judicial organs have the duty to give effect to constitutionally recognized rights and freedoms.[23] This calls for judicial oversight of governmental actions to protect citizens from abuse of power. A fair judicial system is therefore essential to rule of law. In particular, judges can play a crucial role in defining the relationship between the courts and the other arms of government and between judges and the people.[24]

However, while the Constitution of Ethiopia is quite generous in its list of human rights ranging from the classic rights (life, liberty and property) to the most recent ones (e.g. environmental rights), it has failed to set up an effective enforcement mechanism. In practice, the fundamental rights and freedoms are disconnected from the means to enforce them. A mere list of rights is not sufficient for their enjoyment; and as the experience of states without

---

[18] *Id.*, p. 149.
[19] *Id.*, p. 150.
[20] Anderson, M., *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Institute of Development Studies, Sussex, 2003, p. 1.
[21] World Bank, *World Development Report: Building Institutions for Markets*, 2012, p. 129.
[22] Constitution of Ethiopia, *supra* note 2, Art. 13(1).
[23] A similar provision in the South African Constitution stipulating the state's duty to 'respect, protect, promote and fulfill the rights in the Bill of Rights' has been interpreted to refer to both negative and positive obligations requiring the state to take all actions necessary to give effect to basic rights; see South African Constitutional Court quoted in Davis, D., 'The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?', *P.E.R.*, Vol. 15, No. 5, 2012. Retrieved from <http://www.saflii.org/za/journals/PER/2012/46.pdf.> [Accessed on March 23/2014].
[24] Gleeson, M., 'Courts and the Rule of Law', 2001. Retrieved from <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm> [Accessed on March 23/2014]

written constitution (e.g. United Kingdom) proves a list of rights is not a necessary condition for the enjoyment of personal liberty and freedom.

1.3. Access to Justice as a Human Right

Access to justice is defined as the 'ability of people to seek and obtain a remedy through formal or informal institutions of justice, and *in conformity with human rights standards*'.[25] International and regional human rights instruments as well as FDRE Constitution guarantee access to justice as a human right.[26] For instance, the Universal Declaration of Human Rights proclaims the right to obtain effective remedies for redressing rights violations before a competent tribunal.[27] Two principles stand out from this: *effective remedy* and *competent tribunal*. The right to equality before the courts and equal protection of the law also presuppose access to justice. On its part, the International Covenant on Civil and Political Rights, without explicitly mentioning access to justice, recognizes right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law' in the determination of civil and criminal matters.[28] This provision is designed to ensure fairness of proceedings as well as the independence and impartiality of the tribunal. The African Charter on Human and Peoples' Rights (AFCHPR) specifically guarantees the right of appeal to challenge infringement of human rights and the right of access to justice.[29]

Locally, The FDRE Constitution recognizes these and other international human rights instruments adopted by Ethiopia as yardsticks in the interpretation of fundamental rights and freedoms.[30] Everyone has 'the right to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power'.[31] This provision is very detailed in comparison to the international bill of rights discussed above. Among others, it entitles complainants 'to obtain a decision or judgment'. Under the Constitution access to court is much more than ability to file a court case as the right to obtain 'a decision or judgment' provides an extra parameter to guarantee effective access to justice. Regarding the institutional system, adjudication is to be carried out by a court of law or

---

[25] United Nations Development Program, quoted in Meene, I. and Rooij, B., *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation*, Leiden University Press, Leiden, 2008, p. 7.

[26] The treaties ratified by the legislature are an integral part of the laws of Ethiopia (Constitution of Ethiopia, *supra* note 2, Art 9(4)).

[27] Universal Declaration of Human Rights (UDHR), 1948, Art 8.

[28] International Covenant on Civil and Political Rights (ICCPR), 1966, Art 14.

[29] African Charter on Human and Peoples' Rights (ACHPR), 1982, Art 7.

[30] Constitution of Ethiopia, *supra* note 2, Art 13(2).

[31] *Id.*, Art 37.

competent body with judicial power. In other words, only regular courts and *tribunals duly established by law* can exercise judicial decision making. Furthermore, the Constitution's authors have given additional safeguard to judicial independence by outlawing the establishment of 's*pecial or ad hoc courts* which take judicial powers away from the regular courts or institutions *legally empowered to exercise judicial functions* and *which do not fol1ow legally prescribed procedures*'.[32] Thus, only the legislature can create courts and courts must observe fairness during decision making. Simply stated, the Constitution imposes substantive and procedural due process limits in adjudication. Typical procedural devices for ensuring fairness include adequate notice, opportunity to be heard and the chance to refute evidence of an adversary.

2. Meaning, Nature and Origin of Petitioning

The term petition refers to a formal written request presented to a court or other official body.[33] It denotes written instrument directed to some individual, official, legislative body, or court in order to redress a grievance or to request the granting of a favor.[34] Normally, petitions are submitted to government organs such as legislative, executive and administrative bodies.[35] The word petition is so broad that it also covers complaints filed with courts as well. This view is shared by Spanbauer who notes that the petition clause in the American Constitution envisages 'a broad vision of petitioning, consistent with the British and colonial experience encompassing the past practices of written application to the executive or legislative branch and initiation of judicial proceedings or requests for judicial review'.[36]

The origin of petitioning is traced back to thirteenth century England.[37] It was initially recognized under the *Magna Carta*, albeit in an indirect fashion and later formally included under the bill of rights of 1689.[38] It gradually started to be practiced in many jurisdictions as one mode of airing grievances.[39] Despite its long history, it acquired the status of a legal right only in early eighteenth century. Before being gradually expanded in scope, petition did not initially entail entitlement to explain one's complaint before the authorities or to demand

---

[32] *Id.*, Art. 78(4).
[33] Garner, H., (ed.), *Black's Law Dictionary*, 9th ed., West Publishing Co., St. Paul, p. 1261.
[34] Encyclopedia Britannica, Petition, Retrieved from <http://www.britannica.com/EBchecked/topic/454043/petition.> [Accessed on March 23/204]
[35] Spanbauer, J., 'The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth', *Hastings Constitutional Law Quarterly*, vol. 21, 1993, p. 17.
[36] *Id.*, p. 42.
[37] *Id.*, pp. 19-20.
[38] Encyclopedia Britannica, *supra* note 34.
[39] As we shall see later, Ethiopian rulers (like their British counterparts) acted as fountain of justice handling the complaints brought by their subjects.

legislative deliberation. It only stood as a right for consideration only, which might be followed by an immediate rejection.[40]

It is disputed whether the right to petition imposes a correlative duty on government to accept and consider the demand.[41] In the first half of the eighteenth century, the US President Quincy Adams announced that every person had the right to petition to Congress with an opportunity to be heard on the merit of a petition.[42] As Spanbauer suggests, the right to *response* was considered, at least initially, as inherent in petitioning thereby limiting officials' power to turn a deaf ear to petitioners.[43] Similarly Stephen Higginson posits that a meaningful right of petitioning depends on at least a minimal governmental consideration and response regardless of the final outcome.[44]

In contrast to this view, in *Smith v. Arkansas State Highway Employees*, the US Supreme Court held that the government did not have a duty to listen to grievances or to respond to grievances.[45] It further observed that the failure of the concerned officials 'to consider or act upon grievances' did not violate the First Amendment. While recognizing the right of public employees 'to openly petition', the Court denied the affirmative obligation of authorities 'to listen, to respond or, in the context of the case, to recognize the association and bargain with it'.[46]

For the purpose of this chapter the word 'petition' is meant written submissions by aggrieved persons to the executive branch of the Ethiopian government. Petition here excludes written submission where a large number of crowds arrange signatures of support with the view to lobby some form of government or non-governmental decisions. Also, the authors agree to the distinction some authors maintain between petitioning and administrative review of decisions. Petitioning and administrative review are two mutually exclusive channels of seeking redress. Administrative reviews are basically condition precedents that any aggrieved person must exhaust before he approaches the judiciary while petitioners petition the highest executive organ without any need to follow the hierarchy in the administrative chain. Petitioning should not, therefore, be seen in the light of administrative review precisely because no person petitions while at the same time pursuing

---

[40] Spanbauer, *supra* note 35, pp. 11-12.
[41] *Id.*, p. 12.
[42] Quincy Adams quoted in Higginson, S., 'A Short History of the Right to Petition Government for the Redress of Grievances', 96 *Yale Law Journal*, 1986, p. 11.
[43] Spanbauer, *supra* note 35, p. 17. The writer further argues that the right to petition in the US Constitution includes a mandatory official response, not necessarily a positive one though (*id.*, p. 49).
[44] Higginson, *supra* note 42, p. 11.
[45] The ruling of the US Supreme Court discussed in Spanbauer, *supra* note 35, p. 50.
[46] *Ibid.*

judicial recourse in a court of law. Petitions are just means of recourse that people often take while they have frustrations in the judicial system.[47]

3. Petitioning as a Constitutional Right in Ethiopia: Past and Present

In Ethiopia, petition as a constitutional right is as old as at least the first written constitution. The 1931 Constitution of Ethiopian recognized the right of citizens 'to present to the Government petitions'.[48] With some modifications, this right was maintained in the Revised Constitution of 1955.[49]

Devoting two articles on petitioning, the 1987 Peoples' Democratic Republic of Ethiopia (PDRE) Constitution was more detailed than its predecessors. It obliged government officials to 'examine and respond to the proposals and criticisms submitted and take appropriate action'.[50] It further made retaliation against complainants punishable by law.[51] Complaints, which under Article 52, could be submitted 'against state organs and mass organizations or officials thereof' must also be examined and responded to'. The PDRE Constitution was therefore a departure from earlier constitutions that did not require concerned bodies to respond and take action on petitions.

Although generally conscious of the right to petition,[52] the current Ethiopian Constitution provides little as regards the extent and nature of the responsibility of government officials to respond to petitions. Are government institutions bound to receive petitions; do they have also a duty to respond? Of course, Art. 13(1) which imposes on the three branches of federal and state governments the duty 'to respect and enforce' fundamental rights and freedoms (including petition) guaranteed by the Constitution warrants the conclusion that complaints can be submitted to the legislative, executive and judicial arms of government. Still, to the best of the authors' knowledge, there is no authoritative interpretation on this provision by the HoF. The determination of the status of the right under

---

[47] For instance, an aggrieved employee of Hawassa University may directly petition to the Office of Prime Minister without any need to exhaust administrative remedies available at the Civil Service Tribunal. Should she however choose to follow the conventional administrative review channel, she sets in motion a judicial process distinguishable from petitioning studied here.

[48] Ethiopian Constitution of 1931, Art 28.

[49] Art 63 of the Revised Constitution reads: "Everyone in the Empire shall have the right to present petitions to the Emperor in accordance with the law". See, Revised Constitution of Ethiopia, infra note 67. The 1931 Constitution limited the scope of the right to Ethiopian nationals only; the Revised Constitution extended its reach to everyone but it replaced the word 'government' with 'Emperor' and hence it put limit as to whom complaints could be submitted to.

[50] Constitution of the Peoples' Democratic Republic of Ethiopia, Proclamation No. 1/1987, *Fed. Neg. Gaz.*, Vol. 47, No. 1, Art. 51.

[51] *Ibid*.

[52] Article 30 of the FDRE Constitution recognizes the right to petition along with freedom of assembly and public demonstration.

the FDRE Constitution therefore seems to us complicated. One may not know if it is treated as part of a singular right, assimilated to assembly and demonstration,[53] thereby entailing the application of the restrictions under Art 30(2) to the right of petition as well.[54]

The principles of separation of powers and rule of law, both of which are recognized under the FDRE Constitution, do not require all disputes to be justiciable or all grievances to be resolved through court litigation.[55] As Murray Gleeson put it, these principles do 'not require that the entire apparatus of the judicial system be brought to bear upon all disputes, or even upon all disputes about legal rights and obligations'.[56] Petitioning and alternative dispute resolutions are additional means by which grievances can be handled. Access to justice includes petitioning government. And, both access to justice and right to petition are fundamental rights pursuant to the FDRE Constitution.[57] Both provide individuals and groups with the means to bring their concerns to the attention of government officials for a redress.

4. Recourse to Executives in Ethiopian Legal History: Monarchical Judicial Prerogatives in Retrospect

In Ethiopian legal history, administration of justice was not restricted to the judiciary. Until the demise of the Monarchy in 1974, administrative and judicial functions were not clearly distinct. Indeed, adjudication of cases formed a central part of public administration and the principal function of the administrative organs of the state.[58] This fusion of judicial and administrative power was a peculiar feature of the history of administration of justice.[59] This is said to have been made for two purposes; one was avoiding the necessity of sending

---

[53] From the caption of Article 30 – *The Right of Assembly, Demonstration and Petition* – it seems there is one right instead of three distinct rights (i.e. right to assembly, right to demonstration and right to petition).

[54] Article 30(2) stipulates: 'This right [in the singular] does not exempt from liability under laws enacted to protect the well-being of the youth or the honor and reputation of individuals, and laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity.' Consequently, criminal prosecution and civil liability for defamation could follow for breaching those limitations. In comparison, in the US, where the right to petition had a historically privileged status (compared to freedom of speech and press), free speech and the press were subject to criminal and civil actions; but these restrictions were not applied to petitioners. Exceptions were baseless lawsuits, petitions brought in bad faith. In England, the publication of a petition previously submitted to parliament or court could result in legal action. The reason for disallowing publication is that it would make the matter reach to the world at large, and this is unwarranted; thus, unprotected by the right. Spanbauer, *supra* note 35, pp. 52-53.

[55] Gleeson, *supra* note 24.

[56] *Ibid*.

[57] Constitution of Ethiopia, *supra* note 2, Arts 30 and 37.

[58] Abera J., *An Introduction to the Legal History of Ethiopia: 1434 – 1974*, Shama Books, Addis Ababa, 2012, p. 213.

[59] An example of this fusion of executive and judicial functions was the appointment by Emperor Menelik II of the Chief Justice as his Minister of Justice in 1908. See, *id*, p. 214; Assefa F., *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Wolf Legal Publishers, Postbus, 2006, p. 390.

judicial personnel to remote areas to which only few officials were willing, and second was the insistence on the part of governors that they would be able to maintain law and order only if they were also given the judicial power. It was only in 1973, by virtue of Proclamation No. 323/1973, that administrative and judicial functions were separated.

Ethiopia's centuries long tradition regarded the monarchy as the supreme head of the executive, the fountain of justice, agent of change and as the law giver.[60] Of these, the long-held king's judicial role had to do with the religiousness of the monarchy and hence was part of reverence to God's words. The following sentences chronicled in *Fetha Negast* (Law of Kings) evince that fact:

> The honored king loves justice, but the unjust loves evil and injustice, for his soul's ruin…Never shall the king wrong the orphans and the widows, since the Highest Lord has said 'if you wrong them they will cry out to me and their cry will be heard by me, I will answer them. My anger will blaze out against you and I will smite you with war and your wives will be widows and your children orphans, referring to Ex. 22, 23. [61]

Hearing appeals was one of the roles of the Emperor from ancient times, as early as the middle ages.[62] This monarchical judicial power was exercised until the end of the reign of Emperor Haile Selassies I (r. 1930-1974). He was said to allocate two days a week to carry out his judicial business based on summary of the case presented to him by the chief justice, *Afe Negus*.[63] And, the Penal Code of the 1930 empowered the Emperor to pass death sentence.[64] Death sentences were executed after the assessors and scholars of the *Fetha Negast* gave their opinions and when finally the Emperor pronounced his judgment in the Crown Court.[65]

---

60 Abera, *supra* note 58, p. 213.

61 Paul and Clapham, *Ethiopian Constitutional Development*, *infra* note 67, p. 293 quoting from *Fetha Negest* as translated by Aba Paulos.

62 Pankhrust, R., *Introduction to Economic History of Ethiopia: From Early Times to 1880*, Lalibela House, 1961, p. 122. Richard Pankhrust documents the accounts of travelers called Alvarez, Poncet and Bruce as follows: 'Alvarez also describes the legal system in which the Emperor constituted the final court of appeal…Appeal cases were decided by the Emperor though not normally heard by him in person…Poncet relates that he was present in the great hall of the palace when Iyasu I received petitions from his subjects. Those who had favors to beg came in and advance up to the foot of the throne where one of the ministers took their petitions and read them with a loud voice. Sometimes the Emperor took the pain to read them himself, and made answer out of hand. Iyasu, he added, had 'an extraordinary love for justice' which he administered with 'great exactness'.

63 Muradu A., *Legal History and Traditions*, vol. 2, JLSRI, Addis Ababa, 2007.

64 *Ibid*.

65 Abera, *supra* note 58, p. 218.

Conventions based on divine kingship were the primary sources of legitimacy for the myriad of imperial powers.[66] The Emperor had powers and functions which were 'executive', 'legislative' and 'judicial' in nature.[67] The Revised Constitution of 1955, however, had provisions which had long been invoked to justify the constitutionality of imperial judicial powers. Art. 35 of Constitution, for instance, stated that the Emperor had the right (and the duty) to maintain justice throughout the courts. Art. 36 of the same constitution further stated:

> The Emperor, as a sovereign, has the duty to take all measures that may be necessary to ensure at all times…the safety and welfare of its inhabitants including their enjoyment of the human rights and fundamental liberties recognized in the present constitution…subject to the other provisions of this constitution, he has all rights and powers necessary for the accomplishment of the ends set out in the present article.

Imperial prerogatives to hear appeals and hence to adjudicate cases also relate to the constitutional right of everyone in the Empire to present petitions to the Emperor.[68] This provision allowed every Ethiopian to appeal to the Emperor whenever s/he felt that s/he had been made the victim of gross injustice.[69]Accordingly, the Emperor, as a supreme judge and fountain of justice, could override and annul any court ruling when appealed to him.[70]

These judicial powers of the Emperor have been described by some commentators as 'residual', an otherwise undefined power to maintain justice through courts.[71] This power has been construed to perpetuate the traditional institution of the Imperial Crown Court — also called *Zufan Chilot* — where the Emperor exercised discretionary jurisdiction to review and remand cases brought before the regular courts. It is reported that the legal basis for the Imperial Crown Court derived from the sovereign prerogative of the Emperor to see that justice is done.[72]

Also to be noted is that the Crown Court was largely distinct from the courts formally established by law in that such courts were to act completely independent of the imperial

---

[66] Interestingly, the first written Constitution of Ethiopia clearly recognized the right of all Ethiopian subjects to petition the government, in legal form! See, the 1931Constitution of Ethiopian, Art. 28, *supra* note 48.

[67] Paul, J. and Clapham, C., *Ethiopian Constitutional Development: A Source Book*, Vol. I, Oxford University Press, Oxford, 1967, p. 393.

[68] See, The Proclamation Promulgating the Revised Constitution of the Empire of Ethiopia, *Neg. Gaz*., 1955, Art 63.

[69] Scholler, *Ethiopian Constitutional Development*, *infra* note 72, p. 53.

[70] *Ibid*.

[71] Paul and Clapham, *Ethiopian Constitutional Development, supra* note 67, p. 393. See also Abera, *supra* note 58, p. 223.

[72] Scholler, H., *Ethiopian Constitutional Development,* Vol. I, Artistic Printing Press, Addis Ababa, 2004, p. 47, citing Redden, K., *The Legal System of Ethiopia*, The Mitch Company, Charlottesville, 1968, p.47. The *Zufan Chilot* (Crown Court) was argued to be not a court in a legal sense (Sedler, R., *Ethiopian Civil Procedure*, Oxford University Press, Oxford, 1968, pp. 8-9, 12, 15-16 & 18).

adjudication.[73] The exercise of jurisdiction in *Zufan Chilot* was discretionary in that the Emperor was required neither to hear a particular case nor to exercise *Zufan Chilot* jurisdiction at all.[74] Also striking about *Zufan Chilot* was that the Emperor was not bound to decide the case in accordance with the provisions of the formal law; he could rather base his decision on principles of justice and fairness without reference to any law.[75] In so doing, he could mitigate the rigor of the application of the law, or grant relief from the effects of the law which the courts could not in the exercise of their judicial powers.[76]

As much as it left rooms for the constitutionality of monarchical judicial authority, the Revised Constitution of 1955 ironically recognized judicial independence and impartiality. Art. 109, for instance, provided that judicial power is vested in courts established by law and shall be exercised in accordance with the law and in the name of the Emperor. In similar vein, Art. 109 stipulated about the need for judicial independence. This must have sent mixed signals about separation of powers between the executive and the judiciary.

5. Recourse to Executives over the Judiciary in Present Ethiopia – Factors and Implications

5.1. Overview of Recent Petitions Filed with Executive Bodies

This section presents an overview of sample petitions filed before higher executive organs at the federal level. By outlining the merits of these sample petitions, it sets the stage for subsequent discussions. Cases raised in this section are selected purposively while the underlying criteria for such selection being that these petitions have been presented only in the recent past, even some of them still awaiting answers from the executive offices of the government. The descriptions aim at revealing the justiciability of the cases and that those petitioners could have initiated court actions to obtain redress instead of petitions.

It is to be noted that whilst there currently exist no hard-and-fast baseline data that clearly describe the extent of petitioning in Ethiopia, the number of purposively selected petitions filed just in the past couple of years demonstrate at least the increasing recourse to petitioning. The authors believe that these petitions, no matter how seasoned they may be, help show the increasing popularity of petitions in Ethiopia. This, however, is by no means, to suggest that the decline of court cases with the increasing popularity of petitions. What it does mean is that petitions are apparently becoming viable alternatives to judicial process.

---

[73] Paul and Clapham, *Ethiopian Constitutional Development, supra* note 67, p. 395.
[74] Scholler, *Ethiopian Constitutional Development, supra* note 72, p. 47.
[75] *Ibid.*
[76] *Ibid.*

1. Petition by Blue Party and All Ethiopian Unity Party

The forced displacement of people of Amhara ethnic origin from the Benshangul Gumuz region has been on the news for some time in late 2013. Unlike other related incidents of alleged forced displacement, the government itself conceded the occurrence of the incident and even vowed to bring those behind the action to justice. The government claimed that it reinstated the displaced people and had their properties returned. Skeptical of the government's claims and indeed after field visits to the area, Blue Party and All Ethiopian Unity Party presented a petition signed by their lawyer Dr. Yacob H/mariam, a veteran law professor, to the Prime Minister's Office demanding immediate solution to the problem which allegedly continued nonetheless.[77]

In an interview, Dr. Yacob stated that they have not yet heard from the Prime Minister's Office two months after submitting the petition – sometime in June 2013. According to him, the parties are just exhausting domestic remedies so that they may later bring the case before an international criminal court.[78] The petitioners even threatened to go to court should the government fail to provide appropriate solutions to the problem.

As can readily be noted, the complainants preferred to obtain relief from the Prime Minister who is at the helm of the executive branch. Moreover, Dr. Yacob posited petitioning the government was the best possible option given existing doubts on the independence of Ethiopia's judiciary which is also alleged to be inexpedient and costly.[79]

2. Petitions involving Ermias Amelga

By a letter signed on 27 January 2012, the National Bank of Ethiopia, banned Mr. Ermias Amelga, former Chairman and main promoter of Zemen Bank, from serving as a director in the banking industry for inappropriate transactions he allegedly carried out during the formative years of the Bank.[80] Distraught by the decision, he told the press that he would

---

[77] See ናፍቆት ዮሴፍ : ዶ/ር ያዕቆብ ኃ/ማሪያም ለጠቅላይ ሚኒስትሩ ግልፅ ደብዳቤ ላኩ : *አዲስ አድማስ* : ሃምሌ 20 : 2005.

[78] Interview with Dr. Yacob H/Mariam, Attorney at Law and Consultant, September 16/2013, Addis Ababa, Ethiopia.

[79] *Ibid.* At the time of writing, the petitioners did not still hear from the government. Indeed, the Prime Minister once reacted to the issue at a parliamentary session. It is doubtful whether such incidental reactions would count as an answer to the petition.

[80] Eden Sahle, 'Ermyas, Tekle Face Central Bank's Wrath over Zemen Bank', *Addis Fortune*, Vol. 12, No. 614, February 05, 2012.

seek justice against the decision of the National Bank and to that effect he has written a letter of plea to the then Prime Minister.[81]

Ermias' case involves a clear cause of action that the petitioner could have pursued judicially. As an administrative action, the decision against Mr. Ermias was a justiciable matter that could have been taken to court.

In a related story, aggrieved customers of the now troubled Access Real Estate S.C have been banding to bring actions against Mr. Ermias Amelga who they accuse of fraud and numerous improprieties. In a recent colloquium they arranged, the customers invited different higher government officers (including representatives from the Office of the Prime Minister) and reiterated their resolve to bring Mr. Ermias Amelga to justice. More importantly, they have called on the government to intervene on the matter.[82]

This case also represents a clear justiciable matter that could be dealt with judicially. Indeed, the complaining customers are reported to have pursued legal action which they later abandoned due to lack of trust that courts will not be able give them justice.[83]

Postscript: In a very recent letter signed by Minster of Justice Getachew Ambaye, the Ministry of justice apparently (and oddly) 'ordered' the Federal Supreme Court, Ministry of Trade, Addis Ababa City Administration Land Administration Bureau and Document Authentication and Registration Office not to process or handle request for sale or exchange of property including shares in the name of Mr. Ermias and the Share Co.[84] The letter further requires no contractual agreements shall be approved and where such contracts were already approved not to be executed.[85] The executive 'order' also calls for termination of pending individual cases against Mr. Ermias and the Share Company.[86] The letter has soon sparked concern and opposition from various corners including customers of the rogue real estate company. In particular, the legality of such an order from the perspective of separation of powers and judicial independence is questioned.

3. Petition by aggrieved Employees

---

[81] *Ibid.* The letter has not been accessed by the media and hence the public. Yet, it is believed that primary cause for the petition was the decision of the National Bank banning him from board membership in Ethiopia's financial sector.

[82] ታምሩ ጽጌ : የአክሰስ ሪል ስቴት ደንበኞች አቶ ኤርሚያስን በጋራ ለመፋረድ ተስማሙ : *ሪፖርተር* : ነሃሴ 29 : 2005

[83] During the course of writing this chapter, frequent attempts to reach out (via email) Mr. Ermias, now in exile, have not succeeded.

[84] ታምሩ ጽጌ: ፍትህ ሚኒስቴር አክሰስ ረል ስቴትን በተመለከተ ለመንግስት ተቋማት ደብዳቤ ላከ: *ሪፖርተር:* የካቲት 12: 2006::

[85] *Ibid.*

[86] *Ibid.*

Employees of some public enterprises, for example Ethiopian Insurance Corporation, the Development Bank of Ethiopia and the Commercial Bank of Ethiopia, have recently appealed to the Prime Minster over salary increments. Citing disproportionate and discriminatory salary increases made to senior officials of the enterprises, the employees demanded the Prime Minister to look into the 'inappropriate' decisions. They demanded that the increments should have been made proportionately and non-discriminatorily to all employees of the enterprises.[87]

In a related matter, close to 500 employees of the Sheraton Addis Hotel lodged complaints to various higher government offices including to the Office of the Prime Minister and Ministry of Labor and Social Affairs alleging racial discrimination and human rights violations allegedly committed by a French manager of the Hotel.[88] Interestingly, the complaint is also lodged to the two parliamentary institutions established to deal with maladministration and human rights abuses: the Institution of the Ombudsman and the Human Rights Commission, respectively.

The petitioners, citing human rights provisions of the FDRE Constitution, accused the General Manager of Sheraton Addis of human right abuses, insults, racism, and even assault. They noted in their application that the matter is quite grave and unique that cannot be seen as a simple labor dispute. The petitioners demanded that the government create a mechanism through which the Manager (along with his accomplices) be brought before justice; their petition also stated the employees' worry that, if the matter is not taken seriously, the General Manger may contemplate retaliation.

No doubt, both of the above enumerated petitions contain justiciable matter, i.e. violation of labor law and human rights that could be brought before a court through 'class action'. Yet, the petitioners preferred solutions from the executives.

Postscript: Months after lodging petitions to the government, employees of Sheraton Addis recently approached the media and disclosed that they received no official response from the government as a result of which they are currently suffering retributions from their boss.[89] Aggrieved by the silence of the government, the employees vowed to take it to the street by convening a demonstration so that they could get more attention.[90]

---

[87] Berhanu Fekade, 'Disappointed Employees Appeal to Prime Minister Over Salary Increments', *The Reporter – English Edition*, 31 August 2013.

[88] ታምሩ ጽጌ: የሸራተን ሠራተኞች የመብት ረገጣ እየተፈጸመብን ነው አሉ : *ሪፖርተር* : መስከረም 10 : 2006

[89] የሸራተን ሰራተኞች ''መብታችን ተጣሰ'' በማለት ሰላማዊ ሰልፍ ሊወጡ ነው: አዲስ አድማስ: ታህሳስ 12: 2006.

[90] *Ibid.*

4. Petition by Business Community against Ethiopian Revenues and Customs Authority

The Ethiopian business community has increasingly become very active in challenging various measures of the government that affect its interests. Various tax measures of the Ethiopian government have been particular interest to the business community; and there has been for a while a practice of challenging tax measures through petitions to higher executives.

A more recent case concerned 'dividend tax' that the Ethiopian Revenues and Customs Authority moved to collect from companies' 'retained earnings'. In a circular issued by the Authority, companies (both share companies and private limited companies) were required to pay dividend taxes on undistributed retained earnings which were neither distributed to shareholders nor put up to increase capital including interests and penalties. This measure taken by the tax Authority soon sparked controversy and lots of opinion pieces critical of the measure appeared on newspapers for weeks.[91]

Indeed, the business community considered bringing the matter to court and to that effect it formed a committee that would look into 'the implications of suing the tax authority on the private sector'. The intent to sue the tax authority was ephemeral and that the business community used the 'Public-Private Dialogue Forum' to air its objections to senior government officials. After months of stalemate between the tax Authority and taxpayers, the controversy was resolved with a simple statement of the Minster of Finance and Economic Development and later the Prime Minister who in a passing remark overturned the long-held position of the tax Authority.[92]

5. Pensioners Petition

---

[91] A central point in the controversy related to the business community's dissatisfaction with the tax authority's usurpation of the law making power of the parliament by issuing a circular that completely changed the dividend tax regime regulated under the Income Tax Proclamation No. 286/2002; See, for instance, Eyesuswork Z., 'Dividend Tax Law Mistakes Unforgivable', *Addis Fortune,* Vol. 13, No.573, March 24, 2013; Yohaness Wolde-Gebriel, 'Dividend Tax Circular Remains Unlawful', *Addis Fortune*, Vol. 13, No. 673, March 24, 2013; Yitayal Mekonnen, 'Dividend Tax Uproar Unwarranted', *Addis Fortune*, Vol. 13, No. 672, March 17, 2013 [Defending the position of the tax authority]. ደሜ አበራ: በአክሲዮን ትርፍ ድርሻ ግብር አፈጻጸም ላይ የተላለፈው ሰርኩላር መሠራረታዊ ስህተቶች : *ሪፖርተር*: ሚያዚያ 6 2005::

[92] Tamirat G/Giorgis, 'Gov't Accepts: No Tax on Undistributed Dividends', *Addis Fortune*, Vol. 14, No. 687, June 30, 2013. In a letter signed on July 30, 2005 E.C. to the Ethiopian Revenues and Customs Authority, Minster Sophian Ahmed instructed that no dividend tax shall be collected on retained earning if the profit has been used to increase the capital of the companies. In other words, the dividend tax shall be collected only when dividends are actually distributed to shareholders. See also የኢፌዲሪ የገንዘብ እና የኢኮኖሚ ልማት ሚኒስቴር : ለ ኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን: ሀምሌ 30 2005 ዓም::

This petition was filed by Addis Ababa City Pensioners Association to the Office of the Prime Minister. It demanded an increase in pension payments. The petitioners claimed that pursuant to a directive issued by the government, pension increments shall be made every five year but the increment had not been realized.[93] They also stated that given the soaring economic inflation, the existing pension payments were too meager to enable pensioners survive.[94] Accordingly, they asked the Prime Minister to take action to revise the pension payment scheme. No doubt that the first claim of the petitioners was justiciable. Recourse to court was therefore an option to the Association of Pensioners which, among others, sought government to comply with a directive, which is law.

5.2. Major Factors for Increasing Recourse to Executive Bodies: The Propelling Factors

This study uncovered three major factors for the increasing public preference to seek justice from executive organs. The first factor is the dwindling faith of the public on the judicial system. The majority of the informants[95] of the study asserted that there is a growing public perception that the judiciary lacks independence, impartiality and that judicial business has come to be related with politics. According to the dominant view, the public sees no gain in approaching courts to obtain justice while the diktats come from executive politicians.[96] And, as a result, it is better to demand justice from the executive directly than to present claims to a judiciary that has little independence and impartiality.[97]

Previous studies add a kernel of truth to the above view that there is deteriorating public faith and trust on the Ethiopian judiciary. The famous opinion polling entity 'Gallup' conducted a poll in Ethiopia in July 2007 which revealed that few Ethiopians expressed

---

93 ታደሰ ጉበረማርያም : ጠቅላይ ሚኒስትሩ የጡረታ አበል ጭማሪ እንዲደረግ ጥያቄ ቀረበላቸው: *ሪፖርተር* : መስከረም 6 2006

94 *Ibid*.

95 The primary criterion used to choose informants was their experience as petitioners, not their political views or positions that they hold. As a result, most of the informants, if not all of them, were petitioners and therefore are indispensable sources to learn as to what really motivated them to file petitions. In all candors to objectivity and credibility, we made all efforts to hear from government offices but all attempts had failed due to, perhaps, lack of interest on the part of officials in sharing views on the matter.

96 Interview with Engineer Yilikal Getinet, Chairman of Blue Party, September 16/ 2013, Addis Ababa; Interview with Dr. Negaso Gidada, Former President of FDRE and current Chairman of Unity for Democracy and Justice Party, September 16/2005. Interview with Mr. Zafu Eyesuswork Zafu, Former President of Addis Ababa Chamber of Commerce and Sectoral Association and current Chairman of Hibret Insurance Share Company, September 25/2005, Addis Ababa.

97 Lack of public faith in the judicial system has also been raised elsewhere as the primary factor for increasing number of petitions to the executive. For instance in Peoples Republic of China the prevalent public belief that courts cannot maintain their impartiality and independence overwhelmingly increased the number of petitions. See, Xie, Z, 'Petition and Judicial Integrity', *Journal of Politics and Law*, Vol. 2, No. 1, 2009, p. 25.

confidence in their social and political institutions including courts. According to the survey, only a quarter of the respondents expressed confidence in the judiciary. This level of trust on the judiciary was rated to be lower from the regional sub-Saharan meridian by 30%.[98] A similar survey conducted in about the same timeframe in South Africa uncovered that 80% of the respondents stated that they were confident in courts and judges.[99]

A 2004 World Bank report on Ethiopia attributed problems of judicial independence both at the federal and state levels to political motivation and control of judicial appointments. According to the report, the lack of independence was internal in that higher-level judges placed calls to first instance judges questioning their decisions and influencing outcome of cases.[100] The problem is reported to be more pervasive in some regional states. Some regional administrations blatantly interfere with the administration of justice by inappropriate actions as writing letters, firing judges, dictating their decisions or reducing judicial salaries.[101] Enforcement of judicial orders, such as decisions to release prisoners, have been countermanded by the executive.[102] Overall, the report attributes this alleged influence of the executive over the judiciary on the long-held Ethiopian tradition of fusing public administration with administration of justice.

Similarly, *the Comprehensive Justice System Reform Program Baseline Study* underlined the very low level of public perception of the independence of the judiciary in Ethiopia.[103] It pointed out that there is an observable tendency within the executive and/or the judiciary to try to retain or reclaim powers through appointments, influence the composition of judicial oversight bodies and new legislation.[104] It has hence urged that political interference within the administration of justice has to be addressed.[105]

A recently released report by the World Justice Project also documents predicaments of the Ethiopian justice system. The project runs a Rule of Law Index that evaluates states based on four universal principles of rule of law and nine rule of law factors of which, competence,

---

[98] Rheault, M., 'Few Ethiopians Confident in their Institutions', *Gallup World*, January 30 2008. Retrieved from <http://www.gallup.com/poll/104029/Few-Ethiopians-Confident-Their-Institutions.aspx>. [Accessed on March 24/2014]

[99] Rheault, M. and Bob Tortora, B., 'In South Africa, High Level of Confidence on the Judiciary', *Gallup World*, October 6 2008. Retrieved from <http://www.gallup.com/poll/110968/south-africa-high-level-confidence-judiciary.aspx >[Accessed on March 24/2014]

[100] Guttman, M., *Ethiopia: Legal and Judicial Sector Assessment*, The World Bank Legal Vice Presidency, 2004, p. 21.

[101] *Id.*, p. 22.

[102] *Ibid.*

[103] Federal Democratic Republic of Ethiopia, *Comprehensive Justice System Reform Program*, Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, 2005, p.159.

[104] *Id.*, p. 160.

[105] *Ibid.*

professionalism and impartiality of the justice system have been identified relevant to cases like ours.[106] Accordingly, its 2014 World Rule of Law Index ranks Ethiopia 88th out of 99 countries scoring just 0.42 in a scale of 1.0.[107]

The increased likelihood of getting due attention from the government is the second factor that explains recourse to executive bodies. Once a petition is announced in the media, there is a considerable opportunity to obtain answers. Because a chorus of voices are always louder than one, the right to petition is a valuable tool to citizens in that they can join together to speak out for issues that they deem important.[108]According to one notable respondent, publicizing the grievance, along with petitioning the higher level of government, is also an indispensable opportunity to make the matter known to international community.[109] Not because that these international organizations or states are totally oblivious of the problems but because it makes sure that the problem is serious and goes against the values that those states and organizations preach to uphold. And, there is a well-founded belief that the government has the traditions and propensity to provide quick answers to matters that reach numerous ears.[110] Indeed, in other jurisdiction petitioning has long been used to force the government's attention on the claims of the governed when no other mechanisms could be availed.[111]

Efficiency is identified as third factor for increasing trend of recourse to petition.[112] This view is premised on the cliché that judicial processes are normally costly, bureaucratic, procedurally complicated and time-consuming as opposed to petitions which are expeditious and more cost-effective. All that petitioning requires is to approach the right executive body with a modestly written petition. And no fee is required. Some relate this to the first factor already alluded to in that it is by far sager, in terms of time and cost, to approach the executive through publicly announced petition than pleading to a court already under influence of the executive.

Be as it may, these three factors are among the major drivers of petitions as told by actual petitioners. Thus, one may attribute the hike in petitioning to physical inaccessibility of courts, insufficient number of judges, and availability of quality legal service.

---

[106] The World Justice Project, World Rule of Law Index 2014, February 2014, pp. 4 and 8.
[107] *Id.*, pp. 15-16.
[108] Hahnenberg, E., *The Right to Petition the Government*, Briefing Paper. Retrieved from <http://learningtogive.org/papers/paper204.html> [Accessed on March 24/2014]
[109] Interview with Engineer Yilikal Getinet, Chairman of Blue Party, September 16/ 2013, Addis Ababa.
[110] *Ibid.*
[111] Mark, G., "The Vestigial Constitution: The History and Significance of the Right to Petition", *Fordham Law Review*, Vol. 66, Issue 6, 1998, p. 2157.
[112] Interview with Dr. Yacob H/Mariam, Attorney at Law and Consultant, September 16/2013, Addis Ababa.

5.3. Implications of the Increasing Trend to Utilize Petition *vis-à-vis* Rule of Law and Separation of Powers and Right of Access to Justice

While petitioning is a flexible, less costly and indeed expedient mechanism of addressing grievances, it has the potential to undermine and contrive principles of rule of law and separation of powers as well as constitutional right of access to justice unless it is put under a carefully designed legal and institutional framework. A petitioning practice that lacks clear regulatory framework might ultimately result in haphazard, arbitrary, unaccountable and discriminatory system.

Petitioning has the natural tendency of draining rule of law since it practically gives the executive the ultimate say on the matter in contention. And, chances are that the executive might be tempted to misappropriate the discretion unless the whole petitioning enterprise is put under transparent, accountable legal and institutional framework. Nevertheless, once the petitions framework that sets out the substantive and procedural rules is laid down, petitioning might prove to be very useful grievance handling mechanism. Among other things, the rules shall stipulate on as to who is entitled to petition, matters on which petitions could be lodged, scope of the power of the executive authorized to decide on petitions, periods of time during which responses shall be given and other relevant due process safeguards such as possibilities of challenging the decision of the executive by appealing to a higher authority or courts.

Similar line of reasoning applies to the impact of petitioning on the principle of separation of powers. As alluded to already, petitioning practically confers on the highest executive a judicial power on matters which petitioners choose to relent to the petitioning system. In effect, this means that the executive exercises judicial powers on top of its inherent executive power. This consequently raises questions of separation of powers as the principle requires each branch of the government to function within its own boundaries. Yet, a petitioning system designed in such a way that meets the justice demands of any reasonable aggrieved person, especially by guaranteeing due process rights, might not be a menace to separation of powers.

What must not also be forgotten is that petitioning is just a legal avenue alternative to the judicial process. In the ultimate analysis, the petitioner is at liberty to go back to court if s/he is not content with the outcome of the petition. The worry should rather be in making sure that not all sorts of grievances are amenable to petitioning. If made so, in the name of reducing court loads, it may end up overloading the executive. Also to be undergirded is that

in most, if not all, cases people resort to petitions because of their distrust towards courts. Petitions shall therefore be seen, especially in contexts like judicial mistrust, as a way out to those people who would not have meaningful opportunity of redress.

As much as it is a means of enhancing peoples' access to justice, unregulated, haphazard and arbitrary petitioning practice might also be a threat to the constitutional right of access to justice. This may occur mainly when the haphazard petitioning practice does not relent itself to all forms of petitions on equal basis. It is highly likely that an executive with no legal framework to account to while handling petitions might not entertain all petitions in all occasions equally. Even for all human reasons, such an executive may lack both patience and commitment to properly respond to deluging number of petitions without there being any legal obligation. Perhaps, it may pave the way for corruption and impropriety especially by entertaining petitions of those with whom it has some form of affiliation. Therefore, right to access to justice of petitioners with nothing or little to offer would ultimately be violated as their petitions would not properly be answered to. Indeed, such scenario demonstrates not just violation of access to justice rights but also the right to equality and the right to petition itself.

6. Lessons from the SNNPR and the Way Forward in Ethiopia

We noted in the foregoing that unregulated and haphazard petitioning practice has multifarious pitfalls. Nevertheless, Ethiopia does not have a clear legal and institutional framework on petitioning the Federal government. Next to the Constitution's brief recognition of the right to petition under Art 30, there exits little, if not none, legal and institutional framework both at the federal and state levels.

The only exception in this regard is an office under SNNPR's Administration that handles petitions by various parties. This section attempts to draw on useful lessons from the experience of the emerging petitioning system in the SNNPRS.[113] It further considers how

[113] Though unsuccessful, the authors made frequent attempts to learn about the system under which petitions are submitted to the Prime Minister's office. An attempt was also made to schedule an interview with the State Minister of Government Communications Affairs to include the official views and remarks of the government but nothing was heard from the office of the Sate Minister at the time of writing. This notwithstanding, interviewees which had the experience of submitting petitions stated that there doesn't seem to exist any formal organ within the Office of the Prime Minister, nor did official responses came from the office to petitioners as such. We, however, recently learned in a rather 'passing' manner that Head of the Prime Minister's Office Mr. Debebe Abera and Minister of Cabinet Affairs Mr. Eshetu Dalke entertain petitions submitted to the Office of the Prime Minister. This was recently reported by the Amharic biweekly Reporter that these two officials receive increasing number of application from investors who are aggrieved by the inactions of the Addis Ababa City Administration on land related matters. See, ውድነህ ዘነበ: *መሬትን የሚመለከቱ አቤቱታዎች ለጠቅላይ ሚኒስትር ጽሕፈት ቤት እየቀረቡ ነው: ሪፖርተር*: መጋቢት 7 2006፣ ገጽ 1 እና 42::

already existing institutions could be revitalized to fill the institutional void in petitioning in Ethiopia as an alternative to instilling a new petitioning system.

6.1. Towards Institutionalized Petitioning System? — Lessons from the SNNPR

Unlike the Federal Executive, the SNNPRS has a modest tradition of institutionalized handling of grievances leveled by citizens and entities. There is currently a dedicated 'Grievance and Complaint Handling Main Business Process' within the Good Governance and Local Affairs Office of the President's Office of the regional state. This unit was the creation of the Business Process Reengineering and it was officially formed by a directive in March 2001 E.C.[114]

The directive sets the scope of power of the Grievance Handling Business Process to handle 'administrative complaints and grievances' that occur at all administrative levels in the region and it is made to comprise 5 team members. It classifies matters handled by the Grievance Handling Business Process into minor, and major cases .[115] Pursuant to the directive, complaints can be submitted in any form including telephone, e-mail, fax or mail but in accordance with the prescribed form. The overarching aim of the Grievance Handling Business Process is to deliver speedy, quality, less costly and accessible justice.[116] In addition to the directive, the regional government has enacted a 'Team Charter' that governs the relationship between Service Process Team Members and Head of the Administrative Sector. The 'Charter' also sets out the duties and responsibilities of the team, its rules of procedure and ethical standards.[117]

As can readily be noted from the above, the functions of this organ slightly overlap with function of the Ethiopian Human Rights Commission and the Institution of the Ombudsman which, as shall be seen below, are established to handle complaints involving

---

[114] See, *በደቡብ ብሔሮች፣ ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት አስተዳደር ሴክተር የቅሬታና አቤቱታ ጉዳዮች ውሳኔ አሰጣጥ ዋና የሥራ ሂደትን ለማስፈፀም የወጣ የአፈፃፀም መመሪያ*: መጋቢት 2001 ዓ/ም ሀዋሳ:: [Hereafter the Directive] The Directive provides that the Grievance and Complaints Handling Business Process shall be established at regional, zonal, Special *wereda*, *wereda*, city, sub-city and *kebele* levels. (*id.*, p. 33). Before the establishment of this Grievance and complaint Handling section, grievances were handled by each concerned office of the regional government, which was later transferred to the Security and Administration Affairs Bureau See, *በአስተዳደራዊ አቤቱታ አፈታት ላይ የደ/ብ/ብ/ሀ/ክ ተሞክሮ*: የመልካም አስተዳደርና አካባቢ ጉዳዮች ጽ/ቤት : ሰኔ 11-12/2004 : ገጽ 6:: (Hereinafter *the Experience Sharing Document*). This role has later been overtaken by the Office of Administrative Affairs. .

[115] Cases involving 'unjust or unlawful decisions' and 'request for order' are categorized among minor cases. Whereas cases relating to 'violation of law or policy', 'unexecuted administrative decisions' 'investment related complaints', 'violation of rights and benefits' and complaints in connection with religion or religious institutions are identified as major cases to be handled by the Grievance and Complaints Handling Business Process. See, the Directive, p. 5.

[116] See, *The Experience Sharing Document*, *supra* note 114, p. 7.

[117] See, *የቅሬታና አቤቱታ ጉዳዮች ውሳኔ አሰጣጥ ዋና የሥራ ሂደት የቡድን ቻርተር*: መጋቢት 2001 ዓ/ም::

human rights violations and maladministration, respectively, throughout the country.[118] It is said that this regional organ works hand in hand with both of these institutions.[119] Indeed, sometimes these institutions use the Grievance Handling Business Process as an enforcement tool of their decisions that they render on matters occurred in the SNNPR.[120]

From its formation in March 2001 to June 12, 2004 E.C, the Service Process has received a total of 3835 complaints from various members of the community. This number clearly indicates that the petitioning system is being heavily utilized by the public. It has been learned that the number of petitions have increased by significant margin in 2005 E.C making the Grievance Handling Business Process a viable alternative to judicial adjudication. In contrast with petitioning at the federal level, the experience at the SNNPR reveals commendably emerging institutionalized petitioning system from which useful lessons could be learned.

6.2. Revitalizing the Human Rights Commission and the Institution of the Ombudsman: Alternates to or Complementary for Petitioning System

An alternative to or supplementary for the institutionalization of petitioning in Ethiopia is to revitalize the roles of the Ethiopian Human Rights Commission (EHRC) and the Ethiopian Institution of the Ombudsman (EIO), two important yet fully unutilized institutions in handling grievances of citizens against human rights transgressions and maladministration and administrative arbitrariness. These institutions are charged with checking and balancing the legality of measures taken by the executive branch of the government and perhaps by the private actors as well. While the EHRC is charged with receiving complaints of human rights violations, investigating and taking measures on violators, the EIO is established to prevent or rectify maladministration, administrative abuses and arbitrariness.[121]

Given that these institutions are duly established by law with the requisite institutional framework, they could be important channels of handling grievances which currently are

---

[118] See**,** proclamations establishing the Ethiopian Human Rights Commission and the Institution of the Ombudsman, *infra* note 121. Yet, there are a range of matters that cannot be entertained by the 'Grievance and Complaints Handling Business Process' including cases being handled by the Law and Governance Standing Committee of the SNNPR State Council and the Office of the State Council, cases already disposed by the court or pending before a court, cases pending before the Civil Service Administrative Court of the region, cases pending before the Labor Relations Board and pleas in relation to imposition of excessive taxes cannot be presented to the Grievance and Complaints Handling Business Process.

[119] Interview with Mr. Adane Gebeyehu, Good Governance and Local Affairs Bureau Head, September 30/2013 Hawassa.

[120] *Ibid.* See also *The Experience Sharing Document*, *supra* note 114, pp. 9-10.

[121] Ethiopian Human Rights Commission Establishment Proclamation, Proc. no. 210/2000, *Fed. Neg.* Gaz., 6th Year no. 40. Institution of the Ombudsman Establishment Proclamation, Proc. no. 211/2000, *Fed. Neg. Gaz.*, 6th Year no. 41.

rising to remarkable levels. Indeed, their current existence, with further practical works, might not make the need to establish a new petitioning system afresh a necessity. Institutions like the EHRC are said to be very effective instruments in promoting and protecting human rights in Africa for two main reasons. First, they are flexible, less bureaucratic and accessible to ordinary individuals.[122] Unlike judicial process which is very technical and procedural, human rights institutions follow more flexible procedure and process cases more quickly. Second, these institutions enable parties to resolve their disagreements amicably without there being winner or loser.[123]

Yet, despite clearer legislative framework and establishment of the institutions, it is doubtful if citizens have fully utilized the systems and hence solicited redress from these two institutions.[124] This is probably due to two factors: one is that these entities have remained invisible to the public, which, as a result, limited their utility in handling grievances of citizens.[125] People appear to have this developed propensity to take their cases to courts or to higher executive offices if they don't have either the means to pursue or the trust on judicial adjudication.[126]

Second, in addition to their invisibility, questions of independence and impartiality seem to have retracted the public from seeking justice from these institutions. While the Commission receives high number of petitions every year, the majority of submissions relate primarily to right violations in employer-employee relationships submitted by employees of private firms, aid agencies and religious institutions.[127] This in turn implies the insignificance of petitions made against the government, perhaps because of the alleged lack of independence and impartiality on the part of the Commission.

No doubt that the independence of the Ombudsman or the Commission is essential to its effectiveness and that without true independence it cannot exist in true sense of the word.[128]

---

[122] Peter, C., 'Human Rights Commissions in Africa – Lessons and Challenges', *in* Bösl, A. and Diescho, J. (eds.), *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion*, Macmillan Education, Windhoek, 2009, p. 369.

[123] *Ibid.*

[124] The EHRC claims that it handled 289 petitions in its fourth year of operation. See, Inaugural Report of the Ethiopian Human Rights Commission, February 2011, p. 93.

[125] In a recent report, the EHRC admits that there has been oblivion on the part of the public as to its mandates. *Id.*, p. 92.

[126] Dr. Negaso Gidada said in an interview that his previous political party had approached on one occasion the EHC regarding human rights violations against members of the party but they have gotten nothing except a promise from the commission to let the concerned organ know the matter. Interview with Dr. Negaso Gidada, Former President of FDRE and Chairman of Unity for Democracy and Justice Party, held on September 16/2005.

[127] Inaugural report, *supra* not 124, p. 94.

[128] Mohammed A., 'Challenges Facing the New Ethiopian Ombudsman Institution', *in* Reif, L. (ed.), *The International Ombudsman Yearbook*, Vol. 6, 2002, p. 81.

Independence concerns can partly be mitigated through neutral budgetary and appointment procedures for these institutions.[129] In revitalizing the role of EHRC and EIO, it is therefore very important to carry out due outreach and publicity activities on the part of both institutions.

Through various channels of dissemination, the public shall be informed as to how and what matters could be dealt by the institutions. Publicizing real cases duly resolved by the institutions is one possible way of building public trust.[130] The public can be encouraged to utilize the EHRC and EIO through promotional works that inscribe actual cases addressed by the institutions.

Revitalizing these institutions, in addition to installing an institutionalized petitioning system, would be an important step forward in promoting citizens right of access to justice. The institutions, which are basically mandated to investigate human rights violation or maladministration and refer the matter to the concerned body with recommendations, would likely be useful supplements to institutionalized petitioning systems like the one set up in SNNPRS. Investigation reports (and recommendations) of EHRC and EIO might be useful for the organ tasked to have the final say on the petitions.

Concluding Remarks

Submitting complaints and grievances to higher level government offices concerning violations of rights and maladministration is emerging as a preferred alternative to the judicial process in Ethiopia. While Ethiopia has a very long tradition of reserving a great deal of judicial prerogatives to its emperors, recent cases demonstrate a renewed recourse to the executive seeking redress through petitions with apparent disregard to the judicial system.

This chapter examined the increasing tendency of petitioning the executive. It discussed the constitutional framework in the light of separation of powers and rule of law. Also discussed are access to court and petitioning as human rights. We emphasized that Ethiopians have a long tradition of petitioning emperors who used to sit at the apex of the judiciary with powers to hear appeals from lower regular courts or in first instance.

Selected recent sample petitions filed to executive organs at the Federal level in contemporary Ethiopia are also examined to reveal the justiciability of matters alleged in

[129] Independence is often viewed in terms of statutory, financial, organizational and institutional independence. See, *Ibid*.

[130] Recently, the Ethiopian Human Rights Commission has begun to release reports of actual cases that it moved to resolve. See, for instance, Inaugural Report of the Ethiopian Human Rights Commission, *supra* note 127, pp. 92-97.

petitions to have been committed. Informed by primary empirical and other secondary sources, three interrelated factors deriving the increasing trend of petition have been outlined. These factors are dwindling public trust on the impartiality and independence of judicial processes, effectiveness in obtaining quick answers from the executive and efficiency.

The implications of the increasing recourse to the executive are also discussed from the perspective of principles such as rule of law, separation of powers and access to justice. We stressed that unregulated petitioning entails the risk of marginalizing the judiciary from the tripartite power configuration under the doctrine of separation of powers. Heavy reliance on the executive for the purpose of obtaining justice also eliminates certitude and renders the whole system highly discretionary, thereby affecting rule of law. Also worrying about petitioning is that, unlike judicial adjudication which normally is regulated, it hardly guarantees due process unless a clear legal and institutional system is put in place. Given that there is no any institutionalized system rooted in a clear legal framework that obliges executives to respond to petitions also casts doubt on the effectiveness of the existing trend in ensuring citizens constitutional right of access to justice. As it currently stands, the government's approach to petitions is rather haphazard, and at times unresponsive. Whilst it goes to a great length to resolve issues petitions raise, including matters whose legality is at best dubious (e.g., like the Access Real-estate case), it never responds to petitions in some cases (e.g., the case of Sheraton Addis Hotel Employees).

We also detailed the emerging petitioning system in the SNNPRS with a view to offer possible examples. While there appears to exist no information on how petitions submitted to the Office of the Prime Minister are handled, the best practices of the Grievance and Complaints Handling Main Business Process in the SNNPR is worth reckoning should institutionalizing petitioning is opted at the Federal level. The need for revitalizing the roles of the EHC and EIO in times like this where petitioning is booming has also been considered in this chapter. With some public outreach works and building public trust on both institutions, we submit that these institutions could prove to be very crucial in handling grievances.

Finally, it must be underlined that whilst institutionalization of petitioning —or revitalizing EHC and EIO is desirable, it is equally desirable and compelling to take all measures necessary to build the public trust on the judicial system. Institutionalizing petitioning cannot and should not be the answer to the ever dwindling public trust on the judiciary. It should rather be seen as alternative channel of recourse. Thus, a properly

institutionalized petitioning system would prove to be very crucial in reducing workload of courts and consequently realizing expedient justice.

Improving Access to Justice through Harmonization of Formal and Customary Dispute Resolution Mechanisms (CDRMs)

Assefa Fiseha*

Abstract

Based on secondary sources and comparative insights, this study addresses the mechanisms for integrating the customary dispute resolution mechanisms with the formal justice system in a way that also improve access to justice. The key finding is that federal and regional states need to outline clearly the areas in which CDRMs need to be involved in dispute resolution, not *de facto* as they have been doing it to date but by virtue of formal authorization. Such laws or policy frameworks should also authorize regular courts to apply customary law where relevant and make sure that customary courts do not violate human rights.

Key words: access to justice, customary dispute resolution, harmonization of formal and customary disputes settlement mechanisms

Introduction

Several studies[1] have demonstrated the prevalence of customary dispute resolution mechanisms[2] (norms and institutions) in Ethiopia. Recent studies on the courts also hint that despite some efforts that aimed at introducing reforms, the courts continue to face internal and external challenges.[3] As a result, the courts are far from accessible to the ordinary men and women. The 1995 Constitution of Ethiopia Articles 34 and 78 recognize religious and customary based institutions to adjudicate some matters. This is an important step forward in revitalizing such institutions and in improving access to justice. However, much is left to be desired given the extensive role they assume in reality covering issues of wider significance including the settlement of serious crimes such as homicide beyond what is envisaged in the Constitution.

---

* LL.B, honors, LL.M, PhD, Associate Professor of Federalism and Public Law, College of Law and Governance, Center for Federal Studies, Addis Ababa University. Email: assefafish@yahoo.com; tel: 0911365192. The author would like to thank to three of the anonymous reviewers who provided useful comments to an earlier version of this chapter.

[1] See for example: Pankhurst, A. and Getachew A. (eds), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, United Printers, Addis Ababa, 2008; Gebre Y., Fekade A., Assefa F. (eds), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1 and 2, Eclipse, Addis Ababa, 2012.

[2] In most of the literature, 'Alternative Dispute Resolution' is often used but that is conceptually wrong. Western writers use the expression 'alternative dispute resolution' because they have a well established court system yet the courts are often overloaded by cases and hence they are looking for alternatives to the court. In Africa in general and in Ethiopia in particular customary dispute resolution mechanisms are as such prevalent and indeed have been for long the primary way of dealing with disputes. In short they are not as such alternative but principal institutions where disputes are resolved amicably.

[3] Assefa F., 'Separation of Powers and its Implications for the Judiciary in Ethiopia,' *Journal of Eastern African Studies*, Vol.5, No.4, 2011, pp.702-715.

Based on secondary sources, comparative insights and analysis of relevant laws, this study addresses the mechanisms for integrating the customary dispute resolution mechanisms with the formal dispute settlement system, in order to improve access to justice in a way that will complement the role of courts, by reducing their case load but without violating constitutional and treaty based human rights obligations particularly that of women.

If CDRMs are to have a role in reducing the burden of courts and ensuring community peace, federal and regional states need to outline clearly the areas in which CDRMs need to be involved in dispute resolution, not *de facto* as they have been doing it to date but by virtue of formal authorization. Such laws or policy frameworks should also authorize regular courts to apply customary law where relevant and make sure that customary courts do not violate human rights. Another point is the need to consider customary law as a living law. It is not as such static that applied once and remains the same forever and unchanged but both the courts and the society can, when the need arises adapt it to have relevance to current realities. In other words, it can and should be adapted. This way we can enhance access to justice and possibly reduce the burden of courts by limiting their role to the task of ensuring compliance with human right obligations at least with respect to the cases to be brought before customary courts. At the same time we also ensure that constitutional obligations are respected.

To frame the discussion on this issue in context, it is important to highlight the complex relationships between customary dispute resolution mechanisms (CDRMs), the Constitution and the rule of law within the existing constitutional and legal framework in Ethiopia. The Preamble to the 1995 Constitution commits itself to '...building a political community founded on *the rule of law* ...' The Constitution guarantees individual as well as group rights and provides various institutional mechanisms for enforcement of those rights. Unlike some other constitutional systems where such guarantees are stipulated by law, human rights in Ethiopia are constitutionally entrenched. The right to equality and rights specifically protecting women and children are clearly stipulated in the Constitution that put both theoretical and practical challenges to some of the religious and customary practices in different communities. Article 9 of the Constitution stipulates that 'the Constitution is the supreme law of the land. Any law, *customary practice*.....which contravenes this constitution shall be of no effect.' The Constitution opens some space for religious and customary norms and institutions (Arts 34, 78). Yet the Constitution also dictates that such norms and institutions or practices can only be valid in so far as they do not violate norms in the Constitution. Drawing the borderline between the religious and customary norms, on the one hand and the formal law, on the other is a very delicate process left to the implementing

institutions. Yet at a formal level one could state that the foundations for the rule of law and an important space for religious and customary values are enshrined in the Constitution. Nonetheless the key challenge is working out the details on how the CDRMs could be harmonized in such a way that they complement the already overburdened courts but simultaneously respect the rights of every citizen, including women.

1. Perspectives on Legal Pluralism: *De Jure* and *De Facto* Legal Pluralism

According to a latest estimate, there are six thousand[4] judges at federal and state levels in Ethiopia. The population of Ethiopia is estimated to be over 85 million, the second largest in Africa next to Nigeria. The rough estimate is that a judge serves for more than 14,000 people. Our regular courts are then by far inaccessible to the citizen even if we are to assume an ideal court environment free from internal and external pressures. Given this reality, it is not farfetched to think of complementing the regular courts with customary dispute resolution mechanisms as a means to reducing the courts' burden and for improving access to justice.

While in reality CDRMs are dealing with variety of disputes including cases that normally fall within the jurisdiction of the regular courts, the courts' caseloads continue to increase. This is so because the role of the CDRMs is limited owing to the restrictions imposed on them by law and owing to the failure to integrate them with the formal system. Their role is also not well integrated in a way that harmonizes both the CDRMs and the courts. It may be time to contemplate formally integrating the CDRMs with the regular courts as a means to improve access to justice. This might mean that some cases that fall within the jurisdiction of the regular courts should be reallocated to CDRMs. It also requires a policy decision that prevents the possibility of double jeopardy. It so happens that in areas where CDRMs are prevalent, the decisions of regular courts do not necessarily bring an end to the case. In criminal cases, unless parties to the dispute along with their close relatives go through the CDRMs, possibilities for revenge are always there. This will also need a negotiated settlement between federal and state institutions, on one hand and CDRMs on the other.

Indeed, one of the reasons for the current resurgence of academic interest in studying CDRMs is due to the fact that the formal conflict resolution mechanisms have proven to be

[4] Latest figures found from the respective Supreme Courts of the federal and regional states shows that the Amhara region has 1450, Tigray has 294, Oromia has an estimate of 2000, the SNNPRS has 848, Gambela has 74, Benishangul Gumuz has 62, Afar has 67, the federal courts based in Addis Ababa 160 and the Somali region an estimate of 120 judges.

less effective for some recurring conflicts in Africa.[5] The current resurgence in the study of CDRMs and traditional institutions could be seen from several angles. In many parts of Sub-Saharan Africa, the state has often been weak and incapable to deliver basic services including the maintenance of law and order. Hence, CDRMs have been seen as a means for complementing the soft state. In multi-ethnic countries like Ethiopia, CDRMs are also viewed as part and parcel of the discourse on accommodating diversity. As illustrated later, they constitute core component of identity of the ethno- linguistic groups. CDRMs can also be viewed as part and parcel of enhancing community participation in the institutions and norms that affect them and as an integral part of peacemaking efforts in conflict prone societies.

1.1. Conflict Transformation and Community Peace

One of the unique features of customary dispute resolution is the fact that it aims not only at settling disputes among parties (adjudication) but also at resolving conflicts and restoring community peace. Unlike the formal justice sector that primarily aims at settling disputes between parties, CDRMs aim at restoring severed relations and hence at ensuring community peace. This feature is crucially relevant today given the recurrence of various kinds of inter-group conflicts in Ethiopia. It is true that governmental institutions at federal and state levels are engaged in addressing such disputes. The common limitation that one observes is that such exercises often fail to transform conflict or to bring lasting peace between communities.[6]

To be more specific, governmental efforts in addressing inter-group disputes are limited to calming down the crisis without addressing the root causes and without making sure that the inter-group dispute is transformed from hostility and conflict to positive cooperation and interaction. Formal court judgments create sense of winner-loser mentality among the disputing parties forcing them to exhaust all the appeal structures without ensuring peace and harmony between them and their respective communities. In other words, the difference between formal justice and CDRMs is a choice between confrontation and conciliation.

---

[5] See, e.g., *The African Union Charter for African Cultural Renaissance*, 2006, that calls for careful appraisal of such systems; Laurence Juma, 'Africa, Its Conflicts and Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives.' *Michigan State Journal of International Law*, Vol. 13, 2005, pp. 417-515; Chirayath, L., Sage, C. and Woolcock, M., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, A background paper for the World Development Report 2006: Equity and Development, July 2005.

[6] See, for example, Mitiku D., *Managing Inter-ethnic Conflict: The Case of Oromo and Gumuz in Anger and Dhidhessa Valley*, MA Thesis, ECSC, 2009; Zeleke M., *The Role of Horizontal Intergovernmental Relations in the Management of Conflicts: The Case Study of Halaba and Arsi Oromo Ethnic Groups*, LL.M Thesis, ECSC, 2011.

CDRMs focus on settling the particular dispute, reconciling the interests, and more importantly restoring broken relations and putting order in the community. In the context of CDRMs, conflict is viewed not as an individual incident but as disruption of community peace whose integrity needs to be restored.[7] A very good illustration of this is the fact that the reconciliation process engages the perpetrator's and the victim's entire family, a core element of which is the perpetrator's repentance and the victim's forgiveness.

The formal conflict resolution mechanisms often emphasize the resolution of the material causes of conflicts (resource and power are often the focus) without dealing with the psychological and cultural traumas that often trigger retribution. CDRMs deal with values, beliefs, fears and suspicions, interests and needs, as well as with both material and non-material causes of conflicts. Issues related to social status, honors, recognition and respect often play critical role in conflicts and are the focus of CDRMs in the process of healing wounds.

CDRM institutions adjudicate broad range of disputes. CDRMs tend to have wide-ranging flexibility on applicable law. Their mandate is not limited as is often stated in the formal law to limited list of civil cases such as succession, child custody and divorce. They also deal with serious matters such as property rights, access to land, boundary disputes, criminal cases such as homicide and intergroup conflicts. In some societies the same CDRM institution deals with all cases while in others several institutions may deal different cases. A possibility for appeal is also available in some communities. Even if a case is not directly covered under the specific customary law, elders often adapt customary norms of fairness to the dispute at hand. As the CDRMs operate based on community norms, they are found closer to the society compared to the formal courts. These institutions are more accessible to the community.[8]

The rigid dichotomy between CDRMs and the formal law paves the way for a weak justice system because it creates confusion in jurisdiction, applicable law and even risk of double jeopardy. As illustrated later, customary laws based on cultural norms and traditions are often, but not always, in conflict with formal laws and treaty based human rights standards. The parallel existence of formal law (in federations often constituting of federal

[7] Zartman, W., 'Conclusion: African Traditional Conflict Medicine' in Zartman, W. (ed.) *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'*, Lynne Rienner Publishers, London, 2008, p. 224.

[8] For an extensive discussion on the nature of CDRMs and the various disputes they adjudicate see Pankhurst and Getachew, *supra* note 1; Gebre, Fekade and Getachew, *supra* note 1.

and state law) and CDRMs implies that there is potential for overlap in jurisdictions. The result is a complicated and unregulated legal pluralism.[9]

In many countries customary law is critically linked to and inseparable from cultural identity. CDRMs originate from years of repeated practices and conventions of society. In countries that aspired to build homogenized communities despite factual cultural diversity, the result has been a protracted conflict that in the last three decades gave birth to institutional and policy options for addressing diversity including customary norms. As is well known, the Ethiopian political system has been designed under the slogan 'one people, one language, one flag, one religion' for the most part of the 20th century. This brought a protracted conflict between those who imposed the 'nation-state' formula and those who asserted for a more inclusive political system that allows various ethno-linguistic groups to practice their culture and speak their language. In recognition of this fact, Article 39 (2) of the 1995 Ethiopian Constitution stipulated: 'Every nation, nationality and people in Ethiopia has the right to speak, to write and develop its own language; to express, to develop and promote its culture, and to preserve its history.' Customary dispute resolution mechanisms in Ethiopia are therefore not only vital for improving access to justice but are intertwined with the community's right to self-rule and to promote one's identity.

In non-western societies, CDRMs continue to play vital role in terms of providing the citizen access to justice. Indeed there are studies that show an 'overwhelming preference and trust of customary systems of justice.'[10] As is well known, the formal justice system is not widely known by rural communities. The decisions of courts have limited effect between the disputing parties and bring a winner – loser outcome that affects the relationship between parties. Wounded emotions are not healed and may affect community peace.[11] On the contrary, CDRMs are conducted in public, figuratively symbolized by the big African tree with justice under it and hence are more transparent. The norms applicable by the elders derive from the community that gives them more legitimacy, as is often said, 'they are laws made by the people.' Disputing parties are not required to pay litigation fee and hence are

[9] See the section on legal pluralism, *infra.*

[10] Mennen, T., 'Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan,' *Hague Journal on the Rule of Law*, Vol. 2, 2010, pp.218-25; Isser, D., Lubkermann, S., N'Tow, S., *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, United States Institute for Peace, 2009; *International Rescue Committee/UNDP First Field Report on Customary Court Observations*, 2006.

[11] Prillaman, W., *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Praeger, Westport, 2000.

cheaper, more accessible and conveniently located. [12] Customary courts and the elders that administer them are largely trusted over formally trained judges. As the elders that administer justice command respect because of years of accumulated wisdom, impartiality and the trust they earn from the community, they are more trusted than the formal judges. Several studies have shown that in developing countries the judiciary is neither autonomous as stipulated in written constitutions nor is it transparent and accountable. It thus earns less public confidence by the citizen compared to CDRMs. Many CDRMs have already achieved these goals on their own.

Despite these positive attributes there are also limitations within CDRMS. As illustrated later in this paper, the major limitation with CDRMs is that they often violate human right norms particularly those related to women and children. There is also the risk that CDRMs are susceptible to elite-capture. The final outcome could be influenced by the social status of the disputing parties. Dr. Merera Gudina, an academician and a senior politician, in his new book[13] writes how the head of the *Aba Geda*, an Oromo respected traditional institution is being manipulated by the political parties (in the 2010 election) on both sides of the political spectrum (but mainly by the ruling party) including rallying for one or the other party during election.[14]

It is crucial to point out at this stage that too much politicization of CDRMs will have negative impact on the legitimacy of these institutions. At the core of these institutions is the fact that they are headed by respected elders who stand by the side of truth, who promote community values and norms while following impartial and fair process of investigation and decision making or reconciliation.

1.2. Legal Pluralism

Legal pluralism is one of the 'catch all' and controversial concepts. Initially, it was used to counter the concept of the dominant western legal tradition. Later, the socialist law and most post-colonial independent states' claim of unifying indigenous law emerged and hence the concept of legal pluralism was coined.[15] But since then it was viewed as central theme in the analysis of law-society relations. At later stage, it included normative orders not

---

[12] Mennen, *supra* note 10.

[13] *Merera Gudina, Ye Ethiopia Politica Miskilkil Guzo na Ye Hiwote Tizitawoch*, 2nd ed., 2013 (In Amharic) pp. 242-244. Paradoxically, the author in another section is impressed by how the *Geda* System endorsed his party and the opposition in general during the 2005 election.

[14] See below for more on a discussion on this.

[15] See Chiba, M., 'Legal Pluralism in Sri Lankan Society: Toward a General Theory of Non-Western Law' *Journal of Legal Pluralism and Unofficial Law*, Vol. 33, 1993, pp.197-212.

attached to the state. In our context, the concept is used to refer to the presence and recognition of more than one kind of law in the social and cultural practices of a community. In other words, it is about the existence of diverse normative regimes in society.[16] In its broad sense, legal pluralism includes not only the various types of laws proclaimed by the federal and regional states such as constitutions and proclamations but also the various kinds of norms that govern society and emanate from religion, morality and custom so long as the community identifies and treats them through practice as 'law'. Though not exclusively, customary laws take the centre stage in this respect.

Historically, at least four separate but interrelated sources constituted the Ethiopian legal system. The first was the *Fetha Negast* (Law of Kings) – the pre-code source of private law. As Singer noted, it is believed to be introduced into the country between the 14th century (era of Emperor Zer'a Yaekob, 1434-68) and the first half of the 16th century (during the reign of Emperor Eyasu, 1682-1706).[17] Indeed, the *Fetha Negast* represents one of the received foreign laws imported to Ethiopia after it had been translated from Arabic (it is believed to have been originally drafted in Arabic in Egypt from 1235-49) to Geez. It mainly applied to Christians in the highlands of Ethiopia; its application to the Muslim and the many ethnic groups in the rest of the country was marginal. In other words, non-Christians and the bulk of the other groups must have relied on customary dispute resolution mechanisms.

The second legal system was the traditional public law as enshrined in the *Kibre Negast* (Glory of the Kings). Except for the twentieth century and some historical interludes, Ethiopia existed as a political entity for most of its long history, principally with a monarchy and Orthodox Christianity serving as pillars of unity and with a political system established on a balance between centripetal and regional forces.[18] Regional governments exercised important powers such as taxation on some economic activities, maintenance of local security, and trade regulation. Such *de facto* decentralization is enshrined in the oldest constitutional document, the *Kibre Negast*. Written in 1320, the document defined the core of the Ethiopian ethos, the source of legitimacy of the emperor, links with the Solomonic genealogy, and the rules for succession to the throne.[19] These very elements were reflected in

---

[16] Tamanaha, B., 'A Non-Essentialist Version of Legal Pluralism', *Journal of Law and Society*, Vol.17, No.2, 2000, pp.296-321.

[17] Singer, N., 'The Ethiopian Civil Code and the Recognition of Customary Law', *Houston Law Review*, Vol.9, 1971-1972, pp.460-494.

[18] See for example Clapham, C., 'The Ethiopian Experience of Devolved Government,' *Ethiopian Journal of Federal Studies*, Vol.1, No.1, 2013, pp.15-30.

[19] Levine, D., *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2nd ed., the University of Chicago Press, Chicago, 2000.

the 1931 Constitution and the Revised Constitution of 1955, both of which were abrogated by the 1974 Revolution.

The third source of the law in Ethiopia represents proclamations that began to be issued in 1941 and with the code system introduced in the 1960s and subsequent laws proclaimed by succeeding Ethiopian governments. These laws are proclaimed by the state with the principles, procedures and institutions to administer them. Clear violations are, at least, formally met with sanctions. It is to be recalled that some six major codes were enacted between 1957 and 1965 and the professed intention was to create a comprehensive set of laws that would serve 'modern' Ethiopia. The key notion as coined by the drafter of the 1960 Civil Code of Ethiopia, Professor Réne David, was 'modernization of the legal framework'.[20] CDRMs were partly little known to the main actors and partly considered inappropriate to the goal of 'modernization.' The codes were mainly of European origin with very little traditional roots in Ethiopia. The few areas where custom was to some extent incorporated included the family law (for example, family arbitration and adoption that was substantially changed by the Revised Family Code issued in 2000), and succession and arbitration sections of the Civil Code. The Revised Family Law consistent with the principles enshrined in the Federal Constitution provides a limited space for customary and religious laws. It stipulates that each religion and custom determines the formality of the marriage to be concluded between the spouses. Yet it is critical to note that the law provides mandatory provisions that each marriage regardless of whether it is civil, religious or customary one should comply with. Thus the religious or customary based marriage has limitations prescribed by law.[21] In today's federal Ethiopia, this source of law includes laws enacted by the federal parliament and regional state councils. Even the formal law exhibits its own type of legal pluralism where federal, state and even laws issued by sub state entities (such as zonal councils in the South Nations, Nationalities and Peoples' Regional State) occupy their own space. This is so because federalism ensures some level of autonomy to multiple centers of power. The various entities created by the federal and state constitutions have the mandate to enact laws with respect to the specific powers assigned to each level of jurisdiction.

[20] David, R., 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review*, Vol.37, 1962, pp.188-89.

[21] See Arts 26 and 27. The mandatory prescriptions are stipulated in Arts 6, 7, 8 and 9. Among these prescriptions consent of the would-be spouses, marriageable age (18), and that the marriage should be free of mistake or duress remain the crucial ones.

With the massive codification and legal transplantations made in the 1960s, CDRMs that constitute the fourth major source of law[22] were formally done away with. A very good indicator was Article 3347 (1) of the 1960 Civil Code that stipulated "[u]nless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed." This provision of the Code repealed not only those customs that were considered inconsistent with the code but even those that were consistent so long as the Code governed the subject matter. Thus it was a sweeping and revolutionary measure taken against customary laws of the country.

However, it is widely known that CDRMs remained operative in several parts of the country including the central highlands and urban areas where state institutions are assumed to have strong presence.[23] The transplanted laws and institutions were not able to penetrate deep into rural Ethiopia. Careful observers have hinted as early as 1968, and others following suit repeated the same, that CDRMs remained live throughout the country despite the effort to limit them.[24] The formal laws failed to reach the heart of those to whom they were intended to apply and did not respond to the needs of the people and thus lacked legitimacy. The new codes certainly were not based on the opinion of the people concerning law and understanding of justice. Not surprisingly a notable observer, Schiller, indeed criticized the new codes as 'fantasy laws'[25] that sidelined the rich traditions of the people.

Thus the formal laws reflect only one aspect of a rather complex reality. In other words, a system of CDRMs based on age-old community customs and norms runs parallel to the official state law. In many of the regional states of Ethiopia (Afar and Somali in particular), CDRMs are, in fact, more influential and affect the life of the people than the formal system.

---

[22] One can add religious laws and religious tribunals as a fifth element. The *Sharia* Courts, as one example of religious courts applying Islamic laws to family matters such as marriage and succession, exist in Addis Ababa as well as in the regional states. As stipulated in the constituion, these institutions can only adjudicate matters so long as parties voluntarily submit their cases. In the absence of which the matter will be refered to the regular courts. See for details Mohamed, A. 'Sharia Courts as an Alternative Mechanism of Dispute Resolution in Ethiopia' in Gebre, Fekade and Assefa, *supra* note 1.

[23] Pankhurst and Getachew, *supra*, note 1.

[24] Donovan, D. and Getachew A., 'Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism', *The American Journal of Comparative* Law, Vol.51, No.3, 2003, pp.505-552; Paul, J. and Clapham, C., *Ethiopian Constitutional Development,* Vol. II, Addis Ababa University Faculty of Law, 1967, pp.845-48; Beckstrom, J., 'Handicaps of Legal Social Engineering in Developing Nation', *The American Journal of Comparative Law*, Vol. 22, No. 4, 1974, pp. 697-712.

[25] Schiller, A., 'The Changes and Adjustments Which Should be Brought to the Present Legal Systems of the Countries of Africa to Permit them to Respond More Effectively to the New Requirements of the Development of the Countries' in Tunc, A. (ed.), *Legal Aspects of Economic Development*, Dalloz, Paris, 1966, p.200.

On a day-to-day basis, a society functions relatively well on these norms which are based on its deeply held values.

One can only understand the Ethiopian legal system in general, and CDRMs in particular, if one adopts the conception that law is not limited to formal ones. It is appropriate to adopt a conception of law that embraces the norms and customs that derive from the society and are effectively recognized as such as creating rights and duties in the community.[26] In some literature, this is also called *unofficial law* meaning 'a legal system and its components not officially authorized by any legitimate authority, but authorized in practice by the general consensus of a certain circle of people…when they cause distinct influences upon the effectiveness of official law, supplementing, opposing, modifying or even undermining any of the official laws, especially the state law.'[27]

The reality, therefore, is that unlike what is stated by Professor Vanderlinden,[28] Ethiopia had and continues to have a much more complex legal system, not one but plural ones each competing for a viable space.

2. Key Aspects for Integration of CDRMs and the Formal Law

Harmonization is best implemented through an interactive institutional referral system between CDRMs and formal courts and institutions. The question is whether it is possible to harmonize the relations between the two in such a way that the positive role of CDRMs can assist the courts in reducing their burden while at the same time avoiding the pitfalls of CDRMs. CDRMs that violate rights enshrined in formal law need to be checked through state institutions at various levels.

2.1. Constitutional Entrenchment of Human Rights and Implications for Integration of CDRMs with the Formal Legal System

Ethiopia is one of the few countries in Africa that expressly made international treaties on human rights it ratified part of its domestic law.[29] Ethiopia even went further to state in

---

[26] Van Doren, J., 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System', *Journal of Transnational Law and Policy*, Vol. 3, No.1, 1994, pp. 165-204.

[27] Chiba, *supra* note 15, p. 209.

[28] Vanderlinden once said, 'The main characteristic of the contemporary Ethiopian legal system is that it does not yet exist as such.' This is to mean that law meant only the codified and proclaimed ones that would disregard all others. Vanderlinden, J., 'Civil Law and Common Law Influences on the Developing Law of Ethiopia' *Buffalo Law Review*, Vol.16, 1966-67, pp. 250-266.

[29] The core international human rights instruments signed by Ethiopia include Convention on the Elimination of All forms of Racial Discrimination (21 Dec 1965, Ethiopia adopted this in 1976); International Covenant on Civil and Political Rights (adopted on 16 Dec 1966, Ethiopia adopted this treaty in 1993); The International Covenant on Economic Social and Cultural Rights (adopted on 16 Dec 1966, Ethiopia adopted this treaty in 1993); The Convention on the Elimination of all Forms of Discrimination Against

Article 13 of its constitution that such rights and freedoms shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and the international instruments it adopted. One-third of the Constitution (Chapter Three) also contains a broad range of individual and group rights with some major implications for customary laws as well.

Chapter two of the FDRE Constitution (Articles 8-12) provides for fundamental principles of the Constitution. Article 10 in particular states, 'Human rights and freedoms, *emanating from the nature of mankind,* are inviolable and inalienable.' Chapter three of the Constitution provides for the guarantee of host of individual and group rights. Reinforcing the fundamental nature of human rights as one of the principles of the Constitution, Article 104 stipulates that amendment to Chapter Three can only be made if *all* regional state councils approve by majority vote and if the two federal houses endorse it by a two-third majority vote held separately.

The fact that one whole chapter constituting a third of the Constitution provides for fundamental rights and freedoms and the fact that there is a very rigid procedure for amending such rights has its own implication, albeit understudied. When fundamental rights and freedoms are given special position in a constitution through incorporation and by providing a rigid amendment procedure so that current majority members in parliament cannot overstep such constitutional guarantees, rights are then called constitutionally entrenched. Certainly this approach is distinct from situations where parliament provides a law containing fundamental rights and freedoms. Constitutionally entrenched rights reject the possibility of a current majority overstepping its mandate that possibly gives rise to the positivist understanding of the law paving the way for fascist regimes to emerge as in Germany in the 1930 and 1940s.[30] Constitutional entrenchment of rights and freedoms is an institutional mechanism for limiting the power of all political institutions including the legislature.

In Ethiopia, Parliament may enjoy supremacy over the other institutions. But what is stipulated in the Constitution is parliamentary constitutional democracy in which the parliament subjects itself to the supremacy of the Constitution and the entrenched rights and freedoms. Entrenched rights and freedoms are as such trumps over democratic majority. As

---

Women (adopted on 18 Dec 1979, Ethiopia adopted this in 1981); The Convention on the Rights of the Child (adopted on 20 Nov 1989, Ethiopia adopted this treaty in 1991); The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 Dec 1984, Ethiopia adopted this treaty in 1994). Article 9 of the Constitution makes such treaties expressly part of Ethiopian Law.

[30] Grimm, D., 'The Basic Law at 60: Identity and Change,' *German Law Journal*, Special Issue, Vol.11, No.1, 2010, p.42.

such acts of parliament can only be legitimate so long as they comply with the human rights norms in the constitution. Parliament cannot abridge or violate rights 'to suit its whim or policy'.[31] The supremacy of the Constitution along with the chapter on human rights implies that fundamental rights and freedoms cannot be abridged unless exceptional circumstances related to state of emergency or the act of the legislature falls within the boundary of limitation clauses provided in the Constitution or in the international instruments joined to ensure some essential goals. The concept of democracy often equated with majority rule in a parliamentary context is thus significantly qualified in Ethiopia at least at the constitutional level. Constitutional entrenchment of human rights implies that the state is viewed as the primary threat to liberty particularly to civil and political rights.[32] The best way to protect rights is through constitutional entrenchment: a form of higher law which could be amended only with great difficulties.

There is another implication to the idea incorporated in Article 10. By stating that human rights and freedoms emanating from the *nature of mankind*, the article consciously provides for a natural law conception of rights.[33] According to such view, human rights are 'parents, not children of the law.'[34] Legal positivism claims that individuals have no moral rights against the state as such and can claim only such legal rights against the state as are expressly provided by law,[35] that is, rights as a child of the law. According to this view rights are merely granted by the state and may be retracted. On the contrary, natural law theory of rights states that individuals have inalienable rights by virtue of their humanity.[36] Rights are pre-institutional, that is, they pre-existed the state or any form of legislation and thus are pre-social contract. They derive from inherent dignity of human beings and remain the foundations of any just society. Such conception of human rights, that is, human rights as foundations of any political and legal system prevent the system from reducing the law to become a mere instrument of power. The ultimate goal of any political system and the legal

---

[31] Dworkin, R., *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, Oxford, 1996, p.354

[32] Ginsburg, T., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, 2003, p.21.

[33] Agreement theories on human rights stipulate human rights as products of discourse agreed upon. Charles Beitz, *The Idea of Human Rights*, Oxford: Oxford University Press 2009) p.68

[34] See Sen, A., 'Human Rights and Development*'* in Andreassen B., and Marks, S. (eds), *Development as a Human Right: Legal, Political, and Economic Dimensions*, Harvard University Press, Cambridge, 2006, p.4.

[35] Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1977, p.3.

[36] Dworkin's theory is a middle ground between legal positivism and natural law theory of rights. Law should recognize right but insists that the law may contain further rights that are not expressly stated in the law. It is more inclusive than legal positivism, the role of the judge being finding out what the law is.

system is the well being of human dignity.[37] The rights exist independent of any legal or political institutions. Rights are considered as naturally possessed by persons, are innate and cannot be given away.[38] They are critical moral standards to evaluate laws and institutions. Constitutional interpretation then is the application of these constitutional norms against the state and its agents such as the legislature and the executive. Such an understanding of fundamental rights and freedoms attachs a significant role to the interpreter because its mandate of checking the compatibility of laws and decisions of the political institutions is not merely limited to the articles in chapter three of the Ethiopian Constitution but may refer beyond the four corners of the text, that is, to the moral conceptions of rights and freedoms.[39]

What does constitutional entrenchment of rights imply apart from the fact that power of the majority in parliament and the executive is limited? Another important implication is the fact that if constitutionally entrenched rights and freedoms are to remain as limitations on state power, a certain institution must be established and empowered to check whether the acts and decisions of the political institutions comply with (either before they are enacted or after the fact) the constitutional norms.[40] Recognition of human rights in the constitution is an important step forward but is not enough. Strong institutional protection and enforcement is a crucial *requirement* in giving life to constitutionally entrenched human rights.

2.1.1. Rights of Women

The institutional enforcement of human rights can play a key role in the integration of CDRMs with constitutionally entrenched human rights. Human rights become mechanisms for setting up limits not only on power and public institutions but also on traditional authorities including customary law. For example, the United Nations Convention on the

---

[37] See for more Piechowiak, M., *What are Human Rights? The Concept of Human Rights and Their Extra Legal Justification* <http://www.academia.edu/4031501/What_are_Human_Rights_The_Concept_of_Human_Rights_and_Their_Extra-Legal_Justification p. 8 as accessed on 02/08/2013>.

[38] In a way this is part of the social contract theory. Yet there are two versions of social contract: one version adheres that human rights are given/natural and pre-exist the state. The social contract gives effect what natural exists. The discourse theory of social contract states that human rights are created/negotiated in the social contract and come into existence with it.

[39] In the US there is a continuous debate on whether the Supreme Court's interpretive role is limited to the four corners of the text or goes beyond that. The 'interpretive' 'non-interpretive' concept articulated by Ely is just one example. If one is to take the implications of Article 10 of the FDRE Constitution seriously, it gives broad mandate to the interpreter to even refer to moral conceptions of rights and freedoms. Ely, J., *Democracy and Distrust: A Theory of Judicial Review,* Harvard University Press, Harvard, 1980.

[40] Constitutional practice shows many variations in this regard. In the US the concept of judicial review evolved due to judicial practice since 1803 in *Marbury vs. Madison* and as articulated by its Chief Justice John Marshall as the mandate of the regular courts and in particular that of the Federal Supreme Court. In Germany and South Africa the Constitutional Court, not the Supreme Court plays the same role.

Elimination of All Forms of Discrimination against Women (CEDAW) requires states to take a positive action to end discrimination between men and women within CDRMs that emanate from culture and tradition. Nonetheless, CDRMs, in as much as they are acclaimed for their positive contributions in regulating societal behavior, have also some critical limitations that conflict with constitutional norms and the human rights regime.

In the early 1960s, CDRMs were criticized as difficult to ascertain because of wide spread variation and labeled as "primitive laws" hence implying "inferior laws" compared to the formal law (this was the conception prevalent during the making of the codes in Ethiopia).[41] In recent years, the widely held criticism against CDRMs has focused on their inability to adjust to the demands of the international human rights regime, as insensitive to gender equality and related individual rights and freedoms.[42]

As many of the case studies made in several studies so far illustrate, CDRMs are male dominated in that women are largely excluded from the process. Besides, there are some cultures and practices that still allow harmful and discriminatory practices such as female genital mutilation, circumcision, polygamy, early marriage, rape, abduction and exchange of women as a means for ending blood feud between groups. CDRMs are also blamed for denying women's right to asset and related opportunities including land and as result exposing women to exploitation and violence. These practices conflict with Ethiopia's commitment to human rights as stipulated in its constitution and it is about time that mechanisms are designed to address that.

2.1.2. Collective versus Individual Responsibility: Clash of Values?

Clash of values seems to be visible at least on issues related to notions of marriage and inheritance between the formal law and human rights regime, on one hand, and the customary practices of some societies on the other. Western based laws often focus on individual rights and individual responsibility for crimes, prohibit bigamy, and ensure equality between men and women (at least formally) while CDRMs are firmly based on collective responsibility, for example, during compensation and responsibility for fault or crimes. If a perpetrator is found at fault by the elders and is required to compensate the victim, the entire family or members of his clan usually contribute to the amount of compensation fixed by the elders.

---

[41] David, *supra* note 20, pp.188-189.

[42] Oppermann, B., 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Law in Egypt, South Africa and the United States' *Hastings Women's Law Journal* , Vol. 17, No.1, 2006.

Furthermore, a crime of homicide committed by a person faces different consequences depending on the applicable law. When the penal law governs the matter and the crime is committed intentionally, the offender will face years of imprisonment behind bars. But if the applicable law is customary law then the perpetrator does not have to worry about imprisonment. What is expected of him or his clan/family is the payment of compensation. As illustrated below through the case study on inter-ethnic conflicts through *Abo Gereb* on the border between Afar and Tigray, both approaches could be valid depending on the nature and consequences of the crime. When the crime does not affect community peace in the sense that its effect is limited to the victim and his close family, resorting to the formal law could be a just solution. However, if the commission of the crime has serious impact on community peace in the sense that inter-ethnic or inter-group conflict is possible resorting to the formal law is not going to ensure peace and order. Even if the criminal is brought to justice, victim's family and his clan will take the law into their hand and plan an organized revenge that brings endless feud. It is in these circumstances that CDRMs have proven to be more effective in ensuring community peace than the formal statist legal system. Incidentally, it is vital to note at this juncture that this role of CDRMs has no room in the Federal Constitution of Ethiopia.

The notion of individual ownership is also at times least understood in some societies. Even today where land is publicly and constitutionally declared to be a state property at federal and state level, land 'ownership' in most pastoral communities (for example, Afar and Somali) is a communal one, making the debate (public versus private land ownership) even more complicated.[43] This conception of land ownership at times creates tension with private investors as pastoral communities often have little understanding of private leased landholding. Private investors often complain that, apart from the lease payment that is due to the government, they have also to pay in one way or another to clan leaders or else will be subject to eviction. As CDRMs are based on tradition, there is the allegation that they weakly respond to the demands for investment and business. How is the incompatible interest between the government, the formal law that insists on individual responsibility for crimes, clan leaders and the investor to be addressed?

Are human rights, individual responsibility for crimes and CDRMs then necessarily strange bedfellows? As the example in Tigray[44] (a mandatory inclusion of a woman judge by law in Social Courts), CDRM practices in Oromia (where elders are trained to send rape and

[43] See Mohammud A., 'The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities' *International Journal on Minority and Group Rights*, Vol.14, 2007, pp. 85-125.

[44] See Assfa F., 'Customary Dispute Resolution Mechanisms in Tigray' *in* Gebre, Fekade and Getachew, *supra* note 1, 361-388.

abduction cases to the formal courts because elders are lenient on perpetrators related to such cases) and gender based movements hint, it is possible to positively influence CDRMs to meet current demands without necessarily abolishing/undermining them.[45] The South African experience is illustrative in this regard. South Africa's new constitution provided some space for customary law. The same constitution also required customary law to comply with constitutional norms and human rights.[46] The regular courts are duty bound to ensure that the specific application of customary law in a case does not violate the bill of rights section of the constitution. In other words, the courts are duty bound to ensure that customary law remains consistent with the bill of rights. Thus if the integration/harmonization of CDRMs to the formal law is to be meaningful, federal and regional states need to enact a law formally recognizing the powers and jurisdiction of customary courts while at the same time authorizing the regular courts to monitor the customary courts compliance with constitutional obligations on human rights. As illustrated later with the relevant cases from Botswana and South Africa, this approach is called making the customary law a 'living law.' Customary law as such is not static that is applied once and remains the same forever and unchanged but both the courts and the society can, when the need arises, adapt it to have relevance to current realities. In other words it can and should be adapted. This way we can enhance access to justice and possibly reduce the burden of courts by limiting their role to the task of ensuring compliance with human right obligations at least with respect to the cases to be brought before customary courts. At the same time we ensure that constitutional obligations are respected.

2.2. Relevant Comparative Insights

2.2.1. Botswana's Judge Made Law

The latest decision of the Botswana High Court on inheritance rights is a pivotal step for women in Botswana and Africa as a whole. A number of African countries still have discriminatory customary law practices that effectively leave women excluded from inheritance on the death of a male family member. Customary laws accord more rights and authority to men than they do to women. In the customary traditions of Afar and Somali communities in Ethiopia, women are subject to discriminatory practices. Women often

---

[45] For various case studies on the interrelationship between the formal and customary systems of laws in Ethiopia, see generally Gebre, Fekade and Getachew, *supra* note 1.

[46] Bennett, T., 'Re-Introducing African Customary Law to the South African Legal System', *The American Journal of Comparative Law.* Vol. 57, No.1, 2009, pp. 1-31.

receive half the size of compensation paid to men when they are victims. In many parts of Ethiopia, women are forced to enter into political/cultural marriage in order to settle two feuding families.

Botswana's High Court has recently made a ground breaking decision. In the case of Edith Mmusi *et al* vs Molefi Ramentel *et al*[47] Ms Mmusi's parents had four daughters and a son, who before he died agreed that his older half-brother could inherit the family home in the Kanye area, about 85km south of Gaborone. According to the customary law in the area, only men can inherit property of the deceased. It is the son of the half-brother who brought the case seeking to evict the sisters living at the homestead. The key argument of the son was that there is tradition prohibiting women from inheriting the property (or the throne) and the state must 'respect that tradition.'

In a court case fought for over five years, Edith Mmusi and her sisters argued that as it was their home – and they had been contributing to its upkeep and expansion – it was theirs to inherit. Judge Oagile Dingake has risen to the occasion by placing the Constitution of Botswana as the supreme law of the country and authoritatively declaring that the right to equality will not be subsumed by cultural practice. The ruling brought customary law in line with the spirit of the constitution as a supreme law that guarantees equality of men and women. Judge Dingake said that in the name of fairness and equality, women should have the right to inherit property. 'It seems to me that the time has now arisen for the justices of this court to assume the role of the judicial midwife and assist in the birth of a new world struggling to be born.'[48]

2.2.2. South Africa Constitutional Court Case Law: Customary Law as 'Living Law'

South African elders argued in favor of exemption from constitutional norms during the negotiations to the constitution as the right to practice culture and recognition of traditional institutions was recognized in the process but the final resolution reflected a compromise. Regular courts were required to apply customary law but this broad mandate remained valid only when such customary laws did not violate public policy, gender equality, natural justice and more importantly the constitution.

---

[47] High Court of Botswana MAHLB-000836-10 (2012).
[48] *Ibid.*

The supremacy of the Constitution is stipulated clearly and Section 2 of the text holds that any law inconsistent with it is invalid. The Constitution contains justiciable Bill of Rights. However, the Constitution recognizes customary law in various ways. Chapter 12 (sections 211 and 212) provides official recognition to customary law as well as to the institution, status and role of traditional leadership. Specifically, section 211(3) mandates the application of customary law by the courts, where applicable but this is not without conditions. In doing so, courts must ensure that the supremacy of the constitution is not violated and must refer to a legislation that specifically deals with the case at hand. As part and parcel of accommodating diversity, customary law is further recognized under Sections 30 and 31 that deal with the individual right to culture and language of the individual and communities. As illustrated later in a case brought before the Constitutional Court of South Africa, the relations between the customary law and the human rights section of the constitution gives rise to complex issues. On one hand there is the customary law that is codified often called official customary law which may or may not show the current state of the law and on the other there is what some call it the 'living customary law' which refers to the customary law not in history but the one which is applicable now and considered binding by the community. When there are tensions between the customary law and the human rights section of the constitution, courts often exercise either of three options. One option is to invalidate the customary law's applicability. The second possibility is to replace the customary law by common law and the third and often preferred option is to reinvent or adapt the customary law to reflect the spirit of the human rights enshrined in the constitution. In other words, make the customary law a living law.

The recognition of the right to culture and the effort to accommodate diversity including customary dispute resolution mechanisms though critical in multiethnic societies does bring its own challenges. CDRM's may, as indicated above, conflict with constitutionally recognized right to gender equality. More challenging, however, is the view of culture or customary law that courts and other public institutions including the very institutions of CDRMs assume that affects the process of integrating CDRMs as a source of law. Is customary law viewed as norm as it existed for ages or is it considered as dynamic that may adapt to new circumstances and to the community as it lives today and not necessarily in the past? In the process of trying to integrate customary law, are courts required to ascertain what the law is in fact and if so which customary law?

The South African Constitutional Court has entertained a number of cases that deal with the aforementioned issues. The first case *Alexkor Ltd and Another v the Richtersveld*

Community and Others dealt with a claim for restitution of land by an indigenous community based on Land Rights Act.[49]

The Court essentially reiterated the principle stipulated in the Constitution, that is, the recognition of customary law is subject to supremacy of the Constitution and any legislation concerning customary law. The Court drew specifically on section 211(3) of the Constitution and stated that customary law in the Constitution really referred to the living form of that law:

> It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life…In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

In a second case brought before the Constitutional Court, *Shilubana and Others v Nwamitwa,*[50] the Court set guidelines on how courts should develop customary law. Ms Shilubana of the Valoyi traditional community, in South Africa, was appointed as chief of her community setting a new precedent, as such a position was often reserved to an eldest son of the previous chief. The community in specific terms made such a departure from the past as it wanted to modify its customary law in line with gender equality as provided in the constitution. Mr Nwamitwa, eldest son of the previous chief, challenged the decision of the community elders based on the claim as established in the communities customary law and as endorsed by lower level courts. The case was finally taken on appeal to the Constitutional Court.

It is important to note that there are two competing versions of customary law. The first version advocated by those who want to maintain customary law from being monitored or influenced by external forces such as courts and those that view customary laws as 'living laws.' Indeed these two views seem to be behind the conflicting interpretations of the lower courts on one hand and the constitutional court on the other.[51] The position of the lower

---

[49] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

[50] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

[51] See for details Yonatan F., 'Legal Pluralism and the South African Experience: Customary Law as a Constitutional Right,' *in* Elias Nour Setebek and Muradu A., (eds.), *Law and Development and Legal Pluralism in Ethiopia*, JLSRI, Addis Ababa, 2013, pp.183-185.

courts considers customary laws as primordial and fixed norms. Customary laws are viewed as rigid, less flexible, innate and natural that should be free from external influence to which courts must respect. The Constitutional Court's version however views customary law as living law. Customary laws undertake their own transformation and are shaped by social, economic and political forces. They are dynamic and fluid and evolve in reaction to existing realities. Customary laws are interpreted, applied and when necessary amended by either the community or the Courts. In a unanimous judgment, the Constitutional Court adopting the doctrine of customary law as living system of law, that is, current norms chosen by the community, not fixed and unchanging law, affirmed the legitimacy of Ms Shilubana's appointment as chief of the Valoyi people setting aside lower courts prior decisions based on customary law as fixed law.

2.2.3. The Gacaca Courts in Post Genocide Rwanda

Following the 1994 Genocide in Rwanda that left 800,000 dead and 130,000 suspects in prison, the government enacted a law (2001) that allowed traditional institutions called the Gacaca Courts to deal with crimes considered to be less serious.[52] The Gacaca Courts were not historically treating crimes of this sort (were limited to family matters and minor disputes between neighbors) but the government 'reinvented' their traditional role to expand their mandate to address post Genocide issues as the International Criminal Tribunal for Rwanda could only handle a few cases and the national courts which were decimated by the political crisis were understaffed and too weak to address the mass violence. The key features of the Gacaca restorative justice are similar to many customary dispute resolution mechanisms in Africa. At the core of the process are the perpetrator's confession and truth telling and the victim's forgiveness that will lead to healing victim's wounds and reconciliation. The community is actively engaged in the process and the reintegration of the perpetrator to the community is ensured. Also, women as the main victims of the crisis were to constitute active participants in the Gacaca Courts.

3. Implications for Ethiopia: CDRM and the Formal System: An Uneasy Relationship?

[52] The story on Gacaca courts in Rwanda is not without limitations. Some consider the process not fully as part of restorative justice but as 'victor's justice' where Tutsi ethnocracy tries Hutu suspects. This may be a harsh judgement of a much complicated process but it does hint on the limitations of CDRMs when they assume new tasks. See Tiemessen, A., 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', *African Studies Quarterly*, Vol.8, No.1, 2004, pp.57-72.

The 1995 Constitution of Ethiopia stipulates that disputes relating to 'personal and family issues' can be resolved by application of customary and religious laws so long as parties give their consent to that effect. Customary and religious courts are also given recognition (Articles 34 and 78). Thus, informal laws and institutions are given limited space. Yet, in practice and as illustrated in several of the case studies, such institutions and practices are alive and resolve disputes covering a wide range of issues other than those stipulated in the Constitution. While most of the case studies on blood feud indicate that CDRMs deal even with homicide cases in nearly all regional states, the studies on Afar and Somali regional states further prove that it is indeed the formal law and the courts, not CDRMs, which are marginalized. Given this reality, it is hardly possible to limit, as framed by the Constitution, the role of CDRMs by the state. Indeed, the first point that comes out clearly from this study is that there is a need to consider broader policy options for incorporating CDRMs into the formal system. If CDRMs are to have a role in reducing the burden of courts and ensuring community peace, federal and regional states need to outline clearly the areas in which CDRMs need to deal with, not *de facto* as they have been doing it to date but by virtue of formal authorization. Such laws or policy frameworks should also authorize regular courts to apply customary law where relevant and make sure that customary courts do not violate human rights.

The lesson that we can draw from South Africa and Botswana, in particular, is that customary law is not a static and unresponsive legal system. The courts, the respective community and other public institutions can play a critical role in shaping the content of customary law if they view it as a 'living law' that conforms to current realities and the human rights obligations assumed in the Constitution and international treaties. Customary law can evolve in line with the 21st century rights of women and other marginalized groups rights to equality, inheritance and land/asset ownership while at the same time maintaining its basic features.

South Africa has enacted a law entitled "National Traditional Leadership and Governance Framework Act" in 2004, and since then amended it several times. The law sets out the roles and responsibilities of different levels of traditional leaders, institutions, dispute resolution mechanisms and their relationship to the different levels of government. Reform efforts in Ethiopia should clarify issues of jurisdiction between CDRMs and the formal courts. Several of the case studies have proven that there is competition for jurisdiction over disputes between the CDRMs and the courts. In some cases, the same matter is being dealt with twice. One of the parties may have gone through the formal system, found guilty and

served his sentence but that will not end his story. The same party has to go through the CDRM in order to be integrated into his community. The reverse is also possible. This raises the problem of double jeopardy: the same case being treated twice. This is something that has to be avoided and any law/policy regulating CDRMs has to address this practical challenge.

The strained relations between the police and the prosecution, on one hand and the elders on the other, is something that deserves attention. One of the challenges for the elders/CDRMs is the role of the police and prosecutor. In the past, any reconciliation made between the disputing parties with the help of the elders is supposed to end any court/police proceedings. After reconciliation, the elders expect the aggressor to be integrated in the community. Elders also expect that any charges filed before court or police have to be dropped after the reconciliation. Indeed, if the victim has already filed a charge in court or in a police station, the elders, once they get consent from both parties, will ask the permission of the court or the police to end the case through reconciliation. The legal proceeding will continue only if the reconciliation fails.

But in some of the recent case studies, where the concept of individual responsibility for faults and crimes has taken roots, whatever reconciliation is concluded between the disputing parties through the help of the elders is being challenged by the police and prosecution. The formal law and the powers of the public prosecutor prevail over CDRMs. The reconciliation does not necessarily end the legal process and if it continues, the elders worry that the peace restored will be affected, and that the role of the elders in the long run undermined. The local community may then find a situation where the elders are simply powerless. On the contrary, in some other places covered in the case studies, the reconciliation concluded by the elders may also have impact on the legal proceedings. The elders can insist on the charges before the prosecution and the police to be closed once and for all. Those in prison should be released and submitted to their jurisdiction for the whole process of reconciliation to be effective and restore peace. Here, restoring severed relationships and ensuring community peace seems to prevail over individual responsibility for crimes and the formal law including the role of the public prosecutor.

This calls for a careful study of an interface between the traditional mechanisms of dispute resolution and the formal structure. Though with no clear level of interaction, the Constitution has, in fact, created a space for both. So the specific role of the CDRMs and the formal institutions of justice need to be defined by law.

Besides, there should also be a continuous and systematic effort to integrate CDRMs with the formal system for conflict resolution and reconciliation. Indeed, there are some

efforts at regional state level[53] and there are some practices that evolved as a result of this new legal development. Although detailed laws have not been enacted the Somali Regional State for example has formalized the elders to be part of the state structure. Tobias Hagmann in his article discusses about the Somali elders known as *Guurti* and the application of the customary law *Xeer*.[54] A point noteworthy is the fact that the elders discussed are not necessarily the elders as known traditionally but elders established in consultation with the regional state after 1999. Parallel to regional state structure, the elders are established at regional, zonal and *wereda* administration levels. They are paid from the government payroll and some tensions are observed between the elders institutionalized by the regional state and the traditional ones.

Tobias Hagmann discusses the requirements for selecting the elders and for the most part are the known elements that also apply in other CDRMs, the steps in peace making starting from initial incidence of conflict to the final step of reconciliation including the rituals. The main roles of the elders are advising the government on peace and security, mediating conflicts between government and local community, resolve conflicts between clans and conflicts related to land.[55]

Thus, the Federal and State governments could enact relevant laws concerning CDRMs in their respective jurisdictions. As already noted by various works, owing to the limited capacity of the State as well as due to the continued role of CDRM institutions and functions and because of easy access, and proximity to the people implying low or no cost, there is wide spread use of CDRMs. Given this reality, defining the role, jurisdiction, remuneration and effect of decisions by CDRM institutions need to be clarified by law. To minimize tensions and conflict of jurisdiction between CDRMs and courts, there should be continuous forum and interaction between the elders and judges. Both need to be aware of the role and function of each institution through seminars and trainings.

Another trend at harmonizing CDRMs with the formal state structure is the practice in Tigray and Afar regional states where such institutions are used for inter-ethnic conflict

---

[53] See, for example, Regional State Constitutions of Somali Art 56 that stipulates 'the state council shall in accordance with this constitution, establish elders' and clan leaders Council. Particulars shall be determined by law.' Similarly, Afar Regional State Constitution Art 63 stipulates 'the state council may establish Councils of Elders at various hierarchies as may be necessary. Particulars shall be determined by law'. The above constitutional clauses open up the way for establishing Elder's Council and these are only few instances and the respective roles are yet to be outlined in another law.

[54] Hagmann, T., 'Bringing the Sultan Back in: Elders as Peacemakers in Ethiopia's Somali Region.' *in* Burr, L. and Kyed, H. (eds.), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities*, Palgrave Macmillan, New York, 2007, pp.31-52.

[55] *Ibid.*

resolution. The two regional states share a common border and are affected by shortage of natural resources such as grazing land and water for their cattle and camel. Such resource constraints have at times led to conflicts and both regional states have as a result created a formal dispute resolution mechanism that stretches from the regional state councils down to the *Kebele* level. The structure incorporates the '*Abo Gereb'* as one means for resolution of disputes. What is worth noting is the fact that the formal structure that contains representatives of regional state councils, heads of security offices, elders council (*Abo Gereb*) backs the decisions of the *Abo Gereb* and makes sure that dispute resolutions made by the *Abo Gereb* are implemented on both sides of the border. The *Abo Gereb* has a distinct process of electing the elders that are involved in dispute resolution. Each bordering *Kebele* elects three elders.[56] Yet what is distinct is that the *Kebele* in Tigray regional state elects the three elders of the Afar community who should serve as members of the *Abo Gereb* and the Afar bordering *Kebele* elects the three elders from the Tigray community who should serve as *Abo Gereb*. The purpose of such complex process is to make sure that the elders who serve as *Abo Gereb* from both *Kebeles* win the trust of both communities. It is to ensure that the elders are impartial and their main goal is to ensure community peace between the two communities. The elders need to have the wisdom and capacity that transcends specific ethnic group interests. The *Abo Gereb* has an appeal structure. The *Wereda* level *Abo Gereb* has the mandate of amending the customary law that applies to both communities and makes sure that the new law is approved by the entire community before it comes into force. The customary law therefore is not a fixed, rigid one but a living customary law that is responsive to new challenges that arise in the community.

Obviously there is some tension between the practice of *Abo Gereb* and the formal law. The *Abo Gereb* deals with serious crimes such as homicide and raiding of cattle particularly those that affect the peace between the Tigray and Afar regional states. These are serious crimes that fall within the criminal law and are supposed to be brought before the regular courts. Yet decisions of the regular courts that pass sentences to suspects after undertaking the trial have not been able to ensure community peace as the decision of the court does not bring end to the conflict. The perpetrator has to undergo the process of repentance and secure the forgiveness of the victim before his reintegration to the community. Thus what binds in the end is not the decision of the regular court but that of reconciliations made by the *Abo*

[56] See for details Amdemariam, *Dispute Resolution Mechanisms: Best Practices from Tigray*, (Amharic) Hamle 2005 E.C., Makele (unpublished paper available with the author) presented on the Seminar entitled Intergovernmental Relations among the House of Federation and Regional States held in Makele Hamle 25, 2005.

Gereb. Thus what the two regional states used is the formalization of the *Abo Gereb* into the political process particularly when there are serious cases that affect social order and peace in the community. The regular courts engage only when the case involves a crime with less impact on community peace.

Conclusion

The interaction between formal law and CDRMs is crucial and both need each other if one is to speak of a coherent system in the future. But even before some level of harmonization is thought, both systems need each other badly. Right now the level of the State's reach is limited and hence in many cases both are operating nearly separately. The harmonization process should aim at establishing mechanisms for monitoring/supervising the practice of CDRMs for their compliance with human rights regime stipulated in the Constitution. The formal system should recognize and promote the values of the CDRMs to the extent that constitutional norms and human rights are not violated.

Such recognition and promotion necessitate the establishment of an institution or authorizing an already existing institution such as courts with a clear mandate of supervision concerning human rights. Human rights concerning women and children should also be promoted to the community in general and to the elders in particular. The role of women in CDRMs needs to be improved. The formal system could also assist CDRMs (the examples from Gambella and Tigray/Afar indicate) in the enforcement process where individuals attempt to manipulate gaps in the system. CDRMs also remain vital in terms of resolving tensions between groups where the formal system often focuses on the material aspects of the conflict without dealing with the non-material aspects of the conflict.

One serious precaution is in order here. That the two systems should complement each other does not mean that one has to manipulate the other and reduce its vitality and autonomy. There is the risk that too close a cooperation and interaction between the two systems can at times lead to tension. If the allegations of observers on some case studies in Ethiopia[57] are true, then CDRMs may be co-opted, become "sell outs" and lose their soul if they are manipulated by the state institutions. This raises a more vital issue of whether the institutionalization/ formalization of CDRMs is a 'public good' and if they have to be institutionalized, the conditions under which this is to be effected. Unless carefully balanced,

[57] See for example the challenges the *Gada* system of the Oromo is currently going through by Israel, I., 'The Quest for the Survival of the Gada System's Role in Conflict Rolution,' in Gebre, Fekade and Getachew, *supra* note 1, pp.299-320; also Alemu K.., 'Ye Dem Erik Sere'at in Lalo Mama Wereda of North Showa' (Amharic) in *id.*, pp.157-180.

the process of formalization and integration may drain the legitimacy and vitality of CDRMs. A more practical proposal is to work out the partnership between the formal system and the CDRMs depending on the strength and weight of the two systems across regional states. On the positive note, as the case of Social Courts in Tigray and rape cases in Oromia illustrate, the State can also positively influence the role of CDRMs. In the former, one of the serious limitations of CDRMs, exclusion of women, is remedied by requiring female judges in Social Courts. In many parts of Oromia, elders are trained to refer rape cases to the courts as the CDRMs are often blamed for not adequately dealing with such issues.

The Role of Traditional and Informal Justice Systems in Promoting Access to Justice in Criminal Justice Systems: A Comparative Study of South Africa, Uganda and Ethiopia

Wendmagegn Gebre Fantaye*

Abstract

In developing countries, where lack of access to justice is an unremitting problem, traditional and informal justice systems play pivotal role in promoting access to justice. This chapter aims at presenting a comparative perspective on the recognition and role of traditional and informal justice systems in resolving criminal disputes. The comparative study aims at suggesting ways to improve the efficiency and legitimacy of the Ethiopian criminal justice system. The primary focus is, hence, to examine the place of the traditional and informal justice systems in the criminal justice system of South African and Uganda. It is hoped that Ethiopia may learn from the experience of these jurisdictions.

Keywords: Access to justice, traditional justice systems, informal justice systems, popular justice

Introduction

As formulated by the United Nations Development Program (UNDP), access to justice refers to "the ability of people to seek and obtain a remedy through formal and informal institutions of justice, and in conformity with human rights standards."[1] As such, access to justice is not human right entailing only negative obligation of the state. Rather, it is the duty of a state to make sure that judicial bodies are really – physically and financially – accessible to the public.

It might be overly ambitious to require a state to provide citizens with expeditious access to justice under all circumstances, since lack of resources and geographical distances might make it difficult for the state to meet that requirement. Although an appeal to lack of resources may be a good defense not to establish judicial bodies in each and every locality, it would be in fact a denial of justice if a state does not take effective measures to overcome those obstacles to access to justice.

Accessing the formal justice system is often curtailed by various barriers such as delays in justice dispensation, costly legal services, and geographical inaccessibility of courts, thereby making the system beyond the reach of the majority of the population.[2] It would be

* Lecturer in Law (University of Gondar), LLB, LLM (Specialized in Criminal Justice and Human Rights Law). The author can be reached at <wondearse@gmail.com>.

[1] Wojkowska, E., *Doing Justice: How Informal Justice Systems Can Contribute*, World Bank, 2006, p.8.

[2] Kerrigan, F. *et al*., 'Informal Justice Systems, Charting a Course for Human Rights-based Engagement : A Study of Informal Justice Systems: Access to Justice and Human Rights', p.11, retrieved from <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20an

difficult to speak of access to justice in such a system where justice is considered a rare commodity which is accessible only to the privileged, the powerful and the rich, excluding the poor, the marginalized and the weak. Even if it may be beyond the capacity of a state to make the formal justice system accessible to all citizens at all times and places, encouraging the use of traditional and informal justice institutions by enhancing their feature is the extended obligation of the state to ensure access to justice. That is, "[e]nsuring access to justice goes beyond formal constitutional guarantees and formal state institutions to include informal courts."[3] Accordingly, "[i]n order to improve access to justice, modern reforms in dispute resolution include encouraging the use of informal courts and making legal aid services accessible."[4] Thus, providing accessible justice through traditional and informal justice systems – in so far as it is in conformity with international human rights standards – helps promote the cardinal principle of equal justice for all. It can be recapped that:

> Providing accessible justice is a state obligation under international human rights standards, but this obligation does not require that all justice be provided through formal justice systems. If done in ways to respect and uphold human rights, the provision of justice through IJS [informal justice system] is not against human rights standards and IJS can be a mechanism to enhance the fulfilment [sic] of human rights obligations by delivering accessible justice to individuals and communities where the formal justice system does not have the capacity or geographical reach.[5]

While informal justice systems can make justice more accessible, there is a criticism often leveled at such systems that they are on the whole more prone to violate human rights than formal systems.[6] In particular, informal justice systems applying customary or religious norms are often observed being discriminatory against women and children.[7] However, it has been claimed that attributing all the negatives exclusively to the informal justice systems is unfair. From the outset, it should be noted that not all informal justice systems are discriminatory. What is more, discrimination against certain groups of society is not peculiar

---

d%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>.

[3] Morhe, R., 'Access to Justice and Resolution of Criminal Cases at Informal Chiefs' Courts: The Ewe of Ghana', 2010, p. 8, retrieved from <http://purl.stanford.edu/fy898bp6189>.

[4] *Id.*, p.1.

[5] Kerrigan *et al*, *supra* note 2, p.10.

[6] Stevens, J., 'Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems', Penal Reform International, 2000, pp.2-3.

[7] *Id.*, p.2.

to informal justice systems as there is such discrimination in the formal legal systems as well.[8] As Stevens observes:

> Although traditional forums are on the whole more prone to discrimination than formal systems, there are examples of nondiscriminatory informal forums, as well as of discriminatory formal courts… It would be misleading, therefore, to attribute the discrimination primarily to the informal process itself, rather than to the prevailing attitudes which lie behind discriminatory customary norms and laws.[9]

Human rights obligations apply to both informal and formal justice systems.[10] Thus, a state has an obligation to ensure the respect, protection, fulfillment and promotion of human rights, including where informal justice systems are the major provider of justice to the public. Giving due deference to the positive roles of informal justice systems in promoting access to justice, particularly where formal justice mechanisms are inoperative or inaccessible to ordinary people, ensuring human rights compliance is therefore mandatory.

The fundamental question then is: what should the interaction between the formal and informal justice systems look like? In this regard, it is important to state that any project of integration, regardless of its informality, should adhere to the basic principles of the fundamental human rights recognized and guaranteed internationally. As Kerringan *et al* note:

> [I]n many contexts, the best access to justice and protection of human rights will be afforded when the different systems and mechanisms, formal and informal, are allowed (a) to exchange with and learn from one another, (b) to cooperate with one another, (c) to determine the best division of labour, guided by user preferences as well as state policy imperatives, and (d) to develop in order to meet new challenges.[11]

Incontrovertibly, in developing countries, where lack of access to justice is an incessant problem, traditional or informal justice systems play fabulous roles in promoting access to justice. Currently, such systems are widely accepted in different countries by both the general public and the legal profession. However, the recognition of informal administration of criminal justice or settlement of criminal cases through amicable processes is a relatively new phenomenon.[12] Informal administration of criminal justice has now become commonly accepted, and even institutionalized and promoted, by many countries due to a general

---

[8] *Ibid.* (observing that 'in a number of countries in Africa and Asia, wife beating is not considered a crime under the formal law and blatantly discriminatory laws still remain on the statute books.')

[9] *Ibid.*

[10] Kerrigan *et al*, *supra* note 5, p. 10.

[11] *Ibid.*

[12] Lewis, M. and McCrimmon, L., 'The Role of ADR Processes in the Criminal Justice System: A View from Australia', 2005, p.4, retrieved from <http://www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf>.

dissatisfaction of the public with the formal criminal justice system which is often seen as unsuccessful in, *inter alia*, reducing rates of recidivism and addressing the interests of victims of crime.[13] Many (African) countries, such as Uganda and South Africa, have recognized the value of informal administration of criminal justice to address some of the problems facing their formal criminal justice systems and make justice more easily accessible to all people.

There is, however, a great difference of opinion as to the scope of criminal matters, type of cases to be dealt with and limits on the types of sentencing which traditional or customary courts are capable of imposing. That is to say, a great amount of regulation will be needed to allow traditional and informal justice systems to deal with criminal matters. Generally, this chapter examines, based on comparative materials, how traditional and informal justice systems in criminal matters may assist a state in working towards cheap and effective justice system thereby enabling the state to meet its obligation to provide access to justice for all of its citizens.

Terminology

Throughout this chapter, the term 'traditional justice systems' is used to refer to non-state justice systems which stay alive in the African countries under study, since time immemorial and are typically found in rural areas. 'Traditional justice' has also been referred to as 'customary justice' or 'indigenous justice'.

On the other hand, 'informal justice systems' referred all sorts of alternative dispute settlement mechanisms that operate outside the formal justice system. The term is used to refer to any non-state justice system. This may include both 'traditional' – community-based conflict resolution systems which provide their own social order outside the formal legal system – and the 'informal processes' of the highly structured and organized alternative dispute resolution (ADR) mechanisms. Hence, in this chapter, the author uses informal justice systems to refer to the various forms of out-of-court and amicable dispute settlement processes that co-exist with the formal justice system. The phrase 'traditional and informal justice systems' is, then, used to denote traditional and other informal justice systems. What is more, the phrase 'non-traditional informal justice systems' in this chapter is to be understood as including what are referred to as popular justice and (court-based/Westernized) ADR forums.

[13] Kerrigan *et al*, *supra* note 5, p.11.

A comparative analysis of the traditional and informal justice systems of South Africa and Uganda will follow below. Following that, an attempt is made to draw relevant (to the Ethiopian criminal justice system) lessons from the experiences of Uganda and South Africa.

1. South Africa

1.1. Traditional Justice System

Dispute resolution outside of court is not a new phenomenon in South Africa. Of course, customary/traditional system has substantially been suppressed or distorted by colonial rule, which frequently employed local chiefs to retain control and established more authoritarian, rigid and ethnic based structures.[14] In spite of this, there had, still, been room for customary system to remain in place as one of the forms of dispute resolution in South Africa during colonial period. The 1927 Black Administration Act, which was repealed in 2005, tolerated customary law 'so long as it wasn't deemed "repugnant" to common law [of England], in which case it was nullified'.[15]

Customary law plays a central role in the resolution of disputes. Customary law is largely used by traditional communities that constitute a sizeable portion of the South African society:

> [C]ustomary law is probably the only form of justice known to many South Africans. About half the population lives in the countryside where traditional courts administer customary law in over 80 per cent of villages. The courts, which are also found in some urban townships, deal with everyday disputes like petty theft, property disagreements and domestic affairs–from marriage to divorce and succession. [Moreover]… [j]ustice is swift and cheap as the courts are run with minimal formalities and charge less than a dollar for a hearing. The judges use everyday language, and the rules of evidence allow the community to interject and question testimonies. These courts are close to the people who don't have the money or time to travel to towns for formal courts.[16]

South Africa has, since 1994, tried to integrate the traditional justice system into the wider state legal and regulatory framework. The country's 1996 democratic constitution explicitly recognizes customary law. Accordingly, "[t]raditional institutions and laws are all

---

[14] Chirayath, L., Sage, C. and Woolcock, M., 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems', World Bank, 2005, p. 4 [Hereinafter Chirayath *et al*]. Retrieved from <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/CustomaryLawandPolicyReform.pdf>.

[15] Haffajee, F., 'South Africa: Blending Tradition and Change', *UNESCO Courier*, Vol. 52 Issue 11, 1999, p.33.

[16] *Ibid.*; see also Republic of South Africa's Policy Framework on Traditional Justice System under the Constitution, 2009, p.6 (noting that 'a large number of people who live in traditional communities subscribes to the principles of customary law and embraces the traditional court system that applies this form of law. An estimated 14 million people [out of a population of 42.5 million people] form part of traditional communities in all provinces in South Africa except the Western Cape') [Hereinafter the Policy Framework].

officially recognized in the 1996 Constitution."[17] Many other subsequent legislations and policies address the significance of customary law, traditional courts and the judicial function of traditional leaders. For instance, the 2003 national Traditional Leadership and Governance Framework Act has plainly set out the roles and responsibilities of different levels of traditional leaders and institutions, and their relationship with the different levels of government. Furthermore, the 2009 Policy Framework on the Traditional Justice System under the Constitution (hereinafter the Policy Framework) has affirmed the importance of the institution of traditional leadership (traditional justice system) in the administration of justice to enhance access to justice and to contribute to the improvement of life for all people.[18]

Traditional leadership has long played a pivotal role in traditional communities[19] with respect to the administration of (criminal) justice. In administrating justice, traditional leaders resolve disputes through traditional courts *(Makgotla/Inkundla)*.[20] The courts provide people with swift and cost-effective justice:

> The importance of traditional courts derives from the fact that they are closest to the communities and use the language and methods that the community understands better than the procedures applied by formal courts. A traditional leader and his/her councillors [*sic*] sit in commune ('*lekgotla*'), hear the evidence of complainants and 'accused' persons, and resolve disputes according to the cultural practices and customs applicable to the community in question. In contrast to the formal court system, traditional courts do not adhere to any prescribed or written set of rules. They are guided by the culture and tradition of the community in which they operate. In this way, justice is dispensed easily and quickly.[21]

Nevertheless, the traditional justice system is not without its critics. Some of the practices of the traditional justice system have come into conflict with some of the values underpinning the South African Constitution, such as equality and the eradication of discrimination based on, in particular, race, gender and age.[22] Specifically, women are barred from serving as judges and often discriminated against as litigants in traditional court proceedings. It has been noted that "[a]llegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes and the prevalent exclusion of women in the traditional court structures and bias against women litigants or parties to the proceedings

---

[17] Chirayath *et al*, *supra* note 14, p.24.
[18] The Policy Framework, *supra* note 16, p.7.
[19] A traditional community is a community which: (1) is subject to a system of traditional leadership in terms of that community's custom; and (2) observes a system of customary law. See the Republic of South African Traditional Leadership and Governance Framework Act [hereinafter the Act], 2003, art 2(1) (a) and (b). For more on recognition of a community as a traditional community and withdrawal of recognition of traditional communities, see Chapter Two of this Act.
[20] The Policy Framework, *supra* note 16, p.6.
[21] *Ibid*.
[22] *Ibid.*

continue to gloom the picture over these [traditional] courts."[23] Another important criticism against traditional courts relates to corporal punishment, the most common type of sentence meted out by the courts.[24]

In improving access to justice and protection of human rights through the traditional justice system, South Africa has exercised high leverage over the role of traditional leaders and courts regulating through the 1996 Constitution and a number of statutes. The application of customary law is subject to the constitutional clauses of equality and non-discrimination.[25] More importantly, the Constitution has provided for a mechanism of protecting the Bill of Rights included in it. The Constitution establishes different institutions such as the South African Human Rights Commission, the Commission on Gender Equality and the Public Protector with constitutional mandates to investigate any violation of constitutional rights. [26] A number of statutes, as noted above, also regulate the role and functions of traditional leaders and the traditional justice system. In South Africa, the law, in ensuring gender equality and inclusion, requires that among the democratically elected traditional council members, at least a third of them must be female.[27]

1.2. Criminal Jurisdiction of Traditional Courts

The role of traditional courts in the criminal justice system in South Africa is duly acknowledged by the Policy Framework. It has been stipulated that "[t]raditional courts should be utilized as one of the diversion programs where cases are diverted from the ordinary courts, applying the formal criminal justice system to be dealt with through the use of alternative dispute resolution or restorative justice."[28] The Policy Framework has also tried to determine the criminal jurisdiction of traditional courts. Accordingly, traditional courts are conferred with criminal jurisdiction to entertain less serious crimes arising from customary law and common (state) law crimes.[29] It has specifically prohibited such courts from

---

[23] *Ibid.*

[24] *Ibid.* The document notes that '[t]raditional courts still regularly administer this sanction in forms varying from few lashings to ferocious beatings.'

[25] Odinkalu, C. A., 'Pluralism and the Fulfillment of Justice Needs in Africa', 2005, retrieved from <http://www.afrimap.org/english/images/paper/Odinkalu_Pluralism_Justice_ENfin.pdf>.

[26] The Policy Framework, *supra* note 16, p.26.

[27] The Act, *supra* note 19, Art.3 (2) (b). A traditional council has many crucial functions. It has the functions of, *inter alia*, administering the affairs of the traditional community in accordance with customs and tradition; and giving assistance, support and guidance to traditional leaders in the performance of their tasks. See generally Art 4 *et seq.*

[28] The Policy Framework, *supra* note 16, pp.34-35.

[29] *Ibid.*

entertaining serious disputes such as domestic violence and indecent assault.[30] Besides the type of criminal cases that might be dealt with by traditional courts, the Policy Framework determines territorial jurisdiction. It provides that "[t]he jurisdiction of traditional courts should be in respect of offences and disputes that have arisen within the area of jurisdiction of the traditional court concerned."[31] It is instructive to note that an accused/defendant is not entitled to the constitutional right to legal representation in proceedings before traditional courts. The Policy Framework articulates the issue of legal representation as follows:

> The right to legal representation in the mainstream courts is pursuant to section 35 of the Constitution and this right is non-derogable. However, in the traditional justice system the right to legal representation does not find application as the traditional justice system is distinct from the ordinary courts envisaged by the Constitution (section 35(3)(c)). The purpose of traditional courts is not to convict, so much as to restore harmony and reconciliation. … [l]egal representation should not be permissible due to the fact that traditional courts do not deal with technical legal questions that require lawyers to interpret.[32]

With regard to the sanctions traditional courts may impose, the Policy Framework requires for any sanctions imposed to be of a restorative justice nature. The traditional courts, thus, would not be allowed to consider any form of imprisonment, suspended sentence, and other severe sanctions such as banishment and expulsion from the community as most of these sanctions would not be justified under the Constitution.[33] Generally,

> [t]raditional courts may impose fines and /or monetary compensation. In relation to traditional courts, the focus has always been on reconciliation and restorative justice rather than on punishment. A fine is seen as an acceptance of guilt and the fine is often self-imposed. … [t]raditional courts should be empowered to impose innovative community sanctions, particularly sanctions that facilitate restorative justice, in keeping with the traditional role of traditional leadership. Historically, traditional leaders were charged with maintaining peace and harmony in their communities.[34]

Decisions of traditional courts are final and appeal is discouraged as it protracts legal processes.[35] Yet, the Policy Framework provides that mechanisms should be established for referral of cases from traditional courts to formal courts and vice versa.[36] Accordingly,

---

[30] *Id.*, p.35.
[31] *Ibid.*
[32] *Id.*, p.36.
[33] *Id.*, p.34.
[34] *Ibid.*
[35] *Id.*, p.36. This would in effect contribute to expedite the process in the resolution of disputes and achieve the legal principle of speedy trials. Judgments and decisions of traditional courts are usually based on consent by the defendant/accused person, and these decisions arrived at also translate into decisions of the community as everyone participates in the resolution of the disputes. The concept of appeal is consequently not a feature of the traditional court system.
[36] *Ibid.*

decisions of traditional courts are reviewable by the magistrate's court having jurisdiction, and grounds for review include absence of jurisdiction on the part of the court, gross irregularities, interest in the case and bias.[37]

To enhance the role of traditional justice system in promoting access to justice, the Policy Framework calls for traditional leaders to undertake prescribed training programs.[38] It aims, through trainings, at advancing the values and principles of the Bill of Rights recognized under the Constitution.[39]

From this, it can be observed that there is an attempt to establish a well-managed or coordinated interaction between the traditional and formal (criminal) justice systems. The Policy Framework, which seeks to create accountability of traditional leaders in discharging their role and functions in the administration of criminal justice, further proposes that national legislation should require "traditional leaders who have been designated as presiding officers to take an oath of office before a magistrate of the magistrate's court in the area of jurisdiction of the traditional court."[40] The Policy Framework also suggests that national legislation may provide for the enactment of a code of conduct for traditional leaders designated to exercise their role and functions in the administration of justice, and should prescribe measures to be taken against any breach of such ethical conduct by any traditional leader.[41]

1.3. Non-traditional Informal Justice Systems in South Africa

1.3.1. Community Courts

'Community courts' has become the contemporary term used when referring to popular justice structures operating outside the formal justice system in most urbanized African townships and informal settlements.[42] In South Africa, traditional legal system, operated by traditional courts, is not exclusive to rural areas. Urbanites with limited resource to rely on

---

[37] *Ibid.*

[38] *Ibid.*

[39] *Id.*, p.37. The policy document acknowledges the importance of sensitizing traditional leaders about gender equality in the handling of disputes relating to women and other vulnerable members of society through human rights education and social context training programs.

[40] *Id.*, p.34.

[41] *Ibid.*; some of such measures sought by the Policy Framework include training programs and temporary or even permanent withdrawal of the designation (if the breach is serious enough to warrant withdrawal).

[42] Alternative Dispute Resolution, South African Law Commission, Issue Paper 8, Project 94, 1997, p.34, retrieved from < http://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf>. [Hereinafter Commission Paper]

the formal system 'tend to replicate traditional African behaviour patterns' in townships.[43] Popular or community courts which attempt to offer the social and/or legal protection that state institutions fail to provide are the most important forms of non-traditional informal justice system in the Republic of South Africa.

Community courts should be distinguished from 'the people's courts'[44] which operated during the years of the struggle against apartheid in South Africa. Currently, community courts are a social fact and functional in most stable and organized urban communities. However, "[t]he main type of community court which currently exists in South Africa is the Street Committee, also known in some areas as the section committee or headmen's committee."[45] This section addresses the roles of Street Committees in access to criminal justice system in South Africa.

Street Committees, which serve urban areas ranging in size from roughly 50 houses and sites to more than 200, handle a considerable number of criminal disputes. Different disputes relating to, for instance, communal washing lines or noisy neighbors are resolved before they degenerate into situations where disputants might resort to force.[46] In contrast to the Western-style formal criminal justice system which is based on retributive justice where the objective is to establish blame and administer punishment, Street Committees emphasize reconciliation between parties.[47] Dispute settlement before Street Committees is informal, cost-effective, accessible and participatory. Steven notes:

> Proceedings before street committees are normally conducted at weekends or in the evening. They share many of the features of traditional dispute resolution. Procedures are simple and no formal representation is allowed. The parties to the dispute may 'bring as many supporters as they need to help tell the story.' The public may participate by asking questions and offering comments and a holistic approach is taken in order to ensure appropriate and lasting solutions to a problem.[48]

The most commonly available remedies that may be ordered by Street Committees include restitution, service to the aggrieved party, compensation for lost work-time and

---

[43] Bidaguren, J. A. and Estrella, D. N., 'Governability and Forms of Popular Justice in the New South Africa and Mozambique: Community Courts and Vigilantism', *Journal of Legal Pluralism and Unofficial Law*, Vol. 34, Issue 47, 2002, p.127.

[44] For more on people's courts in South Africa, see Stevens, *supra* note 6, pp.39-47.

[45] *Id.*, p. 40.

[46] *Id.*, pp. 40 and 42. But, that is not to state that the seriousness of a particular issue is not taken into account by the Committees in entertaining criminal matters. It should be noted that '…street committees almost invariably decline jurisdiction in favour of state courts in cases involving rape or murder.'

[47] *Ibid.*

[48] *Id.*, p. 42.

hospital expenses, or service to the community.[49] In enforcing decisions, Street Committees employ eviction orders and denial of certain services to a person who is thought to be the cause of the conflict. As Stevens observes, "access to civic association services may be withdrawn from recalcitrant residents, while the ultimate sanction for non-compliance is eviction or banishment from the area."[50] Incidentally, it is quite interesting to note that Street Committees sometimes use the state community policing as way of coercion which can force a disputant to abide by their decisions.[51]

Appeal against a decision of the Street Committees is possible. Unsatisfied party may appeal to the Area Committee against a decision of the Street Committee. Where, following an appeal, eviction orders are ratified by the higher authority, the Street Committee oversees its execution with a view to ensure that the dispute has been successfully resolved and report back developments after appeal to the higher authority.[52]

Generally, Street Committees are able to play substantial role in the criminal justice system by resolving community conflicts more quickly and more effectively than the ordinary courts thereby contributing a lot towards maintaining social order since the objective is to bring harmony to the community. On the negative side, the gender inequity of the Committees can be mentioned. Members of Street Committees are usually composed almost exclusively of male elders.[53] Research indicates that very few women are elected as members of the Committees and are not as such expected to play a considerable role in the dispute resolution process. Even when elected, it was not uncommon to exclude women in the Committee from discussion 'by the ploy of asking them to make and serve tea when the discussion stage was reached, while the discussion continued unabated.'[54] Hence, it is possible that the gender composition of the Committees could adversely affect decisions involving women.

Bidaguren and Estrella indicate that popular justice systems (community courts) in South Africa are not well integrated into the formal judicial system.[55] On the other hand, it has been observed that South Africa, over the last decade, has attempted to regulate popular

---

[49] *Ibid.*
[50] *Ibid.*
[51] For more on this, see Schärf, W., 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?', paper Presented at a workshop on 'Working with Non-State Justice Systems held at the Overseas Development Institute', Institute of Development Studies, 2003, p.27.
[52] Stevens, *supra* note 6, p.43.
[53] *Id.*, p. 41.
[54] Burman, S. and Schärf W., 'Creating People's Justice: Street Committees and People's Courts in a South African City', *Law & Society Review*, Vol. 24, No. 3, 1990, p. 711.
[55] Bidaguren and Estrella, *supra* note 43, p.128.

justice forums in a way hitherto unknown in the country. In doing so, three objectives have been sought to be attained:[56] (1) external assistance for popular justice organizations through human rights and self-regulation trainings; (2) setting limit on 'popular sovereignty' in order to foster the protection of human rights; (3) the incorporation of bodies of popular justice into the formal justice system. If such objectives are met, popular justice forums in South Africa seem to enhance their capabilities in the fight against crime in particular and in promoting access to justice in general.

1.3.2. Other ADR Mechanisms in the South African Criminal Justice System

In South Africa, ADR is used for handling various criminal matters. Areas where ADR is utilized include community courts, victim-offender mediation, and juvenile justice.[57] The 2005 Children's Act of South Africa, which came into effect on 1 April 2010, provides for the use of ADR, usually with a restorative justice approach, in criminal proceedings involving children in conflict with the law.[58] As a result of family-group conferences, mediation services and pre-trial conferences that are put in place in the Children's Courts Chapter of the Children's Act, sending children to courts is usually considered as a measure of last resort.[59] Obviously, such a juvenile justice program can facilitate the rehabilitation and reintegration of a child offender into society.

Victim-offender mediation, the primary purpose of which is to compensate the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for mending the harm, is the other form of ADR mechanism given role in South African criminal justice system. This process may or may not include restorative justice approach.[60] The use of ADR, especially with a restorative justice approach, can allow for a healing and conciliatory process to take place for it gives the victim an opportunity to tell the offender how the crime affected him or her. In addition, an offender can have the opportunity to apologize, explain his or her behavior and make some reparation. Nonetheless,

---

[56] *Ibid.*

[57] Commission Paper, *supra* note 42, p.39.

[58] *Ibid.*; the juvenile justice program is a procedure whereby 'offenders are diverted from judicial process in the first instance.' Often, victims and offenders meet to discuss 'what has happened and negotiate measures for repairing damage caused by the offense'. The meeting may involve family and other support persons who may also participate in the discussion. See also the 2005 Children's Act of the Republic of South Africa, chapter 2.

[59] Justice and Correctional Services, South Africa Yearbook 2010/11, South African Law Reform Commission. p.352, retrieved from <http://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/chapter15.pdf>.

[60] *Ibid.*

restorative justice is always voluntary and hence need not be 'forced upon the victim of any crime or offence'.[61]

2. Uganda

2.1. Formal Courts Founded on Traditional and Popular Justice Systems

Uganda, which had been under British colony until 1962, is a multi-ethnic state having four principal ethnic groups and over 40 languages.[62] Since pre-colonial times, many customary dispute resolution mechanisms had operated. During colonial era, the British allowed the traditional Kingdoms to exercise judicial power.[63] Even following independence, Local Council Courts (LC Courts) have continued 'to be part of the formal Ugandan legal system'.[64] The state courts are geographically inaccessible or are very remote to the majority of the population, particularly in rural areas.[65] Even more, the legal profession in Uganda is not as large as the demand for it. Uganda has inherited the British adversarial system and as a result the judicial process itself poses great problem to access to justice. Since the administration of adversarial system – given the technical nature of the law and its procedures – requires professional services, legal services are very much expensive and beyond the reach of the majority of the population.[66]

Uganda has designed and is implementing an interesting system of (criminal) justice administration. The country follows a hybrid or pluralistic system of criminal justice administration. It has established LC Courts in 1988 at the lowest administrative level as part of a policy decision to make justice more accessible.[67] LC Courts are established as an attempt to provide grassroots justice and to bring justice closer to the people and to enable people to use their traditions in resolving disputes.[68] That is, one of the main and unique features of such system of justice administration seems to be the exercise of judicial powers in a manner akin to traditional mechanisms of disputes resolution. LC Courts are designed to provide 'popular justice' that is 'accessible to the public in terms of laws, cost and

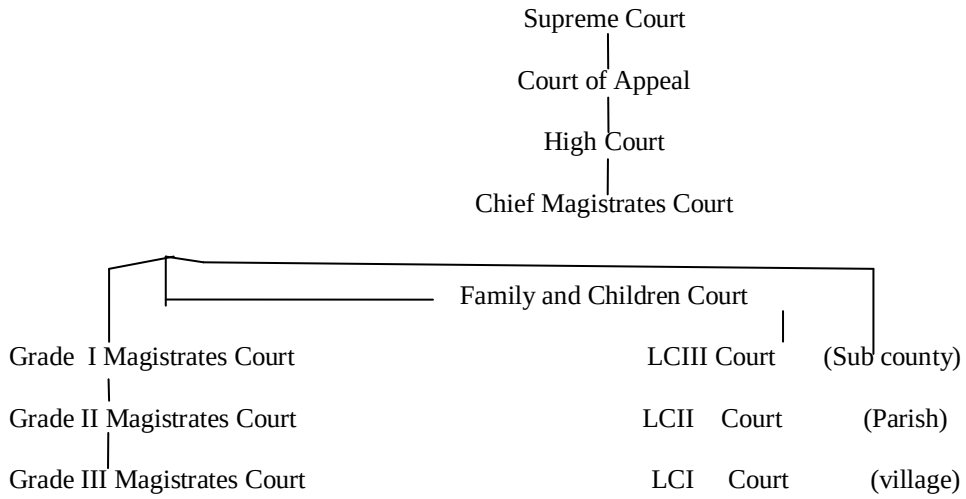
---

[61] *Id.*, pp.352-53.
[62] Robinson, S., 'Restorative Approaches to Criminal Justice in Africa: The Case of Uganda', in Etannibi Alemika *et al* (eds), *The Theory and Practice of Criminal Justice in Africa*, Institute of Security Studies (ISS), 2009, p.58.
[63] *Id.*, pp. 59-60.
[64] *Id.*, p.60.
[65] *Id.*, pp. 60-61.See also Kane *et al*, *infra* note 68, p.9.
[66] *Id.*, pp. 6-7. The number of lawyers in Uganda; including those who do not do traditional lawyering is estimated to be about 1500, approximately one lawyer for every 12,000 people.
[67] *Id.*, p.18.
[68] Kane *et al*, 'New Frontiers of Social Policy, Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor', Conference paper: Arusha Conference, 2005, P. 6.

distance'.[69] Described as an attempt to de-formalize or popularize the administration of justice,[70] LC Courts provide a mechanism that can link the formal justice system with traditional justice system approaches. As Stevens notes, the now technically formal LC Courts are little more than 'informal' courts' from colonial times.[71] Nevertheless, the LC Courts are, *de facto*, highly connected to traditional justice system and rely on lay judges who apply common sense and local norms.[72] LC Courts – which are duly recognized by the 1995 Ugandan Constitution – are authoritatively established by the Local Council Courts Act, 2006, as part of the formal state court hierarchy and their jurisdiction, powers, procedure and other related matters are defined. Under this Act, LC Courts are established at every village (LCI), parish (LCII), town, division and sub-county (LCIII) levels.[73]

The following diagram recaps the Ugandan Court Structure and the different levels of LC courts as provided for under the 2006 LC Courts Act.[74]

Figure 1: Hierarchy of Ugandan Courts



[69] Monitoring Integrity in Local Council Courts in Uganda, The Foundation for Human Rights Initiative, p.25, retrieved from <http://ppi.integrityaction.org/sites/ppi.integrityaction.org/files/publications/Monitoring%20Integrity%20in%20Local%20Council%20Courts.pdf>.

[70] Kane *et al*, *supra* note 68, p.6.

[71] Stevens, *supra* note 6, p.64.

[72] Khadiagala, L. S., 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights', *Development and Change*, Vol.32, 2001, pp.63-64 (noting that LC courts are characterized as legal institutions 'located on the boundary between the state law and indigenous or local law' with lateral and vertical linkages to state and society).

[73] Ugandan Local Council Courts Act, 2006, Section 2.

[74] Stevens, *supra* note 6, p.63.

As can be seen from the above diagram, the LC Courts are the bottom of the formal judicial pyramid. They are legally incorporated into the formal justice system. The Executive Committee (LC I) at the lowest local level 'constitutes itself into a court' and hear disputes between locals. Similarly, LC Courts exercise some judicial function at parish and sub-county levels.[75] In general, LC Courts established at each administrative level are considerable in number ultimately begetting easy physical accessibility to the public.[76]

Members of LC Courts are volunteers who receive no remuneration.[77] One of the most important things LC Courts can be praised for is that the composition of members is mostly regulated in order to maintain for gender representation thereby enabling women to serve on the tribunals. The 1995 Ugandan Constitution requires for representation of women in all LC Courts and women are eligible for the chairpersonship.[78] At least two members, out of five, of the town, division or sub-county LC Court must be women.[79] Gender balance is also required for the lowest, village level LC Courts.[80]

2.1.1. Criminal Jurisdiction of LC Courts

LC Courts have both civil and criminal jurisdictions. Due to their physical proximity, and some other reasons that will be noted later on, their jurisdiction in civil matters is not restricted by the monetary value of the subject matter in dispute.[81] But, as regards criminal matters, they exercise jurisdiction over a limited number of minor criminal cases, usually relating to offenses committed by juveniles.[82]

The 2006 LC Courts Act, in Section 2, provides for some of the remedies the courts may have the power to order. As restorative institutions, LC Courts have the power to order reconciliation, compensation and apology and other related sanctions.[83] Pursuant to Section 10 of the 2006 LC Courts Act, any party dissatisfied with the judgment or order of LC Courts has the right of appeal. As can be discerned from the diagram above that illustrates the

---

[75] See Section 2 of Executive Committees (Judicial Powers) Act cited in Kane *et al*, *supra* note 74, p.8.
[76] *Ibid*. The total number of LC Courts at various levels has been indicated to be 953 LC III Courts, 5,225 LC II Courts and 44,402 LC [I]. Hence, LC Courts create easy physical accessibility to the society.
[77] Stevens, *supra* note 6, p.69.
[78] Kane *et al*, *supra* note 68, p.13.
[79] Local Council Courts Act, *supra* note 73.
[80] Kane *et al*, *supra* note 68, p.8; the law requires that 30% representation of women for LC courts at village level should be maintained.
[81] *Id.*, p.7.
[82] *Ibid*.
[83] Robinson, *supra* note 62, p.65.

Ugandan court structure, parties to a dispute initiate cases at the LCI level – albeit they can choose to use the concurrent jurisdiction of the magistrates' courts. Appeals originating from LCI will go to the LCII and later LCIII courts before reaching the Chief Magistrates Court (and the Courts on top of it) which may uphold or overturn decisions or send cases back for retrial.[84]

In practice, LC Courts are apparently observed overstepping their authorized jurisdiction.[85] One may wonder why LC Courts act beyond their jurisdiction. Possible reasons include their (physical and financial) accessibility.

2.1.2. The Role of LC Courts in Promoting the Right of Access to Justice

LC Courts in Uganda can be characterized as popular and effective in realizing access to justice.[86] Lawyers are not permitted to practice before LC Courts; and this makes access to LC Courts cheap. The cost is also reduced due to simplified procedures. Parties are not required to specify their grievance/dispute in writing.[87] The other role of LC Courts in promoting access to justice is that language is not a barrier to any party.[88]

In sum, LC Courts are financially and physically accessible both in urban and rural areas where formal institutions are inaccessible.[89] Moreover, Ugandans appear to feel a sense of ownership in their legal system for the very reason that participatory traditional institutions, allowing them to speak their own language, with local elders who understand their specific customs and traditions, are effectively integrated with state institutions, thereby creating legitimacy in the criminal justice administration.[90]

2.2. Role of the ADR Mechanisms in Promoting Right of Access to Justice in the Ugandan Criminal Justice System

Uganda has attempted to address problems facing its criminal justice system in various ways. In addition to establishing the LC Courts, ADR is given a place in the criminal justice system. The country has employed dual ADR systems – traditional and Court-based ADR

---

[84] Stevens, *supra* note 6, p.63 (observing that 'appeals involving the trial of a child lie from the LCI courts to the LCII and LCIII courts and then to the Family and Children Court, created under the Children Statute, before going on to the Chief Magistrates Court, the High Court, the Court of Appeal and the Supreme Court').

[85] *Id.*, p.66.

[86] Greco, A., 'ADR and a Smile: Neocolonialism and the West's Newest Export in Africa', *Pepperdine Dispute Resolution Law Journa*l, Vol. 10, No.3, 2010, p.671.

[87] *Ibid.*; Kane *et al*, *supra* note 68, p.8.

[88] Greco, *supra* note 86, p. 671.

[89] Kane *et al*, *supra* note 68, p.8.

[90] Greco, *supra* note 86, p. 671.

mechanisms.[91] As a result, today, ADR, both traditional and court-based, is in use in the Ugandan legal system to resolve disputes. Customary ADR methods are practiced by community leaders who use traditional norms and forms of dispute resolution.[92] That is to say, traditional or customary ADR is practiced through LC Courts. Dispute settlement through LC Courts is 'out of court' (ADR) process since decisions are made by local members and in accordance with customary law or norm. Meanwhile, Anglo-American (Westernized) or court-based ADR methods are exercised by trained lawyers whose numbers are increasing by the day.[93]

Judges have discretionary powers to instruct the disputing parties to resolve their differences outside court and to come back to court only if they have failed to reach agreement through ADR.[94] Consequently, in case of minor misdemeanors or criminal cases with a specified sentence of a jail term of two years or less, the judge or magistrate may allow disputing parties to resolve their conflict through ADR.[95] But, in Uganda, as it stands now, criminal cases that are not aggravated and do not entail a lifetime imprisonment sentence or the death penalty are negotiable and therefore ADR applies.[96] In case of traditional ADR mechanisms, the LC courts sometimes use the formal court system (the Magistrates Courts) for the purposes of execution of their decisions/judgments and this makes ADR enforcement effective.[97]

It must, however, be noted that LC Courts, despite many of their prompted praises, can be criticized for (1) lack of knowledge and application of formal law by LC Court members; (2) the unrestricted jurisdiction of the LC Courts; (3) under-representation and discrimination of women in the LC Courts, despite legal requirements; (4) non-observance of procedural safeguards; (5) bias and corruption among LC Court members; (6) nominal court fees and absence of remuneration to LC members; (8) difficulty of enforcement and appeals; and (9) lack of or inadequacy of record-keeping.[98]

3. Ethiopia

---

[91] Using Alternative Dispute Resolution to Protect the Rights of People Affected by HIV AND AIDS in Uganda: The Experiences of FIDA and Plan in Kamuli and Kampala, Plan and FIDA Uganda, 2010, p.6 [Hereinafter Using ADR].
[92] *Ibid.*
[93] Greco, *supra* note 86, p.663.
[94] Using ADR, *supra* note 91, pp. 4-5.
[95] *Id.*, p.5.
[96] *Ibid.*
[97] Kane *et al*, *supra* note 68, p.7.
[98] For detail discussion on the criticisms, see Stevens, *supra* note 6, pp.64-72, Robinson, *supra* note 62, pp.70-73 and Kane *et al*, *supra* note 68, PP.11-15.

3.1. Customary and Non-traditional Informal Justice Systems

3.1.1. Customary Justice System

Traditional forms of dispute resolution mechanisms have long existed in Ethiopia. Even after formal establishment of courts in the 1940's, customary ways of dispute settlement of different ethnic groups is still prevalent and dominant in many parts of the country. A cursory reading of the codes enacted in the 1950's and 1960's reveals that efforts have been made to recognize the most widely used forms of ADR, i.e., arbitration and conciliation/mediation, as an alternative to court litigation. These customary ways of dispute resolution have grown parallel to Ethiopia's court system. Under the 1995 Constitution of Ethiopia (FDRE Constitution), customary laws and practices are recognized in so far as they are not contrary to the Constitution.[99]

To use the ethno-linguistic phrase employed in the FDRE Constitution, Ethiopia is a nation of nations, nationalities and peoples with diverse values such as languages, religion and culture. Years ago, C. Conti Rossini, in expressing the incredibly diverse nature of the country, aptly asserted that 'Ethiopia is a museum of peoples'.[100] Numerous customary laws and institutions exist in the country as each ethno-national group has its own customary methods of dispute resolution. Hence, it is very difficult to identify a 'national' customary law in Ethiopia which has a uniform application among all ethnic groups. In this regard, it has been indicated that:

> Customary dispute resolution is paradoxically both general and specific in Ethiopia. On the one hand it is widespread and found spatially almost ubiquitously throughout the country and has worked historically in the absence of the state justice system as well as where it exists in the past and in the present. On the other hand it is localized and the consistency and jurisdiction of… [customary dispute resolution] institutions are generally limited to a particular localities [sic] within ethnic groups.[101]

To have an idea of the totality of this body of law, one therefore needs to study the customary laws of each ethnic group. As Aberra Jembere appositely noted, "[w]hen we talk about the customary law of Ethiopia, we are more or less referring to the whole corpus of customary law of the different ethnic groups."[102] From this follows that, the customary laws of Ethiopia are copious, in form and substance, to the extent of the number of the ethnic

---

[99] The Constitution of Federal Democratic Republic of Ethiopia, 1995, *Fed. Neg. Gaz.*, Proc. No.1, 1st Year, No.1, Arts. 9, 34 and 91[Hereinafter FDRE Constitution].

[100] Conti Rossini cited in Aberra Jembere, *infra* note 102, p.78.

[101] Pankhurst, A. and Getachew A., (eds.), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, French Center of Ethiopian Studies, Addis Ababa, 2008, p.1.

[102] Aberra J., *Legal History of Ethiopia 1434-1974, Some Aspects of Substantive and Procedural Laws*, Afrika-Studiecentrum:Leiden, 1998, p.40.

groups of the country.[103] This being the case, no discussion will be made here on the customary laws of the different ethnic groups for a book chapter of this length cannot adequately describe the plethora of customary laws and institutions in the country.

3.1.2. Non-traditional Informal Justice System in Ethiopia

3.1.2.1. The Recognition and Role of ADR in the Criminal Justice System of Ethiopia

The application of ADR in civil matters has a legal basis – both constitutional and statutory.[104] With regard to criminal matters, however, as a closer scrutiny of the existing legal framework would reveal, it is difficult to find any legal basis for criminal disputes resolution through ADR mechanisms.

In Ethiopia, the 1950s and 1960s were years during which the country embarked on an enormous codification project in a bid to transform or 'modernize' its legal system. Accordingly, the codification project enabled the country to have the six modern legal codes. However, the problem with almost all the codes is that they 'have a predominantly western flavour, and seem to bear little relation to the traditional patterns of life prevailing in the country'.[105] This problem seems more reflected in the 1957 Penal Code which was replaced, with minor modifications, with the Criminal Code of Ethiopia in 2004.

The 2004 Ethiopian Criminal Code seeks to prevent the commission of crimes through the provision of due notice and punishment.[106] It is also affirmed that when due notice fails in preventing crimes, punishment, for whatever purpose, as means of crime prevention follows. What transpires from this is that the Criminal Code by far shows the bipartite (state-offender) character of the criminal justice system. It does not incorporate any kind of restorative justice value that could reflect the interests of crime victims, offenders and community. This also holds true for the 1961 Criminal Procedure Code. The Criminal Procedure Code strictly requires the police, prosecutors and courts to deal with a criminal matter to ensure that criminal convictions are sought whenever that is possible. Although the criminal justice sector is now known to encourage the settlement of some criminal disputes by negotiation,

---

[103] Generally, for in-depth discussion of customary laws and institutions of a representative sample of ethnic groups, see Pankhurst and Getachew, *supra* note 101 and Aberra, *supra* note 102, pp.43-79.

[104] FDRE Constitution, in Article 34, allows for the resolution of disputes regarding personal and family matters based on religious or customary laws if all parties consent. Other statutory laws such as the Civil Code, the Civil Procedure Code, Family Code and Labor Proclamation recognize, in their different parts, the use of ADR in certain civil matters.

[105] Fisher cited in Pankhurst and Getachew, *supra* note 101, p. 4.

[106] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Federal Negarit Gazeta*, Proc. No. 414, Preamble and Art.1.

there is no clear legal basis for the practice. The only exception is Article 151 of the Criminal Procedure Code that requires the court to reconcile the parties in case of private prosecution before trying the case. Other than this the criminal justice system gives no opportunity for some cases to be referred to ADR methods or for other diversion mechanisms.

In summary, the modern formal criminal justice system in Ethiopia is largely modeled on Western criminal justice system and thereby echoes retributive justice.[107] And, pursuant to both the Criminal Code and the Criminal Procedure Code, the possibility of alternative criminal dispute resolution process, with or without restorative option, seem unfeasible. This in turn would signify that the criminal justice system disregards any out-of-court dispute resolution, including customary dispute resolution mechanisms, in criminal matters. Customary dispute resolution institutions, in addition to other non-traditional informal justice systems, are given no legal room to entertain criminal matters though in reality they play crucial role by supporting the formal justice system. A study showed that:

> CDR [customary dispute resolution] systems are not allowed any formal space of operation in the criminal law areas in spite of the fact that they are heavily involved in criminal matters. …the formal justice system often relies on CDR institutions to solve less serious cases, to bring criminals to courts, to ensure that verdicts are upheld and to achieve reconciliation after cases are concluded.[108]

The FDRE Constitution has recognized the right to access to justice as a human right under chapter three of the Constitution.[109] However, there are practical hindrances for Ethiopians to exercise their right of access to justice to the full. On the one hand, courts are too remote to many people, especially in the countryside. On the other hand, in courts which are relatively near, many people cannot practically exercise their right to access to justice since they cannot afford judicial costs like lawyer's fees, court fees and other expenses. There are, therefore, major shortcomings and problems in the judicial administration of justice in Ethiopia. As empirically attested, 'the judicial system is neither accessible by, nor responsive to, the needs of the poor'.[110] The problems of the formal criminal justice system are many and include limited access of the public to justice, lack of integrity and legitimacy.[111] In view of this reality, giving due legal recognition to ADR methods for the settlement of criminal

[107] This can generally be contrasted with the African tenet of justice which is 'far more restorative – not so much to punish as to restore a balance that has been knocked askew' (see Macfarlane, *infra* note 117, p.503).
[108] Pankhurst and Getachew, *supra* note 101, p.8.
[109] FDRE Constitution, Art.37.
[110] See Comprehensive Justice System Reform Program Baseline Study, the Federal Democratic Republic of Ethiopia Ministry of Capacity Building, 2005, p. 161.
[111] *Ibid*.

matters could have provided alternative way of settling criminal cases and avoid the current haphazard practice of negotiated settlement of certain criminal cases.

Promisingly, the 2011 Ethiopian Criminal Justice Policy (hereinafter the Criminal Justice Policy) has introduced the idea of ADR in criminal justice administration.[112] The Criminal Justice Policy has recognized ADR mechanisms as a valuable remedy to the various problems facing the criminal justice system. The Criminal Justice Policy permits prosecutors and judges to refer certain types of criminal cases to ADR methods. But, it has clearly indicated that referral of certain criminal cases to ADR takes place only if there is a clear acceptance of responsibility by an offender or suspect through, for instance, formal guilty plea. The suspect or defendant is at liberty either to use ADR in getting his case resolved or to seek formal full trial. The case would be referred to ADR only after ascertaining that the suspect or defendant has consented freely and he has obtained legal advice. In addition, he must plead guilty formally, in writing.

According to the Criminal Justice Policy, referral of certain types of criminal cases to ADR methods can take place at two stages in the criminal justice process — i.e. at the pre-charge or post-charge stages. At the pre-charge stage, the public prosecutor has the discretion to refer the case to ADR before instituting a charge against the suspect notwithstanding that there is sufficient evidence that would support a conviction. However, the public prosecutor is required to take many factors into consideration before deciding to refer the case to ADR. More specifically, the public prosecutor should ensure that: (1) the character and conduct of the suspect warrant that resolving the case through ADR instead of charging and punishing the suspect through the formal criminal justice process enables the suspect to lead a non-criminal life within the community; (2) the suspect is non-dangerous and non-recidivist; (3) the crime is not an organized crime; (4) the crime is not committed using weapons and violence; and (5) the crime is not related to sex offence. Generally, the Criminal Justice Policy requires for a system to be established that will enable the public prosecutor to refer certain criminal cases to ADR. The system generally is one that guides the public prosecutor to make referral primarily by having a look at the gravity, type and nature of the crime; the character and background of the suspect; the extent of the harm caused to the victim(s), etc.

At the post-charge stage, the court can, by its own motion, refer a criminal case to ADR. It may also order the referral at the request of the defendant or the public prosecutor. In the context of the Criminal Justice Policy, the potentially eligible persons whose criminal

[112] The Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, Council of Ministers, Feb., 2011.

case can be referred to ADR, among others, are juvenile offenders, non-recidivist offenders and those offenders who committed/omitted crimes entailing simple imprisonment.

While we are on the same subject, Social Courts need to be discussed as a variant of non-traditional informal institutions. Described as the Ethiopian State's most (physically) accessible informal dispute resolution mechanism at the local level,[113] Social Courts are established at the *Kebele* level, the lowest administrative unit in the country. They adjudicate minor civil claims; and in minor criminal cases they have the power to sentence offenders with community services, such as cleaning the drains; these are enforced by the *Kebele* administration.[114] One of the problems with such courts is that they apply rules of the formal legal system, not customary norms of the people. The establishment of Social Courts for the administration of criminal justice (in addition to civil cases) does not therefore seem to enable the people to use their customary traditions in resolving disputes. The decisions of Social Courts are, however, subject to review by the regular courts allowing the regular courts to monitor the work of Social Courts.[115]

3.2. The Link between Formal and Informal Justice Systems in Ethiopia

As a matter of fact, traditional and other non-state, or simply informal, justice mechanisms have a role in addressing issues arising from conflict in many parts of Ethiopia. As some studies have reported, "local communities across Ethiopia actually rely heavily on informal justice systems for dispute settlement and conflict resolution".[116] Thus, it does not come as a surprise that the traditional justice system prevails over the formal criminal justice system in most parts of the country. The impact of the formal criminal justice system on the management and resolution of cases of criminal nature in many parts of the country is very minimal.[117]

Among the numerous ethnic groups in Ethiopia, customary dispute settlement mechanisms help create and maintain good relationship among the members of the

---

[113] Baker, B., 'Where Formal and Informal Justice Meet: Ethiopia's Justice Pluralism', *African Journal of International and Comparative Law,* Vol.21, No. 2, 2013, p.208.

[114] *Ibid*.

[115] See For instance Art 30, A Proclamation to Provide for the Establishment of *Kebele* Social Courts of the Amhara National Region, 1997, Proc.No.20/1997, *Zikre Hig*, 3rd Year, No.20, and Art 50 (3) & (4) of Addis Ababa City Government Revised Charter Proclamation, 2003, Procl. no. 361/2003, *Fed. Neg. Gaz.*, Year 9, No. 86. Both provisions stipulate that decisions rendered by the Social Courts in the respective jurisdictions are subject to appeal to the regular court having first instance jurisdiction in the respective jurisdictions (Amhara Region and Addis Ababa City).

[116] Baker, *supra* note 113, p. 204. Macfarlane, J., 'Working towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with Formal Legal System', *Cardozo Journal of Conflict Resolution*, Vol.8, 2007, p. 488.

[117] *Id*., p. 499.

community. Resolving disputes by going to formal courts further exacerbates the social conflicts and poses a danger of disintegration of societal bonds. In most Ethiopian societies, conflicts are not merely seen as an affair of disputing parties for "conflict resolution efforts take place in a way that address the intricate web of economic, social and political support networks and avoid total societal disintegration in the aftermath of hard and fast verdicts".[118] In so doing, societies resolve their disputes amicably thereby keeping their social cohesion to live in peace and security. To the contrary, the formal criminal justice system is often found inefficient in many aspects. Once a criminal matter is set in motion and the case eventually reaches trial, the conviction rate is very low (less than twenty percent) for different reasons.[119]

In spite of the gargantuan roles informal justice system is playing in Ethiopia, there is lack of integration of the informal and formal justice systems. As noted before, customary systems operating outside of the state system are often the dominant form of dispute resolution mechanisms. Despite that, customary dispute resolution mechanisms 'seem to operate almost completely independently of the official state system'.[120]

Article 34 of the FDRE Constitution permits the resolution of disputes with respect to personal and family matters as per religious or customary laws. As a precondition, disputing parties must consent to have the case heard in a traditional forum. However, there are no 'formal links between the traditional and the formal system and no mechanisms to monitor the consent of parties'.[121] Pre-existing religious and customary courts are accorded official recognition by the 1995 FDRE Constitution, and both federal and regional legislatures are supposed to reorganize such courts.[122] Despite the efforts to recognize customary systems, there is no specific law, to date, that governs such system.[123] More importantly, the mandate of religious and customary courts is limited to handling disputes with respect to 'personal and family' matters; they are not entrusted by the Constitution to settle disputes of a criminal nature.

Despite the lack of formal authorization to settle disputes of a criminal nature, customary disputes settlement mechanisms continue to exercise *de facto* jurisdiction over criminal matters in many parts of the country. And many of the problems of traditional justice

---

[118] Kelemework T., 'Conflict and Alternative Dispute Resolution among the Afar Pastoralists of Ethiopia', *African Journal of History and Culture*, Vol. 3(3), 2011, p.46.
[119] Macfarlane, *supra* note 116, pp.500-01.
[120] Chirayath *et al*, *supra* note 14, p.3.
[121] *Id.*, p.9. Macfarlane, *supra* note 116, p.501.
[122] FDRE Constitution, Arts. 34(5) and 78(5).
[123] Baker, s*upra* note 113, p.204.

systems in several countries are naturally shared by the customary justice system in Ethiopia. Though the Ethiopian informal justice system, particularly the customary one, is a very common dispute settlement mechanism in extensive areas of the country, it works within a set of limitations. Most of the limitations are related to gender insensitivity and representational problems.[124] Accordingly, women, both as victims and participants, are usually excluded from dispute resolution process because of their sex. The interest of children (and other vulnerable parties) is also frequently disregarded in a dispute resolution process.

Customary conflict resolution practices are to be challenged for their incompatibility with human rights.[125] In many societies, corporal punishment and death penalty are not uncommon.[126] Customary conflict resolution practices are generally proved for violating a number of other human rights, including those of women and children, that are recognized under the FDRE Constitution and international human rights agreements to which Ethiopia is a state party.

4. Lessons to be Learned from Uganda and South Africa

From the foregoing comparative analysis, it is clear that there are lessons to be drawn from conflict resolution through traditional and informal systems in Uganda and South Africa. Uganda and South Africa have recognized and integrated informal administration of criminal justice to address some of the problems facing their formal criminal justice systems and make justice more easily accessible for all people. In Uganda, there is integration of the formal and informal criminal justice systems through the established LC Courts. The country has established LC Courts at the lowest administrative level in an attempt to provide grassroots justice. The LC Courts are formally integrated into the formal justice system but in practice, they operate according to local perceptions of justice or customary laws. Generally, it has been said that the courts are financially and physically accessible both in urban and rural areas where formal institutions are inaccessible.

In South Africa, grassroots mechanisms of administration of justice have been instituted through traditional courts and popular justice forums such as the Street Committees. These justice systems are well linked with the formal justice system and are regulated through legislations. The practices in Uganda and South Africa, by and large, show

---

[124] *Id.*, pp.205 & 207; also Macfarlane, s*upra* note 116, pp. 499 & 506.

[125] Assefa F., 'Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications', in Elias N. Stebek and Muradu A. (eds.), *Law and Development, and Legal Pluralism in Ethiopia*, Justice and Legal System Research Institute, Addis Ababa, 2013, pp.122-24.

[126] Gebre Y. *et al.* (eds.), *Customary Dispute Resolution Mechanisms in Ethiopia", the Ethiopian Arbitration and Conciliation Center*, Addis Ababa, 2011, pp. 326-27.

that the states work towards an effective dispensation of justice, extend the arm of justice so as to be more effective, bring justice closer to the people at the grassroots level and make the justice system more accessible and friendly. These two countries have created an avenue for the administration of justice within communities thereby contributing to the enhancement of access to justice.

One of the critical problems of the traditional and informal justice systems in Ethiopia is the profound disconnect between such systems and the formal criminal justice system. In practice, the traditional and informal justice systems exist parallel to the formal criminal justice system and play pivotal roles in the administration of justice. Disregarding the existence and importance of the systems would be specious. Therefore, it is submitted that commitment to cautiously integrate, as in Uganda and South Africa, traditional and informal justice systems into the criminal justice system is necessary if efficiency and legitimacy are to be realized in the formal Ethiopian criminal justice system.

Though Social Courts are the closest courts to the people in Ethiopia established at the *Kebele* level, they apply rules of the formal legal system, not customary rules of the people. It is thus recommended that they should be allowed to operate according to local perceptions of justice or customary laws to enable people to use their customary traditions in resolving disputes. In that way, the state can help bring justice closer to the people and would provide people with a sense of ownership in their legal system.

In Uganda and South Africa, recognition of ADR methods, including traditional ADR methods, in the criminal justice system enables the majority of the population in these countries to effectively exercise their right of access to justice. As a result, there have been uses of ADR, mostly with a restorative justice approach.

In Ethiopia, the formal criminal justice system provides no opportunity for some criminal cases to be referred to ADR methods or for diversion programmes, even though de facto the justice institutions encourage the negotiated settlement of some disputes of a criminal nature. It is recommended that there should be diversion mechanisms in case of less serious crimes. A new Criminal Justice Policy has introduced that. Yet, the Policy has to be translated into law. Recognizing ADR or diversion mechanisms in case of less serious criminal matters can add some restorative elements to the criminal justice system. Eventually, that would be used as a way to bring victims, offenders and communities together in an alternative to the formal criminal justice process for minor or less serious criminal cases.

In Uganda and South Africa, specific legislations are enacted to regulate the role and functions of traditional leaders in the administration of justice. The legislations, in addition to

recognizing traditional methods of administering justice inherent in the values of the indigenous/traditional communities, are put in place as mechanisms of regulating traditional justice systems. As a result, they are used to strengthen the indigenous/traditional justice systems in complementing and supporting the formal criminal justice systems ultimately enhancing access to justice.

In Ethiopia, there is no specific federal or state law, to date, that governs traditional justice system. It is therefore recommended that Ethiopia adopts Uganda's and South Africa's approach to integrating the indigenous justice system with the formal one. That is, Ethiopia should enact legislation that will regulate traditional system of justice which is, as things stand now, operating almost completely independently of the formal state system.

It has been shown that Uganda and South Africa have tried to improve the quality of traditional justice systems by providing prescribed leadership and skill training programmes. They provide participation in training programmes as one of the requirements for a traditional leader to be assigned as a functionary in the administration of justice. Accordingly, trainings on, in particular, human rights are clearly required to ensure the full participation and interest of vulnerable groups such as women, youth and persons with disabilities in the traditional justice systems.

In Ethiopia, despite the fact that there are ample and unique ways of settling disputes of any nature and degree arising at any level, most traditional or indigenous/informal institutions, though often very effective, work within a set of limitations such as gender insensitivity and representational problems. It is thus strongly recommended that Ethiopia should follow the practice of Uganda and South Africa in providing training programmes that will ensure the full participation of women, youth and other vulnerable groups in the traditional justice system. Accordingly, proper resources should be devoted to the training of traditional justice providers. The government's involvement in awareness creation programs or capacity building endeavors should, in the main, focus on ensuring that customary tribunals provide justice that is equitable (especially in relation to gender), predictable, transparent and non-discriminatory. Generally, state assistance and cooperation with the indigenous dispute settlement practices should be undertaken in a way that conforms to the FDRE Constitution and international treaties that are ratified by the country on the treatment of women, children and other vulnerable groups. The state's engagement with the traditional justice system could overcome the major limitations of the customary dispute settlement practices and thereby help to ensure that the traditional and informal justice systems

positively contribute towards the efficiency and legitimacy of the formal criminal justice system by promoting the right of citizens to access to justice.

National Human Rights Institutions and Access to Justice: The Role and Practice of the Human Rights Commission of Ethiopia in Advancing Access to Justice

Mohammed Abdo[*†]

Abstract

National human rights institutions (NHRIs) are quasi-judicial bodies set up specifically for the purpose of promoting and protecting human rights. One of the key areas of the function of NHRIs is the promoting access to justice. In this piece attempt is made to cast light on Ethiopian Human Rights Commission's endeavour to advance access to justice. It examines the Commission's practice in promoting access to justice since it commenced discharging its function in 2005.

Key words: national human rights institutions, access to justice, promotion of human rights

Introduction

National human rights institutions (NHRIs) are quasi-judicial bodies set up specifically for the purpose of promoting and protecting human rights. The sensitization of and research and debate on human rights, and investigation of complaints involving human rights issues are among NHRIs' core functions. As part of their mandate, NHRIs promote and facilitate complainant's access to rights and remedies through, for example, the provision of free legal assistance and dissemination of information on human rights. Set up in 2000 pursuant to the FDRE Constitution, the Human Rights Commission of Ethiopia has been trying to promote and protect human rights. One of its modest achievements relate to human rights promotion through sensitization campaigns and legal aid service to the poor. It has been providing legal counsel and aid to poor litigants despite the fact that the enabling statute makes no explicit mention of such scheme. In the protection realm, the Commission has been investigating complaints lodged to it, helping citizens get remedies in rather limited cases.

In this piece attempt is made to review the Commission's endeavour in promoting and protecting human rights and thereby cast light on its contribution in advancing access to justice. Among questions to be investigated in this study are: how effective are the

[*] Assistant Professor, Institute of Federalism and Legal Studies (ECSU), PhD Candidate (Ghent University, Belgium). E-mail: mohammedza@yahoo.com

[†] The background information in this chapter regarding the establishment, mandates and power of Ethiopian Human Rights Commission is adapted from my contribution entitled 'The Ethiopian Human Rights Commission and Its Contribution to the Protection of human Rights and Building of Good Governance: Challenges and Prospects' *in* Benedek *et al* (eds), Ethiopian and Wider African Perspectives on Human Rights and Good Governance, NWV Verlag: Vienna, Graz, 2014, pp. 19-40.

Commission's methods/measures in building awareness among the bulk of the society that are largely unaware of the existence and/or the nature of laws? How has the Commission tried to reach out vulnerable groups in the nation? Has the Commission managed to put in place effective strategies that address vulnerable groups in its operational procedures?

The examination of these questions relies on review of the Commission's promotional strategies and tools and documents produced for such purpose, investigation of enabling legislation, relevant literature, and interview. Before delving into examining the Commission's experience in enhancing access to justice, a background on the establishment, structure, mandate, and enforcement powers of the institution is in order.

1. Establishment of the Commission

1.1. The Political Context and Process

NHRIs usually are set up following constitutional reform and/or chaotic situation ending with peace accord.[1] Regarding mode of setting up, they can be established in three ways: by constitution (or amendment of constitution), by act of parliament, or by presidential decree.[2] The setting up of NHRIs in constitutional texts, which represents the most powerful option as it guarantees the permanence of the institutions, is found in countries that have recently undergone constitutional reforms after experiencing grave human rights crisis in their past.[3]

Coming to Ethiopia, issues of democratic governance, human rights, rule of law, and decentralization emerged following a time of significant legal and political change. After a protracted armed struggle, the current ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) ousted the former military regime from power in 1991, a period coinciding with the fall of the Socialist Camp and the resulting wave of democratization.[4] Following the collapse of the socialist military regime, a transitional government undertook

---

[1] Lindsnaes, B. and Lindholt, L., 'National Human Rights Institutions-Standard Setting and Achievements', in Lindsnaes, B., Lindholt, L. and Yigen, C., (eds.), *National Human Rights Institutions: Articles and Working Papers*, the Danish Centre for Human Rights, 2001, pp. 14-15; see Murray, R., 'The Role of NHRIs at the International and Regional Levels: The Experience of Africa', *Human Rights Law in Perspective*, Vol. 11, Hart Publishing, Oxford and Portland, 2007, p. 3; see also International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions*, Versoix, Switzerland, 2000, pp. 58-62(hereinafter referred to as 'International Council on Human Rights Policy').

[2] Lindsnaes and Lindholt, *Supra* note 1.

[3] *Id.*, pp. 14-15.

[4] Mohammed A., 'The Ethiopian Human Rights Commission: Challenges Confronting Its Effective Functioning', *Chinese Year Book of Human Rights*, Vol. 4, 2006, pp. 27-28.

major transformative measures overhauling the political landscape, ideological orientation, civil service, and economic policy of the nation.[5]

Faced with the lofty task of creating a foundation for a democratic system, those involved in crafting a new constitution opted for providing a rights-based constitution anchored in the rule of law and limited government. A set of provisions with human rights orientation was believed to play a central role in this regard. This explicates the due regard the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) bestows on fundamental rights and freedoms.[6]

Appreciating that the regular courts cannot alone shoulder the protection of human rights, the framers of the *Constitution* agreed on the creation of institutions that would advance democratic governance.[7] The Human Rights Commission was thus created as one of the rights-protective mechanism in response to a history of authoritarian rule in general and a notorious military dictatorship in particular that caused immense carnage.[8] While a constitutional foundation does not *ipso facto* guarantee its better functioning, it provides a more secure basis than an executive decree or order, which is prone to easy change.

It was largely domestic impulse that sparked off the need for the establishment of democratic institutions during the transition period. Increased international factors also opened room for conditions favouring human rights regime in general and democratic institutions in particular in the new democratic process set in motion. Arguably, the global upsurge in the number of NHRIs, dating back to the early 1990s, has thus affected Ethiopia as well.[9] Issues of human rights, argues Welch, entered Ethiopian political vocabulary in part

---

[5] The measures undertaken by the then Transitional Government aimed at redressing past injustices, atrocities and dire economic conditions amid high public expectations. The framing of new constitution with liberal features, inception of federal arrangement and decentralization based on ethno-linguistic factors, structural adjustment, and adoption of market-oriented economic policy are among the major measures taken by the Transitional Government.

[6] The 'Preamble' of the Constitution declares that its objective is to build a political community based on the rule of law for the purpose of ensuring lasting peace and guaranteeing a democratic order. Protection of human right and fundamental freedoms is a key to achieve this commitment. A third of FDRE Constitution (the Federal Democratic Republic of Ethiopia Constitution, 1995, Proc. No. 1/1995, *Fed. Neg. Gaz.*, Year 1, No. 1) is on human rights. Chapter Three contains a Bill of Rights. Article 13(1) makes it incumbent on all government organs at all level to respect and enforce the Constitution.

[7] Sub-articles 14 and 15 of Article 55 of the FDRE Constitution stipulate the establishment of the Human Rights Commission and the Ombudsman Institute, respectively. The setting up of the Auditor General and the National Election Board are envisaged under Articles 101 and 102 of the Constitution respectively.

[8] This is reflected in a document prepared by the Legal Standing Committee of the House of Peoples' Representatives (HPR); see The Document to Elaborate Draft Laws to Establish the Commission and the Ombudsman (in Amharic) [Hereinafter The Document], 1999, p. 1.

[9] Abdo, *supra* note 4, p. 24.

through external influences at the time of transition.[10] It is suffice to mention the policy impact of the US, which emerged as a major supporter and donor of the incumbent party following the collapse of the former regime. In mid 1991, the Bush (Sr.) Administration adopted a new policy towards Africa, which judges governments by their stability and effective governance in order to secure US's economic assistance.[11] This American policy, which centred on democracy and human rights, found one of its first applications in Ethiopia.[12]

A myriad of international factors propelling the wave of establishment of NHRIs in the early 1990s is not unique to Ethiopia. Koo and Ramier have offered an insightful theoretical perspective as to how international factors underpin the growing establishment of NHRIs in different parts of the world since 1990s.[13]

Compared to other legislation, the process of enacting the enabling statute of the Human Rights Commission and the Ombudsman Institute of Ethiopia is unprecedented for it managed to attract a wide range of public and expert participation.[14] Specifically, it involved international experts and practitioners of NHRIs. The draft legislation has also been discussed by local experts as well as the wider public.[15] Drawing on this, Parliament eventually

---

[10] The post Cold-War attachment of provision of financial and technical support of donor governments to human rights issues, the active role of the UN in promoting the idea of establishment of NHRIs and the wave of democratization engulfing countries in transition following the collapse of the USSR in early 1990s have generally contributed to the establishment of the democratic institutions in the new political and constitutional order set in motion in Ethiopia in the early 1990s. See Welch, C., *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations*, University of Pennsylvania Press, Philadelphia, 1995, p. 11.

[11] *Id.*, p. 12

[12] *Ibid.*

[13] See Koo, J. and Ramirez, F., 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004', *Social Forces*, Vol. 87, No. 3, 2009, pp.1321-1354.

[14] Ethiopia chose to have two separate institutions – one for administrative oversight and the other for human rights issues. Gravity of human rights abuses and administrative malpractices along with the sheer size of the country are among the major reasons stated for setting up two distinct institutions. See The Document, *supra* note 8, p. 1.

[15] With a view to drawing on the experience elsewhere as the national democratic institutions were a new phenomenon, the government arranged an international conference in 1997 that managed to bring together about 68 experts, jurists, and activists, numerous officials of national human rights institutions and other officials and representatives. The conference and the deliberations on papers presented therein contributed significantly to the development by parliament of a concept paper with a view to eventually draft legislation for the two institutions. The concept paper contains options to be chosen by the public after public discussion regarding issues such as the structure, mandate, operational powers, leadership, and accessibility of the Commission. National discussions on the concept paper were held at the capital cities of the nine units of the Federation, as well as in Addis Ababa and Ambo. Later, Ethiopian experts made deliberations on the outcome of the discussion held on the concept paper and the choice made by the public regarding the would-be normative content of the legislation. Upon the expert's submission of their findings to the parliament, the parliament prepared draft legislation and tabled it for public deliberation. See Abdo, *supra* note 4., p. 27; see also Mohammed A., 'Challenges Facing the New Ethiopian Ombudsman Institution', *International Ombudsman Yearbook*, Vol. 6, 2002, p. 78; the Document, *supra* note 8, pp. 1-2.

enacted the enabling legislation in 2000.[16] However, the nomination of Chief Commissioner took place only in July 2004.[17] The delay in the enactment of the legislation and appointment of officials was attributed to the Ethio-Eritrean War (1998-2000) that diverted the attention of the government to issues of national security.[18] Also, the process was slowed by political and bureaucratic procedures.[19]

Although the Commission's enabling legislation involved consultation with the general public and a broad-based team of experts, both local and international human rights NGOs were excluded from the consultation, triggering criticism.[20] Despite this, the setting up of the Commission was an important development in the promotion and protection of human rights within the nation. In general, it can be regarded as an expression of willingness on the part of the government to change complex human rights situation in the country,[21] at least when one takes into account the lack (for a long time) of appropriate social and political action and determination to condemn and sanction social norms abusive of human rights.[22]

1.2. Structure and Composition of the Commission

Both a statutory and constitutional body, the Commission is an independent autonomous institution accountable to Parliament (the House of Peoples' Representatives /HPR/). Compared to NHRIs elsewhere, it is a relatively small Commission, composed of a Chief Commissioner, a Deputy Chief Commissioner and a Commissioner for Children and Women, and other commissioners as may be deemed necessary, and the necessary personnel.[23] Its small size would ensure, under normal assumption, a more efficient decision-making process but at the expense of pluralism of its composition in the face of ethnic and religious diversity in the country. A larger one would have promoted pluralism at the cost of resources and decision-making process. The drafters of the enabling legislation seem to have

---

[16] Ethiopian Human Rights Commission Establishment Proclamation, Proc. No. 210/2000, *Fed. Neg. Gaz*., Year 6, No. 40 [Hereinafter Proclamation].

[17] The other two Commissioners were nominated in 2005.

[18] Ethiopian Human Rights Commission, 'Strategic Plan for the Ethiopian Human Rights Commission 2006-2011', 2006, p. 47.

[19] World Bank, *Ethiopia: Legal and Judicial Sector Assessment*, 2004, p. 32[Hereinafter World Bank].

[20] The Human Rights Watch criticized the exclusion of local and international NGOs from the whole process and described the act as 'a worrying matter'. See Human Rights Watch, *Protectors or Pretenders?: Government Human Rights Commissions in Africa*, 2001, p. 60.

[21] Vaughan, S., and Tronvoll, K., *The Culture of Power in Contemporary Ethiopian Political Life*, SIDA Studies No. 10, 2005, p. 57.

[22] *Ibid.*

[23] The Australian Human Rights Commission has 6 commissioners, including the President. The South African Human Rights Commission has at least five Commissioners. Compared to its size and population, Ghana is a small country but the Ghanaian Human Rights and Administrative Justice Commission has three Commissioners.

given much weight to the financial and human resource constraints and opted for a smaller one.[24] Given the large number of ethnic groups in the country, coupled with limited posts for officials, one may not obviously expect the Commission to replicate such diversity at a time.

Increasing its outreach, the Commission, in 2011, set up branch offices in different parts of the country, with most of them in the capital cities of the regional states.[25] Apart from advancing the promotion and protection of human rights at the local level, the decentralization has enhanced the Commission's staff diversity and pluralism as local staff and local vernaculars are used to conduct their respective activities.[26] While regional offices mean better access, physical access remains a barrier for much of the rural population.

The establishing Proclamation provides a number of rules guaranteeing the institutional independence of the Commission in terms of allocation of funding, and appointment and dismissal of and immunity to its officials.[27] Other guarantees of independence provided for under the legislation include authority to recruit and employ staff and to adopt working rules and procedures.[28]

Generally, the establishment of the Commission meets, at least theoretically, the requirement of the Paris Principles regarding the independence of NHRIs. The issue is, however, whether the officials appointed to run the institution are, in practice, truly independent of party politics and the executive branch in discharging their functions. This is significant given the fact that the country did not, to a large extent, have institutions that were and are capable of functioning independently of the government of the day.[29] Apparently, that

---

[24] The concept paper prepared by Parliament hints out this fact; see Document, *supra* note 8, pp. 1-4.

[25] Hawassa, Bahr Dar, Mekele, Gambella and Jijiga and another town, Jimma are where the branch offices were set up in 2011. Parliament approved the proposed establishment of these branch offices in December 2010. Seven more branch offices will be established in the fiscal year 2011/2012 (see Ethiopian Human Rights Commission, Bulletin, Vol. 1, No. 05, 2011, p. 2). The initiative to set-up the branches was made by the Commission itself and prior discussion with Parliament made it possible for securing funding for branch offices. This process supports the view that the Commission is not under the instruction of Parliament as to how to go about doing so.

[26] Training activities used to be handled by the Head Office is nowadays run by the branch offices and complaints are also being entertained by the same. See the UNDP, *Democratic Institutions Program*, Annual Report, 2011, p. 18.

[27] The proclamation (*supra* note 16) provides that the budget of the Commission is to be drawn and submitted to the parliament by itself (Art 19(2)). Executive agencies do not have a say in this regard, and this helps the institution to avoid financial manipulation by other agencies. Further, to ensure the independent appointment of officials, the law sets up an independent Committee, the 'Nomination Committee' (Art 11).

[28] Commissioners may not be held civilly or criminally liable for any act done or omitted, observations made or opinions issued, in good faith and in the exercise of their functions. Further, the Commission is entitled to hire its staff and come up with its operational rules and procedures. Arts 19 and 35, Proclamation.

[29] Mohammed, *supra* note 4, p. 34.

is why scepticism was raised, at the very inception of the Commission, as regards the independence of the first officials that assumed office.[30]

Taking the existing procedure and practice as backdrop, the appointment of party members or affiliates is inevitable in a country where the government of the day exercises effective control over all public institutions. Especially, the appointment of the Chief Commissioner, who usually leads the Commission, may ultimately depend on the will of the political party in power.[31] Be that as it may, the most important thing is whether they are independent in their actual work.

Although apparently in full compliance with the Paris Principles, the Commission is not accredited as yet. Its attempt to get accredited commenced in 2010 but failed to act within a schedule fixed by the International Coordination Committee of National Human Rights Institutions (ICC).[32] Its second application was scheduled for scrutiny by ICC in November

---

[30] The Observatory for the Protection of Human Rights, 'Ethiopia: Human Rights Defenders under Pressure: Report: International Fact-Finding Mission', 2005, p. 18.

[31] It is important to note that although all the Commissioners are appointed by Parliament, it is only the Chief Commissioner who is directly accountable to Parliament. The other Commissioners are accountable to the Chief Commissioner (see Article 13(2), Proclamation). All commissioners are to be appointed for a fixed term of five years of office, with the possibility of one reappointment (Art 14(2), Proclamation).
To highlight the potential influence of the ruling Party on the leadership of the Commission, two of the incumbent Commissioners were actually members of political parties constituting the coalition of four parties (EPRDF). One is from Tigray People's Liberation Front (Berhane Woldekiros, Deputy Chief Commissioner), and the other from Amhara People's Democratic Party(Asmaru Berhanu, Commissioner for Women and Children). This may be enough to doubt the true independence of the Commission. Once they assume office, they are normally supposed to resign from party. No information is available on their relation with the Party since they assumed office. Although not clearly identified as party member, the Chief Commissioner, Tiruneh Zena, is thought to be affiliated to the ruling party. Interview with many experts of the Commission underscores this fact.

[32] The ICC was set by NHRIs themselves for accreditation purposes. To facilitate accreditation it set up a sub-committee entirely devoted to accreditation. The ICC is not a UN agency; it is rather a global association of NHRIs that coordinates the relationship between NHRIs and the UN human rights system. It is composed of 16 members from each of four regions, American, Africa, Asia Pacific, and Europe in order to ensure fair representation of each region. The ICC liaisons with the UN human rights bodies and encourage coordination among institutions. The National Institution Unit under the Office of the UN Office of the High Commissioner for Human Rights acts as a permanent secretariat to the ICC and assists it in, among others, organizing its meetings and its accreditation process. The ICC generally meets during the annual sessions of the Human Rights Council and holds biennial international conferences. The accreditation status is reviewed at least every five years. Accreditation increases NHRI's national and international legitimacy and also entitles participation rights in diverse UN forums depending on their ranking.
The Commission's application for accreditation was supposed to be reviewed by the Sub-Committee on the Accreditation in a schedule fixed for accreditation purpose, which was set for 11-15 October 2010. See the schedule of the Sub-Committee on Accreditation of the International Coordination Committee of National Human Rights Institutions, 2009
Available at: http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx

2012 but was deferred for one year, after which it was accredited with 'B' status in November 2013.[33]

2. Mandate and Power of the Commission

2.1. General

NHRIs are usually commissioned to carry out, among others, promotion, information, documentation, education, research on human rights, and protection.[34] As provided under Article 6 of the Proclamation, the Commission has a very broad mandate to promote and protect human rights. It is mandated to educate the public about human rights with a view to raising awareness and fostering the tradition of respect for human rights, to provide consultancy service on human rights, and to provide opinion on Government reports submitted to international human rights bodies.[35] It is also authorized to investigate, upon individual complaints or *suo moto*, human rights violations and to propose revision, enactment of laws and formulation of policies relating to human rights.[36] In addition, it is empowered to ensure that laws, decisions and practices of the government are in harmony with human rights enshrined under the Constitution and to also make sure that human rights are respected by government as well as other entities.[37]

Apart from government authorities, the Commission's reach extends to individuals and non-state entities. Empowered by an umbrella clause, which entitles it to 'perform such other functions as it may consider necessary for achieving its functions', the Commission thus not only has all the functions the Paris Principles prescribe but also a potentially wider mandate.[38] Unlike, for instance, the Human Rights Commission of South Africa that does not have the competence to entertain some human rights issues, Ethiopian Human Rights Commission is an all inclusive institution.[39] The fact that the Ombudsman's mandate is

---

[33] Official date for considering the Commission's application for accreditation was set for 18-22 November 2013. See the website of the ICC sub-committee on Accreditation (SAC). nhri.ohchr.org/EN/AboutUS/ICCAccreditation/Page/NextSession.aspx. See also nhri.ohchr.org/EN/AboutAccreditation/Documentss/SCA%20Report%20November%202012%20%28English%29.pdf. The Commission was given 'B' status after review of its application for first accreditation in the schedule fixed (November 2013). See www.ohchr.org/Documents/Countries/NHRI/Chart_Status_Nis.pdf (Accessed on 20 March 2014). It means that the Commission is not fully in compliance with the Paris Principles or has not yet submitted sufficient documents to make that determination.

[34] Lindsnaes and Lindholt, *supra* note 1, p. 25.

[35] Sub-arts 3, 6 and 7 of Art 6 and Art 19(2)(d), Proclamation.

[36] *Id.*, Article 6(4) and (5).

[37] *Id.*, Articles 6(1) and (2).

[38] *Id.*, Article 6(11).

[39] The South African Human Rights Commission's actual mandate is not as broad as it appears at first sight. It is competent to deal with human rights issues as far as they do not fall within the remit of other independent democratic institutions. For instance, it is not empowered to deal with issues of gender equality and the

confined to maladministration issues only, making it a prototype of a classical ombudsman, signifies the inclusiveness of the Commission's mandate on human rights issues.[40]

Such inclusive mandate is advantageous. On top of scarcity of resources, it allows for the application of an integrated and consistent human rights approach to different human rights issues. In other words, it is cost-effective than dispersing the fiscal resources across several new human rights bodies, especially for a poor country like Ethiopia.

Although bestowed broad mandate, the Commission's reach is not without limitation. It does not have the power to scrutinize alleged human rights violations pending before the HPR, the House of Federation (HoF) or courts of law at any level.[41] Hence, all other government institutions, save those excepted by the law, are not off-limit to the Commission's investigation. It is remarkable that the statute subjected the military, security, and police forces that are usually associated with human rights abuses in the past to the Commission's power.[42] Incidentally, it should be noted that the Commission is different from the Ombudsman in that the latter does not have the power to investigate matters related to national security and defence forces.[43]

2.2. Investigation and Enforcement Power

NHRIs should be given ample powers in their legal framework at investigatory process, at the implementation stage, and in the other roles that the institutions undertake.[44] The Commission is empowered to investigate complaints, upon individual complaints or *suo moto*.[45] The rules on filing a complaint to the Commission make it easy for complainants to access it as the Commission can be moved to take action by a complainant in person or by someone on his/her behalf in any language and format.[46] The simplicity of a rule to bring a

---

rights of minorities as these powers are given to two separate democratic institutions set up exclusively for each of such issue.

[40] See Art 6, the Ombudsman Institute Establishment Proclamation, Proc. No. 211/2000, *Fed. Neg. Gaz.*, Year 6, No. 41[Hereinafter Ombudsman Proclamation].

[41] Art 7, Proclamation, *supra* note 16.

[42] Mohammed, *supra* note 4, p. 37.

[43] See Art 7 Ombudsman Proclamation. However, in reporting on matters related to national security, the Commission is obliged to take caution with a view to not endangering national security and the same applies to secret matters related to the well-being or protection of individual lives (Art 39(3), Proclamation, *supra* note 16).

[44] The United Nations Centre for Human Rights, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, *Professional Training Series No. 4*, 1995, p. 13 [hereinafter referred to as 'UN Professional Training Series No 4']*.*

[45] See Arts 6 and 24, Proclamation, *supra* note 16.

[46] A Complaint may be instituted by a person who alleges that his/her right is violated or by his/her spouse, or family member or representative or a third party (Art 22(1), *id.*). The Commission may also receive

complaint to the attention of the Commission is meant to supplement the formality of procedures that could limit access to courts.

The Commission is given a range of powers to investigate a complaint submitted to it, including the investigative power of subpoena, giving it theoretically adequate powers necessary for the examination of a complaint.[47] Any person asked to appear for the purpose of furnishing information or production of document or record should cooperate with the Commission. Failure to act accordingly constitutes offence punishable by sentence and/or fine.[48]

The Commission is, as a matter of general rule, supposed to settle complaints through an amicable means, seeking an agreement between the parties (Art 26(1)). A limited number of cases may not be subject to such means.[49] Emphasis on amicable means of settlement reflects the reality regarding dispute resolution in the country. The fact that more than 84% of the population lives in rural areas where the traditional system has a strong authority on individual as well as communal matters makes the reflection of such system in the Commission's power significant.

As is the case with most NHRIs, the Commission is not authorized to set aside, revoke or modify decisions of agencies. Made in an advisor capacity, its recommendations are not legally binding. It is not explicitly authorized to initiate court proceedings either in its own name or on behalf of an aggrieved party either.[50] However, it is under obligation to notify the concerned organs of the crimes or administrative faults committed, if it believes that such occurred in due course of or after its investigation.[51]

The enforcement mechanisms it uses to ensure compliance are to publicize, be it in annual or special reports as may be necessary, and to finally report to the Parliament on its recommendations in particular and on its overall activities in general.[52] Another instrument of enforcement is criminal sanction. A penalty is prescribed if there is failure to apply the

---

anonymous complaint (Art 22(3), *id.*). A complaint may be lodged, free of charge, in writing, orally or in any other means and may be in the working language of the Commission, which is Amharic, or in any other language. See Arts 23(1) -(3), *id.*).

[47] The Commission is empowered to compel the attendance of witnesses to give testimony, or force the production of evidence by those in possession of them (Art 25, *id.*).

[48] *Id.*, art 41.

[49] The Commission's Complaint Handling Manual is apparently silent on this matter. According to the interview with one of the experts in the investigation department of the Commission such cases include allegation of torture, forced disappearance, violence against women(Interview with Terefe Wondimu, Senior Investigator, Investigation Directorate, Human Rights Commission of Ethiopia, 15 September 2011, Addis Ababa).

[50] *Ibid.*

[51] Article 28, Proclamation, *supra* note 16.

[52] *Id.*, art 39.

recommendations issued by the Commission or if there is failure to provide reasons within three months for not applying the recommendation, forcing person(s) subject to the recommendation of the Commission to behave in some way.[53] Serving to strengthen its enforcement powers, such sanction is an incentive to the Commission's autonomy. As additional enforcement tool, the Commission may collaborate with other organs, for instance, media and NGOs, to mount pressure on government authorities to heed its opinions.

The Commission possesses only persuasive powers to issue recommendation or initiate negotiation or mediation in order to resolve grievances. While this may, at first glance, appear to relegate the Commission to a back-seat role in promoting and protecting human rights, it might bring with it freedom of movement and action in investigation of complaints and promotion of human rights. Particularly, promotional work may not be considered, from government officials' point of view, biting and spur them, at least, not to interfere with, or, at best, support the Commission's efforts.

3. The Commission and Access to Justice

Respect for and protection of human rights at the national level can only be guaranteed with the availability of effective remedies. Indeed, the ideals of human rights are only met if they can be asserted. Fundamental to realizing this is access to justice.

Constituting a core fundamental right and a central concept in the broader field of justice, access to justice may be defined as the process of ensuring that all individuals have access to the legal services and to legal processes in order to defend and enforce their rights as well as to seek or obtain a legal remedy. While it typically is construed to having a case heard in a court of law, it can more broadly encompass mechanisms such as NHRIs, including human rights commissions, equality bodies and ombudsman institutions.

Effective access to justice hinges not only on the existence of adequate institutions but also on capacity of citizens to assert their rights. Effective access to justice thus presupposes, among others, legal awareness and legal aid and counsel. NHRIs play crucial role in the provision of legal counsel and legal aid and to raise human rights awareness. The activities of the Commission in relation to provision of legal counsel and raising awareness-raising initiatives are highlighted below.

---

[53] If a person without good cause fails to comply with a recommendation issued by the Commission or fails to provide justification for not doing so within three months from receipt of the recommendation, he/she commits a criminal offence and is liable to punishment. The person could face imprisonment from three to five years or a fine from 6000-10000 Ethiopian Birr or both. See Art 41(2), *id.*

At the out-set, however, it is important to note that the Commission's mandate is specifically not defined in terms of access to justice. Despite this, the Commission's functions such as the provision of legal counsel, awareness-raising initiatives, and investigation of complaints advance, directly or indirectly, access to justice.

3.1. Legal Aid and Counsel

Provision of free legal assistance by NHRIs helps the poor to access justice, removing financial and information obstacles hampering them from doing so. NHRIs should thus promote and facilitate complainant's access to their rights and remedies, including the ones offered by themselves and remedies that exist elsewhere, such as courts of law. They have a duty not only to inform complainants of their rights and potential remedies but also to help them through the process as they are meant to serve the interest of those who may have experienced human rights abuse.[54] Such service is particularly important for the vulnerable groups who are likely to live in poverty. After all one of the effectiveness parameters of NHRIs is their ability to meet the needs of groups in society who are at risk of human rights violations.[55]

Although the FDRE *Constitution* guarantees access to justice as one of the fundamental rights, free legal aid is limited to criminal cases.[56] The Civil Procedure Code talks of pauperism whereby indigent applicants may be relieved of payment of court fee, which does not constitute legal aid. Realizing the acute shortage of legal aid, the bar law obliges advocates to offer *pro bono* service for fifty hours a year.[57] By the same token, some local NGOs and students at public law schools offer free legal services on voluntary basis. Although commendable, all these efforts are barely enough in the face of the enormity of the poor people who seek such service. Public defender and legal aid services are thus very limited and quite weak, constraining the right of access to court, especially of such people who could not afford to pay for the service of advocates.[58] The role of the Commission in the provision of free legal aid could help fill in the void in this regard.

---

[54] Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions: History, Principles, Roles and Responsibilities', *Professional Training Series No. 4*(Rev.1), 2011, p. 82 [hereinafter referred to as 'Professional Training Series No. 4(Rev.1)'].

[55] Mohamedou, M., 'The Effectiveness of National Human Rights Institutions', in Lindsnaes, Lindholt and Yigen, *supra* note 1, p. 50.

[56] See Art 20, FDRE Constitution.

[57] See Art 49, Federal Court Advocates' Code of Conduct Regulations, Council of Ministers Regulations No. 57/1999, *Fed. Neg. Gaz.*, Year 6, No. 1.

[58] World Bank, *supra* note 19, p. 30.

The Commission has been providing legal aid service to poor litigants despite lack of explicit reference to such mandate by the enabling statute. However, such power is implied from its general mandate and the definition given to 'human rights' under the establishing legislation.[59] In order to realize the provision of *pro bono* services, the Commission has teamed up with local NGOs and universities in different parts of the country and provided financial support to more than 112 centres established in different parts of the country for such purpose.[60]

Apart from expanding accessibility, the major objective of establishing these centres is to help, particularly, the vulnerable groups of the society- women, children, persons with disability, the destitute, the elderly, and people living with HIV/AIDS gain access to free legal services.[61] With the help of such centres the Commission has provided information on legal and institutional solutions to complainants and also actually assisted the victims in receiving effective remedies from courts. In 2012, a total of 7,872 indigent people (60% women and 40% men) and in 2013, a total of 13,867 of them (of which 6208 were women) have benefited from the services of the legal aid centres across the country.[62] Most of the cases submitted to the legal aid centres relate to family (maintenance and divorce cases), labour and land use issues and the services provided include writing of statement of claim, defence and appeal, legal counselling, and representation in courts.[63] It is important to note that the number of women who benefited from *pro bono* service exceeds that of men, reducing the gender gap in accessing the Commission. As the services are basically meant for vulnerable group, especially such as women, it is likely that women will remain accounting for the largest part of the beneficiaries.

The Commission has started monitoring the centres by making an on-site visit where it holds discussion with the organs running them in order to sort out problems encountering the centres and to find ways to strengthen and widen the services offered by them.[64] With a view

---

[59] The FDRE Constitution guarantees access to justice as human rights in and of itself (See Art 37). The enabling Proclamation of the Commission defines human rights as those guaranteed by the Constitution and international human rights instruments. Assisting indigent's access to justice therefore falls within the mandate of the Commission.

[60] The Commission has increased the number of legal aid centers it sponsors from 60 in 2010 to 112 in 2011. 67 Centers in collaboration with 16 sixteen Universities, and 45 in collaboration with Civil Society Organizations, including Ethiopian Women Lawyers Association, and Ethiopian Christian Lawyers Fellowships, See Ethiopian Human Rights Commission, Annual Report 2011/2012, p. 4; Annual Report 2010/2011, p. 2, 15, & p. 70.

[61] Annual Report 2011/2012, p. 4; see also Annual Report 2010/2011, p. 15.

[62] Annual Report 2011/2012, p. 4; see also Annual Report 2012/2013, p. 8.

[63] *Ibid.*; see also Annual Report, 2010/2011, pp. 16-17.

[64] Annual Report 2011/2012, p. 5.

to fostering their services, the Commission has initiated attempt to create a network among its partner legal aid providers with a view to putting in place uniformity in their work.[65]

Aside from providing legal counsel, the centres also serve as points for funnelling complaints to the Commission, improving its accessibility. This is in the sense that the legal aid centres help complainants to reach the Commission given its limited outreach activity at the local level.

Constituting one of the milestones of the Commission, the provision of free legal assistance to the underserved is a remarkable move. Large segments of the population are completely unaware of the existence or the nature of laws, legal rights, the official legal system (including courts as well as the Commission itself), and there are few effective methods to create and build awareness, or provide legal services.[66] The centres will help increase access of the general public, to the Commission, especially the disadvantage strata of the society. It enhances not only access to justice for the most disadvantaged strata in society, but also simultaneously develops the capacities of future legal practitioners who are studying law and also serve in the centres.[67]

Although a commendable initiative, the fate of those Centres is at stake as they are considerably dependent on donors' funding that ended in 2012.[68] Given its meagre resources, the Commission is not likely to retain most of them. The recent desperate measure undertaken by the Commission to finance the centres following the end of the DIP project hints the difficulty that lies ahead to keep then running.[69] The Commission has to strive to find ways and means to increase the number of centres in order to reach out to more people in rural areas that by and large have no access to justice. The specific measures to be taken to sustain the centres and the ones to be set up in the near future include the use of *pro bono* lawyers, the participation of bar associations, cost-sharing with the universities hosting the centers, and linkage with donors that could finance them.

3.2. Legal Awareness

---

[65] *Ibid.*

[66] World Bank, *supra* note 19, p. 30.

[67] Most of the Centers are run by law school students at different universities in the country, and the legal service is provided by students who volunteer to offer free service at legal aid clinics.

[68] The Democratic Institution Program (DIP) under the auspice of the UNDP that has been crucial in capacity building of the Commission ended in 2012. The Program aims at building the capacity of the democratic institutions such as the Commission, the Ombudsman Institute, the Anti-Corruption Commission, and the Election Board.

[69] The Commission scrambled to finance the Centers after the end of the donor funding. See Annual Report 2011/2012, p. 5.

Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. It is here that the need for legal awareness raising endeavor comes into play.

Strategies to create legal awareness should be undertaken by both government and non-government actors. Among government bodies, NHRIs, as institutions entrusted with the specific task of promoting and protecting human rights, are best-suited to promote legal awareness, relating particularly to human rights issues. In their role as promoter of human rights, NHRIs are responsible for spreading awareness of human rights with a view to inculcating a culture of human rights and bring about social change in this respect.

The list of powers of the Commission includes both promotional and protection functions, with the accent being on the former one.[70] The hitherto practice of the Commission is consistent with the spirit of the enabling legislation, which accords due emphasis to promotional activities compared to protection ones. In other words, the Commission has, since it became fully operational, given preference to the promotional functions, especially in relation to investigation of human rights violations, rather than protection aspects. This is a pragmatic approach consistent with the reality in the country. The authoritarian tradition in the country nurtured unchecked and blanket use of governmental powers, moulding factors that constrain a human rights culture from emerging. Such settings demand more of promotional and sensitization works than protection in order to bring about a gradual and long-lasting impact in nurturing a human rights culture.

Before reviewing the practice of the Commission as regards promotional works that ultimately aim at enhancing access to justice, it is good to see a dilemma facing NHRIs in non-democratic and/or countries at the early stage of democratization to strike a balance between protection and promotion functions in order to put its promotional work in perspective. Besides, scrutinizing factors that stymied democratic tradition and a human rights culture from taking root in Ethiopia is important to envisage the importance of making equilibrium between the promotional works on the one hand and protection on the other and the need to give weight to the former.

The extent of the democratic nature of the State not only brings into play question of effectiveness of NHRIs but also raises issues as to the focus of their functions. Where a State is democratizing rather than democratic, promoting rather than protecting human rights will

[70] Most of the functions and powers laid down under Art 6 of the Proclamation relate essentially to promotional functions except sub-art 6(1, 4 and 5), which talks of its investigation power, directly or indirectly.

take centre stage, as the practice of human rights rests on the socialization of human rights norms and perspectives.[71] Additionally, countries that have experienced long periods of violence and upheavals are unlikely to have developed a strong human rights culture and the institutions may thus consider general human rights awareness training to be a priority.[72]

For a great deal of its history, Ethiopia was a highly centralized state ruled by Monarchy who claimed to have descended from King Solomon. Following a popular uprising in the early 1970s a highly centralized last Monarch was uprooted by a coup staged by the Military. The Military junta that assumed power in 1974 adopted a socialist ideology, carrying out a widely supported land reform program and nationalization of private property and enterprises of elites associated with the old system. As the Military gradually consolidated its power and failed to heed to a call for a broad-based government, some parties, accusing the Military of hijacking the revolution, resorted to armed struggle against it. Weakened by civil war and lack of public support, the regime could not resist the mounting military pressure staged against it by the incumbent ruling party, EPRDF. Following the capture of the Capital in May 1991, the military rule crumbled, paving the way for a new chapter in the country's history. The incumbent Party spearheaded attempt at democratization, decentralization and inception of a federal arrangement, in a stark contrast to the past political landscape.

Authoritarianism is the hallmark of the history of governance in the country. The different rulers assumed extensive powers and relied on iron fist to rule their subjects. The transgression of human rights was considered their prerogatives, manifested in the exercise of unquestionable political authority.[73] To stay in power, violation of human dignity was thus taken to an unprecedented degree.[74] Concerns for the institutionalization of human rights promotion and protection are therefore of recent phenomenon in Ethiopian political and legal discourse as such issues were hardly possible prior to the early 1990s.[75] Democracy and human rights are thus far from the Ethiopian collective consciousness.

In a nutshell, a rampant exercise of governmental powers, widespread ignorance of human rights and means of their vindication, entrenched cultural attitudes towards the

---

[71] See Thio, L., '*Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep"*', Yale Law Human Rights and Development Journal, Vol. II, 1999, p. 1; see also Cardenas, S., 'Emerging Global Actors: The United Nations and National Human Rights Institutions', *Global Governance*, Vol. 9, 2003, p. 38.

[72] Professional Training Series No. 4(Rev.1), *supra* note 54, p. 144.

[73] Lencho L., *The Ethiopian State at the Crossroads: De-Colonization and Democratization or Disintegration?* Red Sea Press, Asmara, 1999, p. 7.

[74] *Ibid.*

[75] Mohammed, *supra* note 4, p. 29.

government, and a deeply-rooted tradition of impunity in the country make promotional task of special exigency.

Protection heavily focuses on investigation, which is, by its very nature, retrospective and aims mainly at redressing a particular complaint. There is a danger that it may not address systemic and entrenched policies, practices, traditions and behaviour. Promotion is however forward looking and could vie with embedded practices and traditions without necessarily implicating specific government institutions. It also is less a matter of enforcement and more of putting latent pressure to highlight human rights problems and the need to address them in the long-run. The Government is more receptive to such works than protection and reporting of specific human rights abuses that tends to directly or indirectly implicate specific institution(s) and/official(s), something which usually touches their nerve and could engender hostile reaction. This is self-evident from the reaction of the current government to reports issued by relatively independent and critical human rights NGOs, both local and international, outlining human rights abuses allegedly attributable to government authorities and their agents.[76] A somewhat politicized perception of human rights issues in the nation is to blame for such reaction. This makes it difficult, if not impossible, for the Commission to do its protection work, especially cases relating to politically sensitive matters, without encountering serious political opposition. A sustained promotional activity will bring about a deeper and longer-term impact on human rights awareness, societal capacity to assert and protect human rights, and capacity to seek redress under the law, contributing to countering impunity and fostering accountability in the country.

3.2.1. Promotion of Human Rights Literacy and Awareness

The first task the Commission embarked on, following the first Chief Commissioner's appointment in 2004, was the promotion of the institution itself. At the very inception, the promotional works carried out focused on introducing the institution to the public through, among others, the media and by distributing its enabling statute and pamphlets on its mandate.[77] As institution new to Ethiopian political and legal landscape, it was incumbent on the Commission to define itself from the very inception and publicly promote its scope of

[76] The Ethiopian government usually reacts angrily to reports documenting human rights abuses and vehemently rejects such reports as baseless and accuse organizations issuing such reports of harbouring nefarious intention against the Government. This is what usually happiness when the US State Department, Human Rights Watch, Amnesty International and the Ethiopian Human Rights Council issue reports of human rights situation and abuses in the Country.

[77] The Ethiopian Human Rights Commission, 'Its Establishment and Activities over the Period 2005-2006, 2006, p. 5(referred to as 'Annual Report 2005/2006').

mandate as statutory body charged with the sole task of promoting human rights. It is likely that would-be complainants would be confused, particularly at the beginning, to identify the difference of its function from the existing complaint-hearing bodies. This makes consistent promotion of the institution itself important right from the start.

To just give an overview, a major promotional work carried out by the Commission at the inception was related to election, distributing a 70-page pamphlet titled 'election and human rights', in three major languages.[78] The promotion of election has to do with the election enthusiasm that engulfed the nation in the first year of the Commission's operation.[79] Since then the Commission has gradually been expanding its promotional activities in other areas of human rights.

Broadly categorised, training and campaigning activities of the Commission focus on three entities: government bodies, associations, and other entities playing roles in the promotion of human rights, such as the media. It uses a variety of strategies including organizing seminars, roundtables, workshops, and training courses, with the aim of raising awareness of human rights.

The Commission has worked to sensitize government authorities to human rights issues. Sensitization activities targeting government organs – the executive, legislative body and the judiciary – at both the Federal and State levels, are carried out primarily through training programs and organising seminars and workshops. For instance, the Commission, in 2011, concluded the first round of training for Deputies, both at the Federal and State legislative houses. The focus of each session is to introduce the notion of human rights, on the role Parliament could play in enforcing human rights in general and the rights of vulnerable groups such as women, children and people with disabilities, the drawbacks encountered by respective bodies in their bid to enforce human rights and the roles expected of each of them to ameliorate the setbacks.[80] Such sessions aim to underscore that state behaviour must be tuned to human rights, focusing on the role of legislators in this regard. It has not necessarily brought about a dramatic change in legislations enacted by Parliament nor

---

[78] *Ibid.* The pamphlets were distributed in Amharic, Tigrigna, and Oromifa; see also the Ethiopian Human Rights Commission, Consolidated Five Year Report, 2011, pp. 2-3[hereinafter referred to as 'Consolidated Five Year Report'].

[79] The 2005 general election coincided with the coming into operation of the Commission. The Commission promoted election issues probably to indicate its operation and visibility at a time when the whole nation was captivated by the election fervor.

[80] The Ethiopian Human Rights Commission, Inaugural Report, 2011, p. 58; see also Ethiopian Human Rights Commission, Annual Report 2006/2007, 6-8.

has it reduced human rights abuses in the country. It marks a redefinition of what the appropriate role of Parliament ought to be as far as human rights are concerned.

The Commission has started a second round of training for legislators, both at the Federal and State levels. It is remarkable that the training manuals and sessions have been conducted in the respective working language of the States, ensuring diversity and making the discussion to have local flavour.[81] In a way, it promotes local language, which forms one of the core pillars of the current federal arrangement.

The most preventive strategy for human rights violations would comprise the introduction of human rights education in primary and secondary education as well as targeted education for professional groups, including lawyers, judges, police and civil servants in key positions.[82]

Another important target for training is the judiciary. A campaign of education and awareness for judges is one of the most important steps a NHRI can take to enhance its own effectiveness.[83] The judiciary is instrumental in the enforcement of human rights and judges need to be made fully aware of their responsibilities in this regard. This is particularly important in Ethiopia where there remains little concern for and/or limited application of international human rights standards by the judiciary, even of treaties which the nation has ratified. Judges tend to avoid invoking and applying human rights provisions of the Constitution and international human rights norms.

One area where the Commission has been effective is in offering training and education, which consumes the bulk of its attention and budget. It organized various educational programs as part of its effort to promote human rights. For instance, one of the workshops organised by the Commission on the role of the judiciary is related to the domestic application of international human rights.

The Commission conducted a consultation workshop on the status of international human rights treaties under Ethiopian legal system and the role of the judiciary in enforcing

---

[81] Annual Report 2011/2012, p. 8; see the Ethiopian Human Rights Commission, Bulletin, Vol. 2, No. 04/04, 2012, pp. 5-6[hereinafter Bulletin No. 04/04]. The first round of the discussions as well as manuals were prepared in the working language of the Federal Government and translations were used, consuming time and at times lack of professional translators hindered the adequate transmission of messages.

[82] Kjaerum, M., 'The Experience of European National Human Rights Institutions', in Lindsnaes, Lindholt and Yigen, *supra* note 1, p. 120.

[83] International Council on Human Rights Policy, *supra* note 1, p. 81; see also the 'Nairobi Declaration' adopted at the end of the 9th Conference of NHRIs for the Promotion and Protection of Human Rights, Nairobi, Kenya, 2008, p. 5.

international human rights treaties ratified by the country.[84] The aim of the consultation was to sort out loopholes and find out ways for the application of human rights instruments in the justice sector in general and the judiciary in particular.[85] It was a remarkable meeting as it was attended by those directly concerned with the enforcement of human rights and others who play a crucial role in this regard - the attendees include the President of the Federal High Court and other senior judges, public prosecutors, legal experts drawn from government agencies, representatives from academic institutions and civil society organizations.[86]

Such forum could generate discussion, raise the awareness of lawyers and judges regarding international human rights standards and their application at domestic level, and direct the focus of courts in overcoming difficulties in the application of human rights norms at the domestic level.

Following the workshop, the Commission took a concrete step to facilitate the actual implementation of treaties by the judiciary. It teamed up with a local NGO, Action Professionals' Association for the People (APAP), to help Parliament ratify international treaties in such a way that they could easily be applied by the judiciary, thereby rectifying a longstanding obstacle in law-making procedure that has impeded their application by the judiciary.[87] All international human rights instruments ratified by the country are supposed to go through a proper national law-making procedure to overcome such constraints in implementing them at the national level. This will assist in the invoking of international treaties by courts as it helps to rectify constraints in applying international human rights

---

[84] The Workshop was on 'The Implementation of International and Regional Human Rights in Ethiopian Courts'. See the Ethiopian Human Rights Commission, Bulletin, 1, No. 05/03, 2011, pp. 5-6 [hereinafter referred to as 'Bulletin 05/03'].

[85] *Ibid.*

[86] 76 participants representing Judges from Federal and Regional Courts, Prime Minister Office, Heads of Justice Bureau and Prosecutors from Federal and Regional Offices, Ministry of Foreign Affairs, Justice Sector Professionals Training Center, Justice and Legal System Research Institutes, Civil Society and participants from law schools.

[87] See Ethiopian Human Rights Commission, Annual Report 2007/2008, pp. 10-11; Annual Report 2006/2007, p. 5; see also Inaugural Report, *supra* note 80, p. 77. Non-publication of the full text of ratified international treaties in the local language in the national law reporter is frequently raised as one of the obstacles hampering the application of international treaties by the judiciary. See Ethiopia's Report submitted to the Human Rights Committee on 28 July 2009, which was considered by the Committee on 22 October 2009, UN, CCPR/C/ETH/1, 2009, p. 6*;* Canadian International Development Agency, 'Independence, Transparency and Accountability in the Judiciary of Ethiopia', National Judicial Institute, Canada, 2008, pp. 120-122; see also Rakeb M., 'Enforcement of Human Rights in Ethiopia', Research Report, APAP, Addis Ababa, 2003, pp. 38-41. The endeavor of the Commission in collaboration with the NGO to rectify such problem has so far not borne fruit.

instruments in courts.[88] In the end, this will help complainants to get remedies prescribed by international human rights norms, offering opportunity for better protection of human rights.

The Commission has also been making sensitization campaigns targeting the general public and/or group structures in society. For instance, in trainings offered to youth and women associations, the focus is on human rights in general and the rights of women, children and persons with disabilities in particular, and the role of the associations in raising the awareness of their members and the general public regarding human rights protection.[89] Specific issues raised include discrimination against women and persons with disabilities in employment and access to public services.

Realizing the sway of religious and community elders in communities, the Commission has also targeted religious and community leaders for sensitization purpose. For instance, it offered training to religious leaders and clan elders drawn from Somali National Regional State where such figures hold not only a significant authority in community matters but also in political decision-making process in the State.[90] A sustained advocacy campaign targeting such figures would help raise awareness as regards particularly gender issues and other customary practices impeding the rights of women.

Work in the formal education sector is an important long-term investment, but media campaigns, posters and other public awareness tools may be more immediately effective in promoting human rights.[91] Audio, visual and print media are powerful tools in reaching out to the public. TV and Radio spots and presentations, talk show, and print media have been used by the Commission for promotional activities, considering them to be key mechanism for raising public awareness.[92]

With the support of media, the Commission embarked on public education campaigns with a view to increasing public knowledge and understanding of human rights and scope of

---

[88] The invocation of the provisions of international human rights treaties in general to settle disputes is rare, although there are some signs that there is a change in this regard. On the few cases in which international human rights are invoked, see UN International Human Rights Instruments, Core Document Forming the Initial Part of the Report of States Parties: Ethiopia, HRI/CORE/ETH/2008, 2009, p. 40; see also Takele S., 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', *Journal of Ethiopian Law*, Vol. 23, No. 1, 2009, p. 149.

[89] Annual report 2010/2011, p. 61; see also the Annual Report 2006/2007, pp 10-11; see also Annual Report 2011/2012, pp. 31-49.

[90] Annual Report 2011/2012, p. 13; see also Consolidated Five Year Report, *supra* note 78, p. 25.

[91] *Id.*, p. 80.

[92] Inaugural Report, *supra* note 80, pp. 72-76.

its mandate and thereby improve its visibility.[93] Some of the promotional activities aired on the National TV and Radio involve aspects of social and economic rights. For instance, discussion was held on Radio Fana on the rights of children.[94] A 90-second TV presentation in 24 different parts was aired on Ethiopian National TV (ETV), focusing on the role and mandate of the Commission, the rights of children, women and people with disabilities, the notion of equality, and the rights of vulnerable groups and affirmative action to be taken to address their problems.[95] The thrust of the series was on discrimination against female children, women and persons with disabilities entrenched in family relations, schools and public services, and on the need to tackle the problems facing these groups through a collaborative effort of the government, the general public and other concerned organs.

The Commission has increasingly been using local languages in its advocacy campaigns. For example, it sponsored the broadcasting of 40 programs in each Afar and Somali languages.[96] The use of local languages in promoting the Commission and human rights is likely to expand its reach to the people who may not speak the working language of the Federal Government institutions including the Commission, helping the audience to internalize the message.

The Commission seems to step up its public education and sensitization effort towards entrenching a culture of respect for human rights and dignity. In that regard, its overall promotional endeavour is guided by strategic plan, which specifies different activities for such purpose for a period of five years, 2011-2016. Apart from providing strategic direction for the Commission, the Plan will ensure that the institution is better poised to maintain and improve the quality of its expanding promotional works. A systematic and sustained campaign to promote human rights will over the years help individuals and/ or groups to assert their rights, paving the way for and enhancing access to justice.

The Commission has published various materials for public consumption in line with its mandate to promote human rights. Apart from providing information on mandate and competence of the Commission, the materials impart information to ordinary citizens on their rights, the obligations of the state in terms of these rights, the remedies available for human rights violations and how these remedies can be accessed and/or made available. However, lack of public awareness of human rights as well as the Commission in rural areas is still

[93] Their themes include the rights of children, discrimination against female children and women in education, property ownership and employment, and the need to address them through the concerted efforts of family, society, government organs and other players to alleviate the problem.

[94] Annual Report 2006/2007, p. 12.

[95] *Id.*, 17; see also the Annual Report 2007/2008, p. 4.

[96] Annual Report 2011/2012, p. 14.

affecting accessibility of the Commission to the largest section of the public, a problem acknowledged by many documents of the Commission. Inevitably, it demands a consistent and extensive campaign targeting the public.[97]

3.2.2. Sensitization of the Rights of Vulnerable Groups

Another significant undertaking of the Commission lies in its promotion of the rights of vulnerable groups. It has given due regard to efforts to promote the notion of human rights in general and those of women in particular, keeping them in public discourse gradually. This is a commendable move given the widespread ignorance of human rights and of gender equality in the country. Such endeavour to enhance knowledge and awareness of human rights has a positive effect not only on the better protection of human rights but also on the process of political liberalisation in the medium to long term.[98] Particularly, a vigorous campaign to change an entrenched negative attitude and practice, both in the general public and governmental institutions, is important to gradually change the human rights situation in the country especially that of women in matters such as employment, education and property.

In most training sessions, discussion on the rights of vulnerable groups (women, children, and people with disability) has become standard practice. For instance, almost all trainings given to legislators, both at the Federal and State levels, contain specific topic concerning such group, with one training manual devoted to it. They touch on historical account of international instruments guaranteeing their rights, the gravity of the problem in Ethiopian context, particularly the prejudice and discrimination against the particular vulnerable groups in both public and private sectors as well as in social life.

Many workshops involving various stakeholders are frequently organized on issues of vulnerable groups.[99] The fact that the latest annual report unusually gives detailed description of promotional works targeting such group is testament to the due attention given to them.[100]

Media release also focuses on tackling a deeply-ingrained discrimination in social and family interactions against vulnerable groups. For instance, a brief presentation featured in media (especially National TV and Radio) highlights, in simple language, how parents give preference to boys than girls, and forces the latter to assist the family with taking care of household activities while allowing the former to study and play with friends in their spare

---

[97] See for instance, Inaugural Report, *supra* note 80, pp. 113-114; see Consolidated Five Year Report, *supra* note 78, p. 55; see also Strategic Plan 2011-2016, *supra* note 18, p. 25.

[98] Vaughan and Tronvoll, *supra* note 21, p. 70.

[99] See also Annual Report 2011/2012, p 13, p. 25 & pp. 31-34; see also Annual Report 2007/2008, p. 11.

[100] See Annual Report 2011/2012 that gives at least 29 pages, out of a 54-page document, to matters concerning vulnerable groups.

time. It tries to emphasize that discrimination starts at home, reinforcing its embedment in society without being perceived as discrimination, and calls upon parents to change the course of things by themselves. For instance, the Commission struck agreement with the National TV and Radio station and aired a 24-part spot for three times per week for about 9 months. The spots contained different aspects of human rights with the focus on the right of vulnerable groups.[101] The experts of the Commission frequently single out such media features as bringing significant awareness as regards gender equality.[102]

Issues of vulnerable groups are also raised in specialist training that may not necessarily be arranged by the Commission. For instance, the Commission was invited to take part in a training organized by the Ministry of Justice to enhance journalists' knowledge of human rights issues. The Commission's presentation focused on the role of journalists in enhancing awareness about the rights of vulnerable groups.[103]

In relation to women, issues usually addressed include discrimination, domestic violence, rape and sexual harassment, and trafficking,[104] which are rampant problems in the country. Incidents of brutal acid attack, deadly violence and rape have frequently been reported in the media, both private and public. As a result of the realization that violence against women and children has reached alarming heights, the Commission appears to sense that the time has come to address such abuse and find ways to combat it. Admittedly, while sexual harassment and violence against women are by no means new, increasing reporting of such incidents portray them as emerging issues that demand attention.

The Commission has been attempting to tackle such problem by making public campaigns and organizing panel discussion, bringing together stakeholders, and holding events. For instance, the Commission organized a consultation forum on such problems with officials drawn from justice sector and the police. The participants entrusted the Commission with the task of leading discussion on these matters and called for consistent deliberations in order to shape a holistic approach involving all stakeholder to tackle the problems.[105]

The Commission also has been trying to raise awareness about sexual harassment and violence against women by holding special events. For example, it organized a '16-day of

[101] See Annual Report 2006/2007, p. 4; see also Annual Report 2011/2012, p. 14.
[102] The experts of the Commission usually invoke how awareness of human rights has been getting to the people by pointing to opinions gathered from the public. Parents have admitted that they have been exercising discrimination without realizing that such acts constitute discrimination in its proper sense, that such practices contribute to the wider discrimination in society and that the fight against it should start in each family.
[103] See Annual Report 2006/2007, p. 4.
[104] Annual Report 2011/2012, p. 47; see also Annual Report 2007/2008, p. 11.
[105] See Annual Report 2007/2008, p. 11; see also Annual Report 2006/2007, p. 11.

Activism against Sexual Harassment Campaign' targeting such acts committed in higher academic institutions. The Campaign was conducted at 22 public and private universities and involved different activities, including, trainings, entertainment, and distribution of leaflets and pamphlets outlining the problem.[106]

The problem of trafficking in women is an issue of serious concern over the years. The Commission has involved itself in endeavour to wrestle with the trafficking of women. This is a commendable move given the fact that Ethiopia has become one of the main source countries of many women exposed to trafficking, grabbing headlines, both locally and internationally, in the last couple of years. Each year thousands of Ethiopian women and girls are being trafficked mainly to the Middle East countries primarily for labour purpose but some end up in sexual exploitation. Traffickers have exploited the dire conditions of women resulting from, among other things, poverty and lack of opportunity. Under the guise of better life, the trafficking is nowadays instigated and facilitated by traffickers who have an extensive network throughout the country and operate in collaboration with front firms engaged in travel arrangement business.

The Commission has been carrying out different activities to raise public awareness of the evils of trafficking of women, ranging from public campaigns to cooperation with other entities working on the same issue. For instance, it has forged agreement with women associations operating in four regional States, which have been engaged in combating trafficking of women and customary practices trampling on women's rights.[107] It provided financial assistance to these associations to strengthen their endeavour. As the associations have been active at grassroots level and have widespread out-reach activities, the support of the Commission would help strengthen their effort.[108] To reinforce the work of similar associations operating in other States, the Commission has launched an inquiry into the capacity of such associations in Somali, Gambela and Benishangul States so that it could render financial and technical support to them.[109]

To buttress its work on trafficking of women, the Commission planned to conduct an inquiry into how selected Federal authorities have been coping with the problem. Once the inquiry is completed, the Commission intends to issue recommendations on measures to be

---

[106] Annual Report 2011/2012, p. 34.

[107] The Associations are operating in Amhra, Tigray, Oromiya and SNNP Regional States. See Bulletin No. 04/04, supra note 79, p. 1.

[108] Among others, the associations have been raising awareness of human rights in general of women's rights in particular by engaging local elders and government institutions and by establishing clubs in schools.

[109] See the Bulletin No. 04/04, *supra* note 81, p. 6.

undertaken to rectify the predicament.[110] Although both the Federal Constitution and the Criminal Code outlaw exploitation and explicitly prohibit the trafficking of human beings, slavery and serfdom and forced labour, there is no specific law on human trafficking in Ethiopia unlike in other jurisdiction. There is also no comprehensive policy in place that addresses the problem either. Given the fact that there has been piecemeal and uncoordinated effort in the country to address the trafficking of women, the attempt by the Commission to come up with a comprehensive recommendation is praiseworthy.

The Commission has given priority to the protection of the rights of children. Regarding children, issues that frequently surface are problems facing street children and children without parents. The Commission has been striving, along with other bodies, to come up with policy and administrative measures to offer support and care to such children by arranging deliberations that involved members of Councils, relevant Federal and State authorities and NGOs.[111] A concept paper developed by the Commission regarding such children was used as a starting point for discussion, following which the Commission hammered out agreement with NGOs to conduct a treatise study on the matter and then make appropriate policy, legal, and administrative measures to wrestle with the problem.[112] The Commission is expected to assume a leading role in the implementation of the findings of the study, using, among others, its public education and monitoring mechanisms.

A variety of means are used to promote the rights of children, one of which is holding a special event. For instance, on the day marking African Children, the Commission, in collaboration with the National TV, hosted a three-day program on the rights of children, where 'children court' was also set up.[113]

The Commission has also been promoting the rights of persons with disability. Among others, it translated international human rights instruments relating to their rights into Braille and finally distributed them to 30 libraries throughout the country.[114] It has recently completed the translation of the Convention on the Rights of Persons with Disabilities into three languages.[115] Also, most of the trainings offered to law makers at both the Federal and State levels incorporate specific topic on the rights of persons with disability. In addition, it

[110] See Annual Report 2011/2012, p. 47
[111] See Annual Report 2011/2012, p. 13; see Annual Report 2007/2008, p. 11; see also Annual Report 2006/2007, p. 12.
[112] See Annual Report 2007/2008, p. 11.
[113] See Annual Report 2006/2007, p. 12.
[114] See Annual Report 2011/2012, p. 16.
[115] *Ibid.*

has been offering training to associations of persons with disability to raise their awareness about their rights, where other stakeholders also took part.[116]

Although giving attention to vulnerable groups is laudable, the Commission fails to pay equal attention to the people living with HIV, given the gravity of the problem facing them and the rampant discrimination against them. Compared to other vulnerable groups, it paid little attention to them although it believes that they form part of vulnerable groups.[117] Occasionally, the Commission has promoted their rights, however.[118]

The impact of the sensitization of the right of vulnerable group is not obviously an immediate one. It would, in the long-run, encourage such group to assert their rights. To realize this, the Commission ought to sustain its endeavour of promoting the rights of such group.

The promotional activities undertaken by the Commission since its inception indicate that it has been striving to create general awareness about human rights and the institution itself. As regards substance, they lack focus on specific types of rights and on groups that need primary attention, such as people living with HIV.[119] They also lack diversity of topic as they give attention only to historical development of these rights and the role of Parliament in human rights, the rights of women, children and elderly.

Another problem with the overall sensitization and awareness initiatives of the Commission is that the promotional works, particularly in training sessions, use complex jargons that may not easily be grasped by the audience, especially for non-lawyers.[120] Also, the training materials vary in size and format and the approach used in delivering training varies from trainer to trainer. It appears that the Commission leaves discretion to trainers to determine the format for the training manuals and conducting the training sessions. Nonetheless, this problem is likely to gradually dissipate following measures undertaken to build the Commission's capacity. The Commission used to rely on outside experts to run

---

[116] *Id.*, pp.35-36.

[117] Strategic Plan 2011-2016, *supra* note 18, p. 44.

[118] For instance, it arranged workshop for Association of People with HIV on the theme: AIDS and Human Rights. See Annual Report 2011/2012, p. 10.

[119] The Commission moves from one issue to another and appears to lack a consistent approach. For instance, it raises issues regarding violence against women and switches to the trafficking of or discrimination against women. This may be because the Commission is too ambitious to address all issues related to women at the same time. In its Strategic plan, the Commission conceded that its promotional activities did not take into account the rights of vulnerable groups, especially the rights of people living with HIV. See Strategic Plan, *supra* note 18, p. 26.

[120] Mohammed A., 'National Human Rights Institution and Economic, Social and Cultural Rights: An Examination of the Mandate and Practice of the Ethiopian Human Rights Commission', in Brems, E., de Beco, G., and Vandenhole, W., (eds.), *National Human Rights Institutions and Economic, Social and Cultural Rights*, Intersentia, Cambridge, 2013, p. 137.

most of its promotional works, including education and training and research on human rights. However, a significant progress is achieved in building the capacity of human resources of the Commission for such purposes.[121] As a result, most trainings nowadays are provided by the Commission's own experts and research works are carried out by the same. The reliance on in-house experts will rectify the defects with training materials and mode of training delivery.

In its promotional endeavours, particularly the ones targeting the general public, information on human rights, the means to vindicate them and on the available remedies upon their violations must be intelligible to the public and knowledge provided to them must serve their practical purposes.

4. Adjudication of Complaints involving Vulnerable Groups

Adjudication involves the process of determining the most appropriate type of remedy or compensation. Adjudication mechanisms include judicial and quasi-judicial processes, including NHRIs.

On top of promotion of human rights, the Commission is mandated to protect human rights using its quasi-judicial competence. The enabling legislation empowers the Commission to inquire into alleged human rights infringements upon receiving a complaint from an aggrieved person or on its own motion.

The process at the intake of complaints is fairly easy. If a complainant appears in person, he/she has to first appear before the Registrar of the Commission who would invite him/her to narrate the matter orally and then decide if it falls within the competence of the Commission. A case may be admitted at times on condition that a complainant produces further evidence. After a case is admitted, the respondent is notified of the matter and given an opportunity to present his/her version. Or, information will be gathered by correspondence with the respondent and, if deemed necessary in some cases, through on-site visits. If a case is found to be outside the jurisdiction of the Commission, it provides advice to the complainants as to a competent institution to deal with such case or refer the matter to the concerned institution.[122] If the Commission believes that available remedies have not been

[121] Interview with Paulos Amega, Head of the overall promotional function department at the Commission, 18 November 2013, Addis Ababa, Ethiopia.

[122] Referral may be direct or indirect. A direct referral is one where the Commission passes on the complaint to the relevant body and advises the complainant of this action. An indirect referral is one in which the Commission provides relevant contact details to the complainant, so that they may pursue the alternative avenue themselves. If it appears that the complainant is capable of doing this, an indirect referral will

exhausted, it may reject a case. A complainant whose case is rejected by the Registrar is entitled to file petition against such decision to the next official in the hierarchy within the institution (Article 27 of the Proclamation).

The Commission does not appear to observe strict rules of standing. It allows anyone to make a complaint to it, either as victim or on behalf of one. This is important for the complainants, particularly vulnerable groups, as it makes it easy for them to access the Commission.

There is a steady growth in the number of cases submitted to the Commission over the years following the Commission's promotion campaigns to raise awareness about itself and human rights.[123] However, the number of cases submitted to the Commission annually since its inception is rather small given the sheer size of the country and its poor human rights records.[124] The exact number of complaints submitted to the Commission in general and of social and economic rights is difficult to come by. This is attributable to the poor file management and recording of cases prior to 2010, before the Commission reformed its business process.[125]

The recent statistics from the Commission indicates a marked increase in the number of cases submitted to the Commission. More than 1427 complaints submitted to the Commission in 2012/2013, even before the end of the Ethiopian fiscal year, represent an even greater increase over the 65 cases received in its first year of operation.[126]

---

generally be appropriate. See the Ethiopian Human Rights Commission, Complaints Handling Manual, 2011, p. 29.

[123] Inaugural Report, *supra* note 80, p. 91; see also the Ethiopian Human Rights Commission, Annual Report 2009/2010, pp. 14-15.

[124] Ethiopia is a vast country with over 85 million people. The poor human rights records of the country is well-documented by human rights NGOs, both local and international. Reports issued by, among others, the US State Department, Amnesty International, Human Rights Watch and the Ethiopian Human Rights Council attest to this fact. Based on its own documents, the Commission received about or more than 4563 complaints since its inception. The rather low number of complaints has to do with the sheer size of the country accompanied by a lack of branch offices until recently or the inadequacy of promotion works by the Commission and/or a lack of awareness regarding the Commission's function or lack of interest in the Commission as it lacks executive powers. Among others, a sustained promotion by the Commission about itself and the newly opened branches offices and the likely increase in the number of such offices in the near future will possibly increase the number of complaints coming to the Commission.

[125] Owing to the lack of Registrar prior to April 2010 cases end up in the hands of individual investigators as there was no practice of a centralized system of recording and admitting cases. The reform was launched in 2009 and completed it in 2010, culminating in changing its organizational structure. It resulted in, among others, rearranging the original departments and also created new sections and posts, one of which is the Registrar within the Investigation Directorate. One can observe an improvement in the delivery of services in general and file management in particular after the Registrar went operational. See Inaugural Report, *supra* note 80, pp. 55-56; see also Annual Report 2010/2011, p. 8.

[126] See Annual Report 2012/2013.

Among cases coming to the Commission one finds that many cases relate to vulnerable groups. The Commission adopted a fast-track procedure for cases designated as priority and urgent ones, which, in essence, help vulnerable groups.[127]

Bearing consistency with its operational procedures, when a complaint of discrimination based on disability or HIV is lodged by an individual complainant, the Commission appears to seize and investigate it immediately. To just mention some, in one complaint, a person with HIV alleged discrimination based on his status and the Commission acted promptly to investigate the matter and finally issued recommendation. Similarly, in another case, a person with disability claimed that he was denied employment opportunity based on his condition, constituting discrimination. The Commission instantly investigated it and issued recommendation. Giving priority to and speedily investigating complaints relating to vulnerable groups signifies the attention the Commission pays to the need to protect their rights.

Although relatively low, the gradual increase in the volume of complaints indicates that the Commission's prolonged campaign to promote itself and human rights and its expanding outreach have enabled people to steadily access the office.[128] Given the sheer size of the nation and the wide-spread ignorance of the existence and function of the Commission, access to and of the Commission to the vast expanse of the rural population is still a problem to reckon with.

5. Assessment of the Commission's Practice in Enhancing Access to Justice

The value and benefit of the Commission remain largely untested because of the intransigence of the dominant autocratic political culture as well as the deficiencies of the Commission itself. A challenging setting means that the task of the Commission is more demanding and challenging than its counter-part in established democracies that operate in favourable condition. It, as a result, is likely that the Commission's contribution to build a human rights culture in the nation is scuttled by a variety of factors.

---

[127] Such cases include cases relating to violence against women, cases relating to children's rights, gender equality and women's rights, persons living with HIV, persons with disability. See Complaints Handling Manual, *supra* note 122, p. 31.

[128] Paulos Amega, head of the overall promotional function department, is of the opinion that the promotional activity is to be credited with increasing the number of cases appearing to the Commission annually, Interview with him on 18 November 2013, Addis Ababa, Ethiopia. Other experts working (and/or who worked) at the Commission also share the same view. For instance, observation from exchange of views with Ahmed Hussen, Investigator, Department of Investigation and Mebrahatu Woldu, former expert at the department of education and training at different times indicate this.

Although its mandate is specifically not defined in terms of access to justice, the Commission, as part of national human rights framework, plays important role in advancing access to justice. Its role and contribution to enhancing access to justice is rather modest, undercut by a combination of factors which, among others, include lack of effective strategies in discharging promotional functions, financial constraints, limited visibility at local levels and interaction with NGOs, limited transparency on the part of the institution, and problems associated with establishing institutional credibility.

Marking its achievement, the Commission's milestone is the provision of legal aid to the poor and its focus on promoting the rights of vulnerable groups. The Commission needs to deepen its linkage with NGOs, higher academic institutions and other stakeholders to keep the legal aid service running and expand it.

The Commission has been experiencing a steady growth in the number of cases from year to year. However, the volume of the complaints received annually is low given the sheer size and population and the complex human rights problems in the nation and poor track-record in protecting them. As a complementary body, the Commission has to devise strategies to increase the number of complaints through, for instance, a credible handling of cases, efficiency in dealing with them, publicity of its investigation outcomes, and through a sustained campaign of dissemination of information on its mandate and jurisdiction. Measures taken to improve the efficiency and transparency of the institution could spur would-be complainants to seek its service. Put differently, such measures could impel individuals to have recourse to a complementary mechanism of protecting human rights other than the existing tribunals, increasing access to justice.

Improving complaint-handling system, publishing selected recommendations of the Commission in annual report and/or special report on regular basis, both online and in print form, particularly those recommendations which have been complied with, are among the measures that could help foster the efficiency and transparency of the Commission.

Of course, the Commission appears to have realized that online presence is an essential component of promotion and communication. To that effect, it has been trying to put in place a system to provide its service through digital and electronic communication scheme. Accordingly, it has introduced a tall-free number through which interested parties could get service free of charge. Such system could open the possibility to get service without appearance in person before the institution. Also, it has designed and developed content for its website, which provides basic information on its mandate as well as its activities. Introducing online presence in general and online and digital complaint systems in particular

forms part of encouraging actions taken by the Commission to foster accessibility. However, most annual reports have not been put online and no information on complaints and their outcomes are accessible online. The Commission needs to be forthcoming in putting more information online as regards its past, existing and planned activities, particularly investigation of complaints, to spur potential complainants who to access the system and make use of it.

As accessibility presupposes that people know of the institution and its function and that they are able physically to contact it, the Commission needs to undertake more outreach activities and decentralization. Unfortunately, the Commission could not realize its plan to open five more branches, which was supposed to take place in 2012. The Commission has to strive to open the proposed branch offices and to even establish more offices in other areas.

Apart from efficiency and transparency, the Commission has to demonstrate its independent functioning in investigation of complaints, particularly those that are considered politically sensitive. No significant case confronting Government policy and laws have ever been publicly released, highlighting its intent to avoid upsetting the government and raising scepticism as to its independence. Unless the Commission shows that it has been challenging government authorities when circumstances justify it, the Commission would lose the trust of the public, affecting the appetite of potential beneficiaries of its services.

The Commission's complaint handling manual does not define what a high profile case or sensitive case is. The operational manual (i.e. complaint handling manual) should articulate clear procedure on considering sensitive and high profile cases to avoid selectivity in launching investigation on matters, particularly those making headlines.

In connection with independence and credibility, the officials that assume the office of the Commission have to be politically neutral, courageous, and are committed to the defence of human rights. Independent-minded and intrepid officials can breathe life into the Commission and mould it to become an effective monitoring body. The onus of realizing this falls on appointment process - it has to be transparent, competitive and participatory. Save the existing practice of inviting the public to submit candidates they deem fit to run the institution, the incumbent recruitment process of the leadership of the Commission does not seem to be transparent, competitive and also fails to involve diverse segment of the society.[129]

[129] The absence of clear set of procedures on short-listing candidates and lack of meaningful public consultation on nominees characterize the selection of the first as well as the incumbent batch of Commissioners. It was not clear as to how they were selected from among the proposed candidates. The Nomination Committee does not include NGOs proper, failing to include NGOs working on human rights and, particularly those critical of the government. The Committee is composed of four members from each faith group (Islam,

In a nut-shell, the Commission ought to go great length to foster a culture of human rights and access to justice. Be that as it may, its works, especially promotional ones and legal aid, represent important first steps in achieving this, constituting part of stepping-stone to a greater mechanism for protecting human rights in the country.

Concluding Remarks

The Commission was set up as part of a constitutional reform following the overthrow of the brutal military regime in the early 1990s. Since it embarked on discharging its functions in 2004, it has been making endeavors to promote and protect human rights by launching legal aid services for vulnerable groups and putting in place operational procedures on the promotion and protection of human rights.

The legal aid centres it sponsored have benefited increasing number of indigent complainants. Given the fact that many Ethiopians could not seek justice owing to financial impediments and complex legal procedures of formal courts, the move to set up such centres has been one of the main milestones of the Commission with significant impact on access to justice.

Legal aid schemes are usually expensive. To overcome such problem, particular attention should be paid to finding ways to ensure financial sustainability and cost effectiveness. Participating *pro bono* lawyers, bar associations, law schools, and linkage with donors and NGOs that could finance legal aid service or help network with actors at grassroots level are suggested as the way to push forward the good job started. Also, the Commission ought to consider establishing additional branch offices to reach out to the rural population and increase its visibility. Although the Commission is not the panacea for all existing human rights problems, including problems of access to justice, the Commission's role in enhancing vulnerable group's access to justice cannot be overemphasised.

Information on human rights, the means to vindicate them and on the available remedies when rights are violated must be intelligible to the public and knowledge provided

---

Orthodox, Protestant and Catholic), Speakers of the two Chambers of Parliament (the HoF and the HPR), seven members from the House of Peoples' Representatives, the President of the Federal Supreme Court, and two members from among opposition parties that have seats in Parliament (See Article 11 of the Proclamation establishing the Commission). It is not clear how the opposition group is represented in the last nomination of the Commissioners as there is only one seat of the opposition party in Parliament. The ruling party won 99.6 of the seats, losing only two seats of a 547- member House (one seat went to the opposition party and the other to an independent candidate who openly affiliates himself to the policies of the ruling party).

to them must serve their practical purpose. Promotional activity to raise human rights awareness needs, thus, to be audience-friendly and also refer to as many real-life situations as possible. Also, the Commission needs to focus on specific training and education works that focus on enhancing the skills needed to assert human rights, unlike the existing promotional activities that aim at parting general information about human rights.

Effective Access to Justice through Legal Literacy in Ethiopia

Pietro Toggia*

Abstract

Access to justice has been a widely recognized principle in constitutional democracies. This universal principle is specifically articulated in Article 37 of FDRE's Constitution and the February 2011 Ethiopian Criminal Justice Policy which was issued by the Ministry of Justice, and approved by the Council of Ministers. Hence, all Ethiopian citizens have the right to enjoy the constitutionally guaranteed due process rights in every aspect of the civil and criminal justice systems. However, this study proposes that individuals should equally be expected to have adequate awareness of basic legal knowledge of how the legal system is structured and administered, what the legal process entails, the basic knowledge and capacity to seek free legal advice and services, and most importantly, individuals should know how to claim and exercise their due process rights *qua* human rights.

Keywords: legal literacy, legal awareness, effective access to justice, human rights

Introduction

Access to justice is a formally recognized and cherished principle in many countries. It is incorporated in constitutional provisions, legislative policies, and executive guidelines. The United Nations' instruments highlight it. Accordingly, national governments set goals for access to justice through justice sector reform programs. Similarly, international and regional organizations support the attainment of access to selected justice programs with money and technical training. This universal principle is specifically articulated in Article 37 of FDRE's Constitution and recently in the Ethiopian Criminal Justice Policy issued by the Ministry of Justice.[1]

Access to justice is notably linked to human rights concerns about human dignity and equal protection; it is now universally viewed as an integral part of the human rights framework. Access to justice is therefore articulated as "a matter of right" than a mere "entitlement."[2] Human rights are framed as standards, or bench marks and as reference points for measuring access to justice.[3] Access to justice is also viewed to have considerable impact

* Ph.D., Professor of Criminal Justice, Kutztown University of Pennsylvania.

[1] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. no. 1/1995, *Fed. Neg. Gaz.*, Year 1, no. 1[Hereinafter FDRE Constitution]; *የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ; ፍትሕ ሚኒ ስቴር :- የ ካቲት 25/2003 ዓ.ም*. (FDRE's Ministry of Justice, *The Ethiopian Criminal Justice Policy*, 4 March 2011) [hereinafter *The Ethiopian Criminal Justice Policy*].

[2] Curran, L. & M. A. Noone. 'Access to Justice A New Approach Using Human Rights Standards,' *International Journal of the Legal Profession*, Vol. 15, No. 3, 2008, p. 202. [hereinafter Curran and Noone]

[3] *Ibid.*; United Nations Development Program (UNDP), *Access to Justice: Practice Note*, September 3, 2004 [hereinafter UNDP, *Access to Justice*].

on economic development and poverty reduction, particularly in developing nations like Ethiopia.[4] Access to justice is defined as the ability to exercise one's legal and human rights, and secure benefits from such rights.[5] The exercise of rights and fulfillment of basic human needs entail to seek legal remedies for harms, injustices, and conflicts. The recourse to such remedies may entail access to formal and customary venues of dispute or conflict resolution. The social groups generally identified as disadvantaged and with special need for access to justice are people with lower socio-economic status, minorities, the mentally and physically challenged, women, the illiterate, the elderly, residents of rural areas, children, and HIV/AIDS patients.[6] Moreover, the lack of access to justice is viewed as tantamount to injustice; and the lack of concern or insensibility is what Judith Shklar refers to as something beyond a mere "indifference" but a matter of "civic failure."[7]

The provision of legal aid is also framed as a critical component in the general context of access to justice. For example, the United Nations has recently prepared a guideline to this effect in the criminal justice sector, highlighting the principles to respect the legal rights of suspects, defendants, victims, witnesses, as well as protecting and ensuring the independent services of legal aid providers.[8] Similarly, the Penal Reform International Conference held in Lilongwe, Malawi recognized and echoed the same principles about legal aid services with specific set of recommendations and plan of actions intended for African nations.[9]

The declarative statements on access to justice in international and regional instruments, in constitutional provisions, and in national policies proffer the framework of normative principles. The challenge however is always how this can be translated into practice. The main concern is obviously how *effective* will access to justice be for socio-economically disadvantaged citizens. This chapter examines the significance of legal awareness in realizing access to justice. Critical issues such as the awareness of individuals about their legal rights, and the public knowledge of how the legal system is structured and functions, as well as how they can navigate through the legal process are explored. And most importantly, individuals should have the capacity or competency as how they could claim and exercise their due process rights *qua* human rights. This chapter argues that basic legal

[4] UNDP, *Access to Justice*, *Supra* note 3, p. 3.
[5] *Ibid.*; UNDP, *Programming for Justice: Access for All*, 2005, p.4 [hereinafter, UNDP, *Programming for Justice*].
[6] UNDP, *Access to Justice*, *Supra* note 3, p. 3.
[7] Shklar, J., *The Faces of Injustice*, Yale University Press, London, 1990, pp.5-6 [hereinafter, Shklar].
[8] United Nations, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 2013, pp. 8-11 [hereinafter, *UN Principles and Guidelines on Access to Legal Aid*, 2013].
[9] Penal Reform International, *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, 2004, pp. 3-5 [hereinafter, *The Lilongwe Declaration*, 2004].

knowledge is imperative for *effective* access to justice. Even with the availability of free legal advice and services, one of the key elements is to be able to know where and how to access services.

The United Nations Development Program (UNDP) articulated the importance of legal awareness as follows: "Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. Information on remedies for injustice must be intelligible to the public and knowledge provided to them must serve their practical purposes."[10] In order to achieve this normative goal, the UNDP recommends the establishment and expansion of legal clinics, legal aid centers and legal information clearinghouses within the civil and criminal justice sectors, including programs in institutional capacity building, legal education through the mass media, legal training seminars and workshops, and community-based alternative dispute resolution systems.[11]

The critical element for effective access to justice is the active and direct participation of all the claimants. Accommodations (with best intentions) for people in need of access to justice should not be designed and delivered in a paternalistic fashion, in which the legal professionals would conventionally think and always act on behalf of their clientele. Although lawyers are trained to represent their clients, their advice and services may not be satisfactory. It may even appear paradoxical that, even despite their competent legal services, both the counsels and their clients may still experience lack of access to justice in the justice sector. Nonetheless, active and direct participation of stakeholders in seeking remedies is a necessary condition of effective access to justice. Those who are socially disadvantaged should be knowledgeable about their constitutional rights and as well as empowered to claim their rights. Accordingly, "the justice system reforms *need to engage actors beyond the circle of legal professionals"* (emphasis added).[12]

This chapter examines legal literacy in the conceptual or theoretical framework of access to justice. The author has laid out here a conceptual framework with: (1) the normative element — how access to justice is articulated as a human rights or social justice principle, (2) the legal epistemological feature —with regard to the nature and scope of legal knowledge and the purported knowing subjects or juridical subjects as rational persons, (3) the applicable substantive and procedural aspects in which the individual rights are *de facto*

[10] UNDP, *Access to Justice, Supra* note 3, 2004, p.10.
[11] *Ibid.*
[12] *Id.*, p. 9.

claimed and exercised; (4) the level at which the justice sector enjoys legitimacy commensurable with accountability and transparency; and finally, the attainment of Rawlsian justice as fairness[13] or the achievement of UNDP's vision of justice as human development.[14] Justice as fairness is meaningful and imperative here both as an ethical duty and public policy issue, particularly with regard to providing indispensable public goods to the socially disadvantaged. A satisfactory level of legal literacy among the citizenry is undoubtedly a critical component of claiming and exercising rights within the conceptual framework of access to justice. The aphorism: "People who do not have basic knowledge of their rights do not have rights" calls for a closer and critical examination. Hence, the focus of the analysis in this chapter is to closely examine this issue within a conceptual framework of effective access to justice.

1. Analytical framework of access to justice

There are four critical areas which must be highlighted and examined in a conceptual framework to analyze access to justice (see figure 1). The first is a basic philosophical premise that access to justice is a normative principle. This principle is articulated in international instruments and national constitutional provisions.

1.1. Access to Justice as a Normative Principle

Many of the thirty Articles contained in the Universal Declaration of Human Rights (UDHR) explicitly and implicitly affirm access to justice in the UDHR's declarative statements or normative framework. Most importantly, Articles 6, 7 and 10 of UDHR stipulate equal recognition before the law and equal protection under the law. Article 8 provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[15] Similarly, the International Covenant on Civil and Political Rights (ICCPR) reaffirms the universal and equal rights of individuals for an effective remedy, and enforcement of their claims by competent judicial authorities.[16] The African [Banjul] Charter on Human and Peoples' Rights also emphasizes equal protection under the law, and more specifically it states that every individual shall have

[13] Rawls, J., *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts, 1971 [hereinafter Rawls]. According to Rawls, the principle of [justice as] fairness is realizable when first of all, "[government] institutions or practices are just" and second, when "one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests." (pp. 111-2).

[14] UNDP, *Access to Justice*, *Supra* note 3; UNDP, *Programming for Justice*, *Supra* note 5.

[15] Article 8, The Universal Declaration of Human Rights (UDHR), 1948.

[16] *International Covenant on Civil and Political Rights* (ICCPR), UN General Assembly, December 16, 1966. [hereinafter ICCPR]

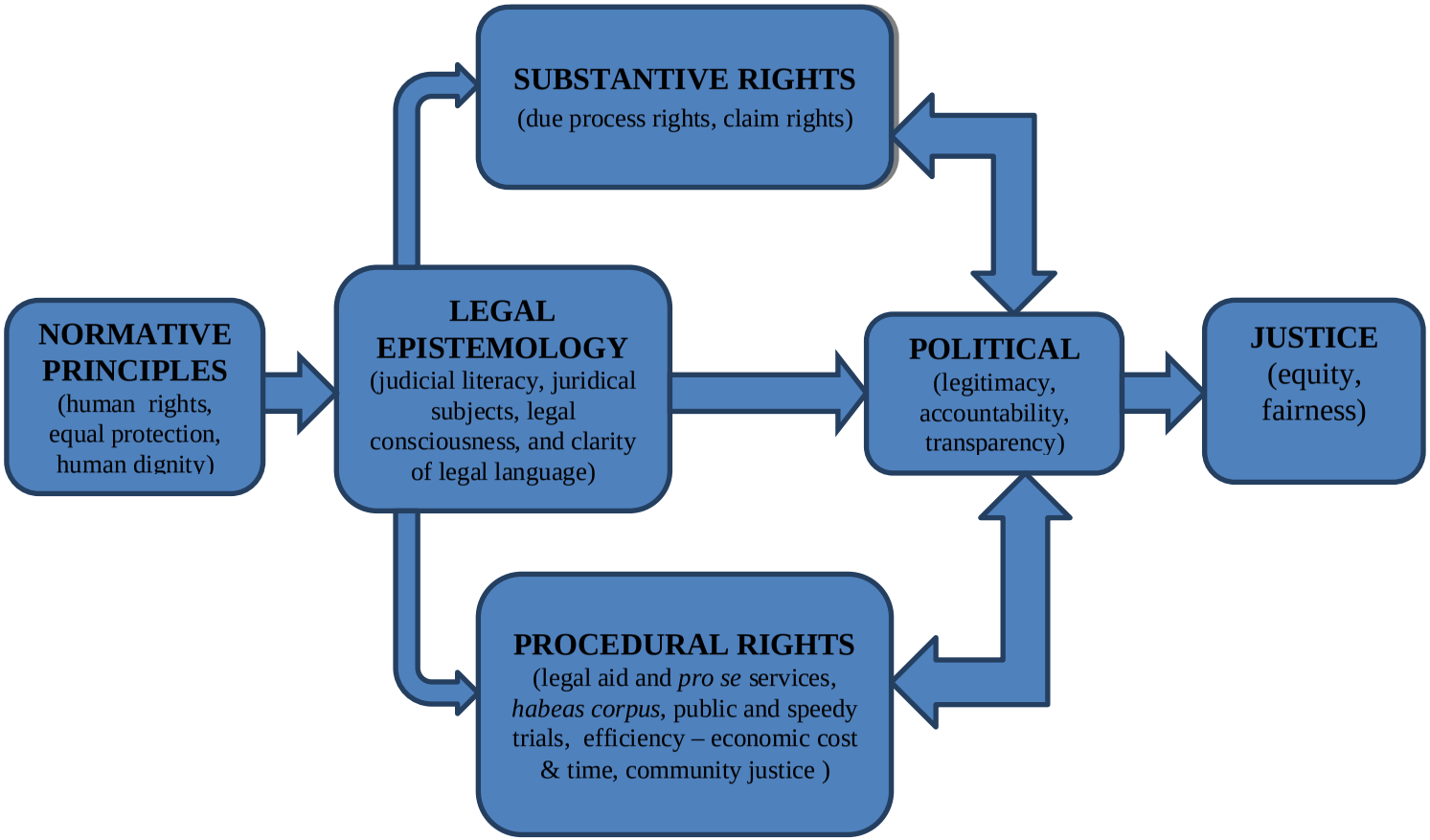


Figure 1: Analytical Framework of Effective Access to Justice

his/her day at court.[17] These normative principles concerning human rights, equal protection, and human dignity are also reflected in scores of other international instruments dealing with the code of conduct and ethical guidelines for criminal justice administrators, law enforcement and correctional officers, judges, prosecutors and lawyers.[18]

If access to justice is a human right, there must be claimants and duty bearers. The notable human rights scholar, Alan Gewirth states that human rights are "claim-rights" for claiming "important objects or goods"; he also argues that valid "claim-rights" also presuppose the "correlative duty" of others not to interfere with the rights of the claimants while they are exercising them.[19] Furthermore, this 'duty' may require restraint by authorities from taking measures that interfere with rights so that individuals may reasonably claim their rights (i.e., negative rights). Most importantly, this requires authorities to render active administrative support and legal services to claimants. This normative principle should generally be acknowledged, on one hand, for the common good and, on the other hand, for individual citizens. However, such social support and legal services (even with the utmost good intent) should not create a relationship of absolute dependency between the providers and beneficiaries. The lawyers should be representatives, counselors and consultants to their well-informed clients. The lawyer-client relationships should preferably be framed to create a knowledgeable, well-informed, active, and autonomous citizenry. Gewirth has cogently argued as follows: "Even when the rights require positive assistance from other persons, their point is not to reinforce or increase dependence but rather to give support that enables persons to be agents, that is, to control their own lives and effectively pursue and sustain their own purposes without being subjected to domination and harms from others."[20]

The assistance and services provided in the short term by qualified legal and administrative professionals should, in the long term, result in the empowerment of all

---

[17] African [Banjul] Charter on Human and Peoples' Rights, 21 October 1986 (see Articles 3 and 7) (hereinafter the Banjul Charter)

[18] See UN's *Basic Principles on the Role of Lawyers*, Eighth United Nations Congress, September 1990; UN's *Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169, 17 December 1979; UN's *Standard Minimum Rules for the Treatment of Prisoners*, 31 July 1957; UN's *Basic Principles on the Independence of the Judiciary*, 6 September 1985; UN's *Guidelines on the Role of Prosecutors*, 7 September 1990; UN's *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power*, 29 November 1985; and UN's *Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985.

[19] Gewirth, A., *Human Rights: Essays on Justification and Applications*, The University of Chicago Press, Chicago, 1982, p. 2. [Hereinafter, Gewirth]. Gewirth and Wesley Hohfeld are in agreement with his assertion that human rights are "claim rights." Moreover, Gewirth refers to the freedom or rights of such claimants as "social freedom"; but this may however entail restrictions under certain conditions. He argued that "… each person be left free to perform any actions he wishes so long as he does not threaten or violate other persons' rights to freedom (by coercing them) or to well-being (by harming them)." (*Id.*, p.17).

[20] *Id.*, p. 5.

citizens, especially those who have special legal needs. Such invaluable support originating from government agencies, higher education institutions, and non-government organizations should also include the utilization of alternative legal processes including customary dispute resolution as well. The Ethiopian traditional dispute resolution or mediation practices are still functional and are much more accessible, especially to rural residents.[21]

The concern here is to enhance "fundamental moral status," as well as to empower "self-controlling" and "self-developing" moral agents or conscientious citizens for their "freedom and well-being."[22] Nonetheless, the positive or enabling measure and "the primary justification of governments is that they serve to secure these rights [human rights]."[23]

The primary beneficiaries of access to justice should be the socio-economically disadvantaged. This social category of beneficiaries includes the poor, women, children, the physically and mentally challenged, the illiterates, crime victims, the elderly, and people with chronic illnesses. Accordingly, in order to provide equal opportunity to all "…society must give more attention to those with fewer native assets and to those born into the less favorable social position."[24] This was generally elaborated and articulated as fundamentals to social justice by John Rawls; the two fundamental principles of Rawlsian social justice are of equal opportunity and fairness.[25] Hence, equal opportunity or equal rights of citizens along with equity and fairness are the benchmarks of a just society.

One of the characteristic features of social justice involves a normative framework for "assigning rights and duties in the basic institutions of society and they [the principles of social justice] define the appropriate distribution of the benefits and burdens of social cooperation."[26] Second, the distribution of "Primary Social Goods" (PSGs) in the form of rights, liberties, jobs, income, health services, education etc., should be to "everyone's advantage" and "open to all."[27] And third, justice is a system that should maintain "a proper balance between competing claims."[28] The normative equilibrium sought here and the social equity therewith mandate the provision of equal opportunities to the socio-economically

[21] See Gebre Yntiso, *et al*. (eds.), *Customary Dispute Resolution Mechanisms in Ethiopia - ባህላዊ የግጭት መፍቻ ሰርዓቶች በኢትዮጵያ*, Ethiopian Arbitration and Conciliation Center, Addis Ababa, 2011.
[22] Gewirth, *Supra* note 19, pp. 5 and 15.
[23] *Id.*, p. 3.
[24] Rawls, *Supra* note 13, p.100.
[25] *Id.*, pp. 97, 111-2, 199.
[26] *Id.*, p. 4.
[27] *Id.*, pp. 60-61.
[28] *Id.*, pp.10.

disadvantaged. The ethical ingredient in the judgment or decisions corresponding to such a noble principle will lead to a well ordered or just society.[29]

1.2. Substantive and Procedural Rights of Access to Justice

Substantive and procedural elements provide sufficient conditions for the realization of legal rights. Otherwise, any declarative or prescriptive rights may remain only in books, and may become abstract and unfathomable to many citizens.

The realization of substantive and procedural rights are even more urgent and indispensable pertaining to basic human rights; and accordingly, they facilitate in achieving effective access to justice *qua* human rights. The espousal of human rights, democratic rights and due process rights at a national level, and in a written form framed in constitutional provisions is a welcome step, particularly in transitional democracies. The FDRE Constitution provides for human and democratic Rights (Article 10), the right to liberty (Article 17), basic due process rights (Articles 19, 20, and 21), rights valuing human dignity (Article 24), equal protection under the law (Article 25), and women's and children's democratic rights (Articles 35 and 36, respectively). These provisions either explicitly or implicitly are guiding principles for access to justice. More specifically, access to justice is reflected in Article 37 of the FDRE's Constitution: "Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power." What is stipulated here as "the right to bring a justiciable matter to a court of law" is based on what Rawls laid out within the "the principle of redress."[30]

The newly revised public policy of the Federal Ministry of Justice in Ethiopia outlines a plan for the criminal justice system to achieve justice according to the rule of law, and function effectively towards achieving such broad objectives as justice and fairness through institutional accessibility, transparency, and accountability; and all these are framed to be based on the rule of law.[31] The Criminal Justice Policy document in its preface, acknowledges that criminal justice agencies lack transparency, accountability, and justice.[32] In addition, it notes that the ethical code of conduct and professionalism are much desired from the Ethiopian criminal justice personnel.[33]

---

[29] *Id.*, pp. 453-62.
[30] *Id.*, p. 101.
[31] The Ethiopian Criminal Justice Policy, *Supra* note 1.
[32] *Id.*, pp. 2-3.
[33] *Id.*, pp. 3-4.

These same problems and weaknesses exist in the justice sectors of many countries. The UNDP and the World Bank strongly advocate for reform of the justice sectors of these countries.[34] The distinctive features of the problems identified by UNDP and the World Bank include long trial delays, gender biases against women, class bias against the poor, lack of basic facilities, lack of clear and coherent legal information on individual rights, lack of proper training for judicial staff, shortage of trained lawyers and judicial officers, lack of direct and active public participation in providing feedback for reform, the dire need for easily obtainable compiled and annotated laws and proclamations, and inadequate budgets.[35] These pervasive problems are generally believed to impede access to justice. One of the critical elements impeding access to justice is: "[L]ack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights."[36]

The substantive and procedural features of access to justice include, among other things, the following:

- Facilitating legal aid and *pro bono* services to indigent parties in civil law suits and in criminal cases;
- Providing legal assistance for *pro se* litigants (litigants litigating by their own without assistance by lawyer);
- Enhancing safeguards in legal cases presented by and involving poor persons;
- Appreciating the benefits of *amicus curiae* (a person who has interest in and involves in a legal case by offering opinions and arguments as a "friend of the court");
- Requiring that proceedings be open to the public and conducted expeditiously;
- Taking legislative measures to simplify legal jargon, and replace it with plain use of language in written laws and proclamations;
- Streamlining court hearings;
- Observing the *writ of habeas corpus* as a constitutional mandate;
- Implementation of a balanced and fair bail system;
- Observing client-friendly appeals in cases involving substantial constitutional issues as a matter of judicial mandate;[37]

---

[34] See The World Bank, *Ethiopia Legal and Judicial Sector Assessment*, Washington, D.C. 2004.
[35] *Ibid.*; UNDP, *Access to Justice, Supra* note 3.
[36] *Id.*, p.4.
[37] However, the *writ of certiorari* (a U.S. Supreme Court order to review decisions made by lower courts) is not a 'matter of right', but discretionary. Hence, the U.S. Supreme Court only hears about 1% of the cases filed

- Implementing the common law practice of *writ of mandamus* (a judicial order requiring a government official to perform legally required task); and
- Adopting the common law practices in pleas of *non est factum* (which means that the written contract is nonbinding or financial responsibility to an incurred debt is challenged based on claims of deception or misinformation or misleading agreements); as will be discussed below, this legal safeguard has mainly been instituted to protect the illiterate citizens in contractual relations in civil law cases.

Law schools and private lawyers in Ethiopia have made concerted efforts to provide legal aid and *pro bono* services. Law Schools at the various universities have established legal aid clinics to serve the socio-economically disadvantaged during the last few years.[38] However, their free legal services are limited by lack of funding.[39]

The legal aid service coordinated by the Center for Human Rights at Addis Ababa University, in cooperation with Ambo, Adama, and Hawassa Universities, and civil society organizations has provided legal service to a considerable number of clients.[40] The Center has provided legal services to a total of 3,249 indigent clients between December 2012 and November 2013; it has provided training to 140 paralegals between December 2012 and November 2013.[41] Similarly and in a larger scale, the Ethiopian Human Rights Commission (EHRC) has been providing free legal services for 12,000 people in collaboration with 16 Ethiopian universities since 2010 at 111 legal aid centers run by the partner universities; EHRC is financially supported ($267,000) by United Nations Development Program (UNDP).[42] One of the beneficiaries of such free legal services, seeking to reclaim his house in Hawassa City, was Abebe Ayalew. Abebe's story, with dependents who were indigent,

---

every term (U.S. Supreme Court's Office of the Clerk, October 2009). According the U.S. Supreme Court's Office of the Clerk: "The Court grants and hears argument in only about 1% of the cases that are filed each Term. The vast majority of petitions are simply denied by the Court without comment or explanation. The denial of a petition for a writ of certiorari signifies only that the Court has chosen not to accept the case for review and does not express the Court's view of the merits of the case"(*Id.*, p.1).

[38] To this author's knowledge, the following universities have such Legal Aid Centers or law clinics at different locations in urban and rural areas in the country: Adama University, Ambo University, Addis Ababa University Center for Human Rights, Bahir Dar University, University of Gondar, and Hawassa University, Jimma University, and Haramaya University. The legal aid services by the Laws Schools are generally provided by students under closer supervision of their law instructors.

[39] Center for Human Rights at Addis Ababa University, *Progress Report*, December 2012 – November 2013 [hereinafter, Center for Human Rights, *Progress Report*].

[40] *Ibid.*

[41] *Id.*, pp. 5-6.

[42] United Nations Development Programme., "Vulnerable people get free legal aid in Ethiopia," at <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/successstories/vulnerable-people-get-free-legal-aid-in-ethiopia/> (Accessed on 15 November 2013).
(See the Ethiopian Human Rights Commission (EHRC) web site for its programs and services at <http://www.ehrc.org.et/>; Ethiopian Human Rights Commission Annual Performance Report, June 2010-July 2011.

and blind, illustrates how free legal services can make a huge difference in people's lives. Abebe states: "As a disabled person, I could have been a homeless person living in the streets if I hadn't gotten free legal aid from this Center."[43] This story further illustrates the Rawlsian notion of democratic equality in the context of his "difference principle" and "procedural justice".[44] The fundamental principle is that society ought to empower and provide leverage with opportunities (public goods and social services) to those who are socio-economically disadvantaged; otherwise, the advocacy for 'equal treatment' of individuals who are 'unequal' to begin with is *de facto* a perpetuation of social inequality.[45] Nonetheless, the key element for accessing such legal services is the knowledge and capacity of beneficiaries how and where to seek and utilize such available legal assistance. This concern was intensely examined and articulated well by Thomas Geraghty and Diane Geraghty in their paper on *Child-Friendly Legal Aid in Africa* as follows:

> For example, how should the availability of legal services be made known to children and their families? How should the relationship between the child and lawyer/legal aid provider be structured in terms of communication, lines of authority, confidentiality, and participation of family members? … How and to whom should the specific skills and knowledge necessary for the effective provision of legal aid to children be identified and imparted, and by whom should it be evaluated? What skills should be possessed by legal aid providers who interact with children in need of legal aid on the ground?[46]

Providing legal services to *pro se* defendants in criminal cases or litigants in civil cases is integral to access to justice. Legal representation on one's own behalf (mainly among the working poor due to prohibitive legal expenses) is obviously a challenge in terms of comprehending the laws, and navigating the various phases of the legal process. In the United States, guides and informational materials are distributed and available to criminal defendants and civil litigants in *pro se*, in *forma pauperis* (cases presented by and involving a poor person), poor persons are often represented by lawyers. Proceedings in *forma pauperis*, however, do not necessarily mean that litigants in *pro se* cases have always gained access in *writ of certiorari* or appeal cases. These clearly written guidelines were prepared by the U.S. Supreme Court, U.S. District Courts, and the Federal Judicial Center.[47] These guidelines provide pertinent legal information and do not contain legal advice. They contain such

---

[43] *Ibid.*
[44] See Rawls, *Supra* note 13, pp. 75-90.
[45] *Id.*, pp. 75 – 80.
[46] Geraghty, T. & D. Geraghty, *Child-Friendly Legal Aid in Africa*, Commissioned by UNICEF & UNDP, June 2011, p. 5.
[47] Office of the U.S. Supreme Court Clerk, *U.S. Supreme Court Guide for Prospective Indigent Petitioners for Writs of Certiorari*, October 2011; Federal Judicial Center, *Assistance to Pro se Litigants in the U.S. District Courts*, 2011; U.S. District Courts, *U.S. Handbook for Civil Cases.*

information as: lists of required legal forms, documents, and applicable rules of federal procedure, fee waiver forms and time tables for filing cases, what to include in filing legal applications, and where to file, how and what kind of evidence to gather and present themselves, to submit proof of income and property ownership, office hours of the court clerks, and further assistance with the availability of 'information kiosks' in the proximity of the court clerks' offices and so on. One has to take caution here that while in the U.S., there is adequate information and services that are accessible to *pro se* litigants, it is still very difficult for any individual who is not represented by a professional legal counsel or lawyer to obtain relief.

Similarly, drawing lessons from the practice of common law countries (as in the United States), introducing judicial orders commonly issued to instruct and require government officials in the executive branch to perform certain duties (*writ of mandamus*), may help redress injustice originating from abuse of power and corrupt practices.[48] The judicial power to issue such orders has also been viewed as significant in maintaining checks and balances among the different branches of government, and the judicial review power and the judicial independence of the higher courts in a constitutional democracy.[49] This does not necessarily mean that *pro se* litigants always avail themselves of remedies in such arrangement.

The open court principle is also viewed as one of the critical components in access to justice jurisprudence, and specifically to legal literacy. The open access policy requires unrestricted access to the courts. The constitutional principle that guarantees public access to the justice system is found in the "the right to a public trial," "the right to full access to evidence" presented in court, as well as the right to challenge the accusers (Article 20 of FDRE's Constitution). Moreover, the 1996 Ethiopian Federal Courts Proclamation reaffirms the 'open hearing' principle with an exception to legal cases affecting public safety and state security.[50]

Tangentially, a persuasive argument can also be made here about the applicability of "the right to freedom of expression" and "freedom of the press" (Article 29 of FDRE's Constitution). The access and the presence of the media (the print press, television, radio,

---

[48] U.S. Congress bestowed the judiciary with the power to issue *writ of mandamus* and the other *writs* such as *habeas corpus* and *scire facias* (compelling individuals to appear in court) in the *Judiciary Act of 1789.*

[49] See the landmark U.S. Supreme Court's reasoning and decision under Chief Justice John Marshall in *Marbury v. Madison* (1803).

[50] Federal Courts Proclamation, Proc. No 25/1996, *Fed. Neg. Gaz*. Year 2nd No 13.[Hereinafter Federal Courts Proclamation]. Article 26 Open Hearing "1) All cases shall be heard in open court. 2) Notwithstanding the provisions of sub-Article (1) hereof and without prejudice to procedural laws relevant to adjudication, cases may be heard in camera in consideration of the following: (a) public and state safety and security: or (b) public morality and decency."

digitized news on the internet) in courtroom hearings is necessary to educate the public. The nineteenth-century English utilitarian philosopher, Jeremy Bentham supported unrestricted access to court hearings as "the very soul of justice"; and his oft-cited assertion that without "publicity there is no justice."[51] Undoubtedly, as Abel cogently states, access to justice is not merely filing cases and having a physical presence in courtrooms.[52] Meaningful access to justice requires empowering individuals as knowledgeable with adequate skills to navigate through the system seeking a fair outcome.[53]

Nonetheless, an inquiry should be made about the extent of public access to the courts in Ethiopia. The critical concern here is that unconditional openness (or what Friedman dubbed as "pathologically open" court) may result in multiple 'frivolous lawsuits' or opportunistic lawsuits for the purpose of 'extortion'; whether it may foster a litigious legal culture or potentially facilitate adversarial social relationships, as well as offer a conducive venue for financial exploitation by private lawyers.[54] On the contrary, unlimited or unrestricted access to court may perhaps influence potential litigants to be overly cautious and refrain from easily and mindlessly initiating lawsuits and counter-lawsuits. Perhaps an open court policy and practice may also enhance public awareness about laws and the legal process to deter unnecessary or frivolous lawsuits for the sake of mutual advantage to be protected from possible liabilities as what Friedman referred to "reciprocal immunity."[55]

Clearly, there are also exceptions to open court rules pertaining to classified court documents and court hearings. *In camera* hearings (closed or private hearings) are off limits to the public and the media in such cases — involving serious state security and public safety (in terrorism, espionage, and treason cases), police undercover operations, trade or patent secrets, protection of the identity of witnesses (like children), police testimonial evidence about ongoing investigations, as well as limited court space or limited seat availability. Jeanine Lutzenhiser has identified and discussed a "five-factor test" as checklist of an open

---

[51] Bentham, J., *Select Extracts From the Works of Jeremy Bentham*, Simpkin, Marshall, & Co., London, 1843. Bentham was passionate in expressing his views on 'publicity' (possible reference to transparency and accountability in his time) in both legal and political institutions. He specifically noted: "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. Under the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time" (*id.*, p. 115).

[52] Abel, L., '*Turner v. Rogers* and the Rights of Meaningful Access to Courts,' *Denver University Law Review*, Vol. 89, No. 4, 2013, pp. 805 – 23.

[53] Zorza, R., 'Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation,' *Drake Law Review*, Vol. 61, 2013, p. 859. (hereinafter, Zorza)

[54] Friedman, L., 'Access to Justice: Some Historical Comments,' *Fordham URB Law Journal*, Vol. 37, 2010, pp. 6 – 7.

[55] *Id.*. p. 7.

court in the state of Washington.[56] The checklist is quite insightful to likewise assess all the other important features or aspects of access to justice; her checklist includes balancing the conflicting interests of the defendant and the public, judicial limitations of time for sealed court records, seeking the least restrictive but effective means to proceed with a case without closure, and ensuring fairness in terms of identifying the overriding interest of the parties in the case.[57]

1.3. Legal Epistemology: Legal Knowledge of Juridical Subjects

All aspects of the criminal and civil justice sectors in the modern legal system since the eighteenth-century have operated with the basic assumption that all individual citizens are purported to be knowing subjects and rational-legal subjects. The premise for 'reasonable person' standard in eighteenth-century enlightenment jurisprudence was that all individuals are endowed with reason; that they are able to differentiate right from wrong with established social norms as the baseline.[58] Accordingly, each citizen is expected to know his/her legal responsibilities as well as social duties in a 'social contract' within their respective nation-states. This historical and universal premise featuring the 'juridical subject' is applicable to every aspect of modern criminal laws, family laws, labor laws, property laws, contract laws etc., pertaining to compliance to the institutionalized laws, and as well as assuming responsibility when violating the laws. Citizens therefore are presumed to be generally knowledgeable about: (1) national and international laws; (2) their rights and duties; (3) legal institutions; and (3) how the legal process works.

Hence, the universal truism, that 'ignorance of the law excuses no one' (*ignorantia juris non excusat*), is historically premised on the general idea that *all* individuals unequivocally must be knowledgeable of the laws and the corresponding legal responsibilities. For example, FDRE's revised Criminal Code reaffirms both "ignorance of the law" and "mistake of law" as legally inexcusable.[59]

The universal characterization of a 'reasonable person' in the modern legal system remains abstract because many citizens lack the requisite legal knowledge to meet such a

[56] See Lutzenhiser, J., 'An Open Courts' Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence,' *Washington Law Review*, Vol. 87, 2012, pp. 1203 – 49.
[57] *Id.*, pp. 1215-16.
[58] Yet, exceptions to the 'reasonable person' are also granted to children, mentally ill (insane) individuals, and the emotionally unstable individuals due to 'irresistible impulses' etc.
[59] Article 81 (1): "Ignorance or mistake of law is no defence." Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Fed. Neg. Gaz.*, Proc. No.414, 10th Year, No.58 [hereinafter FDRE Criminal Code].

standard. Ronald Cass observes the challenges the U.S. Supreme Court regularly faces in addressing "ignorance of the law" defenses *vis-à-vis* the "vagueness" of the laws (their own lack of clarity and specificity), and the absence of "fair warning" or cautioning citizens in advance for the existence of such laws.[60] Hence, the U.S. Supreme Court invalidates laws for lack of clarity under the "void-for-vagueness" doctrine;[61] or for lack of specificity.[62] This problem is in part due to inaccessibility of statutory laws that is not the case in void for vagueness cases as perhaps not written in plain and comprehensible language to the public. This is the rationale in such cases.

Of course, there is an obvious problem with such universal assumption where socio-economically disadvantaged people, as the illiterate, the poor, women, children, the elderly, the chronically sick, and rural folks, etc. are equally expected to be judged by this standard of the enlightenment's legal philosophy. The socio-economically disadvantaged are people in modernity whom the postmodern scholars perceptively refer to as the "decentered subjects".[63] As much as their *de facto* marginalization is recognized by the legal system, there is still much to be desired in terms of urgent attention and catering to their needs as citizens or right bearers. Rawls asserted that Primary Social Goods (which encompasses public education, rights, liberties, income, opportunities and requisites for active participation in civil and social life) are the necessary condition to meet people's "rational desire," particularly, "for the least advantaged, for those with the least authority and lowest income."[64] Disseminating knowledge through public education for children and adults is mutually beneficial to the interest of individuals and the sustainability of society (the common good) as a whole. Along this line, Rawls further argued that "... the value of education should not be assessed solely in terms of economic efficiency and social welfare. Equally if not more important is the role of

---

[60] Cass, R., 'Ignorance of the Law: A Maxim Reexamined,' *William and Mary Law Review*, Vol. 17, No. 4, 1976, pp. 671-699.

[61] See U.S. Supreme Court decision in *Lambert v. California* (1957) in which the California state court decision was reversed, holding that the appellant (Lambert) had no knowledge of the city of Los Angeles's ordinance to register as a city resident for a previous felony offenses; in *City of Chicago v. Morales* (1999), the U.S. Supreme Court affirmed the Illinois appellate state court decisions, holding that the City of Chicago's anti-loitering ordinance (city law) violates due process due to its vagueness and arbitrary restrictions on individual liberties.

[62] *McBoyle v. United States* (1931); the U.S. Supreme Court, reversed the lower federal court decisions for Mr. McBoyle's conviction based on the legal definition of his theft (of an airplane) as stealing a motor vehicle, and for the lack of *specificity* of the definition of an airplane theft.

[63] Milovanovic, D., 'Dueling Paradigms: Modernist v. Postmodernist Thought,' *Human and Society*, Vol. 19, No.1, 1995, pp. 3-5.

[64] *Id.*, pp. 92-4.

education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way *to provide for each individual a secure sense of his worth*."[65]

One of the justifications for punishment in the criminal justice systems is deterrence. According to the eighteenth-century (Cesare Beccaria and Jeremy Bentham's) classical criminology, the basic assumption is that any individual action is generally based on free will or free choice.[66] Both Beccaria's and Bentham's conception (or rather speculative reasoning) of individuals' desire and mental ability can be summarized as follows.[67] People generally tend to seek and maximize pleasure, and avoid pain since they are by their nature hedonistic (pleasure-seekers). Individuals are rational calculators so they have the mental capacity to differentiate pleasure from pain. Crime is a source of pleasure for some and punishment should be instituted to outweigh the gain (the pleasure) from crime. The rationale here is to discourage individual offenders (specific deterrence), as well any one with the potential for criminality among the public (general deterrence). The philosophical underpinning for both the assumption about criminal behavior and the justification for punishment is people's expected knowledge and understanding about criminal laws, and the corresponding punishments for transgressions. The main epistemological question here is what percentage of the populace really does have such knowledge and capacity to be deterred from wrongdoings for fear of punishment?[68]

Nonetheless, this utilitarian philosophical assumption of knowledge, awareness, or anticipation is still the basis for defining the elements for intent and culpability for any act in violation of criminal laws. For example, a crime is an act when an individual commits "an unlawful and punishable act *with full knowledge and intent* in order to achieve a given result."[69] Conversely, any perpetrator is responsible for an act committed out of negligence "… while he was *aware that his act* may cause illegal and punishable consequences."[70] Thus, there seems to be a dissonance in the function of the legal system in terms of what is expected from the public in understanding the laws and *de facto* lack of cognitive capacity of citizens to understand them.

---

65 *Id.*, p.101 (emphasis added).

66 For the classical and utilitarian conception of 'free will', hedonism' (pleasure seeking), and deterrence, see Beccaria, C., *Essay on Crimes and Punishments* [1864], W.C. Little, Albany, 1872; J. Bentham, *An Introduction to the Principles of Morals and Legislation* [1789], Clarendon Press, Oxford, 1907.

67 *Ibid.*

68 See Bruce Jacobs's excellent critical survey and examination of this subject; Jacobs, B., 'Deterrence and Deterrability,' *Criminology*, Vol. 48, No. 2, 2010, pp. 417-41.

69 FDRE Criminal Code, *Supra* note 59, Article 58 - 1(a), (emphasis added).

70 *Id.*, Article 59-1 (a).

Mueller, Solan, and Darley cogently posed a series of relevant queries in an interesting article, "When Does Knowledge Become Intent?"

> First, do laypeople actually differentiate the various states of mind conceptually? That is, when judging behavior, do people distinguish between intentional and knowing acts, knowing and reckless acts, reckless and negligent acts, and so on? This question is both complex and subtle. It includes issues such as how much knowledge, and what kind of knowledge regarding something that *may* go wrong – that is, understanding risk –is sufficient to count as knowing ex ante [beforehand] that something will go wrong – that is, having knowledge.[71]

They concluded in their studies that there is an imperfect correlation between the legal standards about individuals' state of mind and peoples' actual behaviors; they actually made a very cautious observation in their findings: "Our studies show that in many instances there is strong concordance between the legally relevant state of mind categories and people's judgments of states of mind, moral wrongness, and increasing degree of liability. However, the match is not perfect."[72] Similarly, addressing the subtle distinction between wrongdoing and fault in the context of culpability or criminal intent (*mens rea*), Brown observes that the U.S. Federal Criminal Code does not actually encompass clear guidelines or categories to interpret mental state (whereas, the U.S. Supreme Court does have its own).[73] One has also to note that such interpretive guidelines are based on "inferences from textual meanings" of written laws (statutes), as well as deciphering or re-reading the intent of law-makers to identify broadly categorized mental states for different criminal offenses.[74] This topic deserves to be explored in further research in the context of Ethiopia's legal system.

1.4. Legal literacy

The main concern about access to justice is *how effective* it is for socio-economically disadvantaged citizens. Even with the availability of free legal advice and services, the key element in accessing them is the basic knowledge and capacity of would be beneficiaries as to *how* and *where* to seek such legal assistance. Hussein Tura's research in Wolaita Zone, in Southern Ethiopia clearly illustrates this point; he finds that "despite the possibility of assigning private lawyers to qualifying indigents for a total of fifty free hours per year of

---

[71] Mueller, P., L. Solan, & J. Darley., 'When Does Knowledge Become Intent? Perceiving the Minds of Wrongdoers,' *Journal of Empirical Legal Studies*, Vol. 9, No. 4, 2012, p.859 (hereinafter, Mueller, Solan, & Darley).

[72] *Id.*, p. 862.

[73] Brown, D., 'Federal Mens Rea Interpretation and the Limitations of Culpability's Relevance,' *Law and Contemporary Problems*, Vol. 75, No. 2, 2012, pp. 109-131.

[74] *Id.*, p. 113.

legal consultation, the Zonal [Wolaita] Justice Bureau argues that this entitlement is sparsely made use of by indigent litigants. This is clearly attributable to lack of awareness, according to the officials."[75]

The argument in this chapter is not to expect ordinary citizens to have the knowledge and capacity on a par with lawyers or legal scholars. Nor is it to wish that lawyers and legal advisors be driven out of business or become superfluous. People generally need to have the basic legal knowledge and capacity to claim and exercise their fundamental rights. In this regard, it is not even contentious to echo what Roach and Sossin assert: there is "informational deficit."[76]

Legal literacy can be defined as the individuals' ability to know their rights, to understand the meanings and applications of specific laws pertaining to their interest, to identify and seek free legal services, and to be able to have basic navigation skills through the formal legal process. Other scholars make conceptual distinctions between "legal awareness" and "legal consciousness." For example, Mary Gallagher distinguishes "legal awareness" as knowledge that provides a means for access to justice; whereas, "legal consciousness" refers to the active utilization of such legal knowledge or "the mobilization of the law" to one's advantage.[77] Other scholars use a different term of reference for empowering people with legal or political knowledge as "critical literacy," and specifically "the awareness of justice and delivery of justice" as "critical consciousness."[78]

The functionally literate may not necessarily be legally literate. Individuals with some levels of formal education, who have completed elementary schools or high schools, and universities may not have sufficient legal knowledge and skills. The main reason for this is the extreme specialization and professionalization of the legal field. Therefore, lawyers are elites or *cognoscenti* (i.e. experts) in the field. They are believed to have what Judith Shklar refers to as "hyper-literacy."[79] Along with the development of the legal profession, the legal system has continued to operate using technical language which only lawyers and legal

---

[75] Hussien T., 'Indigent's Right to State Funded Legal Aid in Ethiopia,' *International Human Rights Law Review*, No. *2*, 2013, p. 135 [hereinafter, Hussien, 2013]

[76] Roach, K. & L. Sossin., 'Access to Justice and Beyond,' *University of Toronto Law Journal*, Vol. 60, 2010, p. 382.

[77] See Gallagher, M., 'Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness,' *Law & Society Review*, Vol. 40, No. 4, December 2006, pp. 783-4 (hereinafter, Gallagher).

[78] Frederic, G., *Political Literacy: Rhetoric, Ideology, and the Possibility of Justice*, State University of New York Press, Albany: New York, 1994, pp. 6-9.

[79] UNDP, *Access to Justice*, *Supra* note 3.

experts can comprehend, i.e. *legalese*. Legalese is a specially and professionally crafted language format which is almost exclusively accessible to the legal experts.[80]

Socio-economic status and low level of literacy positively correlate with access to justice, particularly with legal literacy. The poverty rate in Ethiopia (categorized as a low-income country with current GDP of $41.61 Billion) is 29.6% at the national poverty line, and the GNI per capita of $380 is one of the lowest in the world in 2011. The poverty gap at $2 (USD) a day for people in poverty is 23.6% (PPP).[81]

According to UNESCO, in 2010, there were 26, 847,000 million illiterates in Ethiopia; and the literacy rate (15 years of age and older) was 39 %. The breakdown in terms of gender indicates a 49.1% male literacy rate and a 28.9 % literacy rate among women.[82] There has been a steady and appreciable improvement in the literacy rate in Ethiopia from 27% in 1990 to 35.9 in 2000, and to 39% in 2010. UNESCO's projection of literacy rate for 2015 is 68%.[83] The Literacy Gender Parity Index (LGPI) (which is female/male literacy rates) in Ethiopia is currently at .59;[84] this again shows a steady improvement from .51 in 1990 to .46 in 2000.[85] Interestingly, in 2010 the youth literacy rate of 55% (of 15-24 years of age) specifically is much higher than the national rate; the youth literacy rate has also shown dramatic improvement from 33.6 % in 1990 to 49.9 % in 2000.[86] In 2010, the total number of illiterate youth were 7,090,000; and the breakdown in gender literacy rates shows that it is 63% among male youth, and 47 % among female youth; and the LGPI among the youth is much higher (.75) than the national rate of .59.[87]

Literacy has varying definitions. This is mainly due to the fact that there are multiple forms of literacy such as basic literacy, functional literacy, numerical literacy, critical literacy, health literacy and so on. And we can also add here legal literacy as one of the varying levels of public awareness. The working definition of literacy as defined by the United Nations is "the ability to read and write, with understanding, a short simple statement

---

[80] The dictionary definition of 'legalese' is: "The formal and technical language of legal documents that is often hard to understand." Oxford Dictionaries at <http://www.oxforddictionaries.com/us> (retrieved on 3 April 2014).

[81] The World Bank, at http://data.worldbank.org/country/ethiopia; or at http://data.worldbank.org/indicator (Accessed on 17 October 2013). According to the World Bank Ethiopia's population in 2012 is estimated to be around 91.73 million.

[82] UNESCO Institute for Statistics, *Adult and youth Literacy, 1990-2015: Analysis of Data for 41 Selected Countries*, 2012. pp. 13-17 (hereinafter UNESCO Adult and Youth Literacy), pp. 13-17.

[83] *Id.*, p. 13.

[84] This Gender Parity Index (.59) simply means that for every 10 literate men there are 6 literate women.

[85] UNESCO Adult and Youth Literacy, *Supra* note 82, p. 16.

[86] *Id.*, pp.19-23.

[87] *Id.*, pp. 22-23

about one's everyday life."[88] Another definition is that "literacy is the ability to use printed and written information to function in society, to achieve one's goals, and to develop one's knowledge and potential."[89] A literate person was defined by UNESCO in 1978 as: "[A] person is functionally literate who can engage in all those activities in which literacy is required for effective functioning of his group and community and also for enabling him to continue to use reading, writing and calculation for his own and the community's development."[90]

It is acknowledged that the utmost attention should be given to literacy as one of the six goals of the *Education For All* (EFA) global agenda.[91] This educational strategy (encompassing literacy as a basic human right and as a necessity in modern high-tech and knowledge societies) was formulated and embraced by 164 countries in Dakar, Senegal in 2000.[92] Indeed, "[L]ow literacy is a much larger problem than previously assumed in every country surveyed: from one-quarter to over one-half of the adult population fail to reach the threshold level of performance considered as a suitable minimum skill level for coping with the demands of modern life and work." [93] And correspondingly, the benefits of literacy "has long been valued in its own right and for the access it provides to other benefits such as employment, high income and the capacity to participate fully in society. What has often not been recognized is the full range of benefits to be derived from a literate population, for both the economy and for society."[94]

Although there is no empirical research on the subject, the lack of public legal awareness is pervasive. How many Ethiopians possibly know what court summons for the accused and subpoena for a witness are? How many can truly comprehend the informational text in court orders, the court hearing date, and the venue? How many may know their rights to receive notice of charges, their bail rights and right to a public trial? How many would

---

[88] *Id.*, p. 10.

[89] National Assessment of Adult Literacy (NATL). <http://nces.ed.gov/NAAL/fr_definition.asp> (accessed on 17 October 2013) (hereinafter NATL).

[90] Cited in The Organisation for Economic Co-operation and Development (OECD). *Programme for the International Assessment of Adult Competencies* (PIAAC), <http://www.oecd.org/site/piaac/#d.en.221854> (Accessed on 17 October 2013) (hereinafter PIAAC).

[91] UNESCO, Education For All Global Monitoring Report., *Literacy: The Core of Education For All*, 2006, p. 27 [hereinafter EFA Global Monitoring Report].

[92] The World Education Forum, The Dakar Framework for Action, Education For All: Meeting Our Collective Commitments, Dakar, Senegal, 26-28 April 2000.

[93] OECD. *Literacy Skills for the Knowledge Society: Further Results from the International Adult Literacy Survey*, 1997. P. 5 [hereinafter OECD *Literacy Skills for Knowledge Society*].

[94] The Organisation for Economic Co-operation and Development (OECD)., *Highlights from the Second Report of the International Adult Literacy Survey: Literacy Skills for the Knowledge Society*, p. 4, available at <http://en.copian.ca/library/research/nls/ials/ialsreps/ialsrpt2/ials2/highe.pdf> (Accessed on 17 October 2013) [hereinafter *International Adult Literacy Survey*].

know that "instigating false accusation" is an offense (Article 447 of FDRE's Criminal Code) which is punishable up to five years in prison? Do people comprehend the seriousness of "false testimony" or perjury which is punishable up to five years in the Ethiopian Criminal Code (Article 442)? Do people know what "obstruction of justice" or "refusal to aid justice" means? What about "contempt of court" which is punishable by up to one year imprisonment and 3,000 Birr? How many are able to make sense of the meanings "misprision of felony" or "failure to report serious crimes" which are punishable by a short prison term or monetary fines (Article 443)? There could be many victims and victims' families who show frustration and disappointment with the criminal justice system when they do not comprehend what "statute of limitations" mean (Articles 216-8). How about the "witness protection statutory provision" in Article 444? Do people appreciate the optional prosecution method (private prosecution) with "a formal complaint" to be filed by interested parties in a criminal court within 90 days?[95]

One could find the answers to these questions, including knowledge of family law, labor law, and commercial laws by conducting a survey to gather and compile data on legal knowledge. Such a literacy survey assessment may necessitate the development of a legal literacy scale to measure levels of legal knowledge, knowledge of the legal process, skills to navigate through the legal systems, as well as knowledge about resources and availability of free legal information and services. Such a scale has been developed for health literacy assessments.[96]

Some of the anecdotal comments I heard from judges in *Bahir Dar* reaffirm the extent of low rates of legal literacy among defendants in criminal cases. In their responses to pleadings, some defendants quite commonly respond how they could dare to challenge the formidable accusation by the state; and still others respond with a sense of fatalism, and leave the legal process and outcome to the Will of the Supreme Being. Similarly, in response to whether they would like the court to consider their release on bail, some persist in their pleading that they are innocent; this is perhaps a misunderstanding on their part that seeking bail for them means tantamount to admission of guilt.

---

[95] FDRE Criminal Code, *Supra* note 59, Article 212; Criminal Procedure Code, Proc. No.185/ 1961, *Neg. Gaz.*, Extraordinary Issue No. 1 of 1961, Articles 13 and 47 [hereinafter Ethiopian *Criminal Procedure*].

[96] Stableford, S. & W. Mettger., 'Plain Language: A Strategic Response to the Health Literacy Challenge,' *Journal of Public Health Policy*, Vol. 28, No. 1, 2007, pp. 71-93.(hereinafter Stableford and Mettger). The critical observation by Medicine and Healthcare Reports in 2004 about people's health literacy is quite insightful and apposite to legal literacy; the Report states that: "… adults with limited literacy skills know less about their health problems, are less likely to engage in certain preventive behaviors, less likely to comply with self-management regimes for chronic health conditions, and more likely to have poor health and more frequent hospitalizations" (*id.*, p. 73).

In one study among randomly selected 138 detainees in police custody and at the correctional center in Wolaita Sodo in Southern Ethiopia, it was observed that:

> most respondents strongly agree that the legal system is too complicated to understand properly; while only 10% are aware of their rights. Furthermore, whereas 82% are of the view that only the very wealthy can afford to protect their rights, 78% strongly agree that the courts are not places for the poor. Moreover, 85 % indicated their inability to afford a good lawyer if faced with a serious legal problem, whereas 89 % are unaware of how to seek legal assistance in the zone.[97]

With such surveys and observations replicated, more data can be gathered to shed light on the legal literacy problem in Ethiopia. Consequently, common misperceptions could be addressed through targeted national legal literacy campaigns. It may not also sound unrealistic that any such literacy campaign in the short term will address all of the areas of legal knowledge identified and described above.

1.4.1. Language Simplification and Special Protection of Illiterates

One of the most critical issues pertaining to access to justice (and specifically to public legal literacy) is the development and use of plain or simplified language in civil and criminal sectors of the legal system. The discourse and the focus on the use of plain language began in the 1960s. And it is now embraced in the United States, South Africa, Australia, England, Canada, Sweden, and New Zealand since the mid-1990s. There are also organizations which promote legal literacy such as the *Plain Language Association International* in Canada and *The Plain Language Action & Information Network* (PLAIN) in the United States.[98] These organizations provide guidelines, reference materials, writing samples in plain English, training workshops, and information to draft and use plain language laws and agency regulations in plain or simple languages that would be readable and comprehensible to the public. The definition of plain language "is a way of communicating that everyone in your audience can easily understand."[99] Still this may be a major challenge in countries like Ethiopia with a prevalence of high rates of illiteracy. However, at the initial phase policies with the focus on simplifying the use of legal language in tandem with legal literacy programs for the functionally literate individuals could make differences.

The requirement for the use of plain language became a federal law in the United States in October 2010. The U.S. Congress passed the *Plain Writing Act of 2010* that requires that

---

[97] Hussien, *supra* note 75, p. 136.

[98] Visit its web sites, PLAIN at http://plainlanguagenetwork.org/; Plain Language at http://www.plainlanguage.gov/usingPL/government/index.cfm. (accessed on 17 November 2013) [Hereinafter PLAIN and Plain Language, respectively].

[99] *Ibid.*

"documents issued to the public must be written clearly."[100] The Act defines "plain writing" as "writing that is *clear*, *concise*, *well-organized*, and follows other best practices appropriate to the subject or field and *intended audience*."[101] Furthermore, the *Plain Writing Act* states the purpose of the use of simplified language: (1) "improve effectiveness and accountability of Federal Agencies"; (2) promote "clear Government communications," and (3) communicate in a plain language that "the public can understand."[102] The Act also requires each federal agency to use plain writing, and directs federal employees to follow the guidelines prepared by the Plain Language Action and Information Network. Subsequently, in March 2011 the Plain Language Action and Information Network (PLAIN) prepared Federal Plain Language Guidelines for federal employees, covering such topics as how laws should target the intended audience, the use of simple words, avoidance of technical jargon and long sentences, using active verbs, inclusion of examples, and accessible document design with structured headings and sub-headings.[103] Accordingly, there are now 43 federal agencies in the United States, including the Departments of Justice, Commerce, Treasury, Agriculture, Labor, Defense, Education, Health and Human Service, Social Security Administration, Housing and Urban Development which have implemented the plain language in their services to the public.

One of the leading scholars advocating of plain language, Joseph Kimble, argues that "[P]lain language has to do with clear and effective communication —nothing more or less. It does, though, signify a new attitude and a fundamental change from past practices. If anything is anti-literary, drab, and ugly, it is traditional legal writing — four centuries of inflation and obscurity."[104] Opponents argue that simplification of legal language will compromise precision and accuracy for the sake of clarity.[105] The response to this criticism from the proponents of plain language is that clarity and accuracy are not mutually exclusive; rather, they are complementary.[106] Another criticism leveled against writing in plain language style is that it focuses more on the text (i.e. text-based) rather than the readers (reader-based). The concern here is that the plain language advocates place much more emphasis on the drafting of the text rather than assessing the ability of the users or the readers.

---

[100] 'Plain Writing Act of 2010,' *Public Law* 111-274, 13 October 2010.
[101] *Id.*, Section 3(3) (emphasis added).
[102] *Id.*, Section 2.
[103] PLAIN and Plain Language, *Supra* note 98.
[104] Kimble, J., 'Answering the Critics of Plain Language,' *The Scribe Journal of Legal Writing*, 1994-95, p.52 [hereinafter Kimble].
[105] Garner, B., *A Dictionary of Modern Legal Usage*, 2nd ed., Oxford University Press, Oxford, 2001.
[106] Kimble, *Supra* note 104, pp. 53-5.

The rejoinder to such critical remarks is that the proposition that plain language is effective and improves comprehension is supported by empirical studies on the level of comprehension among readers of jury instructions (31% improvement in comprehension), medical-consent forms (91% improvement in comprehension), draft legislation (half to a third less time needed to read the original by law students), divorce application (applications that used to be rejected due to error decreased from 42% to 8%), and understanding insurance services (improvement by 106%).[107] Furthermore, Kimble's riposte to the criticism that plain language is devoid of "flavor" was acerbic; he scoffed at the criticism by stating that "we don't find much flavor or precision in *Further affiant sayeth not*."[108]

The views of the proponents of plain language are quite insightful in examining our legal language too. For example, the very important and critical statutory provision, i.e. Article 48 -2 of FDRE's *Criminal Code* on "የወንጀል ኃላፊነት" ("Criminal Responsibility") in Amharic reads: "ማንም ሰው በዕድሜ፣ በሕመም፣ ባልተለመደ የእድገት መዘግየት፣ ወይም ጥልቅ በሆነ የአእምሮ የመገንዘብ ወይም የማመዛዘን ችሎታ መቃወስ ወይም ከዚህ በታች በአንቀፅ ፵፱ በንዑስ አንቀፅ (፩) ከተመለከቱት ምክንያቶች በአንዱ ወይም በማናቸውም ሌላ ተመሳሳይ ስነ-ህይወታዊ ምክንያት የወንጀል ድርጊት በሚፈፀምበት ጊዜ የድርጊቱን ዓይነት ወይም ውጤት ለመገንዘብ ወይም በዚህ ግንዛቤ መሠረት ራሱን ለመቆጣጠር በፍፁም ያልቻለ ሲሆን ለፈፀመው ድርጊት ፍፁም ኢ-ኃላፊ ስለሚሆን አይቀጣም።" [109]

The above sentence is rather long with at least six coordinating conjunctions (i.e. 'or')[110] and the translated phrases for 'biological' and 'irresponsibility' are rather incomprehensible even for functionally literate citizens. As much as I am proud of our language heritage like all Ethiopians, I do also really doubt the ability of the majority of people (even the youth of this generation with formal education) to be able to comprehend and use the *Ge'ez* numerals as references to articles of the law. We do extensively and conveniently use the universal Hindu-Arabic numerals in Ethiopia. Nonetheless, this may be simplified with clarity without the loss of its legal accuracy or precision with the following abridged version: "ማንም ሰው በዕድሜና በአእምሮ ጤንነት ጉድለት፣ እንዲሁም በአንቀፅ 49 በንዑስ አንቀፅ 1

[107] *Id.*, pp. 62-5.
[108] *Id.*, p. 61.
[109] FDRE Criminal Code, *Supra* note 59, Article 48 (2), "A person is not responsible for his acts under the law when, owing to age, illness, abnormal delay in his development, deterioration of his mental faculties, one of the causes specified under Article 49 sub-article 1 or any other similar biological cause, he was incapable at the time of his act, of understanding the nature or consequences of his act, or of regulating his conduct according to such understanding."
[110] Interestingly, the official English translation of the Article in the Ethiopian Criminal Code above has only three such coordinating conjunctions.

በተጠቀሱትና በተመሳሳይ ምክንያቶች፣ በአንደኛው የተነሳ ራሱን ለመቆጣጠር በፍፁም ባይችልና የወንጀል ድርጊት ቢፈፅም በኃላፊነት ተጠያቂ አይሆንም።" [111]

The physically disabled, visually impaired, and illiterates also need special legal protection. In this regard, we can emulate a procedural law (i.e. *non est factum*) from common law countries such as England and the United States. *Non est factum* (a Latin term which means "it is not his deed") is a legal doctrine in contract law that emerged in the 13th Century. It absolves someone who signed a deed or any legally-binding agreement, without understanding its content due to physical and mental disability or illiteracy. Under this doctrine, a deed may be revocable if a person involved in the transaction is deceived or misinformed or coerced into signing. Such civil cases often relate to loans, property sales and purchases, property transfer and inheritance, wills, labor contracts, as well as rental leases. And the modern version of the doctrine since the decision in *Foster v. Mackinnon* in 1869[112] is still designed to protect the socially disadvantaged groups who lack legal literacy. A successful plea for *non est factum* could bring an outcome in the contract being null-and-void.

Common law courts are very cautious in granting such remedies and require a stringent requirement of proof for a lack of consent and a lack of negligence on the part of the complainant. Unfortunately, the burden of proof for the plea to invalidate the contract (based on physical or mental illness, illiteracy, and other mitigating factors) is on the signer of the contract who is seeking a relief. Lord Pearson of England in the 1971 decision of the House of Lords in *Gallie v Lee* gave his opinion as follows: "The plea of *non est factum* is a plea which must necessarily be kept within narrow limits. Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed."[113]

The Ethiopian Civil Code attempts to extend such protection for illiterates or individuals with disability with safeguards such as verification of written contracts and witness testimonials. Article 1728 (3) of the Ethiopian Civil Code maintains the following: "The signature or thumb-mark of a blind or illiterate person shall not bind him unless it is authenticated by a notary, registrar, or judge acting in the discharge of his duties."[114]

---

[111] The author would make a modest claim here or rather a disclaimer that he is not a linguist, despite his proficiency in Amharic language.

[112] *Foster v Mackinnon* (1869) LRCP 704.

[113] *Saunders (Executrix of the estate of Rose Maud Gallie deceased) v. Anglia Building Society* (1971). Available at <http://archive.is/EHYN#selection-173.0-191.33> (Accessed on 14 December 2013)

[114] Civil Code of Ethiopia, Proc. No., 165, 1960, *Neg. Gaz.* Year 19, No. 2, Article 1728 (3) [Hereinafter, *The Ethiopian Civil Code*].

However, the issues here are whether effective procedural safeguards are in place for such provision; and most importantly, the legal awareness of the protected groups and their legal counsels in claiming such rights to seek protection. Furthermore, specific court cases must be surveyed and studied by legal scholars pertaining to legally protecting illiterate individuals and individuals with physical and mental disability from onerous and unfair contractual obligations.

India, Singapore, Nigeria, Uganda, and Ghana have already adopted this legal doctrine. Nigeria enacted an "Illiterates Protection Act" in 1958, and revised it last in 1994 as the "Illiterates Protection Law."[115] Uganda also has the "Illiterates Protection Act" requiring verification of signatures, authenticity of documents, and including penalties for fraud or forgery.[116] Similarly, Ghana has legislated and revised such a law to protect illiterates.[117] Such and similar promising practices from elsewhere and at home shall be adopted and developed.

2. Promising Practices of Access to Justice

In an interesting study (for 16 months) about "legal consciousness" in Shanghai, China, Gallagher observed that people's attitude towards the law has changed and became positive since the Chinese "Rule of Law Project" began in the 1980s.[118] The general observation of the researchers of legal consciousness in China is that knowledgeable individuals who had direct experiences and basic skills to litigate mostly labor disputes in Chinese courtrooms share invaluable information with and provide services to people they know.[119] These litigants showed persistence in exercising their rights by "mobilizing the law" in the courtrooms, as well as using their legal knowledge and experience to extend legal assistance and providing legal advice as lay "legal experts" to friends, family members, co-workers, and neighbors.[120]

The basic legal knowledge offered at the Shanghai Legal Aid Center includes definitions and introduction of new legal terminology, how to collect and present evidence,

---

[115] Ayodele, G., 'An Overview of the Plea of Non Est Factum and Section 3 of the Illiterates Protection Law (1994) of Lagos State in Contracts Made by Illiterates in Nigeria,' *Nigerian Current Law Review*, 2007 – 2010, pp. 1-39.

[116] *Illiterates Protection Act 1918*, Chapter 18, Uganda Legal Information Institute. At http://www.ulii.org/ug/legislation/consolidated-act/78 (accessed on 14 December 2013).

[117] *Illiterates' Protection (Amendment) Act*, (Act 127), Judicial Training Institute of Ghana, 1963 at <http://jtighana.org/new/actdetails.php?id=51>. (Accessed on 14 December 2013)

[118] See Gallagher, *Supra* note 77.

[119] *Ibid.*

[120] *Id.*, pp. 785-8.

how and where to file complaints or lawsuits, how and where to seek alternatives to the formal legal process, identifying strategies in negotiating with employers, and a classroom demonstration of how to actively engage in the legal process.[121] Such knowledge, however, also comes with price since those individuals exhibit signs of frustration or what Gallagher referred to as "informed disenchantment" for the obvious reason that "the laws did not work in the ways they had expected and hoped."[122] Despite such frustration, many, particularly in labor disputes, continue to exercise their labor rights as "repeat players," not as "one shotters."[123]

There are promising practices for improving access to justice in other countries and in Ethiopia. These promising practices pertaining to enhancing legal awareness within the context of access to justice are observed in such countries as Venezuela, The Philippines, Sierra Leone, Indonesia, Armenia, Peru, Chile, Ghana, and Ecuador:[124]

- Citizen legal information centers inside court buildings in Venezuela;
- "Justice on Wheels Program" in which judges travel to rural areas by buses to provide legal information and adjudicate legal cases in the Philippines;
- Sierra Leone – Community-based paralegal programs for the poor; the legal advocacy and counsel, empowerment, legal awareness, distribution of manual for paralegals and volunteers, as well as through radio programs in Sierra Leone;[125]
- The Paralegal Advisory Service (PASI) in Malawi which has been providing basic legal training to paralegals who in turn assist and counsel clients since 2000;[126]
- Training paralegal volunteers; engage them in community legal education and dialogue on local and specific issues of common concerns in Indonesia;
- A successful television program entitled *My* Right focusing on legal awareness in Armenia;
- Public legal education in indigenous languages in Peru;
- Public awareness of the law with comic books and video games, particularly targeting children in Chile;
- Public education on the legal status of women in Ghana; and

---

[121] *Id.*, p. 802.
[122] *Id.*, p. 785.
[123] *Id.*, pp. 787-8.
[124] Maru, V., 'Access to Justice and Legal Empowerment: A Review of World Bank Practice,' *Hague Journal on the Rule of Law*, Vol. 2, 2010, pp. 264-73 [hereinafter, Maru, 2010].
[125] TIMAP For Justice in Sierra Leone, available at < http://www.timapforjustice.org/>; Maru, 2010, pp. 267-9.
[126] Paralegal Advisory Service Institute (PASI), available at http://pasimalawi.org/.

- One hundred (100) hour of skill training sessions on mediation in Ecuador;[127]

Similarly, assisting impoverished women (in poor female-headed households) to obtain birth and divorce certificates in Indonesia is worth noting.[128] The establishment of a Multi-Stakeholder Taskforce Forum (MSTF) comprised of community members, victims' advocate groups, judges, prosecutors, police, and NGOs, for specific issues such as domestic violence in Indonesia.[129] Organizing human rights clubs for high school students (as it is common in many school districts in the United States) is also valuable in enhancing awareness among the youth in Ethiopia.

Although on a smaller scale, the public legal awareness work done by the Center for Human Rights at Addis Ababa via radio programs, brochures, and face-to-face literacy sessions is a worthwhile endeavor. According to the Center, between December 2012 and November 2013, "[T]hirty-three radio programs, each 60 minutes long, have been produced. These programs address issues relating to women's rights, employment relations, pension rights; pro-poor housing laws; rights of persons with disability and child rights."[130] The development and expansion of such worthwhile programs on a larger scale contributes to effective access to justice. As Rawls cogently sums up the rule of law in a constitutional democracy: "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations"[131]

Conclusion

The declarative statements on access to justice in international and regional instruments, in constitutional provisions, and in national policies create a framework of normative principles. The challenge, however, is always how this can be translated into practice. The main concern is obviously how effective justice will be for socio-economically disadvantaged citizens. This chapter covers the significance of the awareness of individuals about their basic legal rights, and the public knowledge of how the legal system is structured and functions, as well as how they can navigate through the legal process. Most importantly, socio-economically disadvantaged individuals should have the capacity or competency to claim and exercise their due process rights *qua* human rights. This study reveals basic legal knowledge is imperative

[127] Maru, *Supra* note 124, p. 273.
[128] 'Increasing Access to Justice for Women, the Poor, and Those Living in Remote Areas: An Indonesian Case Study,' *Justice for the Poor*, Vol. 6, No. 2, 2011.
[129] *Ibid.*
[130] Center for Human Rights, *Progress Report*, *Supra* note 39, p.7.
[131] Rawls, *Supra* note 13, p. 235.

and requisite for effective access to justice. Even with the availability of free legal advice and services, the key element in accessing them is the basic knowledge and capacity of the least advantaged beneficiaries as to how and where to seek such legal assistance. Accordingly, as suggested in this chapter, public policies and services to be provided in all the justice sectors should continually be accommodative of internal reforms and selective adaptation of promising practices from other countries.

Disability and Access to Criminal Justice System in Ethiopia

Muradu Abdo*

Abstract

The criminal justice system of Ethiopia is not fully geared towards addressing the concerns of persons with disabilities. Both procedural and substantive criminal laws are inadequate to address their special needs. And such inadequate laws lack specificity in addressing the needs of the disabled. This paper suggests proper enforcement of the existing laws, their revision to address existing gaps, and use of legal education.

Key words: disability, access to justice, criminal justice system, Ethiopian laws

> *It is all a matter of breaking down negative perceptions… You have to look at the person and not at the disability. That requires a tremendous change of perception in everyone.*[1]

Introduction

Persons living with disability are those with long-term physical, mental, intellectual or sensory impairments that hinder their full and effective participation in society on equal basis.[2] National and international legal instruments bestow upon this category of the world's population certain legal rights.[3] Rights, as opposed to grants, are entitlements intended to level the playing field for people living with disability. These rights of people with disabilities apply to civil and criminal justice systems. A criminal proceeding normally begins with police investigation of the commission of a criminal offense. A criminal proceeding is a process with various distinct stages which may go all the way to the highest court of the land.

---

* LL.B and LL.M., Assistant Professor of Law, School of Law, Addis Ababa University, muradu1@yahoo.co.nz. This contribution is a revised version of a research conducted for the ILO under the ILO/Irish Aid Partnership Program between September 2009 and September 2010.

[1] United Nations Enable, 'Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights' available at: <http://www.un.org/disabilities/default.asp?id=476>. (Last accessed August 22, 2014).

[2] UN Convention on the Rights of Persons with Disabilities, 2006 [Hereinafter Disabilities Convention]. For the preliminary profile of persons living with disability in Ethiopia, see Japan International Cooperation Agency Planning and Evaluation Department, *Country Profile on Disability Federal Democratic Republic of Ethiopia*, 2002. Available at: <http://siteresources.worldbank.org/DISABILITY/Resources/Regions/Africa/JICA_Ethiopia.pdf> [last accessed July 27, 2013].

[3] *Ibid*.; The Constitution and international human rights instruments ratified by Ethiopia also give recognition to the rights of persons living with disability, even if such recognition lacks explicitness. Ethiopia enacted a statute in 2008 which gives protection to persons with disability in work places. For an overview and interpretation of this law on the right to employment of persons with disabilities, see Seyoum Y., 'Towards Inclusive Employment: The Features and Impact of Proclamation 568/2008 on the Employment of Persons with Disabilities', *Journal of Ethiopian Law*, Vol. 24 No. 1, 2010.

At various stages of a criminal proceeding, persons with disability participate as suspects, as witnesses, as crime victims, and as family members. In these various capacities, people living with disabilities will inevitably face actors in a criminal justice system such as police officers, defense lawyers, prosecutors, court registrars, court clerks, judges, and prison officials. People living with disabilities also come in contact with the institutions themselves (police stations, courts and prosecution); they further experience the application of criminal law. If any of these elements of the criminal justice system are inaccessible to people living with disabilities, their rights can easily be adversely affected. As compared to an unsuitable civil proceeding, a criminal proceeding insensitive to the legitimate concerns of this category of people leads to more serious adverse consequences.

The gravity of effects of the criminal justice system on people living with disabilities as well as lack of research in this area in the Ethiopian context has attracted the attention of this researcher. The objective of this research is to assess whether criminal proceedings are accessible to people living with disabilities in the Ethiopian legal system. To this end, the study considers key elements of the administration of criminal justice in Ethiopia. This assessment is made taking into account the various dimensions of access to justice. The conceptual framework of the research hinges on the notion of access to justice based on review of literature and of the existing criminal justice system of Ethiopia. In particular, the research: analyzes the manner in which various laws of the country conceptualize the definition of disability with the view to identifying and examining the approach to disability that Ethiopian laws have adopted.

The chapter assesses the Ethiopian legal and policy framework to see if the substantive and procedural criminal laws of Ethiopia are compatible with the special needs of people living with disability. It then identifies gaps in the substantive and procedural criminal law of the country in the protection of the legitimate interests of people living with disability. It examines the role of the legislature and the courts in making the criminal justice system of the country accessible to persons with disabilities.

Specifically, the chapter discusses interfaces between persons with disability who are estimated to be between 7 and 10 percent of Ethiopia`s population[4] and her criminal justice

[4] See Japan International Cooperation Agency, Planning and Evaluation Department, *Country Profile on Disability*, 2002, pp. 5-8(on file with the author). The Addis Ababa population stands today at 2, 738,240 (see Federal Democratic Republic of Ethiopia Population Census Commission, *the Summary and Statistical Report of the 2007 Population and Housing Census Results*, 2008, p. 114). This census report is mute on the percentage of persons living with disabilities. There were estimates that there are 5 million persons with disabilities in Ethiopia in 2003. According to the Population and Housing Census of 1994, of a total population of 53,477,265, there were 988, 849 people with disabilities in Ethiopia, that is, 1.85% of the

system in the course of discharging their duty to aid justice which is manifested through crime reporting, testifying and appearing before criminal proceedings as a plaintiff-defendant. The chapter discusses the following as instances undermining the rights of disabled persons: conflicting models of disability underlying the country`s legal framework pertaining to disabled persons, lack of official publication of the full text of pertinent international treaties and conventions in relevant court languages, lack of specificity, clarity and completeness in the relevant rules; lack of sign language interpreters that creates, for instance, difficulty on the part of courts to hear complaints from persons with speaking disabilities about their conditions in prison and at times leading to an indefinite jailing of suspects with hearing and speaking disabilities on the ground that the police could not undertake investigation for lack of a sign language interpreter and disability unfriendly infrastructures to and from criminal justice system institutions including physical courthouse environment and lack of training to judges and other relevant actors on the special needs of persons with disabilities.

The chapter focuses on criminal justice system and more specifically on criminal proceedings, not on the entire legal system. It dwells upon criminal laws with nation-wide applicability as well as criminal justice institutions with similar jurisdictions. The study has not opted to select one group of people living with disability, such as the visually impaired or persons with hearing impairments; rather it covers the entire spectrum of people living with disability. While an in-depth study of the impact of disability upon persons with specific disabilities would be an optimal approach, such a study was not feasible because of resource limitations.

The assumption of the chapter is that on the basis of the equality clause[5] of the FDRE Constitution (the Constitution), the Ethiopian state has the duty to make its criminal justice

---

population; which means 2% of the total population; 23.34% leg impairment; 20.37% partial blindness;13.28% hearing and speech impairment; 11.91% blindness; 8.8% hand impairment; 6.48% mental disability; 3.48% leprosy; 3.22% multiple disabilities; and 3.48% other disabilities (JICA Report). However, this figure is considered very low and hence led to a baseline survey in 1995, which shows a 2.95% prevalence out of 50,000,000 population and indicates the highest incidence of disability in Addis Ababa with 17.7% of the households with persons with disabilities. However, the base line study admits that the figures obtained in the survey to be "suspiciously low in a country where there was a long standing civil war, periodic episodes of drought and famine is frequent and poverty is rampant". The Continental Plan of Action for the Africa Decade of Persons with Disabilities estimated that persons with disabilities in Ethiopia represent 7.6% of the population. (African Union, *Continental Plan of Action for the Africa Decade of Persons with Disabilities 1999-2009*, 2002). There are different reasons for the differing estimates of the number of disabled persons in Ethiopia: for example, a study undertaken by Japan International Cooperation Agency (JICA) on Disability Profile in Ethiopia, states, "In Ethiopia, some associate disability (handicap)with spiritual phenomenon or the evil, and do not let disabled persons to go out in public. This leads to families hiding disabled family members which in turn leads to inaccurate information and statistics on disabilities" (*id.*, pp. 3-4).

[5] Article 25 of this Constitution (Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. no. 1/1995, *Fed. Neg. Gaz.*, Year 1, no. 1) provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall

system accessible to people with disabilities, the latter being the right bearers. In specific terms, the state is constitutionally obliged to identify and remove, to the extent possible, the impediments (i.e., physical, legal as well as communicational barriers) to the enforcement of the right of disabled persons to make use of the criminal justice system. A corollary of this is that failure on the part of the state to make the criminal justice system accessible to people with disabilities should be viewed as disability-related discrimination. However, the claim made against the state to make the criminal justice system accessible to people with disabilities should be subject to the principle of reasonable accommodation, which in the context of criminal justice means an accommodation which is not unduly costly or does not fundamentally alter the nature of processing cases in the criminal justice system.

The chapter draws on mixed methodology. To the extent that the study dwells on the legal framework in the field of disability and access to criminal justice system, it follows the tradition of legal positivism. Legal and policy documents as well as court cases are relied upon. The chapter goes beyond mere legal positivism to include some empirical evidence.

Section 1 describes concepts of access to justice, of Ethiopia's criminal justice system, and of disability. Section 2 documents theoretical perspectives on issues of disability, followed in Section 3 by a survey of national and international legal-policy regimes covering the rights of people with disabilities in criminal justice systems including: The Criminal Code (2004), The Criminal Procedure Code (1961), The UN Convention on the Rights of Persons with Disabilities, The Criminal Justice Policy (2011) and The Comprehensive Justice System Reform Program Baseline Study(2005). Section 4 outlines the role of criminal justice system actors in making the system accessible to persons with disabilities. Conclusion and recommendation follow.

1. Conceptual framework

Three concepts which are central to this chapter, namely access to justice, criminal justice system and disability, are described in that order.

1.1 Access to Justice

guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status'. Article 37 of the Constitution, which relates to access to justice is interpreted, based on the minutes of the Constituent Assembly, covers any matter as opposed to the qualified term justiciable matter. See also Birissa D., 'The Right of Access to Justice of Persons with Disabilities in Ethiopia: The Law and the Practice', Addis Ababa University, Faculty of Law Library, 2009, LL.B Thesis, Unpublished, pp. 64-65.

Accessibility relates generically to the ease with which a person can use something such as a physical structure or a service.[6] In this wide sense, accessibility means the capacity of an environment, object or tool or information to be used by all persons as safely, comfortably and independently as possible, which avoids limitations and barriers of human beings to move freely in an environment.[7] Accessibility may refer to the degree to which legal information is adequately provided to the target population. There are two approaches to access to justice.

The first is a broad approach, which sees access to justice as a question of social, economic, and environmental justice aimed at equalizing all citizens of a country.[8] Part of this broad view of access to justice is access to legal services and to other services that are provided by the state.[9] The United Nations Development Program views access to justice as a basic human right and as an indispensable means to combat, *inter alia*, discrimination on the basis of disability.[10] The meaning that UNDP attaches to access to justice is much broader than improving an individual`s, such as disabled persons`, access to court and guaranteeing legal representation. It extends to ensuring that legal and judicial outcomes are just and equitable.[11] The U.N. Convention on the Rights of Persons with Disabilities also subscribes to a broad conception of accessibility in stating that the entire justice system of a member state shall be made usable by people with disabilities, including court services.[12]

The second and more restrictive conception of access to justice refers to the availability of the different dimensions of a given legal system to the citizenry. This paper seeks to single out, as the title indicates, an aspect of the second view of access to justice, namely the availability of the different elements of the ordinary criminal justice system to people with disabilities.

1.2 The Criminal Justice System

Conventionally, state criminal justice system is defined in terms of its components to include the police, the prosecution, the courts and prisons. This is an actor-centered description. It is a restrictive definition because it leaves out essential elements that make up

---

6 Web-Dictionary <wordnetweb.princeton.edu/perl/webwn> (accessed March 17, 2010).
7 As quoted from Eduardo Alvarez in Birissa Diribi, *supra* note 5 at 4.
8 See UNDP, *Access to Justice: Practice Note*, 2004, pp. 3-4. Available at: http://www.undp.org/governance/docs/justice_pn_en.pdf (Last accessed March 17, 2010).
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 See the combined reading of the Preamble (v), Arts 2, 3/f, 4/h, 9, 12, 13, 20, 21 and 24 of Disabilities Convention.

the criminal justice system of every modern state. For example, it leaves out law schools which train would-be prosecutors, judges and defense lawyers. This narrow definition leaves out the substantive and procedural criminal laws including law of evidence applied by the criminal justice system's actors. Also excluded from the purview of a narrow definition of the criminal justice system are legislators, defense lawyers, and the context in which the criminal justice system is implemented.

In order to remedy these deficits in the orthodox notion of a criminal justice system, this paper comes up with what this researcher calls a system-based approach that conceptualizes the state criminal justice system as encompassing the substantive and procedural criminal laws including evidence law, the actors, and the structures. The actors include law students, police, prosecutors, defense lawyers and judges whereas the "structures" means the institutional settings of legislatures, law schools, courts, police, prosecution and prisons.

The paper conceives accessibility of the criminal justice system as the ease with which people with disabilities can reach and make use of the substantive and procedural criminal laws including the services of the criminal law institutions. This system-based characterization of accessibility of criminal justice system has many facets. For example, accessibility of criminal law to disabled persons is an aspect of this notion of accessibility, which means whether the criminal justice system offers an opportunity to a person with disability to know what the law is and to make use of it. Availability, clarity, and completeness of the criminal laws and policies are within the purview of this way of looking at accessibility. Another aspect of this conception of accessibility is attitudinal accessibility, meaning the way the actors in the criminal justice system view people with disabilities in the course of discharge of their official responsibilities. Still another aspect of this notion of accessibility of the criminal justice system is the accessibility of the physical infrastructures. This system-based conception of accessibility of the criminal justice system to people with disabilities may be used to judge the quality of service they are getting.

1.3 The Notion of Disability

The term disability does not connote a homogenous class of people; it is a diverse concept for it subsumes several different categories and sub-categories of people. Even within a given class of disabled people such as those living with hearing impairments, there is a range of disability. Disability can be defined in terms of the severity of its effect or of cause or of body part affected or of duration or a combination of these factors. A person with

disability is conceived in this chapter as any person, being of criminal law age,[13] with long-term or short term physical, mental, intellectual or sensory impairments.[14]

2. Three Approaches to disability

The *non-rights based approach*, the *social approach* and the *social and beyond approach* are three perspectives which explain disability. These approaches underlie laws and policies regarding this class of persons. In the absence of a theory that specifically articulates the way criminal justice system should view persons with disabilities (except the theory of insanity) these three approaches to disability are treated here with the hope to shed light on the issue of disability and access to criminal justice system. The common thread that ties together the three approaches to disability is the question: what disables people? This section explains these various approaches, and it raises a related issue to be considered in the next part, which is the type of approach that has influenced the thinking behind existing national and international laws concerning people with disability.

2.1 Non-Rights-Based Approach to Disability

This sub-section categorizes four models, that is, the charity, moral, medical and functional models of disability, under an umbrella of *non-rights based approaches* to disability because, though the causes of disability might differ in each case, these four

[13] See Arts 52-56 of the Criminal Code of Ethiopia (Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Fed. Neg. Gaz*., Proc. No.414, 10th Year, No.58.), which classify persons into age categories for the purpose of criminal responsibility as below 9; between9-15 (inclusive?); between 15 and 18 (inclusive?); and above 18 (inclusive?).

[14] This working definition is a modified version of Article 1 of the Disabilities Convention. The Convention does not include a definition of 'disability' or 'persons with disabilities' as such. However, elements of the preamble and Article 1 provide guidance to clarify the application of the Convention. The preamble recognizes that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. Several elements of these provisions are relevant to highlight. 'First, there is recognition that "disability" is an evolving concept resulting from attitudinal and environmental barriers hindering the participation of persons with disabilities in society. Consequently, the notion of "disability" is not fixed and can alter, depending on the prevailing environment from society to society. Second, disability is not considered as a medical condition, but rather as a result of the interaction between negative attitudes or an unwelcoming environment with the condition of particular persons. By dismantling attitudinal and environmental barriers - as opposed to treating persons with disabilities as problems to be fixed - those persons can participate as active members of society and enjoy the full range of their rights. Third, the Convention does not restrict coverage to particular persons; rather, the Convention identifies persons with long-term physical, mental, intellectual and sensory disabilities as beneficiaries under the Convention. The reference to "includes" assures that this need not restrict the application of the Convention and States parties could also ensure protection to others, for example, persons with short-term disabilities or who are perceived to be part of such groups.'' See UN Enable, *Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities*, available at: <http://www.un.org/disabilities/default.asp?navid=23&pid=151#iq7> (Accessed: December 4, 2009).

perspectives conceive treatment to be accorded to people with disabilities as grants rather than rights. Each model thus is treated briefly below.

The *charity model* considers people with disability as helpless victims who need "care" and "protection". In order to meet the needs of people with disability, the model resorts to the goodwill of benevolent humanitarians for "custodial care" of this class of people. In addition, the charity model imposes social responsibility to members of the society to take good care of people with disabilities. Such responsibility emanates from individual acts of generosity. Assistances arising out of the charity model compromise the entitlements of the "grantees" because charity replaces entitlements. Hence, 'the charity model creates legions of powerless individuals.'[15]

The *moral model* on the other hand attributes disability either to a supernatural being or a curse from ancestors.[16] This model attributes disability to sins or immoral conduct committed by parents or ancestors of people with disability, leading to self-hatred and ostracism.[17] According to this model, human beings are passive actors and have nothing to do with the cause of the disability. The *moral model*, like the charity model, results in non-rights based treatment of people with disability.

The *medical model*, considers disability as an individual, bio-medical or functional problem.[18] The medical model invokes the images of disease and disorder. These features of people with disabilities are abnormal, but may be prevented or ameliorated through medical treatment. The medical model centers on biological factors. The medical model focuses on preventing or bringing the individual's experience in line with "normalcy."[19] The medical model sees disability as any loss or abnormality of psychological or anatomical structure or function; disability resides in the body of the person; the person is equated with a medically sick person; disability can be cured with medical attention.[20] In its extreme form, this model may treat persons with disability even as undeserving or dangerous; this association of disability with danger underpins the custodial model of care.[21]

---

15 Indian National Human Rights Commission, *Disability Manual*, (2005) available at <http://nhrc.nic.in/Publications/Disability/chapter02.html>, viewed on September 15 2010).

16 Oliver, M., 'Theories of Disability in Health Practice and Research', *British Medical Journal*, Vol. 317, 1998, pp.1446 *et seq*; Tekalign G., 'Vulnerability of Persons with Disabilities to HIV Infection: The Case of the Blind, the Deaf and the Physically Disabled in Gullele Sub-City of Addis Ababa', August 2007, Graduate School of Social Work, Addis Ababa University, Unpublished Thesis (on file with the author).

17 Barnes, C., 'The Social Model of Disability: Valuable or Irrelevant?' *in* Watson, N., Roulstone, A. and Thomas, C. (eds.), *The Routledge Handbook of Disability Studies*. Routledge, London, pp. 12 *et seq.*

18 *Ibid*.

19 Disability Manual *supra* note 15.

20 *Ibid*.

21 *Ibid*.

Finally, in the *functional model*, the difficulties experienced by a person with disability are regarded as arising from a 'mismatch between the individual's biological condition and functional capacities on the one hand and environmental, situational factors on the other'.[22] This model tends to emphasize the role of providing training and support services with a view to making the individual as functional as possible. This model has been instrumental in establishing rehabilitation services throughout the world and the development of assistive technologies.[23] In spite of its remarkable progress compared to the *charity* and *bio-centric models*, this model expects a person with disability to fit into the environment through the use of compensatory skills and assistive technologies.[24] People with disabilities need to adjust themselves to the 'normal environment'; the environment is not required to adjust to the conditions of people with disabilities.[25] In other words, the burden is on the individual to fit within the system, not the system to include the individual.[26]

The four models outlined above share a number of commonalities. The non-rights-based models of disability lead to rehabilitation. The *moral* and *medical* models see people with disability as those in need of services from rehabilitation professionals who can provide training, therapy, counseling or other services to make up for the deficiencies caused by their being disabled. These two perspectives have guided and dominated clinical practice with the resulting assumption that both the problems and solutions lie within people with disabilities rather than within society; it is the impairment itself that causes the limitation, without recognizing the role of the social environment in disabling persons with impairments.[27]

The non-rights-based approaches to disability are replete with weaknesses. They assume that people with disabilities are always in need of help since they cannot support themselves. Their case is an issue of compassion, not that of entitlement. It is as if all persons with disabilities are afflicted with maladies. The *medical model*, for instance, has the effect of putting persons with disabilities under the exclusive care of doctors, rehabilitation professionals, psychologists and social workers who would help persons with disabilities to adjust to the environment structured to suit non-disabled persons. Dependency is the consequence of the *medical approach* to disability. The non-rights-based approaches also suffer from a fallacy in that the problem of a person with disability in one part of their body is extended to their entire body; a problem with part of their body, which may have social roots,

[22] *Ibid.*
[23] *Ibid.*
[24] Shakespeare and Watson, *infra* note 29.
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*

is extended to the person as a whole. Further, these non-right-based models are critiqued on the ground of being reductionist because they link the issue of disability solely to a single factor, namely to the individual person with disability. Finally, such non-rights-based perspectives subscribe to the following two myths embedded in societal psyche:

> The first myth is the perception that people with disabilities are ''suffering''. Rather than extending legal rights and protections, as with other oppressed groups, a societal response would be to extend ''charity''. The second myth is that people with disabilities lack the ability to make choices or determine for themselves what is best for them in all spheres of life (physical, mental, emotional, spiritual, political, sexual, and financial). [28]

2.2 The Social Approach to disability

The social approach locates the experience of disability in the social environment, rather than in the impairment of the person, urging us to take actions to dismantle the social and physical barriers to the participation and inclusion of persons with disabilities; it reinterprets disability as social oppression, and radically refocuses the agenda away from cure, treatment, care and protection to the acceptance of impairment as positive dimension of human diversity, and rejection of a social norm that results in exclusion.

It is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. To understand this it is necessary to grasp the distinction between the physical impairment and the social situation, called 'disability', of people with such impairment. Thus we define impairment as lacking all or part of a limb, or having a defective limb, organs or mechanism of the body and disability as the disadvantage or restriction of activity caused by a contemporary social organization which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. [29]

---

[28] Tyiska, C., **'**Myths about the Disability Community**:** Working with Victims with Disabilities', an OVC Bulletin, <http://www.trynova.org/victiminfo/ovc-disabilities> (accessed, July 27, 2009); here it is stated: 'An even stronger stigma attaches to people with disabilities. Our society is not socialized to integrate differences in abilities as a part of our perception of "normality". The cultural norms for functioning include good hearing and vision, physical independence and mobility, mental alertness, the ability to communicate primarily through the written and spoken word, and physical attractiveness. Deviations from those norms tend to frighten those in the "able-bodied majority" who define the concept of normal abilities.'

[29] Shakespeare, T. and Watson, N., 'The Social Model of Disability: An Outdated Ideology?' *Research in Social Science and Disability*, Volume 2, 2002, p. 10.

Besides, Abichandani states:

> In recent years, however, the approach has indeed been of a broader understanding of disability, which recognizes that the circumstances of people with disabilities and the discrimination they face are socially created phenomena and have little to do with the impairments of people with disabilities. This is a critical reorientation of perspective which has important implications for the way in which law and policy in relation to disability are developed. It is recognized that problem does not reside in the person with a disability, but results from the structures, practices and attitudes that prevent that individual from exercising his or her capabilities.[30]

The significance of the shift in perspective may be illustrated by the following example.

> It is the stairs leading into a building that disable the wheelchair user rather than the wheelchair. It is defects in the design of everyday equipment that cause difficulties, not the abilities of people using it. It is society's lack of skill in using and accepting alternative ways to communicate that excludes people with communication disabilities. [31]

The social model requires action from both the society and persons with disabilities themselves. If the key problem is a set of social barriers, then society must dismantle such barriers through educational campaigns and anti-discrimination legislation, not mainly through the strategy of medical cure or rehabilitation. The second impact, which seems to be valid in the context of western societies, of rethinking disability is:

> Suddenly, [disabled] people were able to understand that they weren't at fault: society was. They didn't need to change: society needed to change. They didn't have to be sorry for themselves: they could be angry…disabled people began to think of themselves in a totally new way, and became empowered to mobilize, organize, and work for equal citizenship. Rather than the demeaning process of relying on charity or goodwill, disabled activists could now demand their rights.[32]

As the non-rights-based models locate issues of disability within the individual with disability, the social construct approach takes the other extreme position in shifting the issues towards the social environment, meaning adverse social attitude towards persons with disabilities and physical and communicational impediments. The social construct model treats the situation as if the question of disability has nothing do with the subject. It is the society which is entirely accountable for disability and has nothing do with impairment. The

---

[30] See Justice RK Abichandani *infra* note 124.
[31] Office of the Deputy President of South Africa, *South African Integrated National Disability Strategy*, White Paper, 1997.
[32] See Shakespeare and Watson, *supra* note 29, p. 11.

social model either downplays or disregards impairment of body or mind. In this connection, it is stated, by way of a critique, that:

> Experientially, impairment is salient to many…impairment is part of our daily personal experience, and cannot be ignored in our social theory or our political strategy. Politically, if our analysis does not include impairment, disabled people may be reluctant to identify with the disability movement, and commentators may reject our arguments as being 'idealistic' and ungrounded. We are not just disabled people, we are also people with impairments, and to pretend otherwise is to ignore a major part of our biographies.[33]

The social model claims a rather clear-cut dichotomy between two terms: impairment (the biological) and disability (social), impairment being an attribute of the individual body or mind, and disability as a relationship between a person with impairment and society. Gleeson, by way of a critique on the social model, says:

> There is danger in taking this definition in its entirety since everybody has his or her own peculiar set of capabilities and limitations that informs the social experience of the individual. Individuals encounter different and unique social realities based on what they are capable to do; therefore, we should realize that society can create different barriers to all people disabled and non-disabled alike.[34]

2.3 The Social Approach and Beyond

The third perspective is the social and beyond approach. Shakespeare and Erickson assert that an adequate social theory of disability should include all the dimensions of disabled people's experiences: bodily, psychological, cultural, social, political, rather than claiming that disability is either medical or social.[35] It is also said:

> [S]uch a perspective is a crucial part of our demand for our needs to be treated as a civil right issue. However, there is a tendency within the social model of disability to deny the experience of our own bodies insisting that our physical differences and restrictions are entirely socially created. While environmental barriers and social attitudes are [a] crucial part of our experience of disability and do indeed disable us, to suggest that this is all to it is to deny the personal experience of physical and intellectual restrictions of illness and of the fear of dying.[36]

This third perspective on disability suggests a middle ground; as the social context matters in the definition of disability so is the impairment element. The non-right based

---

[33] *Id.*, p. 15.

[34] Gleeson quoted in *ibid.*; Shakespeare and Watson *supra* note 29, pp. 11-12.

[35] Shakespeare T. and Erickson, M., 'Different strokes: beyond biological essentialism and social constructionism' *in* Rose S., and Rose, H. (eds.), *Alas Poor Darwin: Arguments Against Evolutionary Psychology*, Random House, London, 2001, quoted in *ibid.*, Shakespeare and Watson *supra* note 29.

[36] Morris, J., *Pride Against Prejudice: Transforming Attitudes to Disability*, New Society, Philadelphia, 1991, p. 10.

approaches to disability, for example, both the functional model and the medical model do have grains of truth to take into account in handling disability issues. In the social construct and beyond theory, impairment has something to contribute to the situation of the person with disability and so is the social attitude towards impairment. This same third approach to disability downplays the strict impairment-disability dichotomy and it envisages their merger. This middle ground shares with the social model of disability the capital point that one major strategy to level the playing ground for persons with disabilities is to insist on the recognition and enforcement of their human rights.

The social approach and beyond thinking should not be taken as immune from criticisms even if it gives us a better picture of the state of persons with disabilities. For one, it is not a perspective of its own; it stands on the oldest theory of disability (the non-rights based approaches) and relatively new doctrine of disability, namely the social approach to the issue; and for another, the social theory and beyond does not tell us the appropriate mix between the non-rights-based approaches and the social approach. It merely points to us the relevance of the two approaches in our thinking about disability.

3. Legal and Policy Framework

To which of the three approaches to disability outlined above do Ethiopian laws and policies in general and the criminal laws in particular gravitate? Are the criminal laws of the country and other laws and policies ancillary thereto specific and comprehensive enough to cater to the special needs of persons with disabilities in their contacts with the criminal justice system? What is the current legal and policy trend in the country in respect of the treatment of people with disabilities in the criminal justice system? In order to address these questions, the sub-sections that follow considers the various laws and policies of Ethiopia, both in their past and current state, which have bearing on the accessibility of the criminal justice system to persons with disabilities. This is followed by examination of pertinent international human rights instruments including declarations and resolutions.

3.1 National Laws and Polices

Apart from the equality clause, the Revised Constitution of 1955 did not contain any provision dealing with persons with disabilities.[37] Yet a statute issued under the 1955 Revised

[37] See Art 37 which provides that: No one shall be denied the equal protection of the laws. Also, Article 38 stated: there shall be no discrimination amongst Ethiopian subjects with respect to the enjoyment of civil rights. The Revised Constitution of Ethiopia, Proc. 149/1955, *Nega. Gaz.* 15th Year, No. 2.

Constitution seemed to endorse the medical-charity models of disability.[38] This same statue established what was then called the Rehabilitation Agency for the Disabled with the aim to 'foster and facilitate through direct assistance and extension services increasingly effective participation of private charitable organizations engaged in the rehabilitation (physically and mentally) of the disabled' who were assimilated to infants and senile persons.[39] Another law passed to implement the 1955 Revised Constitution suggested the charity model in stating that: 'Deaf-mute, blind persons…who, as a consequence of a permanent infirmity are not capable to take care of themselves or to administer their property may invoke in their favour the provisions of the law which afford protection to those who are insane."[40]

Article 22 of the PDRE Constitution uses words showing its subscription to the medical-charity approach to disability.[41] The Transitional Government of Ethiopia Charter committed itself to the principle of equal treatment of human beings by embracing the Universal Declaration of Human Rights.[42] A law enacted under this transitional period appears to have subscribed to the medical-charity view of disability in defining a disabled person as: "A person who is unable to see, hear or speak or suffering from injuries to his limb or from mental retardation, due to natural or man-made causes."[43] The FDRE Constitution, too, followed suit when it used, under Article 41(5), the phrase: 'The state shall…allocate resources to provide rehabilitation and assistance to the physically and mentally disabled…' [44]

When considering subsidiary legislation, the first formal criminal law of Ethiopia, issued in 1930, states that 'a madman shall be treated differently than a grown person of full understanding..; punish offenders to the extent, not of the gravity of the offense, but of the

[38] See Art 5, Order of Establishment of the Rehabilitation Agency for Disabled, Proc No. 70/ 1971, *Neg. Gaz.* Year 30th No. 16, which provides: any person who, because of limitations of normal physical or mental health, is unable to earn his livelihood and does not have anyone to support him; and shall include any person who is unable to earn his livelihood because of young or old age; this order had in mind in defining the term for the specific purpose of rendering assistance to a person who falls within the purview of such class. The Amharic rendition of this definition evokes the image of total incapacitation of persons with disabilities: it in part runs: "ድኩም" ማለት ሠርቶ ለመኖር የማያስችል የአካል ወይም የአእምሮ ጉድለት የደረሰበትና…

[39] *Id.*, Article 2 cum Article 5 cum the preamble.

[40] See Art 340 of the Civil Code of Ethiopia, Proc. No.165/1960, *Neg. Gaz.* 19th Year No. 2.

[41] This Article states: 'The state and society shall provide special care for those disabled on the course of defending the sovereignty and territorial integrity of Ethiopia and safeguarding the revolution as well as the families of the martyrs.' The Constitution of Peoples` Democratic Republic of Ethiopia, Proc. No.1/1987, *Neg. Gaz.* 47th Year No. 1.

[42] See Art 1, Transitional Period Charter of Ethiopia, No.1, 1991, *Neg. Gaz.* 50th Year No.1.

[43] See Art 2/1 of The Rights of Disabled Persons to Employment Proclamation, Proc. No. 101/1994, *Neg. Gaz.* 53rd Year.

[44] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. no. 1/1995, *Fed. Neg. Gaz.*, Year 1, no. 1.

amount of their understanding.'[45] Article 19 of the 1930 Penal Code provides: 'the man who is unable to know properly the edicts and law of the Government by reason of his being mentally deficient through illness or any other cause shall have seven tenths remitted while Article 22 of the same says: 'If a man be mentally deficient, the punishment shall be light.' Article 276 of the same code also stipulates: 'A man who uses terms of abuse such as ''dumb, deaf, blind, hunchbacked' or any infirmity resembling these which is a judgment of God…''. The drafters of the first Penal Code of Ethiopia took this principle from the *Fetha Negast* (Law of Kings).[46]

The 1957 Penal Code contained numerous provisions regarding persons with intellectual disability. The principle the 1957 Code adopted in respect of criminal responsibility is that every adult physical person above fifteen[47] is presumed to be criminally responsible.[48] This presumption in favor of criminal responsibility can be rebutted by contrary evidence. This contrary evidence might be shown by establishing, at the time of the commission of the criminal offense, that the defendant suffered from full or partial irresponsibility.[49] The establishment of complete or partial irresponsibility by a person accused of a certain criminal offense might lead to complete or partial exoneration from criminal liability.[50] There are a number of provisions in the 1957 Penal Code which indicate its adoption of the medical model of persons with mental disability.[51] The Criminal Procedure Code of Ethiopia, enacted to implement the 1957 Penal Code of the country and which is still in force, is consistent with the latter in its dealing with persons with mental disabilities.[52] The

---

[45] The Ethiopian Penal Code of 1930, p. 5.

[46] Lowenstein, S., *Materials for the Study of the Penal System of Ethiopia*, Haile Sellassie I University, Addis Ababa, 1965, p. 59.

[47] See Arts 52-56 of the 1957 Penal Code of Ethiopia, Procl. No. 158/1957, *Neg. Gaz.*, *Extraordinary Issue No. 1* of 1957 [Hereinafter Penal Code]. See also Arts 52-56 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Fed. Neg. Gaz.*, Proc. No.414, 10th Year, No.58 [Hereinafter Criminal Code].

[48] *Id.*, Penal Code of Ethiopia, art 48(2).

[49] See Arts 48 – 49, Penal Code. See also Arts 48 – 49, Criminal Code for identical provisions on the issue of persons with complete or partial criminal responsibility.

[50] The conditions that must be proved for an accused to benefit from defense of lack of responsibility shall be: owing to mental disability of one sort or another, at the time of the commission of the crime, the accused was unable to either completely or partially understand the nature of his/her act or even if he/she understood the nature of his/her act he/she was not aware of the effects of his/her act or both. *Id.*, Criminal Code, Arts 48-49.

[51] See Arts 48-49, 133-136, 185, 208, 210, 80, 102 and 779, Penal Code.

[52] See Art 208 of the Criminal Procedure Code, Proc. No.185/ 1961, *Neg. Gaz.*, *Extraordinary Issue No. 1* of 1961, which states:
"*Art.* 208. - *Warrant in respect of irresponsible persons.* Where any person is found to be not fully responsible for his acts and the court decides that he be confined or treated in accordance with the provisions of Art. 134 or 135 Penal Code, the presiding judge shall by warrant under his hand in the fifteenth form prescribed in the Third Schedule to this code order that the accused be remanded to a suitable institution for confinement or treatment.'' See also Form XV of the same which guides the judge in placing a person with diminished responsibility under institutional care and treatment.

current Criminal Code of Ethiopia is identical to the 1957 Penal Code of the country in its treatment of offenders with intellectual disabilities and in its use of words describing persons with mental disabilities.[53]

The adoption of the non-rights-based approaches to disability, such as the charity or medical models, or hybrid of the two by various Ethiopian laws, does not mean that the country has adopted laws which explicitly discriminate against persons with disabilities because the principle of non-discrimination (of equality) has been fully entrenched in the constitutions since the enactment of the first written constitution of Ethiopia.[54] Subsidiary laws of the country also reflect the principle of equality, and to the treatment of like case alike.[55] Hence, never in the history of legislation in Ethiopia have persons with disabilities been singled out specifically and treated differently, to their detriment, on the basis of their disabilities.

In fact, the criminal law of Ethiopia imposes certain obligations, on all persons without distinction on basis of disability. The 1957 and 2004 penal codes of Ethiopia impose on all persons, with or without disabilities, one central duty, with two aspects, in relation to the administration of criminal justice. The first is the duty to assist. This duty requires that the commission of an offense must be reported when a person knows about the commission of a crime.[56] Second, the law imposes a duty to aid the administration of criminal justice by coming forward to testify about the details of the crime.[57] For example, Article 124 (1) of the

---

[53] See the wording of Articles 129-133 of this Criminal Code, which are almost identical to the wordings used in the 1957 Penal Code.

[54] See for example, the equality clause of the 1955 Revised Constitution of Ethiopia as well as the non-discrimination clause of the 1987 PDRE Constitution.

[55] See Art 4, Penal Code, which provides: "Criminal law applies to all alike without discrimination as regards person's social conditions, race or religion." For a virtually identical declaration of equality, though with some expansion of the list of possible grounds for discrimination, see Criminal Code, Article 4 which in part reads: "Criminal law applies to all alike without discrimination as regards persons, social conditions, race, nation, nationality, social origin, color, sex, language, religion, political or other opinion, property, birth or other status."

[56] Art. 438. - *Failure to inform the Law. ''*(1) Whosoever, without good cause: (a) knowing the identity of the perpetrator of, or of the commission of, an offence punishable with death or rigorous imprisonment for life; or (b) is by law or by the rules of his profession, obliged to notify the competent authorities in the interests of public security or public order, of certain offenses or certain grave facts, and does not do so, is punishable with fine not exceeding five hundred dollars, or with simple imprisonment not exceeding three months.(2) Nothing in this Article shall affect the provisions of Arts. 267 and 344.'' See also Articles 267 and 344, the 1957 Penal Code. For similar provisions see Articles 254, 335 and 443, Criminal Code.

[57] Art. 442. - *Refusal to aid Justice*: "(1) Whosoever, having been lawfully summoned to appear in judicial or quasi-judicial proceedings as a witness or accused person, interpreter, assessor or juror: (a) fails or refuses to appear without lawful excuse; or (b) having appeared, refuses, contrary to the law, to obey the court or competent judicial tribunal, is punishable with fine not exceeding five hundred dollars, or in the event of persistent and repeated refusal, with simple imprisonment not exceeding one month. (2) Where the offender pleads a false excuse, the court shall pass sentence of simple imprisonment within the limit laid down above, and impose a fine. (3) Where such person has fraudulently obtained exemption from the obligation placed upon him, simple imprisonment may be increased up to the general maximum prescribed by law, subject to

Criminal Code of Ethiopia assumes that prosecution and defense witnesses shall appear before a court of law to give their testimony. A court rule enacted over six decades ago states: "every witness shall give his testimony …in open court…"[58] Just as the criminal law burdens persons with obligations to report and testify, the law also bestows rights upon them. This is the fundamental right to defend oneself if accused of a criminal offense usually termed as the right to be heard.[59] In the course of discharging their duties and exercising their rights, persons with disabilities should, thus, come in contact with criminal justice system authorities.

The question is whether there are impediments to the exercise of these rights and to the discharge of these duties by persons with disabilities. What should happen to persons with disabilities if they fail to comply with their duty to aid the administration of criminal justice by failing to report the commission of crime? What if a person with a disability fails to appear in court of law when called upon to testify as a witness? Article 448 (1, a & c) of the current Criminal Code of Ethiopia provides 'for a simple imprisonment not exceeding two months or a fine not exceeding one thousand Birr' for such violation. But this punishment may not be imposed where the person fails to discharge her duty to aid justice for 'a sufficient cause' within the language of the provisions under consideration.[60]

One might argue that the sanctions should be avoided if the person with disability shows to the satisfaction of the court that her disability has prevented her from complying with her duty to assist justice. Or the person with disabilities, if accused of violating her duty to aid justice, might argue that lack of access to the criminal justice system because of disability prevented her from discharging her duty.

But both possible justifications would not aid persons with disabilities since the criminal law in place does not envisage their situation nor do they benefit the criminal justice system of the country. Utilitarian considerations aside, their exclusion from participating in the justice system might adversely affect their self-worth. A possible injustice ensuing from

---

the application of more severe specific provisions under which the fraud may fall, especially those concerning the use of a false certificate or forgery." See also Art. 30 of the Criminal Procedure Code: "(1) The investigating police officer may, where necessary, summon and examine any person likely to give information on any matter relating to the offence or the offender. (2) Any person so examined shall be bound to answer truthfully all questions put to him. He may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge." For analogous provision, see Article 448, Criminal Code.

[58] See Court Procedure Rules, Art 37, Legal Notice No. 33, 1943, *Neg. Gaz*. Year 3rd No. 2. This same legislation under Articles 3-34 and 72 provided for various sanctions which the courts might impose on a witness who without good cause fails to appear before a court to give his testimonies.

[59] See Art 127 (1), Criminal Procedure Code; Art 20(1), FDRE Constitution.

[60] *Ibid*.

the non-participation of persons with disabilities in the criminal justice system of the country can contribute to the undermining of the entire justice system.

The *Fetha Negast* (also called the 'Ethiopian Law of the Kings') which applied both to civil and criminal proceedings, assumed persons with disabilities to be incompetent to stand as a witness and doubted the veracity of what they would testify in a court of law.[61] It thus stated: '…a person who has lost his reason…shall not be made to take an oath. All those who testify as witnesses must be among those in whom one has confidence, neither poor in intelligence nor completely mad…anyone who is… deaf, dumb, buffoon…none of those who fall within these categories…shall testify as witnesses.' [62] As this quote suggests, the *Fetha Negast's* prohibition of persons with visual and hearing impairments from standing as a witness had something to do with doubting the reliability of what they might testify in a court of law, not just the competency of such persons to serve as a witness. The *Fetha Negast* assimilated this class of persons with disabilities to sinners, who are equally disqualified from serving as witnesses in any court proceedings.[63]

In criminal proceedings,[64] judges of the federal courts appear to take persons with disabilities such as visually impaired persons and persons with hearing or speaking or both impairments as competent witnesses. The Draft Evidence Rules which Ethiopian courts use currently (though based on their discretion) and practice[65] in the federal courts reveal that persons with disabilities are presumed to be competent witnesses unless they, like non-disabled persons, fall within the class of privileged[66] or morally incompetent witnesses,[67] which disqualifies them from testifying in a given case. The competence of a witness to testify means the ability to perceive a given set of facts by one or more of the sense organs, recollection of those facts, and the ability to provide a narrative. The rule upon which courts rely to permit such witnesses to testify is as follows:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by tender years, extremely old age, disease of the body or mind, or any other cause of the same kind. A

---

61 For a detail explanation of the *Fetha Negast*, see Sand, P., 'Roman Origins of the Ethiopian "Law of Kings" (*Fetha Negast*)', *Journal of Ethiopian Law*, Vol 11, 1980, 71.

62 Aba Paulos Tzadua (Tans.?), *The Fetha Negast (Law of the Kings)*, Faculty of Law, HSIU, 1968) as quoted in Robert A. Melin *infra* note 64, pp. 252-253.

63 *Ibid*.

64 Melin, R., *Evidence in Ethiopi*a, HSIU, Addis Ababa, 1972, p. 75.

65 Eshetu A., 'Competency of Ordinary Witnesses in Evidence: The Law and the Practice in Ethiopia', Addis Ababa University, Faculty of Law, Unpublished Thesis, 1998, pp. 34-42 and 75-76.

66 See Melin *supra* note 64, pp. 286-291. In a criminal proceeding, spouses are privileged, under some situations, not to testify against each other.

67 *Id.*, pp. 292-306 (stating the situations in which a person may be disqualified from testifying).

> person who is unable to speak shall not be incompetent and may give his evidence in any manner in which he can make it intelligible, as by writing or signs, but such writing must be signed and made in open court. Such signs may be interpreted by a person who understands such signs and who is sworn to interpret such signs accurately. Evidence given in accordance with this sub-rule shall be deemed oral evidence. A person who is temporarily disabled from testifying or from making his evidence intelligible as provided in this rule shall become competent upon termination of the disability. [68]

The presumption laid down in the draft rule above can be rebutted by any person who seeks to establish that a particular person with a disability does not have the competence to testify. The onus falls on the person who disputes the presumption in favor of competence.

One can easily appreciate the justifications behind this receptive attitude of the Draft Evidence Rules and the courts in making no essential distinction between non-disabled persons and persons with disabilities when it comes to witness capacity. One reason arises from the appreciation of the fact that disability does not necessarily mean complete loss of function of the organs of a person with a particular impairment. Further, within various forms of disabilities, there are degrees of disability. A person with hearing difficulty can perceive facts via her eyes. The fact that she is visually impaired does not mean that she has lost all of her sight. Visual impairment can be put in a spectrum; for example, a visually impaired person can perceive facts through her other sensory organs such as ears or tongue. A person categorized as a visually impaired person may even be in a position to perceive certain facts through her eyes at a certain distance. For example, the American Medical Association said in relation to visual impairment:

> Partial sightedness is related to a person who is partially sighted, or has a serious loss of sight but not blind. ..a person who cannot clearly see how many fingers are being held up at a distance of six meters or less (even when wearing glasses or lenses); also, blindness-is the term that stands to a person who is blind and has severe sight loss and is unable to see clearly how many fingers are being held up at a distance of three meters or less (even when wearing glasses or lenses). However, they may still have some degree of vision. [69]

Moreover, cross-examination can test the ability of the witness to observe, recollect and narrate facts. A blanket prohibition of persons with disabilities from testifying would deprive this class of people of their civil rights and as well as jeopardize the rights of all parties to the proceeding.

---

[68] See Art 92 of the Draft Evidence Rules of Ethiopia in Melin, *supra* note 64, p. 440.
[69] See Eshetu, *supra* note 65, pp. 18-20.

Despite the foregoing, the Ethiopian evidentiary rule which presumes the competency of persons with disabilities to serve as a witness does not rest upon solid ground; its application is uncertain because its application hinges upon the discretion of the judge without specific legal direction on the subject. The Ethiopian evidence rule that places people with disabilities on an equal plane with non-disabled persons emanates from draft legislation. Given the social and cultural background in which persons with disabilities operate in the country, some judges may easily fall back to the old fundamentally defective rule that states that persons with disabilities should not be regarded as competent witnesses because of their supposed lack of credibility. Further, even assuming that all or a critical mass of judges are disability-sensitive and thus ready to abide by the presumption in the draft evidence bill, lack of services in the courts, such as interpreters in the case of sign language, greatly hinders the smooth communication between a court of law and some witnesses with disabilities, e.g., persons with hearing impairment.[70]

As a matter of practice, judges at the federal level resort to three methods in handling a witness with hearing and speech impairments.[71] One approach is that judges themselves try to figure out what the witness has to say. The other is to look for a sign language interpreter among the court audience or in the premises of the court. The third method is to request the Ethiopian Association of the Deaf to send an interpreter at an appointed date. Though each method has its downside, the important point here is that it is not clear from the limited empirical data used in this paper whether judges in Ethiopia do dismiss persons with hearing impairment as incompetent witnesses.

Rules dealing with court interpreters do not explicitly mention persons with visual impairment. In the opinion of this writer, when the law provides the need to supply an interpreter, sign language does not automatically come to mind. The legislature did not explicitly include sign language interpreters. For example, the governing law on this issue at the federal level states: 'The Court shall provide an interpreter to a party who does not understand Amharic'.[72] Much more helpful is the language of the Criminal Procedure Code in this regard.[73] So too is the provision in this connection enshrined in the current

[70] *Id.*, p. 38, (observing that: "on some occasions, judges refuse to accept the testimony of persons with hearing and speech impairments. This also happens in police investigations outside courts since some police consider such persons to be slow-minded.").

[71] *Id.*, pp. 37-38. Interview with Judge 01, Addis Ababa, Ethiopia (February 15, 2010).

[72] Art 25, Federal Courts Proclamation, Proc. No 25/1996, *Fed. Neg. Gaz.* Year 2nd No 13.

[73] Art 27 (4), Criminal Procedure Code states: "Where the arrested person is unable properly to understand the language in which his answers are to be recorded, he shall be supplied with a competent interpreter who shall certify the correctness of all questions and answers." And Article 126 (2) of the same stipulates; "Where an interpreter is required for the purposes of any proceedings, the court shall select a qualified court interpreter.

Constitution of Ethiopia, which states: 'They (the accused) have the right to request for the assistance of an interpreter at state expense where the court proceedings are conducted in a language they do not understand.'[74] Thus, there is a need to make an explicit mention of sign language in legislation. Finally, a related but separate issue is the scope of the provisions dealing with interpretation is rather narrow in their application; they essentially envisage the case where the accused or the witness reaches the court. Yet it is needless to say that a criminal proceeding starts well before the trial stage; police arrests, detains and interrogates a suspect and a witness before the case is forwarded to the court for hearing.

Is there a legislative or policy change that should be made as regards how to view persons with disabilities in the context of domestic laws? The 1996 Developmental Social Welfare Policy of Ethiopia defines disability as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.[75] The National Program of Action of Ethiopia (1999), developed pursuant to this policy, characterizes disability as any loss or abnormality of psychological, physiological, or anatomical structure of function.[76] The official reading of this policy and the program of action accompanying it is presented as recognizing:

> the rights and dignity of people with disabilities; aiming at the facilitation of the means and conditions, which will enable persons with disabilities to become full participants and beneficiaries of equal opportunities in the socioeconomic development of the country and become self-supportive and self-reliant members of the society. The policy aims to create mechanisms by which persons with disabilities will receive appropriate health care, social services, assistive devices, other rehabilitation services, education, skill training, and other support services.[77]

In terms of commitment to the rights of the disabled, Ethiopia has accepted the Continental Plan of Action for the African Decade of Persons with Disabilities (1999-2009) which rests on the 'empowerment and equalization of opportunities for people with disabilities.'[78] Ethiopia has recently ratified the Convention on the Rights of Persons with

---

Where none is available it will select a competent interpreter but no person shall be selected who is a relative to the accused or prosecutor or is himself a witness".

[74] See Art 20 (7), FDRE Constitution.

[75] National Developmental Social Welfare Policy of the FDRE, Ministry of Labor and Social Affairs, 1996.

[76] National Program of Action for Rehabilitation of Persons with Disabilities, Ministry of Labor and Social Affairs, June 1999, Addis Ababa, Ethiopia.

[77] *Status of Victim Assistance in Ethiopia*, Report presented by Assefa Ashengo, Ministry of Labor and Social Affairs Federal Democratic Republic of Ethiopia to the Standing Committee on Victim Assistance and Socio-Economic Reintegration, Geneva, 3 June 2008 (one file with the author).

[78] *Ibid.*

Disabilities, which[79] was considered for ratification by the House of Peoples' Representatives with relative speed.[80] The Convention on the Rights of Persons with Disabilities is credited to have been influenced by the social approach to disability. The traces of this theory seem to be all over the text of the Convention. The Convention:

> [m]arks a "paradigm shift" in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free, and informed consent as well as being active members of society.[81]

The application of the provisions of this Convention to the rights of persons with disabilities in the setting of criminal justice system is not evident even if the intent is clear, which is to address the rights of persons with disabilities in a comprehensive manner, their rights in criminal proceedings included. The ratification[82] and subsequent implementation of the Convention by Ethiopia should have the effect of accommodating the interests of persons with disabilities in the criminal justice system, thereby introducing a shift in the approach of the criminal justice system of the country. As discussed in Section 4.1, this would require the translation of the text of the Convention into local languages and reflect its contents in pertinent policy and legal documents of the country.

The Council of Ministers approved the Criminal Justice Policy of the country in 2011, which is expected to substantially change the existing Criminal Procedure Code of the

---

[79] Ethiopia signed this Convention on March 30, 2007. <http://www.un.org/disabilities/countries.asp?navid=12&pid=166#F>. (Last viewed February 8, 2010).

[80] The Prime Minister of Ethiopia promised to expedite its ratification at a huge gathering of the youth at the Millennium Hall, in Addis Ababa in the third quarter of 2009. As part of this pledge, the Council of Ministers, upon the submission of the Ministry of Labour and Social Affairs, approved an instrument of ratification of the Convention and sent it on to the House of Peoples` Representatives on the 5th of March, 2010; then a few weeks thereafter the HPR endorsed it.

[81] Disabilities Convention, *supra* note 2.

[82] There is one technical concern which might be an obstacle to the application of the Convention in the aftermath of its ratification by the HPR. There are two views on the issue of as to when law enforcement agencies of the country including courts are obliged to consider a ratified convention as an obligatory legal instrument. One position is that a ratified convention becomes an obligatory law as of the moment of its ratification and publication of its ratification in the official gazette, namely *Federal Negarit Gazette* of the country. The other view is that a ratified convention cannot be invoked in a court of law unless its full text is published in the said official gazette. Both sides cite authority to support its position. Given the fact that both sides have strong adherents and given the fact that the pattern of the Federal Government is to publish an indication of the ratification of a convention, not its full text, in the official gazette, this anticipated concern on the way to the application of the Convention is a real concern more than mere academic interest. See Gebreamlak G., 'The Incorporation and Status of International Human Rights under the FDRE Constitution', *Human Rights Law Series* (of Addis Ababa University), Vol. III, pp. 38-45. See also Sisay A., 'The Constitutional Protection of Economic and Social Rights in The Federal Democratic Republic of Ethiopia', *Journal of Ethiopian Law*, Vol. 22 No. 2, 2008, pp. 60-65.

country.[83] The policy, having nation-wide applicability,[84] aspires to a criminal justice system that is participatory.[85] More germane to the discussion here, the Policy states: any course of action taken at any stage of criminal proceedings shall take the interests and special needs of, among others, persons with disabilities.[86] And the same policy document states that all stages of criminal proceedings shall take due account of the letter and spirit of international human rights instruments adopted by Ethiopia.[87] In particular, in relation to crime victims, the Policy document provides:

> They shall be treated with compassion and dignity in the course of criminal proceedings; they shall be enabled to take part at investigation, charge framing and trial stages of criminal proceedings; they shall be given the opportunity to follow up the progress of the proceedings and be informed about the status of the proceeding from time to time; the state shall build the capacity of those associations working in the area of crime victim rehabilitation and assistance.[88]

Another draft document named The Federal Courts' Business Re-engineering Reform seeking to introduce institutional changes in the federal courts of Ethiopia in relation to criminal justice is not explicit about issues of rights of persons with disabilities. The Federal Courts' Business Re-engineering Reform states the need for making the administration of criminal justice system in the federal courts from receipt of complaints all the way to prison administration accessible and participatory.[89] The document also seeks to improve the conditions of witnesses and criminal defendants in the course of criminal proceedings.[90] The Criminal Justice Policy and The Federal Courts' Business Re-engineering Reform document

---

[83] Note that The Criminal Justice Policy, like any other policy in the country, has no binding effect but is likely to inform the contents of the Criminal Procedure Code that is currently under revision.

[84] By virtue of Art 55 (5) of the Constitution, criminal law, therefore, criminal policy, and perhaps as well as criminal procedure law is essentially a matter which falls within the domain of the Federal Government.

[85] Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, Council of Ministers, Addis Ababa, 2011 (on file with the author), pp. 1-2.

[86] *Id.*, p. 7.

[87] *Id.*, pp. 54-55 (stating that 'the criminal justice system shall seek to give remedy, with speed, to those who became persons with disabilities as a result of crime for example by ensuring that they get compensation. In addition, means, such as counselling and other forms of assistance, shall be sought to rehabilitate those who suffered impairment, physical or psychological, owing to a crime committed against them').

[88] *Ibid.*

[89] Draft Business Process Reengineering Document on Criminal Proceedings, the Federal Supreme Court, 2009, pp. 3 and 13 (on file with the author).

[90] *Id.*, pp.34, 35, 37-39 and 47. The document states the following: "police investigators shall take the testimonies of witnesses once, not several times, as much as possible, such testimonies shall be taken at the place where the witnesses reside, not necessarily at police station; both prosecution and defence witnesses shall be refunded for their transportation expenses as well as paid per dimes and ensure that those defendants without bail shall follow their trials either at a criminal bench established at the proximity of prisons or within the premises of prisons or through video conferencing arrangements." These prescriptions are not supported by the current Criminal Procedure Code of Ethiopia.

do not build on each other which might have arisen as a result of lack of coordination in this regard between the two justice sector organs that authored them.

Other laws issued recently reflect a disability-friendly mind set. On face value, these laws do not have direct bearing upon criminal justice system; but they have the effect of enhancing the participation of persons with disabilities in the criminal justice system of the country by contributing to the involvement of such persons in the justice system. The current Ethiopian Value Added Tax Law exempts 'the supply of goods or services by a workshop employing disabled individuals if more than 60 percent of the employees are disabled.'[91] Ethiopian Building Proclamation provides for the existence of facilities, in any public building, which are suitable for persons with physical disabilities.[92] Another progressive recent legislation is the law regulating institutions of higher learning.[93] This law stipulates that:

> Institutions shall make, to the extent possible, their facilities and programs amenable to use with relative ease by physically challenged students; building designs, campus physical landscape, computers and other infrastructures of institutions shall take into account the interests of physically challenged students.[94]

In a complete break with the 1994 law,[95] which portrayed persons with disabilities as lacking competitive abilities in job places,[96] a special labor law issued in 2008 emphasizes

---

[91] See Art 8 (2(o)), Value Added Proclamation, Proc. No. 285/2002, *Fed. Neg. Gaz.* Year 8th No. 33. These goods and services are also exempted from turn over tax. See Article 7/1(k), Turn Over Tax Proclamation, Proc. No. 308/ 2002, *Fed. Neg. Gaz*., 9th Year No. 21.

[92] See Art 36, of Building Proclamation, Proc. No. 624, 2009, *Fed. Neg. Gaz.* 15th Year No. 31, which states: 1)Any public building shall have a means of access suitable for use by physically impaired persons, including those who are obliged to use wheelchairs and those who are able to walk but unable to negotiate steps. 2) Where toilet facilities are required in any building, an adequate number of such facilities shall be made suitable for use by physically impaired persons and shall be accessible to them.

[93] Currently Ethiopia has the following public law schools: Addis Ababa University, Faculty of Law, Mekele University, College of Law and Governance, Axum University, Faculty of Law, Wollo University, Faculty of Law, Debre Markos University, Faculty of Law, Debre Berhan University Faculty of Law, Gondar University, Faculty of Law, Bahir Dar University, Faculty of Law (School of Law), Jimma University, Faculty of Law (Department of Law), Adama University, Faculty of Law, Ambo University, Faculty of Law, Dire Dawa University, Faculty of Law, Haramaya University, Faculty of Law, Nekemet University, Law School, Jijiga University, Faculty of Law, Hawassa University, Faculty of Law, Wolita University, Faculty of Law, Dilla University, Faculty of Law, Ethiopia Civil Service College, Institute of Federalism and Local Studies. Law schools are singled out here to emphasis their central role in making laws on disability accessible, as mentioned in the recommendation of this paper.

[94] See Art 40, Higher Education Proclamation, Proc. No. 650, 2009, *Fed. Neg. Gaz*., 15th Year No. 64.

[95] See Proclamation No.101/1994, *supra* note 43, that subscribed to the medical model of viewing persons with disabilities in defining a person with disability as 'a person who is unable to see, hear or speak, or suffering from injuries to his limbs or from mental retardation, due to natural or man-made causes'.

[96] *Id*. See also Article 13/3(b) of the Federal Civil Servants Proclamation, Proc. 515/2007, *Fed. Neg. Gaz.*, 13th Year No. 15, which introduces affirmative action for persons with disabilities in respect of recruitment, promotion and deployment preferences when they do have equal or close scores to other candidates, but next to female candidates. A good feature of this law is its explicit mention, under Article 13/1, of disability as an

the entitlements of this class of people in job setting by leveling the playing field, for example, via the introduction of the notion of reasonable accommodation.[97] Though written in the context of employment opportunity, this law is significant in two ways in addressing the conditions of persons with disabilities in criminal justice system of the country. First, this special labor law indicates the start of a shift in thinking of the federal legislature regarding people with disabilities. It signals the beginning of the shift on the part of the federal legislature from grant-based approach to a rights-based approach to addressing the affairs of people with disabilities. This legislation, though limited in its scope, has moved from the medical-moral-charity approach to the social model of disability. Its preamble contains the language, "...the negative perception of persons' disablement in society is so deep rooted that, it has adversely affected the right of persons with disability…". A grant, as stated above, is a privilege which the grantor can revoke at will while a right is an entitlement which cannot be revoked at will. As opposed to a grant, a right can be insisted upon in a judicial proceeding upon its infringement. The second significant indication of progress in this new legislation is its explicit recognition of the importance of entrenched societal attitudes, in explaining the present predicaments of persons with disabilities in the country.[98]

Finally, the existence of several associations[99] formed and run by persons with disabilities, and those other associations working on issues of disability,[100] should be taken as a positive sign even if their institutional capacity to take part in the betterment of and their degree of actual involvement, with or without the invitation of state actors, in the criminal justice system should have been studied. And the ratification of the Convention on the Rights of Persons with Disabilities by Ethiopia is expected to mandate associations of persons with

---

irrelevant factor in the treatment of civil servants. See also Art 14/1, Article 29/3/d, Arts 95-102 of the Labor Proclamation, Proc. No 377/2003, *Fed. Neg. Gaz.*, 10th Year, No. 12.

[97] See Art 2/5 of the Right to Employment of Persons with Disabilities, Proc. 568/2008, *Fed. Neg. Gaz.*, 14th Year No. 20.

[98] *Ibid.*; the Preamble reads: "whereas, the negative perception of persons' disablement in society is deep rooted that, it has adversely affected the right of persons with disability to employment; whereas, the existing legislation on the right of disabled persons to employment created, by providing for reservation of vacancies for disabled persons, an image whereby people with disabilities to be considered as incapable of performing jobs based on merit and failed to guarantee their right to reasonable accommodation and to provide for proper protection; whereas, it has become necessary to enact a new law that complies with the countries policy of equal employment opportunity, provides reasonable accommodation for people with disabilities to employment."

[99] Currently, there are the following organizations established by persons with disabilities: The Ethiopian National Association of the Blind (1960), the Ethiopian Deaf Association (1970), The Ethiopian National Association of Ex-leprosy Patients (1996), The Ethiopian National Association of the Physically Handicapped (1993), Addis Ababa Association of the Physically Handicapped (2000), Association of Visually Impaired Students of Addis Ababa University (?), Addis Ababa Women Living With Disability Association (?), the Support Organization of the Mentally Handicapped(?), Federation of the National Associations of Persons with Disabilities (?) and *Walta* Association of the Blind (?).

[100] See Country Profile on Ethiopia *supra* note 2, p. 22.

disabilities to take part in decisions (such as the formulation and revision of criminal laws as well as criminal policy) by public authorities which affect their conditions.[101]

Yet the different aspects of the non-rights based approaches, as understood in this research, are still the dominant attitude in the legal system of the country. As discussed above, the expressions such as 'deaf-dumb, blind and lame' used to describe the situation of persons with disabilities in the various substantive and procedure laws of the country evoke the image of total dependence of this class of people on the other section of the society.[102] Even some constitutions of the country, including the FDRE Constitution,[103] have fallen under the influence of the medical-charity approach to handling the issue of disability. In terms of the Ethiopian law, the situations of persons with disabilities are blamed either on the physical or mental impairment or disease (e.g. the Constitution or the Criminal Code) or on the wrath of God (e.g. the *Fetha Negast* and the 1930 Penal Code). Only in the March 2008, with a Federal legislation which addresses the unfavorable conditions of persons with disabilities in employment setting, the country is able to admit the fact that the predicaments of people with disabilities have, to some extent, to do with the environment, social and physical, they live, in instead of their impairment alone. Some pertinent recent statutes, such as the law governing urban planning and the transport system of the country are mute about the accessibility of roads and vehicles to persons with disabilities.[104] The country is still struggling to break away with the special school system for students with disabilities driven by the medical-charity model of disability, to move to the inclusive school system.[105] The available limited surveys to gauge the attitudes of some communities in the country towards persons with disabilities confirm the embedded nature of wrong perceptions about them.[106]

---

[101] See Arts 32 and 33, Disabilities Convention.

[102] The 1984 National Population and Housing Census used these expressions; see Country Profile JICA, *supra* note 2, p. 8.

[103] Art 41(5), FDRE Constitution.

[104] See Urban Planning Proclamation, Proc. No. 574, 2008, *Fed. Neg. Gaz.* 14th Year, No. 29; Transport Proclamation, Proc. No 468, 2005, *Fed. Neg. Gaz. 11th Year*, No. 58.

[105] Medical-charity perspective is reflected in practice (special schools for children with disabilities founded by religious charitable institutions and continued by themselves and the state. There are 7 residential special schools, 8 day special schools and 42 special classes; the Ministry of Education admits that these schools could not grow; they have been in state of stagnation due, among others, of attitudinal factors; they are segregated (exclusive) rather than inclusive school system for students with disabilities. See Nardos A., 'The Right of Children with Disabilities in Ethiopia', Faculty of Law, Addis Ababa University Unpublished Thesis, 2009, p. 58.

[106] Alemu Abera, 'Attitude towards Females with Disabilities: The Case of Wolayitta Ethnic Group', Addis Ababa University, School of Graduate Studies, Unpublished Thesis, 2002, pp. i-ii and 92-93. The study aimed at finding out the attitudes of the Wolayitta ethnic group towards its female members with disabilities. The findings of the study are: '…the community in Wolayitta ethnic group has enough information and knowledge towards disability and they are aware of types and causes of disabilities. Even if the community has information and knowledge towards disabilities, the society has misconceptions, negative perceptions

3.2 Declarations and Conventions

One needs to take account of international declarations pertaining to persons with disabilities and the position of existing international human rights law in order to make the above survey of domestic policies and legislation complete. May 3, 2008, the date on which the Convention on the Rights of Persons with Disabilities came into force, is a watershed in the history of disability legislation globally. Before this date, as discussed below, the world community made several piece meal declarations (which I call "soft laws" due to their lack of a binding force) intended to improve the circumstances of the several millions of people living with disabilities all over the globe. The world community, as examined below, has also created several legally binding human rights instruments often referred to as the international bills of human rights. I will discuss about some relevant ''soft laws'' (especially the UN Declarations) followed by discussion about the binding human rights instruments.

3.2.1 UN Declarations

In 1971, the UN General Assembly promulgated the Declaration on the Rights of Mentally Retarded Persons which provides that 'the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.'[107] Four years thereafter, in 1975, the General Assembly issued The Declaration on the Rights of Disabled Persons, that defined disability as 'any person who is unable to ensure by himself or herself, wholly or partly, necessities of normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.'[108] In 1979, another declaration was issued, namely the Declaration on the Rights of Blind Persons, which provides, that every deaf-blind person is entitled to enjoy the universal rights that are guaranteed to all people by the UDHR and the rights provided for all disabled persons by the

---

and attitudes towards females with disabilities. In most cases females with disabilities are isolated, neglected and segregated in Wolayitta ethnic group… Mostly society perceives females with disabilities as potentially weak, unproductive and useless. So FWDs are segregated; isolated and neglected from public activities. Still now community hides FWDs at home not to be seen by others. Because the community believes that having a female with disability is shameful to parents. Still now society devaluate females and believes in that a female cannot hold any responsibility, cannot represent and stand for any place to the community or parents at any public leading position'.

[107] General Assembly Resolution 2856 (XXVI) of 20 December 1971, <http://www.un.org/documents/ga/res/26/ares26.htm> (accessed March 17, 2010).

[108] General Assembly Resolution 3447 (XXX) of 9 December 1975, <http://www2.ohchr.org/english/law/res3447.htm> (accessed, March 17, 2010).

Declaration of the Rights of Disabled Persons.[109] In 1982, the UN General Assembly adopted the World Program of Action Concerning Disabled Persons in order to promote the full participation and equality of persons with disabilities in social life and development in all countries, regardless of their level of development.[110]

In 1991, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care were adopted with the objective of seeking to establish standards and procedural guarantees; the Principles provide protection against the most serious human rights abuses of the disabled that occur in institutional settings, such as misuse or inappropriate use of physical restraints or involuntary seclusion, sterilization, psycho-surgery, and other intrusive and irreversible treatment for mental disability.[111] Finally, the UN General Assembly (1993) adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities to ensure that girls, boys, men and women with disabilities, as members of their societies, may exercise the same rights and obligations as others and required states to remove obstacles to equal participation of persons with disabilities.[112]

One can obviously see merits in these declarations concerning persons with disabilities. Although declarations are not legally binding, they express a moral and political commitment by states, and they can be used as guidelines to enact legislation or to formulate policies concerning persons with disabilities; these global declarations address issues of disabilities directly, showing rightly that the conditions of this category of the world's population needs special protection. The downsides are, first, the declarations are piecemeal and incomplete.[113] Second, a declaration is a commitment without legal effect as they can be brushed aside at

---

[109] Art 1 of the Declaration defines a person with disability as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities".

[110] UN General Assembly, The World Program of Action Concerning Disabled Persons A/RES/37/52, 3 December 1982. Available at: <http://www.un.org/documents/ga/res/37/a37r052.htm> (accessed March 17, 2010).

[111] General Assembly Resolution 46/119, 17 December 1991. Available at: <http://www2.ohchr.org/english/law/principles.htm>. (Accessed, March 17, 2010).

[112] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th plenary meeting, 20 December 1993. <http://www.un.org/documents/ga/res/48/a48r096.htm>. (Accessed March 17, 2010). These Standards describe the term, "a person with disability", as "a great number of different functional limitations occurring in any population in any country of the world as a result of physical, intellectual or sensory impairment, medical conditions or mental illness that may be permanent or transitory in nature."

[113] The UN General Assembly used the term 'for' in the title of its 1976 declaration, which triggered harsh critiques from disability advocates arguing that the word 'for' reflected a paternalistic attitude of persons without disabilities, showing their thinking that persons with disabilities should have things done for them. This criticism, in 1979, led the Assembly to the change the title of the declaration from "International Year for Disabled Persons" to "International Year of Disabled Persons." See International Year for Disabled Persons, GA Resolution 31/123, 16 December 1976.

will without any legal consequences. Third, more importantly for our purposes, these declarations are silent about the question of access by persons with disabilities to justice generally and access to the criminal justice system in particular.

3.2.2 The International Bill of Human Rights

When one considers international bill of human rights adopted prior to March 2008, one finds the principle of non-discrimination stated in each of them.[114] However, only one of these conventions, the Convention on the Rights of the Child, under Article 2 and Article 23, specifically recognizes the need to protect persons against discrimination on the grounds of disability. Nevertheless, all the conventions are understood to refer to "disability" implicitly as a prohibited ground of discrimination. This makes it clear that persons with disabilities should not be discriminated against; thus, the Convention on the Elimination of All Forms of Discrimination against Women (1979) applies to all women, including women with disabilities.[115] The UDHR (1948), ICESCR and ICCPR (1966) recognize the civil, political, cultural, economic and social rights of every human being; they implicitly recognize and protect the rights of persons with disability. The UDHR mentions the socio-economic rights of persons with disabilities which include the right to an adequate standard of living, including food, clothing, housing and medical care and social services, and the right to security in the event of disability. It guarantees equality before the law and equal protection by the law for all people, including against discrimination.

The ICESCR makes no explicit reference to disability but, under Article 2 (2), it calls for non-discrimination based on grounds such as race and color and other status; some of the provisions of the ICESCR are brought to some extent close to the situation of persons with disability by General Comment 5 issued in 1994. The ICCPR lists numerous rights relevant to disability, i.e., all people are equal before the law and have the right to equal protection of the law, but it makes no explicit reference to disability. In addition to the general

---

[114] Note that there are also other conventions bearing on rights of persons with disabilities, though indirect, for example: The International Convention on the Elimination of All Forms of Racial Discrimination, The Convention Against Torture, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and The International Convention for the Protection of All Persons from Enforced Disappearance.

[115] The monitoring body of CEDAW, emphasizes that women with disability suffer from double discrimination based on their gender and their disability and are particularly vulnerable; In its Recommendation 18, the Committee on the Elimination of All Forms of Discrimination Against Women stressed that: governments provide information on disabled women in their periodic reports and that they provide information about special measures that governments have taken to ensure that women with disabilities "have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life." See also Art 18/8 of The African Charter on the Human and Peoples` Rights.

international bills of human rights, in July 1990, the Convention on Vocational Rehabilitation and Employment of Disabled Persons (ILO Convention No 159)[116] was ratified; so far as people with disabilities are concerned, this Convention is the first juridically binding international instrument addressing the special condition of persons with disabilities.

The above short description of the international bill of human rights shows that persons with disabilities are not singled out to offer them special treatment warranted by their special conditions. This international human rights regime does not, thus, proceed under the assumption that special situations of a class of persons warrant special laws. Nor does it embrace the need for amplification of the general international human rights law to adapt it to the conditions of people with disabilities. It does not explicitly address the conditions of persons with disabilities in criminal justice systems of states. The linguistic inaccessibility of these international declarations and conventions lessens their local use in Ethiopia.

There are at least a couple of reasons that dictate some special considerations of the Convention on the Rights of Persons with Disabilities (the Convention) since Ethiopia has already made it part of its domestic laws through ratification and the Convention manifests unique features of its own. First, the Convention with its optional protocol is different from the previous conventions and declarations on the subject in many respects. Two differences stand out. First, in its adoption of the social and beyond approach to disability, with its attendant human rights-based strategy as a solution, the Convention decisively breaks away from the prevailing attitude towards persons with disabilities. Legally speaking, it is founded upon human rights-based approach to disability; this Convention raises the central question of what has prevented persons with disabilities from enjoying their human rights equally with persons without disabilities.[117]

And it answers this question saying that attitudinal (the attitude of others) and environmental factors (inaccessibility of facilities), are to blame, not impairments *per se*. The Convention envisages, for example, the possibility that a visually impaired person may be unable to appear before a court of law as a witness in a criminal proceeding not because she is affected by visual impairments, but because the road to and from the court are inaccessible, or if the court buildings are accessible, the court rooms do not have devices to allow the disabled to follow the hearings. The Convention further envisages the possibility that the physical environment surrounding of justice system is inaccessible to persons with

[116] The Convention on Vocational Rehabilitation and Employment of Disabled Persons (ILO Convention No 159). Available at <http://www.ble.dole.gov.ph/issuances/ILO_159.pdf>. (Accessed on September 18, 2010). This Convention is accompanied by ILO Recommendation No 168.

[117] See the Preamble, Disabilities Convention, *supra* note 2.

disabilities not necessarily because it is impossible to make the environment reachable but because those in charge of the system do not view accessibility as a priority. It is to this end that the Convention, in its Preamble, states "…disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others…".[118]

Second, the Convention is comprehensive in terms of envisaging the rights of different categories of persons with disability and the subject matter treated therein. It addresses human rights involving persons with disabilities, including the rights of the disabled to enjoy access to a wide range of services including access to justice. The issue of access to services and facilities in general and access to justice in particular is one of the pillars of the Convention. Article 13 (1), entitled Access to justice, reads:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[119]

A supplement to Article 13 (1) is Article 9 (1) of the Convention, which, in part, states:

> To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility…

With the exception of The Convention on the Rights of Persons with Disabilities, the above national and international legal survey shows lack of explicitness and of comprehensiveness to the conditions faced by persons with disabilities. Bengt Lindqvist, the Rapporteur on Disability of the U.N. Commission for Social Development, reported to the Commission that, 'the fundamental rights of disabled persons - including …, access to courts

---

[118] *Ibid.*

[119] The Disabilities Convention is replete with the term 'access' or 'accessibility'. See, for examples, Preamble V, Art 3 (f) and Article 9 Regarding access and mobility. The Continental Plan of Action for the African decade of Persons with Disabilities, adopted in early 2002, says: 'The built environment throughout Africa has been designed without due consideration for the special needs of persons with disabilities. Physical obstacles and social barriers prevent citizens with disabilities from participating in community and national life. The various impediments to participation and equality are especially formidable for girls and women with disabilities. With positive attitudes, increased awareness and much care, we can build social and physical environments that are accessible for all, i.e., we must work towards a society for all.'

of law… were consistently violated around the world.'[120] On a positive note, the above survey has revealed a shift in perspective towards the social model, and perhaps beyond the social model. This new thinking about disability sees disability as both a question of physical and mental impairment.

4. Role of criminal justice system actors

An actor oriented approach adopted in this research entails legal and empirical analyses of the role of legislator, police, prosecution, courts, prison administration, law schools and associations of persons with disability in making the criminal justice system accessible to persons with disability. Yet, resource limitations have not permitted the author to undertake that kind of holistic investigation. Thus, this section considers the legal roles of two key actors – the legislature and the courts – in making the Ethiopian criminal justice system accessible to persons with disabilities by demonstrating the lack of completeness and directness in Ethiopia's criminal law in protecting the interests of persons with disabilities at the various stages of criminal proceedings. To this end, the section has employed analyses of the law, some empirical evidence, and comparative resources.

4.1 The legislature

The House of Peoples' Representatives (HPR) is established pursuant to the FDRE Constitution. This institution is at the heart of the criminal justice system for it establishes and sets in motion the critical structures of the criminal justice system of the country. The Constitution entrusts the HPR to enact criminal laws and criminal procedure law for the entire nation. [121] In addition to its "power to call and to question any federal official", it is empowered to approve general polices and strategies of the country.[122] It is also vested with the authority to establish such criminal law institutions as the national police force. As discussed previously, the contents of the different criminal laws and related laws passed by the HPR and its predecessors are, to some extent, progressive in their recognition of the need to enact disability sensitive laws, although some of these laws require amendment to eliminate disability insensitive language and to achieve completeness.

The HPR's legislative powers and questioning federal government officials as well as determining the institutional arrangements of the criminal justice system could be used for

[120] Justice RK Abichandani, 'The Right of Handicapped' (Press Release dated 9th February 2000). Available at <http://www.disabilityindia.org/the_right_handicapped.cfm> (accessed February 17, 2010).
[121] See Art 55 (5), FDRE Constitution.
[122] *Id.*, see Art 55 (10).

the betterment of the conditions of persons with disabilities. To this end, the HPR should reactivate (deactivated for no apparent reasons) the 1994 draft Mental Health Proclamation intended to ameliorate the conditions of the mentally ill in their encounter with the criminal justice system of Ethiopia.[123]

The HPR has ratified the Convention on the Rights of Persons with Disabilities expeditiously. This is a positive step forward. But, as is done with other international treaties, what was sent for publication in the official gazette is not the full text of the Convention. It is, rather, a mere notice of the ratification of the Convention. It is suggested that the HPR should see to it the publication of the full text of the Convention in the official gazette instead of publishing a notice of its ratification. The HPR's current initiative of uploading legislation on its website is encouraging. These website initiatives by HPR and others are a new beginning but they lack the authority to replace the predominant paper based distribution. Another positive development worth noting is Article 13 (1) of Proc. No. 590/2008 that requires public authorities to make the directives and manuals it enacts accessible to the public.[124]

In Ethiopia, substantive and procedural criminal laws are insufficiently accessible to the able-bodied, but not to persons with disabilities such as visually impaired persons. The HPR's oversight power and its role as the publisher of the laws it enacts has not been effectively utilized to address this critical problem. A national justice sector reform program document named Comprehensive Justice System Reform Program mentions lack of access to justice information including criminal laws as one of the major problems of the justice system of Ethiopia.[125] This same document identifies the lack of access to legal materials, court cases, legislation including basic criminal laws, and reference materials as basic problems faced by prosecutors.[126] It also states the same problem in not so many words in connection with law schools' and judges' access to legal materials.[127] And it states in general terms:

---

[123] Mehret A., 'Principal Features of the Legal Protection Afforded to Victims of Mental Disorder under the Ethiopian Mental Health Draft Legislation: A Comparative Analysis', Faculty of Law, Addis Ababa University, LL.B Thesis, Unpublished, 1995.

[124] Freedom of the Mass Media and Access to Information Proclamation, Proc. 590/2008, *Fed. Neg. Gaz*., 14th Year No. 64.

[125] Mandefrot B., 'Justice System Reform Program: Preliminary Reform Profile, Program Contents and Objectives' in Justice System Reform in Ethiopia, Proceedings of the Workshop on Ethiopia`s Justice System Reform, Ministry of Capacity Building Addis Ababa Ethiopia, 2002, p. 37.

[126] *Comprehensive Justice System Reform System Program: Baseline Study*, Ministry of Capacity Building, Justice System Reform Program Office, March 2005, pp. 103-104.

[127] *Id.*, pp. 28-282.

*"*Access to legal information in general is a big problem in Ethiopia. Almost all legal professionals complained about the lack or non-existence of legal information."[128]

Lack of legal information has various facets and thus various reasons. The inaccessibility of the law might be attributable to unavailability of the text of the law (owing to insufficient outlets), financial inaccessibility or linguistic inaccessibility, or high degree of illiteracy or lack of availability of the law in forms suitable for persons with disabilities. It is said: 'Some of those reasons could be blamed on the lack of financial means. Most of them are, however, due to the lack of a national strategy to disseminate legal information and to the current legislative procedure.'[129] Generally, in the African context, it is stated that:

> In many countries, the law is drafted and administered only in the national language, which many poor people may be unable to speak or read. In almost all African countries, for example, the justice system operates solely in English, French, or Portuguese, thereby excluding the majority of the population that speak only local languages. Courts may be far away, under-funded, and take years to decide cases.[130]

What is implied here is an argument for a stronger reason, i.e., absent counter-intuitive evidence, if the laws of Ethiopia and other countries in Africa are inaccessible to able bodied people, then a stronger case for the inaccessibility of these laws for persons with disabilities can be made. As to the nature of the language problem, it should be noted that following the constitutional clause, Amharic is a working language at federal institutions and that regions may adopt their own working language; following this, court language at the federal level is Amharic while regional courts can adopt their own respective working languages.[131] And, thus, federal laws are required to be published in Amharic language[132] and yet this, as discussed above, is not observed in relation to international treaties and conventions.[133]

4.2 The Courts

Courts are at the heart of the criminal justice system because they have the authority to regulate the conduct of the police, of the prosecution, of the defense, of jails, of the prison administration, of witnesses, of court room audience, and of those institutions which must

---

[128] *Ibid*. See also Mulugeta G., 'Law Schools' Access to Legislations and Decisions: Overlooked but Critical Source of Legal Education and Research', Unpublished, 2009 (on file with the author).

[129] *Id.*, pp. 172-174.

[130] Report of the Commission on Legal Empowerment of the Poor: Making the Law Work for Everyone, 2008, p. 33.

[131] See Art. 5 (2 & 3), FDRE Constitution, which, respectively, says "Amharic shall be the working language of the Federal government' and 'Members of the Federation may by law determine their respective languages".

[132] See The Federal Negarit Gazette Establishing Proclamation Procl. No. 2/1995, *Fed. Neg. Gaz.*, 1st Year, No.2.

[133] See Alemahu and Gebregiorgis, *supra* note 82.

cooperate in the production of evidence.[134] Thus, a disability friendly criminal bench has potential to play a great role in alleviating the problems of persons with disabilities.

Two facets of accessibility, i.e., physical and communicational accessibility, may be of greater relevance here. The physical accessibility issue has two aspects, that is, infrastructural access to and from courthouse and the accessibility issue in the premises of the court houses themselves. For instance, observation and data indicate that the architectural settings within the premises of court houses in Addis Ababa are less accessible for persons with disability.[135] On the wider question of the accessibility of the city's built up space, recent research has graphically narrated the precarious conditions persons with disability face in the built up environment of Addis Ababa. This research documents the feelings about and frustrations of persons with disabilities themselves about not just inaccessibility of but about the alarming nature of both the old and the new physical infrastructure of the city. A quotation at length from this research is useful:

> When I travel by bus, I always face problems because of the stairs; they are very difficult to climb. Once, while I was struggling to climb the stairs to enter, the bus driver shut the door on me, and the door pushed me outside while my other leg was inside the bus, it was when people screamed that the driver opened the door again to let my leg go.…when I use buses I need space to stretch my legs and since the aisles are too small,… passengers usually stomp on my feet, and show no consideration, when I use mini-bus taxis it is only the front passenger seat that is suitable for me, even that creates problems since the space does not have enough leg room and space for my crutches…. Whenever I ride a taxi with the help of another person who can carry me enter and take a seat and put my wheelchair, the drivers and the assistants don't want to cooperate; I think they don't like a traveler on a wheel chair ….The sidewalks I use today will be changed tomorrow, making it difficult to draw a mental picture, I usually travel by myself and the major problem I face in my day to day life is the impediments posed by utility poles and pot holes. Recently, I have lost four of my front teeth due to a crash against an electric pole….I usually fall into the pot holes that are left by Tele or the municipality. It is especially difficult during the rainy season. I once found myself a pot hole while hurriedly going to class. I was wet and came to class with …mud... The poles that are planted in the midst of the pedestrian pavement usually hit my nose and forehead. Once…two women by the side of the street were… burning some dirt on the side road. …I didn't notice but I treaded on the fire and my rubber

[134] The Criminal Procedure Code gives courts this broad discretion to issue orders when they deem it necessary for the interest of justice.

[135] Interviews with Judge 02 and Judge 03, January 20, 2010; In this respect, courthouses are not physically accessible to persons with disabilities in some advanced countries as one would like to see. Inaccessibility of courthouses to persons with disabilities has led to lawsuits in some jurisdictions. The United States Access Board reports that "currently, the vast majority of courthouses, whether local, state or Federal, are not fully accessible to people with disabilities". The Board also reported that "new facilities, despite the existence of accessibility standards, continue to be designed and built with barriers". US Access Board, Justice for All: Designing Accessible Courthouses Recommendations from the Courthouse Access Advisory Committee (2006), p. 109. Available at <http://www.access-board.gov/caac/report.pdf> (accessed March 22, 2010).

> shoe was on fire. I still didn't notice and went with the fire burning my shoe. Then a certain man came and helped me put out the fire.
>
> There are also some structures in the streets that hit hard a visually impaired person like me. Once I was walking with my friend, we both are not sighted. We asked people to help us cross the street but they ignored us. So we decided to cross by ourselves. What we didn't know was that there was a big pothole in front of us. So we fell into it and the water was so stinky and some itchy insects were in it. The water was high up to our thighs. We managed to go out but the insects were all over our body. Oh! How difficult that day was![136]

Further, a woman with disability here in Ethiopia documented her experience:

> I was invited to an event organized by a private promotional service organization in collaboration with public media that was having a panel discussion on the issue of disabilities. We were very interested and happy to attend the panel to raise these important disability issues. We reached the building where the panel discussion was held but unfortunately the building did not have an elevator or other device. Some of us were in wheelchairs and others had problems of mobility to walk up the stairs. One of the producers said, ''please come, we can carry you on our back''. We were so disappointed and told them that when you want to prepare a panel discussion and invite participants you should know your audience. We thought they did not give much attention to our human value; they only paid attention to the topic to be discussed and transmitted to the media.[137]

Violations of the rights of persons with disabilities cannot stop by themselves; persons with disabilities, either individually or through their associations, must challenge such violations in appropriate judicial or extra-judicial forums. Three cases from other jurisdictions show that persons with disabilities can force the responsible authorities to rethink the criminal justice system in place from the perspectives of persons with disabilities. Two of them arose in the United States of America (US) and the other in the Republic of South Africa. In the US cases, George Lane uses a wheelchair and was unable to attend his traffic ticket hearing that is on the second floor of an inaccessible courthouse that did not have an elevator. Having once crawled up the stairs for a prior hearing and refusing to do it again, Mr. Lane was arrested and jailed for failure to appear for the hearing. Beverly Jones is a court reporter that was unable to work or participate in the judicial process because a number of courthouses were inaccessible. Both sued the state of Tennessee seeking money

[136] Misrak T., 'Challenges and Opportunities of Access and Mobility in Addis Ababa: the Case of people with Motor and Visual Impairments', Addis Ababa University, School of Graduate Studies, Unpublished, 2006, pp. 42-54.

[137] Lakech H., 'A Study on Gender and Disability: The Ethiopian Experience on Ensuring the Right to Education for Women and Girls with Disabilities', Papers for the UNESCO EFA flagship: The Right to Education for Persons with Disabilities: Towards Inclusion December 2006). Available at <http://www.inclusionflagship.net/Lakech%20Hailemariam.pdf>. (Accessed March 16, 2010).

damages and injunctive relief. Their cases were consolidated for appellate review. Recognizing that the ADA (the Americans with Disability Act, 1990) protected the right of access to the courts for people with disabilities to access the courts, the Supreme Court allowed the two cases to proceed. Tennessee had attempted to shield itself from the lawsuits by using the sovereign immunity defense established by the Eleventh Amendment to the Constitution.[138]

The United States Supreme Court upheld the right for George Lane and Beverly Jones to sue Tennessee for money damages under Title II of the Americans with Disabilities Act. The US Supreme Court, in ruling for the plaintiffs, characterized the issue raised by the two cases as a due process question, 'in that states should afford all individuals a meaningful opportunity to be heard in court.'[139] 'The ability to sue for money acts as a serious deterrent to violations of federal law such as the Americans with Disability Act.'[140] The Court also stated Congress passed the Americans with Disability Act in order to reverse "pattern of unconstitutional treatment in the administration of justice against persons with disabilities."[141] In particular, the Supreme Court stated that: with respect to the current issues before the Court, Congress had learned that many people were being excluded from courthouses because of their disabilities. Among the examples identified was the exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.[142]

In the South African case,[143] the first case brought before the Equality Court in 2003, established under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, tackled the issue of physical accessibility when a practicing attorney who was

---

[138] See Supreme Court Rules That Persons with Disabilities Can Sue the State for Monetary Damages, *Tennessee v. Lane, et al.,* 541 U.S. 471 U.S. ____, No. 02-1667 (May 17, 2004): 'Normally, private citizens cannot sue a state without its consent in federal court. Congress can override a state's immunity as long as it legislates to enforce the Fourteenth Amendment within a prescribed framework set out by a series of prior Supreme Court decisions. Tennessee had claimed that Congress overreached in fashioning the ADA to allow these lawsuits'.

[139] *Ibid.*

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid.*

[143] See also *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03). South Africa: Justice Sector and the Rule of Law, A review by AfriMAP and Open Society Foundation for South Africa, 2005, pp. 109-110. Available at: <http://www.soros.org/resources/articles_publications/publications/sajustice_20060223/afrimapreport_20060223.pdfaccessed> (March 16, 2010).

quadriplegic brought a case against the Minister of Justice and Constitutional Development and the Department of Public Works.

The case related to the applicant's difficulties in accessing courts due to her being in a wheelchair. The matter was resolved by a settlement agreement between the parties, which was then made an order of court. Under the terms of the settlement agreement, the courts in which the applicant primarily practices would be made accessible to people with disabilities. One courtroom would also be made accessible, together with one bathroom. Further to this end, the respondents were given six months to draw up an action plan with respect to other court buildings in the country.[144]

It should, moreover, be noted that lacuna in the law may result in an action against the state in other jurisdictions. For example, X and Y v. Netherlands,[145] which was decided in 1985 by the European Court of Human Rights, arose from an unintended lacuna in the Dutch Criminal Procedure which resulted in a sixteen year old intellectually disabled victim of rape being unable to initiate criminal proceedings. The legal guardian of the victim brought the case to the Court alleging a violation of her right to privacy under the European Convention, claiming that the gap in the Dutch law amounted to a failure to protect the mentally handicapped woman's right to privacy against sexual assault. ''The Court agreed with the applicant that there were positive as well as negative obligations on the part of the State; the loophole in Dutch Criminal Law, while unintentional, amounted to an omission by the Dutch state, and the government was ordered to pay reparations to the victim.''[146]

In terms of communicational accessibility,[147] courts must ensure that their communications with individuals with disabilities must be as effective as communications with individuals without disabilities by making available the necessary and appropriate auxiliary aids and services to those individuals. The necessary auxiliary aids and services vary in accordance with the types of disabilities and the length and complexity of the communication involved unless the provision of these auxiliary aids and services are believed to result in undue financial and administrative burden in a fundamental alteration in the nature of the services of the court.[148] For example, appropriate aids and services for

---

144 *Ibid.*

145 De Alwis, R., 'Women and Disability, Panel II: The Principle of Non-Discrimination and Equality from Disability Perspective: Critical Issues concerning Special Measures and Disability', June 17, 2003. Available at" <http://www.un.org/esa/socdev/enable//rights/paneldesilva.htmDocuments>. (accessed March 15, 2010).

146 *Ibid.*

147 The 2000 South African Promotion of Equality and Prevention of Unfair Discrimination Act: Esthe Mulller`s case before the South African Equality Court, p. 50.

148 *Ibid.*

individuals with vision impairment may include: qualified readers, tape texts, Braille and large-print materials.[149] While appropriate auxiliary aids and services for individuals with hearing impairment may include: qualified interpreters, note takers, computer-aided transcription services, written materials, telephone-hand-set-amplifiers, assistive listening systems, telephone compatible with hearing aids, video text displays, exchange of written notes and others.[150]

In the city of Addis Ababa, for example, communicational accessibility of criminal proceedings to persons with disabilities is almost next to nil. Judges routinely take the responsibility of trying to secure government paid sign language interpreters; but the problem in many cases is lack of sign language interpreters, which sometimes leads to detention of the accused until a qualified interpreter is obtained.[151] Judges find it difficult to make sure that an accused with disabilities (such as an accused with hearing impairment) confirms the testimonies he/she gave at the police station.

It is not also possible for judges to hear complaints from persons with speaking disabilities about the conditions in prison. A judge informed this researcher that in the course of visiting a police station, some three years ago, he learnt that there was a suspect with hearing and speaking disabilities indefinitely jailed by the police based on the claim that they could not undertake investigation for lack of an interpreter.[152] Judges stated that there are sign language illiterate accused or victims who can communicate only through sign language, making communication extremely difficult. In those cases, the respondents stated that they attempt to communicate with gestures.[153] Informants stated that the federal courts do not give

---

[149] *Ibid.*

[150] *Ibid.*

[151] Interviews with Judge 04 and Judge 05, February 1, 2010, Addis Ababa, Ethiopia.

[152] *Ibid.*

[153] *Ibid.*; see also *Federal Public Prosecutor v. Negussie Yenus*, Fed. High Court, Criminal File No. 09178, Sene 26, 2000E.C. Unpublished), in which the defendant (without hearing and speaking abilities) was accused of homicide and robbery, appeared to invoke the defense of partial responsibility. A witness against this defendant testified that he saw making confessions about his criminal act using mouth and hand gestures customarily used by persons in his situation to communicate with others. He was held partially responsible based on medical examination which the court interpreted to mean that his two physical impairments might have led to diminished appreciation of the nature of his acts or the consequences thereof within the language of Article 48 of the Criminal Code. See also *Tsgereda Gezahegn v. Fed. Prosecutor*, Fed. Sup Ct. Tikemet 30, 2002E.C. Criminal Appeal File No. 42606, (unpublished.) The appellant was charged with aggravated homicide; she invoked the defense of insanity, owing to her mental illness, she could not stand trial; she was suffering from mental illness at the time of the commission of the offense; that she should be referred to Amanuel Specialized Mental Hospital for medical examination; the lower court (the Federal High Court), in majority vote, rejected the defense`s request for mental diagnosis, thus passed a life sentence. The Supreme Court acquitted her; the Supreme Court did not give any orders for treatment purposes; it just set her free because from the situations (i.e., records, the testimonies, the conduct of the appellant in prison and before the commission of the offense, as well as the result of the medical examination ordered by this appellate court), it concluded that at the time of the commission of the murder she could not understand the nature and

training to judges on the special needs of persons with disabilities, nor do the courts have a policy on such matters.[154] Informants assess the physical courthouse environment as well as the communicational matters in criminal proceedings in Addis Ababa as disability unfriendly.[155] On the question of the general suitability of the courtroom environment to persons with disabilities, interviews with defense lawyers confirm the veracity of the information solicited from judges.[156]

It appears that communicational barriers, though not legal barriers, are invoked to justify an entrenched practice of authorities in the country in avoiding the appointment of legal professionals with visual impairment as judges. It is reasoned that a visually impaired person cannot be eligible to be a judge because: 'she cannot tell if the witness is lying because he/she cannot see her facial expressions while testifying and second she cannot produce handwritten judgments and orders.'[157]

Judges described the following as their experience in handling cases of persons with disabilities: problem of getting sign language interpreter, which leads to detention of persons with hearing and speaking disabilities for longer period of time than they should; lack of legal representation for persons with disabilities; unsuitable court rooms and offices and problems of communication with sign language illiterate accused in court proceedings.[158] A judge said: 'while I was visiting a police station in 2006, I came across with a woman suspected of committing a criminal offense; she was a person without speaking and hearing abilities; she was indefinitely detained for lack of an interpreter and thus impossibility of undertaking investigation on her case.'[159] Another judge said: 'for want of interpreter, I adjourned a criminal case against a man who was a person without speaking and hearing abilities.'[160]

Conclusions and Recommendations

In order to make Ethiopia's criminal justice system applicable to persons with disabilities comprehensive, explicit and accessible, the following are recommended.

---

consequences of her action owing to mental illness. See also: Kidane Ayele, ''Treatment of Insane Offenders under the Criminal Justice System in Ethiopia: the Law and the Practice'' (Addis Ababa University, Faculty of Law, unpublished, 2009); and Wondesson Shewarega, *Defense of Insanity under the Penal Code of Ethiopia: the Law and the Practice*, Faculty of Law, Addis Ababa University, LL.B Thesis, Unpublished, 1999.

[154] *Id.*, Interview with Judge 01 and 02, January 27, 2010, Addis Ababa, Ethiopia.

[155] *Ibid.*

[156] Interview with Lawyer 01 and Lawyer 02, *supra* note 154.

[157] See Diribi *supra* note 5, p. 79.

[158] Interviews with Judge 06 and Judge 07, January 21, 2010, Addis Ababa, Ethiopia.

[159] Interview with Judge 06, January 21, 2010, Addis Ababa, Ethiopia.

[160] Interview with Judge 07, January 21, 2010, Addis Ababa, Ethiopia.

1. The federal legislature should fill in the gaps in the existing criminal laws concerning people with disability. Detailed rules in the forms of regulations and directives implementing such laws are also necessary. The approach in enacting these rules should be a combination of diffused approach and special approach. The former leading to the insertion of disability related laws from time to time in general statutes, and the latter entailing the enactment of legal rules specifically applicable to persons with disabilities. The HPR and other pertinent institutions should translate the full text of the Convention on the Rights of Persons with Disabilities into local languages, which would facilitate the appreciation of its contents by the concerned people and institutions and pave the way for mainstreaming its provisions into policies and laws of the country.
2. The Federal Government of Ethiopia should take concrete action to make the criminal justice system accessible to persons with disability by, for instance, as used by other jurisdictions and as aimed at by the Convention on the Rights of Persons with Disabilities, introducing reasonable modifications in criminal justice system already put in place. For example, in the US context, the term 'reasonable modification' is employed, which in the language of the US Supreme Court means:

> Ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. It allows a state to take reasonable measures to remove barriers to accessibility but does not mandate the state to absolutely employ all possible means to make their services accessible to people with disabilities. It does not force a state to compromise its eligibility criteria for its programs and services. A 'reasonable modification' should be available only when it would not fundamentally alter the nature of the services provided. [161]

3. Legal education should be part of such concrete government action in order to promote the rights of persons with disability as enshrined in the existing rules and issuance of new law. Occasional trainings should be given to the criminal justice system actors namely parliamentarians, police, prosecutors, judges, prison administrators and defense lawyers. Those who engineer roads and buildings should be included in such training schemes. Law schools and training centers for judges and prosecutors can either join hand or undertake such trainings independently. Law schools should include disability related topics either in a mainstreamed fashion in mandatory courses or in a form of special core course. In this connection, law schools should forge partnership with local and international organizations working on issues of rights of persons with disability. Such trainings and

[161] See *Tennessee v. Lane, et al*, *supra* note 138.

formal educational exercises should be designed and delivered with the full involvement of persons with disability if such ventures are to live true to the motto: "nothing about us without us."[162]

[162] This slogan used by disability movement in the West has been powerfully elaborated by Charlton, J., *Nothing about Us without Us: Disability Oppression and Empowerment*, University of California Press, Berkeley, 1998.

Beyond Legal Aid: CLPC's Experience in Providing Comprehensive Services to Realize Access to Justice for Children

Fasika Hailu*

Abstract

This chapter describes practical issues related to access to justice for children focusing on the experience of the Children's Legal Protection Center (CLPC). It explores key issues regarding the provision of legal aid, psychosocial services and capacity building endeavours of CLPC aimed at improving access to justice for children involved in the justice system. The chapter highlights and presents the achievements of the Centre along with the actors involved, the mechanisms used and the challenges faced in ensuring access to justice for children. The chapter draws mostly upon case studies and periodic reports of the Centre.

Key words: access to justice for children, multi-stakeholder approach, psychosocial services

Introduction

The Children's Legal Protection Center (CLPC) was established in October 2012 following a partnership agreement between the Federal Supreme Court and the African Child Policy Forum.[1] It operates under the auspices of the Federal Supreme Court Child Justice Project Office and works to enhance child justice administration by working closely, and in partnership with the justice sector and other governmental and non-governmental organizations in Ethiopia. The long term objective of CLPC includes creating a solid child protection structure in the justice system of the country. In the short term, it focuses on protecting the rights and interests of children involved in the justice system through the provision of legal and psychosocial services.

The CLPC has three branches: one is located at the Federal Supreme Court, another one at the Federal High and First Instance Court *Lideta* branch and the third one at the Federal High Court *Bole* branch. The office of the CLPC at the Federal Supreme Court also serves as a coordination office and facilitates the collaborative efforts of the stakeholders in rendering the services to children.

Although the CLPC is a very new institution that has not passed the test of time, it is already trying its best to provide comprehensive services. Unlike other institutions that work

* Coordinator (Children's Legal Protection Centre), LLB (AAU), MA (AAU).

1 The African Child Policy Forum is an independent, not-for-profit, pan-African organization working on policy research and dialogue on the African child.

on access to justice, CLPC actively engages in rendering legal aid and psychosocial services and capacity building endeavors.

This chapter discusses the activities and contributions of the CLPC in accessing justice to children. In particular, it describes CLPC's activities carried out to ensure the protection of the child's best interest through legal aid service provision, the outcomes reaped and the challenges it faced. In addition, it describes the outcomes of the various capacity building trainings provided by CLPC. The author believes CLPC's achievements in influencing the legal framework through judicial representation before the Federal Supreme Court Cassation Bench; developing guidelines and working manuals that help standardize CLPC's mode of operation and service delivery; and delivering ADR and other psychosocial services are worth sharing. CLPC's experience is also hoped to initiate discussion regarding strategies on access to justice for children.

1. Access to Justice for Children: An Overview

According to recent data from the Ethiopian Central Statistical Agency, children under eighteen years of age comprise nearly 53% of the total population.[2] Their large number coupled with lack of adequate systems and structures that address their special needs, the vulnerability they daily encounter as minors and their status as a disadvantaged social group renders children incapable to defend their rights. As a result, they experience different forms of violence within their homes, in community and in public institutions. Hence, the need for access to justice for children.

An important strategy to protect the right of vulnerable groups such as children is access justice on equal basis with adults.[3] The aim of access to justice, according to the UN Approach to Justice for Children, is "ensuring full application of international norms and standards for all children who come into contact with the justice system…as victims, witnesses, alleged offenders and… regarding their care, custody and protection."[4] Although mere provision of legal aid services cannot fully guarantee the application of these norms and standards to the benefit of children, there is no denying that legal aid is indeed one of the major components of the right to access to justice.

The provision of legal aid service to children should take their special circumstances into account. The concept of "child friendly legal aid" entitles a child to legal aid services

[2] Central Statistical Authority of Ethiopia, Population and Housing Census Report – Country, 2007.
[3] Guidance Note of the Secretary-General: UN Approach to Justice for Children, 2008, p.1 [Hereinafter Guidance Note].
[4] *Ibid*.

irrespective of his participation in civil, criminal, or administrative proceeding. Child friendly legal aid is "the right of a child under the age of 18 to receive competent, timely, and developmentally appropriate legal assistance in connection with a civil, criminal, or administrative proceeding in which the child's rights or interests are at stake."[5] Accordingly, the fact that the proceeding affects a child's rights and interests is enough to make him/her eligible for legal aid.

There are different laws that recognize the right of access to justice (through legal aid) for children who come in contact with the justice system. If we start from international instruments Ethiopia has ratified, we find the Convention on the Rights of the Child (CRC) that requires a child in conflict with the law be "*informed promptly and directly of the charges against him or her, and, if appropriate, through his parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense*"[6]. General Comment No.10 of the Committee on the Rights of the Child further affirms that children in conflict with the law "*must be guaranteed*" free legal or other appropriate assistance in the preparation and presentation of their defense.[7] According to CRC it is not only children in conflict with the law but also all children that are involved in the justice system have the right to be heard in any judicial or administrative proceedings directly or through a representative.[8] Similarly, the African Charter on the Rights and Welfare of the Child (ACRWC) stipulates that "every child accused of infringing the law should be accorded legal and other appropriate assistance".[9]

In addition, international legal standards and guidelines issued by the UN General Assembly relating to children further elaborate children's right to access justice. For instance, the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice calls on states to ensure that "throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid."[10] The UN Guideline on Justice in Matters involving Child Victims and Witnesses of Crime also provides that:

> Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training… This may include

---

5 Geraghty, T. and Geraghty, D., 'Child Friendly Legal Aid in Africa', in *Child-Friendly Legal Aid in Africa*, UNICEF, UNDP, and UNODC, 2011, p. 1.

6 The United Nations Convention on the Rights of the Child (CRC), General Assembly Resolution 44/25, 1989, Arts 40(2) (b) (ii) and 40(2) (b) (iii) [Hereinafter CRC].

7 Children's Rights in Juvenile Justice, UN Committee on the Rights of the Child, General Comment No. 10, Forty-fourth Session, Geneva, 2007, para 49 [Hereinafter General Comment].

8 CRC, Art 12.

9 The African Charter on the Rights and Welfare of the Child, Organization for African Unity (OAU), 1990, Art 17(2) (c) (iii) [Hereinafter ACRWC].

10 The United Nations Standard Minimum Rule for Administration of Juvenile Justice, 1985, Rule 15.1.

> assistance and support services such as financial, legal, counseling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration.[11]

Turning back to national laws, the FDRE Constitution under Article 9(4) provides that "all international agreements ratified by Ethiopia are an integral part of the law of the land." Moreover, Article 13(2) of the FDRE Constitution provides that the fundamental rights and freedoms recognized under Chapter 3 of Constitution shall be interpreted in a manner conforming to International Covenants on Human Rights and international instruments adopted by Ethiopia. Therefore, the above discussed international instruments are part and parcel of the law of Ethiopia.[12]

With regard to the legal framework for the provision of psychosocial services, ACRWC, under Article 17(2/c/iii), and CRC, under Article 40/2/b (ii), stipulates that children in conflict with the law must be provided with legal and *other appropriate assistance*. Although both instruments do not clearly state what services are envisioned by the phrase *other appropriate assistance*, the provision implies that the provision of legal assistance alone is not enough to either provide full-fledged justice to children or, as the UN Approach to Justice for Children puts it, to "ensure full application of international norms and standards".[13]

However, the term *appropriate assistance* seems to be deconstructed by the UN Guideline on Justice in Matters Involving Child Victims and Witnesses of Crime. This guideline provides that child victims and witnesses of crime and, where appropriate, even family members should be accorded not only legal assistance but also financial, counseling, health, social, educational, physical and psychological recovery services as well as services needed to reintegrate the child.[14] Even though the subjects of this guideline are child victims

---

[11] The United Nations Guideline on Justice in Matters Involving Child Victims and Witnesses of Crime, UN Economic and Social Council Resolution 2005/20, 2005, para 22 [Hereinafter Guideline on Child Victims and Witnesses of Crime].

[12] Apart from integrating international instruments to the national legal system, the Ethiopian Constitution guarantees access to justice to all citizens including children. The right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law (or any other competent body with judicial power) and equality before the law is recognized. Also, the constitution places responsibility upon the judiciary, executive and legislative organs as well as non-governmental entities to give primacy to the principle of the best interest of the child in all measures they take. More specific to legal aid is the rights recognized for persons accused of crimes which include the right to be represented by legal counsel of one's choice and the right to be provided with legal representation, at state expense, in all instances where the inability of the accused person to afford legal representation would result in miscarriage of justice. See Arts 20(5), 25, 36(2), 37(1), Federal Democratic Republic of Ethiopia Constitution, 1995, Proc. No. 1/1995, *Fed. Neg. Gaz.* No. 1 [hereinafter FDRE Constitution].

[13] Guidance Note, *supra* note 3, p.1.

[14] Guideline on Child Victims and Witnesses of Crime, *supra* note 11, para 22.

and witnesses of a crime, the requirement for psychosocial assistance is also extended to children in other situations coming in contact with the justice system.[15]

According to An Michels, "the availability of psychosocial support in combination with effective protection strategies allow children to participate safely[in the justice system], improve the quality of their testimony and protect them against potential harm caused by their participation in the justice system."[16] The provision of the right and adequate type of psychosocial support for children involved in the justice system can also help them survive abuse and change their lives for the better. Therefore, it is believed that the various needs of children involved in the justice system can be adequately and effectively catered for through the provision of both legal aid and psychosocial services.

Developing the capacity of professionals who work closely with children involved in the justice system is crucial to bridge the existing gaps in policy and practice of access to justice for children. In particular, professionals working closely with children need to be adequately equipped with the required knowledge and skill about the rights of children and legal issues pertaining to children involved in the justice system as well as on how to handle these children and ensure their best interests.[17]

2. The Experience of CLPC in Setting up a Multi-stakeholder Approach to Access to Justice

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recommends that mechanisms and procedures should be established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e., health, social and child welfare providers).[18] Existence of collaboration among stakeholders creates opportunities to share resources, maximizes service delivery, and facilitates referral systems. It is with this backdrop that the CLPC has

---

[15] *Id.*, para 24; in fact, this is compatible with ACRWC which recognizes the need for range of appropriate assistance for children in-conflict-with-the-law) and the General Comment of the UN Committee on the Rights of the Child which recommends the employment of a range of measures involving removal from criminal/juvenile justice processes and referral to alternative (social) services in dealing with child offenders the majority of which commit only minor offences; see General Comment, *supra* note 7, para 24.

[16] Michels, A., 'Psychosocial Support for Children: Protecting the Rights of Child Victims and Witnesses in Transitional Justice Processes', *Innocenti Working Paper*, No. 2010-14, Florence, UNICEF Innocenti Research Centre, p. vi.

[17] The UN Guideline on Child Victims and Witnesses of Crime identifies capacity building as one of the strategies to foster access to justice to children (Guideline on Child Victims and Witnesses of Crime, *supra* note 11, para 22). UNDP also recognizes capacity building to professionals as one aspect of accessing justice to children; see Access to Justice, Practice Note, United Nations Development Program (UNDP), 2004, p. 6.

[18] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN General Assembly Resolution, A/RES/67/187, 2013, guideline 7 (g).

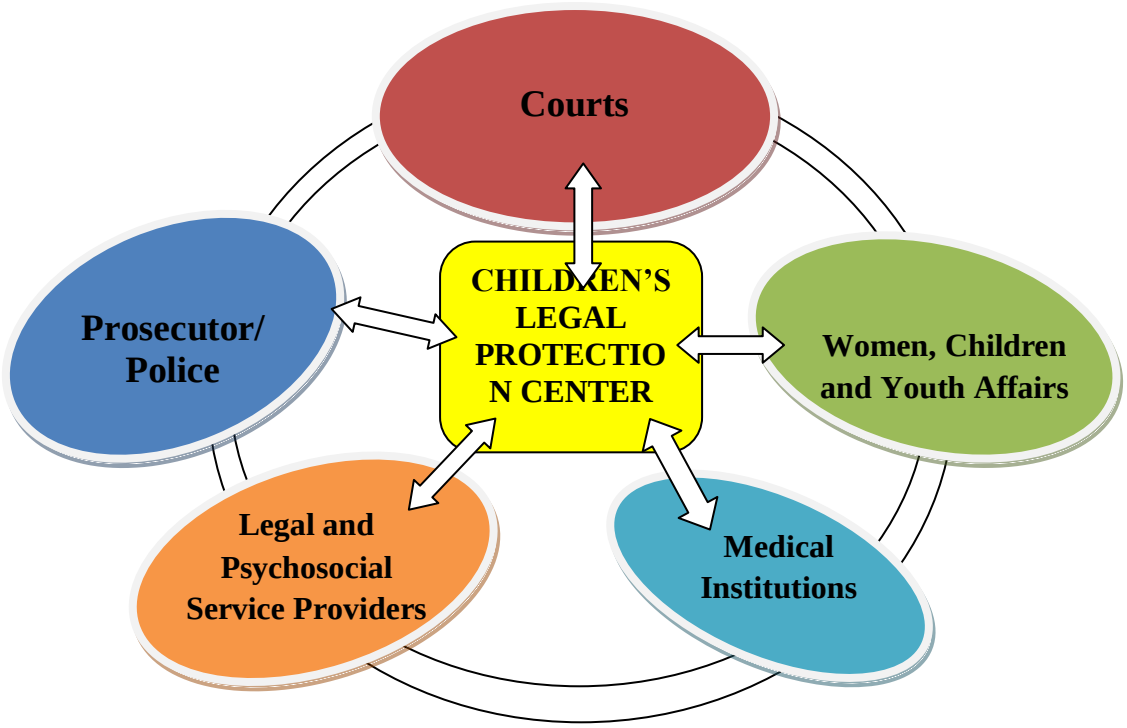
undertaken various activities to create a referral system among stakeholders working closely with children involved in the justice system.

2.1. The Referral System and Its Members

Although some form of referral system was in place among the police, federal courts and some governmental and non-governmental bodies before the establishment of CLPC, an effective referral system was realized only after CLPC has gone operational. Prior to the establishment of CLPC, the Federal Supreme Court Child Justice Project Office (CJPO), with a technical committee composed of eight member organizations had identified potential members of the network, prepared standard for service delivery and formats to be used in referring children from one institution to another. After these preparatory activities, a Memorandum of Understanding (MoU) was signed by 34 governmental and non-governmental institutions on October 11, 2012. The objective of the MoU is to improve child justice administration and respond to the needs of children involved in the justice system by strengthening collaboration and creating network among relevant stakeholders. The 34 signatories include: 5 justice sector institutions of the government, 5 government executive organs, 2 human rights institutions, 3 international and regional partner organizations, 2 local NGOs providing legal aid, and 17 non-governmental organizations that are mandated to provide psychosocial services to children.[19]

Based on this MoU, a referral system was created to provide optimal services to children involved in the justice system. CLPC prepared a referral guideline/manual and further developed the tools and formats necessary to operationalize the system. In addition, the CLPC organized two orientation workshops initially for the leaders of the MoU signatories, and subsequently for direct implementers in the institutions. In both forums, the contents of the referral guide were discussed along with the manner of operation and challenges of the referral system.

[19] Members of the referral network are Federal Supreme Court, Federal High cour, Federal First Instance Courts,Federal Supreme Court Child Justice Project Office, Ministry of Education, Addis Ababa Women, Children and Youth Affairs Bureau, Addis Ababa Remand and Rehabilitation Center for Children in Conflict with the Law, Ethiopian Human Rights Commission, Addis Ababa Police Commission, Charities and Societies Agency, Addis Ababa Health Bureau, Addis Ababa University Center for Human Rights, Save the Children, UNICEF, African Child Policy Forum, Abebech Gobena Yehitsanat Kibikabena Limat Mahiber, African Network for the Prevention of and Protection against Child Abuse and Neglect (ANPPCAN), Association for Women's Sanctuary and Development, Ethiopian Women Lawyers' Association, Ethiopian Christian Lawyers Fellowship, Former Inmates Rehabilitation Center, Forum on Sustainable Child Empowerment, Goal Ethiopia, Hanna Orphans Home, Hiwot Ethiopia, Hope Enterprise, Integrated Family Service Organization, Mekdem Ethiopia National Association, Organization for Child Development and Transformation (CHADET), Organization for Prevention Rehabilitation and Integration of Female Street Children (OPRIFSC), Progynist, Retrak Ethiopia, Selam Children's Village and SOS Children's Villages Ethiopia.


Courts
Prosecutor/
Police
CHILDREN'S
LEGAL
PROTECTIO
N CENTER
Women, Children
and Youth Affairs
Legal and
Psychosocial
Service Providers
Medical
Institutions

The referral system operates as an interactive collection of agencies. Referrals will be made to and from the different signatory institutions to respond to the diverse needs of children involved in the justice system. As illustrated above, children in need of legal and psychosocial services are referred from the first point of contact, the first referring organization, to the Coordination office (CLPC), then to the other service provider (the receiving organization). CLPC is responsible for following up on the result of the referral, collecting report from receiving organizations as well as coordinating the whole process of the referral system.

Also, an operational agreement between the Federal Supreme Court, the Federal High Court, the Federal First Instance Court, Federal Supreme Court Child Justice Project Office (CJPO), the Addis Ababa Police Commission, the Addis Ababa University Center for Human Rights, the African Child Policy Forum, the Ethiopian Women Lawyers Association (EWLA) and the Ethiopian Christian Lawyers Fellowship (ECLF) was signed on November 22, 2012. This agreement is meant to improve institutional response to the demand for legal aid, which is greater than the capacity of a single institution participating in the referral system.

Based on the operational agreement, the justice organs took the responsibility of providing office space for CLPC. CJPO agreed to co-manage CLPC with ACPF and coordinate the operational agreement. ACPF agreed to take the responsibility of staffing and to contribute budget to run CLPC. Similarly, AAU Center for Human Rights, EWLA and ECLF committed themselves to provide interns and *pro-bono* lawyers that provide legal aid service with CLPC.

As will be seen below, the synergy that is created as a result of the collaboration among the various stakeholders through the referral system and the operational agreement has helped CLPC to maximize its service delivery by facilitating the sharing of resources and speeding up the service delivery to children involved in the justice system.

2.2. Guidelines and Formats

One of the commitments CLIP undertook in the MoU and operational agreements relates to the preparation of guidelines and formats necessary for the provision of legal aid and psychosocial services. Accordingly, CLPC developed four guidelines: the *Pro-bono* Lawyers' Guideline, the Legal Counseling Guideline, the Court Representation Guideline and the Case Follow-up Guideline. The first guideline focuses on ethical standards for *pro-bono* lawyers. The second one sets out the step-by-step procedure for providing legal counseling for children and their care providers. The Court Representation Guideline establishes

eligibility criteria (of a child or his/her care provider) for court representation in civil cases affecting the wellbeing and best interest of the child. The recently developed Case Follow-up Guideline clarifies when to begin and how to undertake case follow up, how to document the outcomes of cases, and what to do about cases not yet dealt with.

Apart from the guidelines, CLPC also developed various formats for the actual provision of legal aid services. These includes the client registration form, court representation reporting format, legal aid service reporting format, and referral form for different legal and psychosocial services.

3. The Experience of CLPC in Realizing Children's Right to Legal Aid

Access to justice is a fundamental human right of every person.[20] It also has an element of equality and effectiveness. As noted above, certain segments of the society such as children are more prone to violations of their rights and hence need to enjoy their rights to access justice more than others. Providing assistance to the vulnerable sections of the society is a way of equalizing the unequal before the justice system. Drawing on practical encounters of CLPC, this section shows how children's access to justice can be realized through a multi-stakeholder approach to access to justice.

3.1. Legal Aid for Children Involved in Civil Proceedings

The CLPC provides legal aid to children whose welfare is dependent on the outcome of a family bench proceeding. For instance, children whose parents are under the process of divorce or in custody and child maintenance disputes are provided with legal counseling as well as judicial representation to ensure that their best interest is given due consideration. CLPC also covers costs related to court fee and transportation to children and their care providers.

As could be seen from the excerpts below, CLPC's involvement in providing legal aid service for children is bringing far reaching positive consequences for children. In a case litigated by a *pro-bono* lawyer assigned by the CLPC before the Cassation Bench of the Federal Supreme Court, a land mark decision in the enforcement of the best interest of the child is rendered. Apart from protecting the best interest of the child involved in the particular

[20] Universal Declaration of Human Rights (UDHR), 1948, Art 8.

case, the decision of the Cassation Bench is significant for it has set a standard that binds the ruling of similar cases in the future.[21]

Disregarding the Best Interest of the Child in the Consideration of Facts and Evidence in Civil Cases is a Fundamental Error of Law

The case involved an orphan who inherited a condominium unit from his deceased mother. The child and his deceased mother used to live in a *kebele* house. After being named the guardian of the child following the death of her sister, the aunt began living in the *kebele* house with the child. The *kebele* house was demolished for city development purpose and the government gave condominium houses as a replacement for the evictees. The fraudulent aunt, who had the title deed to the condominium house issued to her own, evicted the child.

Another aunt of the child, who unsuccessfully tried to institute a court case on behalf of the child, brought the case to CLPC's attention. CLPC investigated the case in collaboration with the Addis Ababa Bureau of Women, Children and Youth Affairs, a partner in the referral system. The Bureau helped gather evidence by consulting the resident's profile at the local *Kebele* where the child and his deceased mother used to live. And evidence showing the child's mother as an original registrant to the condominium lot and owner was found. Subsequently, the Centre assigned an attorney to represent the child and appealed to the Federal Supreme Court Cassation Bench claiming existence of error of law in the decision of the lower court.

The Cassation Bench considered the evidence acquired from the *Kebele* administration and overruled the decision of the lower courts. It reasoned that, though production of title deed is the legitimate evidence to show ownership over a building, courts are free to consider additional corroborative evidence when the best interest of the child is at stake. As a result the case is remanded for reconsideration to the lower court.[22]

3.2. Legal Aid for Children in Conflict with the Law

[21] The decisions of the Federal Supreme Court Cassation Bench are binding on lower courts on similar cases requiring interpretation of laws. See the Federal Courts Proclamation Re-amendment Proclamation, 2005, Proc. No.454/2005, *Fed. Neg. Gaz.*, Art 2.

[22] Fistum Tesfaye *v*. W/ro Mamite Azimach and Kirkos Sub-city *Wereda* 01 Administration, Federal Supreme Court, Cassation Division, File no. 84757, May 05/2005 E.C.

Children in conflict with the law are among the major target groups of CLPC's legal aid scheme. Assistances ranging from legal counseling to judicial representation would be accorded to children between the ages of 9-15 at the Child Friendly Benches of the FFIC and to children above 15 and below 18 in ordinary criminal benches. The presidents of each tier of Federal Courts, from the Supreme to the First Instance, have distributed a circular to judges under their respective leadership clarifying the services of CLPC among which the provision of legal aid services to children in conflict with the law is one. The circular states that "no child should be tried without a legal counsel who, in the absence of means by the child or his/her care provider, can be provided by CLPC."[23] Accordingly, federal judges are now requesting CLPC to assign a lawyer where a child in conflict with the law is not represented by a legal counsel. And, CLPC is carrying out its responsibility by assigning *pro-bono* lawyers to represent such children..

Legal Aid for Children from Broken Families

Yonas Hailu, 13, was charged with assault and theft committed in a neighbourhood in Kolfe Keranio. When appearing before FFIC Kolfe Keranio children bench to answer to the charges, he was very untidy, angry and displayed bad manners.

A background study by the *pro-bono* lawyer found that his mother lived in an Arab country, and his father was mentally sick. As he was virtually leading a street life, he had no parental supervision.

The boy was given counseling services and changed his manners dramatically. Upon the request of the *pro-bono* lawyer, the court acquitted Yonas with advice regarding his behaviour.

3.3. Mobilizing *Pro-bono* Lawyers

The CLPC uses *pro-bono* lawyers. CLPC's *pro-bono* lawyers' scheme is making difference in realizing the right to access to justice to children. CLPC makes legal aid service available to children all the way through the preparation of court applications and affidavits to legal counselling, mediation as well as judicial representation. [24] Most of CLPC *pro-bono* lawyers are affiliated with EWLA and ECLF, both of which participate in the referral system

[23] Circular to judges regarding the operation of CLPC, Federal Supreme Court, para 4.

[24] This is in line with the literature on child friendly legal aid which conceives legal aid as inclusive of 'legal advice, assistance, representation and mechanism for alternative dispute resolution'. See Guidance Note, *supra* note 3, p. 2.

discussed above. The CLPC also has strategic partnership with the Addis Ababa University Centre for Human Rights to establish a sustainable legal aid scheme by recruiting student interns and future *pro-bono* lawyers that can provide assistance to *pro-bono* lawyers retained by CLPC. Currently, fifty *pro-bono* lawyers have committed themselves to provide free legal aid to children for a total of 8 hours per week. On average, each lawyer provides legal aid to ten to fifteen clients each day. CLPC provides a modest amount of allowance to *pro-bono* lawyers to cover their transportation, telephone and stationary expenses.[25]

3.4. Beneficiaries of the Legal Aid Service

The CLPC's project document[26] stipulates that a maximum of 1300 children (1000 in Addis Ababa and 300 in five regional states where the CLPC is expected to roll-out beginning from 2014) per annum would receive legal aid services. However, Chart 1 and 2 below show CLPC was able to serve three times the number of children it planned to serve.

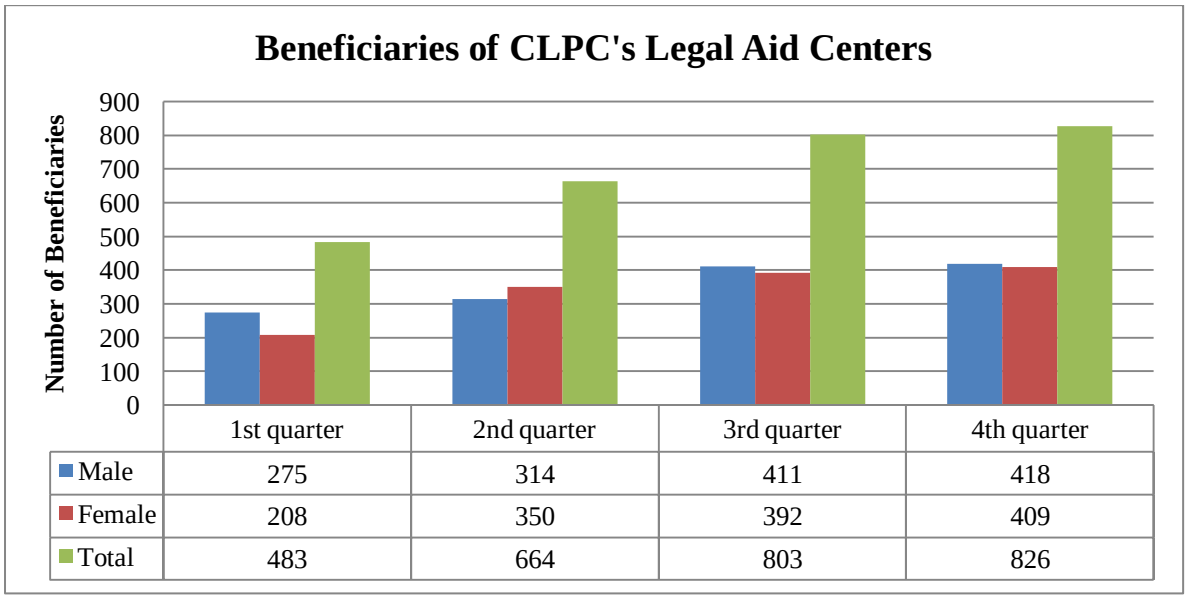
3.5. Provision of Complementary Psychosocial Services

Psychosocial services are provided by the network of mandated non-governmental organizations in the referral system. CLPC refers children it receives from different institutions and those who directly approach it seeking legal aid to these organizations. The major types of psychosocial services that are being provided through the referral system include temporary shelter, nutritional support, educational support, counselling, medical support, income generating activities, transportation allowance to follow up court cases, reintegration with family, and foster care. In addition, community based correction services are also made available for children in-conflict-with-the-law.

[25] Incidentally, 20% of *pro-bono* lawyers have second degrees and 80% have first degrees. Also, the majority of CLPC's *pro-bono* lawyers have served as judges at various federal courts.

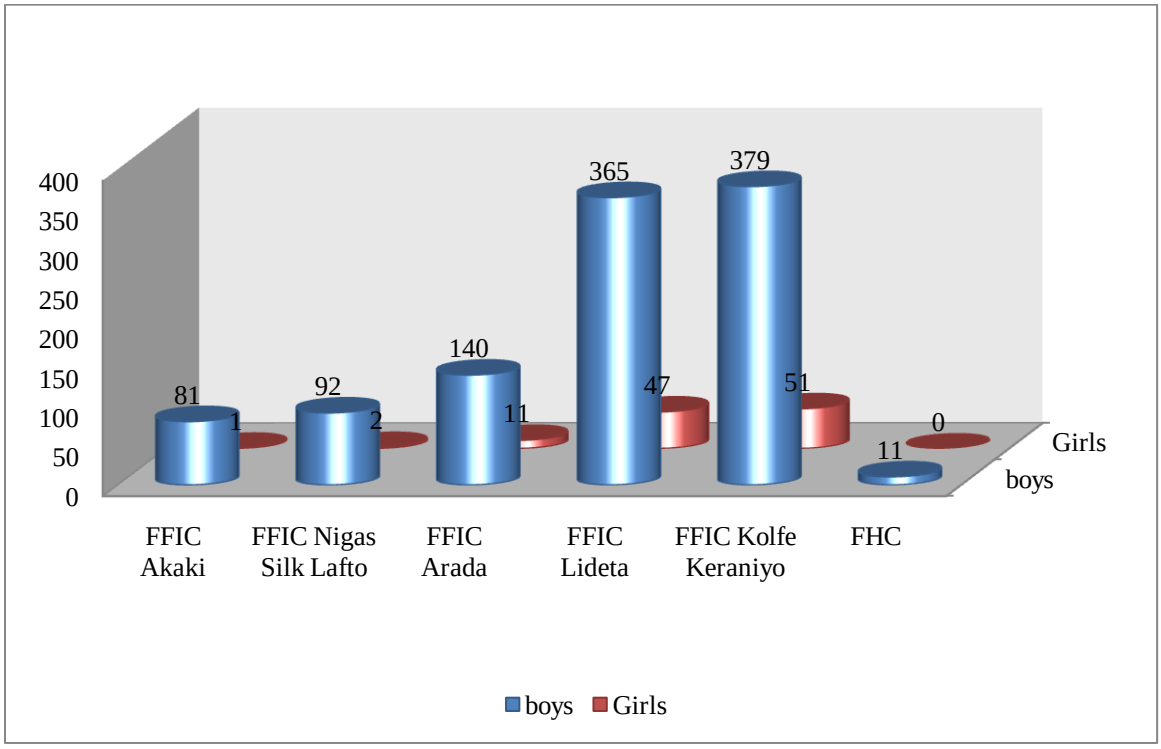
[26] The project document is the initial document that describes the goals, objectives, programs and activities of CLPC and it guides the activities of CLPC from 2012 -2015.

Chart 1: No. of children that benefited from of CLPC's legal aid service in the three centers in 2013



	1st quarter	2nd quarter	3rd quarter	4th quarter
Male	275	314	411	418
Female	208	350	392	409
Total	483	664	803	826

Chart 2: No. of children in conflict with the law that benefited from court representation in 2013



3.5.1. Psychosocial Services for Children Involved in Civil Cases

Clients of CLPC's legal aid are mostly children of divorcing parents. Disintegration of family by itself creates various emotional devastations. But the problem does not stop there for most of the clients. They face malnutrition, disruption of education, physical illness, homelessness, etc. These children have meager resource to cope with these problems when the father, who is usually the bread winner, stops covering the costs for these basic needs. As a result, children in these situations are often forced to trade-off their education and wellbeing for income generating activities including crime. On the other hand, mothers struggle on the responsibility of feeding their children. For instance, the beg for food or cry out of despair as they face the agony of seeing and handling their hungry, sick, naked, homeless and school dropout child. It is very saddening to see divorcing mothers in distress due to lack of means to feed their children.

It is very difficult for these children and their care providers to access justice and claim their right to get maintenance from their parents. Even if courts might decide some amount of maintenance, it is mostly provided after an irreversible damage has befallen the child and the mother. As court judgments take quite some time to be executed, providing temporary psychosocial services is necessary to prevent children from falling into chronic problems that might not be redressed by the justice system. In fact, the psychosocial needs arising out of the legal issue at hand might be more detrimental to the child than the legal issue.

CLPC entertains psychological cases almost on daily basis. Following the application of the child and/or the mother, CLPC summons the father for inquiry. Often, summoned fathers claim that they don't have decent work or that their income is too small even to support themselves. CLPC often rely on the referral system to alleviate the problem of children of divorcing parents. Children and their care providers are referred to member organization for temporary psychosocial services.

3.5.2. Psychosocial Services for Child Victims and Witnesses of Crime

The profile of child victims referred from the police for psychosocial services shows that child victims of sexual and physical violence are mostly abused by a person that is also very close to them, such as parents, relatives, neighborhoods and care takers. This leaves the safety of abused children at risk, especially where the case is reported to the police. Because the perpetrator might attempt to silence the child or destroy evidence, it is imperative children

are put in temporary shelters or safe homes away from the suspect and close to where they can get psychosocial services.[27]

CLPC facilitates psychological service to the children using shelters and safe homes run and owned by NGOs forming part of the referral network. As can be noticed from the case of a rape victim's case summarised below, children benefit a lot from the services at the shelters for it smoothens the reintegration with their families after the finalisation of criminal proceedings.

A Rape Victim's Case and CLPC's Intervention

The case involved a 15 years old girl who was raped and impregnated by her own father. During the investigation process the police was convinced that it was not safe for the child to remain in her father's house before the final verdict was given by a court of law. To ensure her safety and for justice to be done, the police referred the child to CLPC. CLPC referred the child to a safe home for care and counselling. By staying away from immediate families and with the counseling she got in the shelter, she was able to give her testimony freely and effectively.

The court found her father guilty for crimes of rape and incest and sentenced him to 21 years in prison.[28]

3.5.3. Psychosocial Services for Children in-Conflict-with-the-Law

Ato Leulesilassie Liben, judge in the Federal First Instance Court children-in-conflict-with-the-law bench, observe that most of the children that are in conflict with the law are from destitute families. Often, psychosocial services such as community based rehabilitation services, educational support, food and reintegration with family are needed by children in conflict with the law. Absence of proper schooling, parental follow up and lack of means for food and other basic needs lead children to get involved in criminal activities. Hence, CLPC's focus on complementing legal aid service with psychosocial services.

[27] Counselling services help children heal their experience of violence and cope with its traumatizing consequences.

[28] CLPC Referral File No. 105/05(on file with the author).

Diversion Service for Children in Conflict with the Law

Musie Dagnachew, a boy from *Kolfe Keraio* subcity, was charged with theft (for stealing 30 Birr [$1.75 USD] from a neighbouring woman who came to visit his care provider) and appeared before FFIC *Kolfe Keranio* children in conflict with the law bench.

A study into the background of the boy revealed that he started exhibiting unusual behaviour after overhearing his care giver telling a neighbour that she was not his mother. The boy did not want to live with his care provider and she also wanted him to be sent to the remand home.

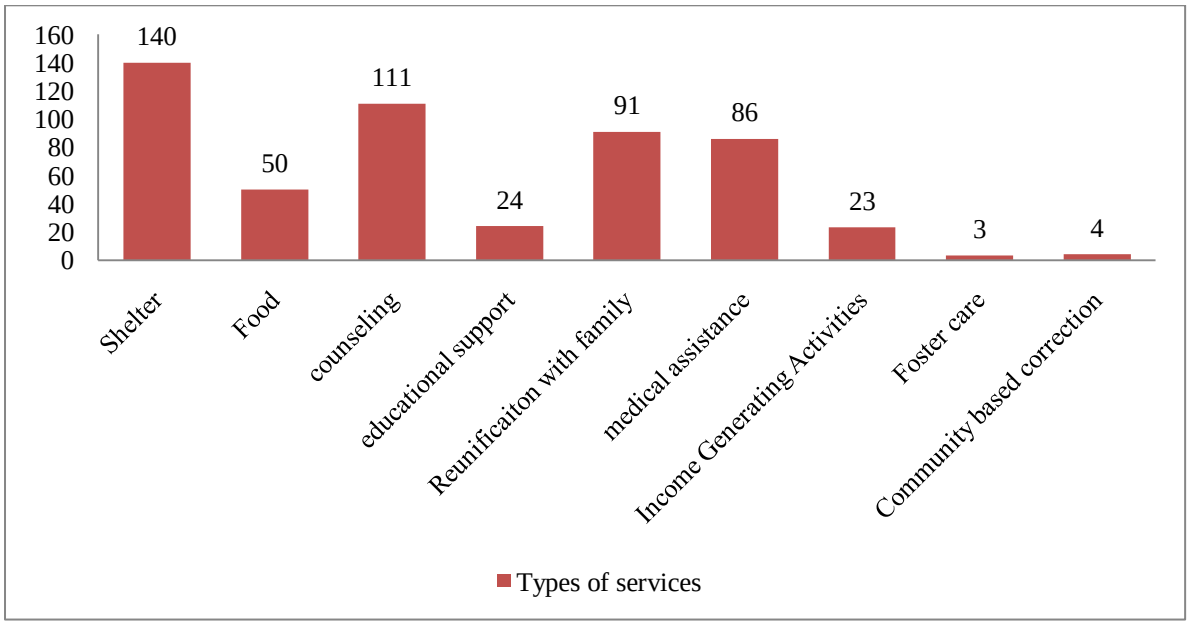
CLPC's *pro bono* lawyer requested the court for diversion of the boy to be corrected at community level instead of sending him to remand home. Following a favourable decision by the court, CLPC referred the boy to FSCE for community based correction and counseling. Similarly, the care giver was referred to FSCE for training on parenting skill and counselling on how to deal with children in similar situations.

The report from the receiving organization indicates that the boy's behaviour has greatly improved following the services he was given at FSCE (Referral File No 150/05).

3.5.4. Beneficiaries of Psychosocial Services

The CLPC's project document stipulates that a maximum of 165 children per annum (100 in Addis Ababa, 65 in selected regional states) would receive psychosocial services. However, as can be seen from the chart below, a total of 204 children have benefited from the 534 different psychosocial services availed through the referral system involving 17 organizations.

Chart 3: Types of Psychosocial Services and their Beneficiaries



3.6. Realizing Children's Right to Know their Parents

Both CRC and FDRE Constitution recognise the child's right to know and be cared for by his or her parents.[29] Although the legal framework allocates the primary responsibility for the upbringing and development of the child on the parent, the protection of the child's right to be cared for by his/her parents is not practically easy, particularly for children born out of wedlock. Fathers sometimes contest their paternity. In such cases, the child's rights to be cared for by his parents hinges on the mother's capacity to produce adequate evidence in support of a request for judicial declaration of paternity. In the absence of adequate evidence, the child will not be able to exercise his/her fundamental rights to the fullest.

Although DNA test results are now admissible as evidence in paternity litigation, the cost of the test may limit its utility. In Ethiopia, where women are financially disadvantaged, the father can easily deny his paternity by refusing to cover the cost of DNA test which is close to Ethiopian Birr 5,000 ($277 USD). In addition, as the burden of proof lies on the party making the claim (which is the mother in most cases), inability to cover this cost may result in the denial of the child's right to know and be cared for by his father. The experience of CLPC shows that some fathers deny their paternity only because the mother cannot afford to cover the cost of DNA test and hence cannot prove paternity.

[29] CRC, *supra* note 6, Art 7, FDRE Constitution, Art 36(1) (c).

In order to address this problem, CLPC covers the cost for the DNA test through a revolving fund it established in partnership with ACPF. Also, CLPC requests alleged fathers, who have the means, to refund the cost of the DNA test if they are found to be the fathers.[30] Incidentally, some alleged fathers agree to accept their child and provide the necessary support when they are told CLPC will cover the cost and establish their paternity through DNA test. Interestingly, in 22 out of a total of 24 cases for which DNA test was conducted over a period of nine months, the alleged men were found to be the biological fathers of the children.

The mere availability of DNA examination service is helping to establish paternity

In a case referred from the Federal High Court (File No. 126018), a mother of 1 year old baby sought to establish the paternity of someone who successfully denied it before a court of law. The appellate court referred the case to CLPC.

Upon referral, CLPC summoned the alleged father and the mother of the baby for mediation. The father insisted that they only had a one month affair which she broke it off, and the boy was born more than a year after they broke up and hence he was not the father. The mother, however, insisted that he was the father of her son and requested DNA test to prove it. As they both stuck to their positions, CLPC set a date for DNA test and asked the father to sign a contract to reimburse the DNA examination cost in case he is found to be the father. Later, the alleged father has sent *shimagiles* (elders) to her pleading to resolve the case amicably rather than incurring unnecessary costs. Therefore, CLPC called both parties and ensured the admission of the father and convinced him to support his son. The Federal High Court affirmed the paternity of the father based on the written admission of the father send to the court from the CLPC. (File No. FSC 125/05)

[30] This is done through the contract the alleged father signs to refund the DNA examination cost.

Establishment of Paternity for Twin Children

A mother of two year old twins approached CLPC claiming that the father of her children denied paternity and was not willing to provide child maintenance. CLPC summoned the alleged father and tried to resolve the case through mediation. But he denied that the children were his biological offspring. He also insisted that he would not accept the children as his own unless his paternity was proved by a DNA test which the mother should pay for if she claimed he was the father.

After exhausting all available options, CLPC was forced to cover the cost for the DNA test. The result of the DNA test showed that the man was in fact the father of the twin children. He, therefore, refunded the cost incurred by CLPC for the examination. Following a mediation process, he also started paying maintenance allowance for the children and agreed to regularly visit his children (File No. FSC 115/05).

3.7. CLPC and Alternative Dispute Resolution

The idea that courts are the exclusive bodies that provide justice is no longer acceptable in justice discourse. Alternative dispute resolution (ADR) mechanisms and administrative remedies are now being endorsed by various stakeholders, including the World Bank, that work on access to justice. Broader definitions of access to justice encompass access to subsidized legal services, alternative dispute resolution, legal awareness and others.[31]

Mediation is a major form of ADR mechanisms that the CLPC is widely utilizing in child focused dispute resolution. Although mediation (and ADR in general) consumes a lot of time, it has the positive impacts of improving communication, reducing conflict, creating stability for children by resolving disputes, and increasing compliance by families with recommended measures. In contrast, the resolution of issues through the courts is by nature adversarial and conflict-driven usually ending with a winner and a loser.

Mediation in CLPC is child focused and is conducted to realize the best interest of the child. Children are made part of the mediation process as much as possible and are given the chance to express their views and concerns in the process. Mediators are given training on mediation skills and how to protect the best interest of the child in mediation. The mediation service is provided based on CLPC's recently developed mediation guideline. CLPC's

[31] Pinedo, M., 'Access to Justice as Hope in the Dark in Search for a New Concept in European Law', *International Journal of Humanities and Social Science*, Vol. 1 No. 19, 2011, p. 15.

mediation guideline thoroughly explains who should do mediation, when to do mediation, ethical considerations, the role of mediators, stages of mediation and follow up activities. The mediation services are usually provided by *pro-bono* lawyers and legal officers of CLPC unless the nature of the case requires the intervention of certified mediators, in which case mediation is referred to such mediators that serve CLPC on call basis.

CLPC attempts to resolve every case it receives through mediation before resorting to judicial mechanisms. One of the major areas of mediation services relates to child maintenance for divorcing or separated parents. For most of the uneducated and disempowered women visiting CLPC, proving the income of their husbands (former husbands/partners) is very difficult. The fathers, particularly those working in the informal sector, are not willing to reveal their actual income. The strategy commonly used by CLPC to mediate on the amount of child maintenance allowance is asking both parents alone the amount and source of expenditure in the house before the separation. Leaving the contested and sporadic expenses out of the computation, the amount agreed by both parents is almost always greater than the initially claimed amount of income. CLPC uses this as leverage to push for the sustenance of the lifestyle the child was used to living before the separation of his/her parents. CLPC also provides mediation services to save marriages from ending in divorce, on the visitation rights of non-custodial parent, on property claims, etc. CLPC was able to solve a total of 140 cases through mediation within a period of one year.[32]

Below is a summary of a successfully mediated case that resolved child maintenance allowance dispute and reconciled parents to create a stable family for children.

Mediation Service is helping to Save Marriage

W/ro Tigist and Ato Hussen, who have three children of 9, 6 and 3 in between them, were separated when W/ro Tigist, the mother, requested CLPC to make Ato Hussen pay child maintenance allowance. Initial attempts to reconcile the disputing parents failed because of the unwillingness of W/ro Tigist. However, CLPC succeeded in mediating the two on the amount of maintenance allowance for the three children taking the lifestyle the children were used to as a springboard. Ato Hussen agreed to pay Birr 2000 (two thousand) per month and drop the money at CLPC's office regularly. After the father paid the agreed amount for two months, CLPC reinitiated attempts to reconcile the parents. This time, the attempt was successful and the parents agreed to solve their problems amicably and started living

[32] CLPC Annual Report, 2013 (Unpublished Material).

together. (CLPC File No. Bole 028/ 05).

4. Building the Capacity of Professionals

CLPC's capacity building training programs mainly target judges, prosecutors, police officers, *pro-bono* lawyers, social workers, medical professionals, and management and support staffs of courts.[33] As the training needs of these professionals differ due to the differing mandate and responsibilities they have, the capacity-building trainings of the CLPC addresses these professionals separately. The training programs of the CLPC are aimed at enhancing the knowledge and skills of target professionals in properly handling and communicating with children involved in the justice system. The contents of the capacity-building training address the specific needs of children coming into contact with the particular target group but touches upon the following cross-cutting major issues:

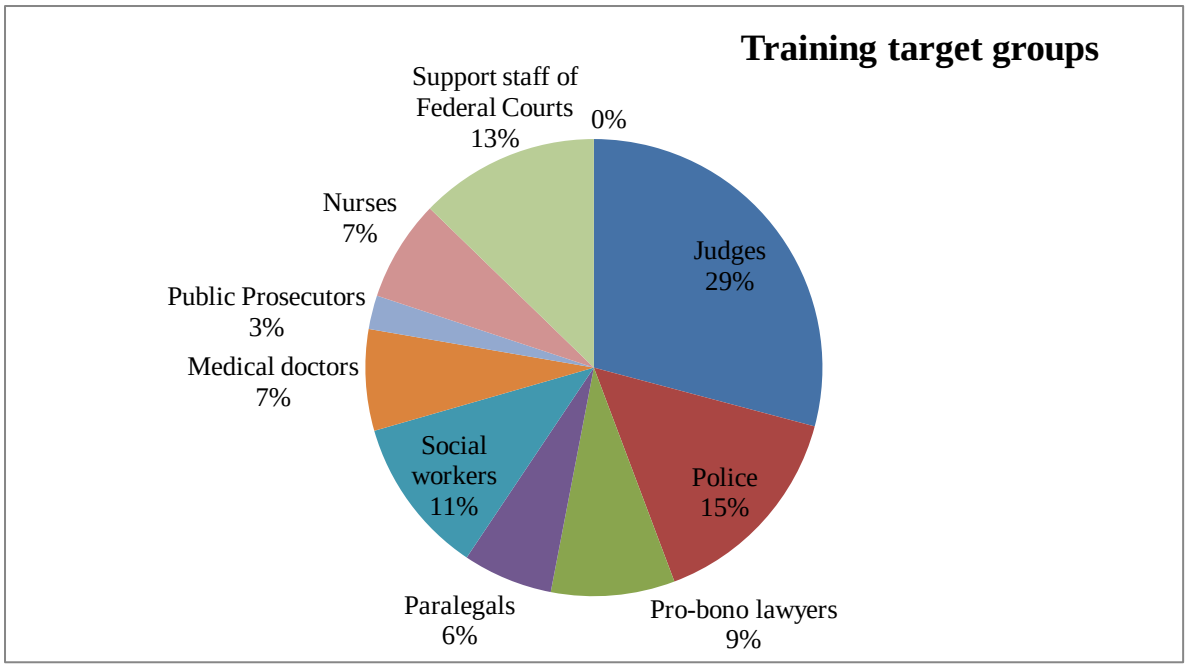
- The rights of children under national, regional and international legal framework;
- Child development;
- Forms, causes and impacts of child abuse;

[33] The European Union guideline on child friendly justice states that training in communication skills, in using child-friendly language and on child psychology, is necessary for all professionals working with children (police, lawyers, judges, mediators, social workers and other experts). Similarly, UNODC and UNICEF documents state that "lawyer, paralegals, police or judicial offers require training in how to communicate with children'. See UNICEF, UNDP, and UNODC, *Child-Friendly Legal Aid in Africa*, 2011, p. 11; Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice and their Explanatory Memorandum, the Committee of Ministers, 17 November 2010, 1098th Meeting of the Ministers' Deputies, p. 26.

- Why children get into delinquency;
- How to treat children in conflict with the law;
- How to communicate with children involved in the justice system;
- Characteristics of children when they come to the court;
- Characteristics, ethics and values of professionals handling cases of children;
- Child friendly administration of justice;
- Stress and burnout management.

Chart 4: Training of professionals working closely with children

Trainings were given to *pro-bono* lawyers that volunteered to take part in the legal aid provision scheme and to interns from Addis Ababa University Center for Human Rights.



CLPC's training has benefited a total of 628 professionals working closely with children involved in the justice system. The feedback from participants of CLPC's training shows that the training has contributed to enhancing the skill of social workers assisting courts in the protection of the best interest of the child.[34] Enhanced communication and interview skills with children and reduction of secondary victimization of children have also improved crime investigation technique of the police.

[34] Zertihun K., 'Assessment of the Activities of Social Workers Serving under the Federal First Instance Court in 2005 E.C.' (A Paper Presented on Annual Review Meeting of Federal First Instance Court, September 1, 2013, Kuriftu Resort. (Document in Amharic).

5. Challenges

Organized and coordinated actions are crucial to providing wide ranging services to children. Most of the collaborations that involve CLPC are anchored upon MoUs whose binding effect is precarious. As it stands now, it is unclear to what extent MoUs bind signatory institutions should they change their mind for one or another reason. These questions need to be answered to ensure the sustainability of the referral system.

Another challenge relates to the vastness of CLPC's activities. The overstretched CLPC might end up doing everything related to children and achieving less or end up unable to sustain its activities. This is so because the level of poverty in Ethiopia is high, and the demand for CLPC's services is quite high. CLPC by itself or through its partners may not be able to respond effectively to the needs of its target groups with the human and financial resource at its disposal. This is where the referral system is imperative; CLPC is working on enhancing its capacity by expanding partnership. Also, strict screening of those clients at chronic risk has been identified as a strategy for efficient use of resources.[35]

There is also a concern related to the sustainability of the services as a major portion of CLPC's expenses are donor funded. To ensure sustainability and reduce operational costs, CLPC relies on *pro-bono* and paralegal model. However, even the nominal transportation allowance paid to the *pro-bono* lawyers are too expensive for the government to take over in the near future. Currently, the contribution of the government is only limited to providing offices, covering the cost of some administrative staffs and monitoring the day-to-day activities of the centre.

The capacity of psychosocial service providers in the network is another challenge. These organizations claim that their capacity to provide optimal services is being hindered by the new CSOs Law and related regulations. According to W/ro Maria Munir, Director of Association for Women's Sanctuary and Development,[36] the 30/70 administrative and program cost allocation is deterring her organization from renting a spacious place to render wide range of services to children and their care providers.

Conclusion

[35] A challenge for CLPC are children, mostly brought through care providers who, when asked about their income level, always claim to be poor. But there is no system put in place to identify those who can from those who cannot afford to pay for the services of lawyers. A system of poverty level assessment should therefore be put in place.

[36] This association is one of the organizations that provides safe home and shelter to child victims and their care givers.

CLPC is the only legal aid center in Ethiopia that specifically targets children. Although other legal aid providing institutions also target children as one of the vulnerable groups of the society, they do not specialize in children. In providing legal aid to children, CLPC uses *pro-bono* lawyers, employed legal officers, paralegals, student interns and mediators. This is one of the learning points for other legal aid providing institutions who are mostly limited to only one model in providing legal aid service.

The other unique feature of CLPC is the fact that it is owned by government and works closely and in partnership with CSOs. This particular feature of CLPC is the major leverage that helped it achieve much in a short period. This arrangement has helped CLPC mobilize fund relatively easily, facilitate the referral system efficiently, speed up children's court cases, give force to the legal counseling services of CLPC's legal aid centers. Although the existing socio-economic priorities of the county may not enable this in the short term, the experience of CLPC can be taken as a model worth replicating in different geographic regions of Ethiopia.

CLPC's experience clearly shows that access to justice actually entails effectively responding to the cries of children. Access to justice is not only access to legal aid, nor is it only access to legal information or the sum of these and access to courts as well. Access to justice for children need to address their psychosocial needs. Through the referral system, CLPC is strategically utilizing the human and financial resource at the disposal of different institutions to provide various psychosocial services. The experience of CLPC in facilitating the referral system is believed to be another lesson others could learn from on the benefit of inter-agency collaboration for child protection.

CLPC is contributing to accessing justice to children by addressing the various barriers they face in the process. Top among these is physical barrier which is being addressed by opening branch offices in different parts of Addis Ababa and furnishing the services of *pro-bono* lawyers in all the children in conflict with the law benches of FFIC. The other problem being addressed through the establishment of victims' fund is lack of means to cover transportation cost and court fee to follow up their cases. CLPC is also tackling the information barrier on the part of right holders and duty bearer through the production of child friendly brochures and TV programs promoting the activities of the centers and courts as well as through the provision of series of training programs to professionals working with children in justice organs and other institutions.

AFTERWORD

The Way Forward: An Evidence-Based Approach to Access to Justice

The essays in this book lay the groundwork for a more robust system of access to justice in Ethiopia. The essays identify important areas of concern regarding access to justice including the role of administrative agencies, the importance of customary systems, and the need for special attention to the needs of the disabled and other vulnerable groups. The essays also contribute to the dialogue about access to justice in Ethiopia by clearly identifying pertinent issues relating to constitutional, legislative, and administrative matters and the customary settlement of disputes.

It is clear from the essays in this book that there is a strong foundation provided by the FDRE Constitution, international human rights standards incorporated into the domestic legal system, and legislation that can be cited in support of efforts to ensure effective access to justice in Ethiopia. Further, the essays, that contain analysis of existing laws and policies, make important policy and legislative recommendations. However, a question--not addressed by these essays-- remains: how do the existing constitutional provisions, domestic laws, and international standards actually influence the realization of effective access to justice in Ethiopia?

The answer to this question requires the taking of a next step—the gathering of information and/or new studies of the ways in which the law enforcement agencies, the courts, and government agencies responsible for protecting human rights and ensuring access to justice actually operate. Only with this knowledge base will justice officials, practitioners, and the ordinary citizen have the knowledge necessary to implement the measures necessary to promote access to justice.

An ideal examination of access to justice in Ethiopia—or indeed of access to justice in any other country-- would consist of an examination of domestic and international human rights standards and assessment of the actual access to justice policies and practices measured by those standards. Such an ideal examination of access to justice practices and policies is impossible without the examination of information—both quantitative and qualitative—about the actual functioning and performance of the various divisions of government responsible for guarantying access to justice for citizens.

Let’s take the example of the design and implementation of a system for ensuring the right to access to counsel in formal criminal proceedings. Researchers would examine the data

concerning the number of cases prosecuted, the nature of the charges initiated by police and prosecutors, the number of cases per judge, the number of cases per public defender or appointed counsel, and how access to defense counsel is actually implemented. The data concerning the criminal justice system would include the number of prisoners incarcerated in Ethiopia, pre-trial and post-trial, the rated capacity of prisons, and information about the conditions of confinement in jails and prisons. With respect to the juvenile justice system, data concerning the number of children in conflict with the law who are prosecuted, the number of children incarcerated in pre-trial detention facilities and in juvenile correctional institutions, the number of children represented by counsel, and the availability of probation and re-entry services could be examined.

The next step in the inquiry would be qualitative and would involve an examination of the ways in which criminal proceedings are conducted, from arrest to final disposition. This would require observation of arrest and detention practices, including interrogation of witnesses and suspects, police investigations, bail practices, and courtroom proceedings. Researchers would also observe the practices of prosecutors and defense counsel and would document the ways in which they interact with suspects, with each other, and with judges.

From the two-step process this would emerge: an evidence-based picture of the way in which criminal proceedings are conducted in the formal courts of Ethiopia—a picture that could be used as the basis for determining the extent of the need for appointed counsel and the role of appointed counsel in criminal proceedings, i.e., whether their involvement should begin at police stations, at the investigatory stage, or at the trial level. Such an examination of the criminal justice system could also include review of the appellate process to make sure that basic rights are being enforced and that convictions are based upon solid evidence.

This volume should provide those who wish to examine actual practice and policy with the tools necessary to move to evidence-based approach for the next steps to be taken in the effort to improve access to justice in Ethiopia.

Index

Select Bibliography

Books, monographs, and related publications

- Abera J., *An Introduction to the Legal History of Ethiopia: 1434 – 1974*, Shama Books, Addis Ababa, 2012.
- African Union, *Continental Plan of Action for the Africa Decade of Persons with Disabilities 1999-2009*, 2002.
- Alemika, E. *et al* (eds.), *The Theory and Practice of Criminal Justice in Africa*, Institute of Security Studies (ISS), 2009.
- Alffram, Hanrik, *Equal Access to Justice: A Mapping Experience*, Sida, 2011.
- Anderson, M., *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Institute of Development Studies, Sussex, 2003.
- Andreassen, B. and Stephen M.(eds), *Development as a Human Right: Legal, Political, and Economic Dimensions*, Harvard University Press, Cambridge, 2006.
- Assefa F., *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Wolf Legal Publishers, Postbus, 2006.
- Austin, J., *The Province of Law Determined*. <ttp://www.koeblergerhard.de/Fontes/AustinJohnTheprovinceofjurisprudencedetermined1832.pdf>. (Accessed 28 August 213).
- Beccaria, C., *Essay on Crimes and Punishments* [1864], W.C. Little, Albany, 1872
- Beitz, C., *The Idea of Human Rights*, Oxford University Press, Oxford, 2009.
- Bentham, J., *An Introduction to the Principles of Morals and Legislation* [1789], Clarendon Press, Oxford, 1907.
- Bentham, J., *Select Extracts From the Works of Jeremy Bentham*, Simpkin, Marshall, & Co., London, 1843.
- Biebesheimer, C., and Mejía, F. (eds.) *Beyond Our Borders: Judicial Reform for Latin America and the Caribbean*, Inter-American Development Bank, Washington, D.C., 2000.
- Bimpong-Buta, S., *The Role of the Supreme Court in the Development of Constitutional Law in Ghana*, Advanced Legal Publications, Accra, 2007.
- Bösl, A. and Diescho, J. (eds.), Human Rights in Africa: Legal Perspectives on Their *Protection and Promotion*, Macmillan Education, Windhoek, 2009.
- Brems, E. *et al.* (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights*, Intersentia, Cambridge, 2013.
- Burr, L. and Kyed, H. (eds.), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities*, Palgrave Macmillan, New York, 2007.
- Canadian International Development Agency, *Independence, Transparency and Accountability in the Judiciary of Ethiopia*, 2008.
- Cappelletti, M. *Judicial Review in the Contemporary World*, the Bobbs-Merrill Co. Inc., Indianapolis, 1971.

- Carias, A, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings*, Cambridge University Press, New York, 2009.
- Claude, W., *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations*, University of Pennsylvania Press, Philadelphia, 1995.
- Clayton, C. and Gillman, H. (eds), *Supreme Court Decision-making: New Institutionalist Approaches*, University of Chicago Press, Chicago, 1999.
- Cobbold, R. and Mills, G. (eds), *Global Challenges and Africa: Bridging Divides, Dealing with Perceptions, Rebuilding Societies*, The Royal United Services Institute for Defence and Security Studies, London, 2004.
- Collins, P., Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, Oxford University Press, Oxford, 2008.
- Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, UNDP, Vol. 1, New York, 2008.
- Council of Europe, *The Role of Supreme Courts in the Domestic Implementation of the European Convention on Human Rights*, 2008.
- Davis, D. and Le Roux, M., *Precedent and Possibility: The (Ab)use of Law in South Africa*, Juta, Cape Town, 2009.
- Dias, A.and Berg, N. (eds.), *Justice for the Poor: Perspectives on Accelerating Access*, Oxford University Press, New Delhi, 2009.
- Dicey, A., *Introduction to the Study of the Law of the Constitution,*, Liberty Fund, Indianapolis, 1982.
- Domingo, P., *Why the Rule of Law Matters for Development*?, Overseas Development Institute (ODI), London, 2009.
- Dorsen, N. *et al* (eds) *Comparative Constitutionalism: Cases and Materials*, 2nd edition, West Publishing, New York, 2010.
- Dworkin, R., *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, Oxford, 1996.
- Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1977.
- Edel, F., *The Length of Civil and Criminal Proceedings in the Case Law of the European court of Human Rights*, Council of Europe Publishing, Strasburg, 2007.
- Elias N. and Muradu A. (eds.), *Law and Development, and Legal Pluralism in Ethiopia*, Justice and Legal System Research Institute, Addis Ababa, 2013.
- Ely, J., *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Harvard, 1980.
- Epp, C., *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago University Press, Chicago, 1998.
- Evans, M. and Murray, R., (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, Cambridge University Press, Cambridge, 2008.
- Fasil N., *A Constitution for a Nation of Nations: The Ethiopian Prospect*, Red Sea Press, Asmara, 1997.

- Federal Democratic Republic of Ethiopia, *Comprehensive Justice System Reform Program*, Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, 2005.
- Federal Judicial Center, *Assistance to Pro se Litigants in the U.S. District Courts*, 2011.
- Frederic, G., *Political Literacy: Rhetoric, Ideology, and the Possibility of Justice*, State University of New York Press, Albany: New York, 1994.
- Gargarella, R *et al*., (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate, Aldershot, 2006.
- Garner, B., *A Dictionary of Modern Legal Usage*, 2nd ed., Oxford University Press, Oxford, 2001.
- Gebre Yntiso, *et al*. (eds.), *Customary Dispute Resolution Mechanisms in Ethiopia - ባህላዊ የግጭት መፍቻ ስርዓቶች በኢትዮጵያ*, Ethiopian Arbitration and Conciliation Center, Addis Ababa, 2011.
- Geraghty, T. and Geraghty, D., *Child-Friendly Legal Aid in Africa*, UNICEF & UNDP, 2011.
- Gewirth. A., *Human Rights: Essays on Justification and Applications*, The University of Chicago Press, Chicago, 1982.
- Ginsburg, T. and Moustafa, T. (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge, 2008.
- Ginsburg, T., *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, Cambridge, 2003.
- Girmachew A. Aneme, and Sisay Yeshanew, (eds), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects*, Addis Ababa University Press, Addis Ababa, 2009.
- Heywood, A., *Political Ideas and Concepts: An Introduction*, Macmillan, London, 1994.
- Human Rights and Legal Affairs Council of Europe, *Compilation of Texts Related to Child Friendly Justice*, 2009.
- Human Rights Watch, *Protectors or Pretenders?: Government Human Rights Commissions in Africa*, 2001.
- Indian National Human Rights Commission, *Disability Manual*, 2005.
- International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions*, 2000.
- Isser, D., Lubkermann, S. and N'Tow, S., *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, United States Institute for Peace, 2009.
- Jackson, V. and Tushnet, M., *Comparative Constitutional Law*, 2nd edition, Foundation Press, New York, 2006.
- Jain, M., *Indian Constitutional Law*, Wadhwa, Agra/Nagpur, 1994.
- James, C., *Nothing about Us without Us: Disability Oppression and Empowerment*, University of California Press, Berkeley, 1998.

- Japan International Cooperation Agency Planning and Evaluation Department, *Country Profile on Disability Federal Democratic Republic of Ethiopia*, 2002. Available at:
- Kairys, D. (ed), *The Politics of Law: A Progressive Critique*, Basic Books, New York, 1998.
- Kay, S. (ed), *Standing to Raise Constitutional Issues: Comparative Perspectives*, Bruylant, Brussels, 2005.
- Kumlachew D. and Debebe H., *Assessment of the Impact of Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia*, Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, , 2012.
- Lencho L., *The Ethiopian State at the Crossroads: De-Colonization and Democratization or Disintegration?*, Red Sea Press, Asmara, 1999.
- Levine, D., *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2nd ed., the University of Chicago Press, Chicago, 2000.
- Lindsnaes, B., Lindholt, L. and Yigen, K. (eds), *National Human Rights Institutions: Articles and Working Papers*, the Danish Centre for Human Rights, 2001.
- Lowenstein, S., *Materials for the Study of the Penal System of Ethiopia*, Haile Sellassie University, Addis Ababa, 1965.
- Mbondenyi, M. and Ojienda, T., (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Pretoria University Law Press, Pretoria, 2013.
- Meene, I. and Rooij, B., *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation*, Leiden University Press, Leiden, 2008.
- Melin, R., *Evidence in Ethiopia*, HSIU, Addis Ababa, 1972.
- Merara G., *Ye Ethiopia Politica Miskilkil Guzo na Ye Hiwote Tizitawoch*, 2nd ed., 2006 E.C.
- Michelman, F, *Brennan and Democracy*, Princeton University Press, New Jersey, 1999.
- Morris, J., *Pride Against Prejudice: Transforming Attitudes to Disability*, New Society, Philadelphia, 1991.
- Muradu A., *Legal History and Traditions*, vol. 2, JLSRI, Addis Ababa, 2007.
- Murray, R., *The Role of NHRIs at the International and Regional Levels: The Experience of Africa*, Hart Publishing, Oxford and Portland, 2007.
- OECD, *Highlights from the Second Report of the International Adult Literacy Survey: Literacy Skills for the Knowledge Society*.
- OECD, *Literacy Skills for the Knowledge Society: Further Results from the International Adult Literacy Survey*, 1997.
- Office of the U.S. Supreme Court Clerk., *U.S. Supreme Court Guide for Prospective Indigent Petitioners for Writs of Certiorari*, 2011.
- Pankhrust, R., *Introduction to Economic History of Ethiopia: From Early Times to 1880*, Lalibela House, Addis Ababa, 1961.

- Pankhurst, A. and Getachew A. (eds.), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution*, French Center of Ethiopian Studies, Addis Ababa, 2008.
- Parke, C., *Just Lawyers: Regulation and Access to Justice*, Oxford University Press, Oxford, 1999.
- Paul, J. and Clapham, C., *Ethiopian Constitutional Development*, Vol. II, Addis Ababa University Faculty of Law, 1967.
- Paul, J. and Clapham, C., *Ethiopian Constitutional Development: A Source Book*, Vol. I, Oxford University Press, Oxford, 1967.
- Penal Reform International, *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, 2004.
- Perry, M., *The Constitution in the Courts: Law or Politics?*, Oxford University Press, Oxford, 1994.
- Plan and FIDA Uganda, *Using Alternative Dispute Resolution to Protect the Rights of People Affected by HIV AND AIDS in Uganda: The Experiences of FIDA and Plan in Kamuli and Kampala*, 2010.
- Prillaman, W., *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Praeger, Westport, 2000.
- Rawls, J., *A Theory of Justice*, Harvard University Press, Cambridge, Massachusetts, 1971.
- Rhode, D., *Access to Justice*, Oxford University Press: Oxford, 2004.
- Rhodes, R., Binder, S. and Rockman, B. (eds.), *The Oxford Handbook of Political Institutions*, Oxford University Press, Oxford, 2006.
- Robert, M., *Evidence in Ethiopia*, Faculty of HSIU Addis Ababa University, 1972.
- Rose, S. and Rose, H. (eds.), *Alas Poor Darwin: Arguments Against Evolutionary Psychology*, Random House, London, 2001.
- Scholler, H., *Ethiopian Constitutional Development*, Vol. I, Artistic Printing Press, Addis Ababa, 2004.
- Sedler, R., *Ethiopian Civil Procedure*, Oxford University Press, Oxford, 1968.
- Sen, A., *Development as Freedom*, Alfred A. Knopf, New York, 1999.
- Sepluveda, M., *et al*., *Human Rights Reference Handbook*, University for Peace, Costa Rica, 2004.
- Shapiro, N., *Courts: A Comparative and Political Analysis*, Chicago University Press, Chicago, 1981.
- Shklar, J., *The Faces of Injustice*, Yale University Press, London, 1990.
- Simmons, B., *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, New York, 2009.
- South African Law Reform Commission, *Justice and Correctional Services*, South Africa Yearbook 2010/11.
- Steven L., *Materials for the Study of the Penal System of Ethiopia*. Faculty of Law Haile Sellassie University, Addis Ababa, Ethiopia, 1965.

- Stevens, J., *Access to Justice in Sub - Saharan Africa: The Role of Traditional and Informal Justice Systems*, Penal Reform International, London, 2000.
- Tate, N. and Vallinder , T., *The Global Expansion of Judicial Power*, New York University Press, New York, 1995.
- The World Justice Project, *World Rule of Law Index 2014*, February 2014.
- Tunc, A. (ed.), *Legal Aspects of Economic Development*, Dalloz, Paris, 1966.
- U.S. District Courts, *U.S. Handbook for Civil Cases.*
- UN Office of the High Commissioner for Human Rights, *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies*, OHCHR, Geneva, 2002.
- UNDP, *Access to Justice: Practice Note*, 2004.
- UNDP, *Integrating Human Rights with Sustainable Development*, New York, 1998.
- UNDP, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-based Approach to Access to Justice*, 2005.
- UNDP, *Rethinking the Role of Law and Justice in Africa's Development*, Addis Ababa, 2013.
- UNDP, UN Women, UNICEF, *Informal Justice Systems, Charting a Course for Human Rights-based Engagement: A Study of Informal Justice Systems: Access to Justice and Human Rights*, 2012.
- UNESCO Institute for Statistics, *Adult and youth Literacy, 1990-2015: Analysis of Data for 41 Selected Countries*, 2012.
- UNESCO, Education for All Global Monitoring Report, *Literacy: The Core of Education For All*, 2006.
- UNICEF, UNDP, and UNODC, *Child-Friendly Legal Aid in Africa*, 2011.
- United Nations, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 2013.
- Van Puymbrpeck, R. (ed.), *Comparative Judicial and Legal Development: Towards an Agenda for a Just and Equitable Society in the 21st Century*, World Bank, Washington, 2001.
- Van Weerelt, P., *The Application of A Human Rights Based Approach to Development Programming: What is the Added Value?*, UNDP, New York, 2000.
- Wanjala, S. (ed.), *Law and Access to Justice in East Africa*, Clairpress, Nairobi, 2004.
- Watson, N. Roulstone, A. and Thomas, C., *The Routledge Handbook of Disability Studies*, Routledge, London, 2012.
- Whittington, K, et al. (eds), *Law and Politics*, Oxford University Press, New York, 2008.
- Wojkowska, E., *Doing Justice: How Informal Justice Systems can Contribute*, UNDP and Oslo Governance Centre, 2006.
- Wojkowska, E., *How Informal Justice Systems Contribute*, United Nations Development Program, Oslo Governance Center, Oslo, 2006.
- World Bank, *Ethiopia Legal and Judicial Sector Assessment*, Washington, D.C. 2004.

- World Bank, *World Development Report 2006: Equity and Development*, Oxford University Press, New York, 2005.
- World Bank, *World Development Report: Building Institutions for Markets*, 2012.
- World Economic Forum, *Global Competitiveness Report 2008-2009*, Geneva, 2008.
- Zartman, W. (ed.) *Traditional Cures for Modern Conflicts: African Conflict Medicine*, Lynne Rienner Publishers, London, 2008.

Articles and conference papers

- ____, 'Increasing Access to Justice for Women, the Poor, and Those Living in Remote Areas: An Indonesian Case Study,' *Justice for the Poor*, Vol. 6, No. 2, 2011.
- Abel, L., '*Turner v. Rogers* and the Rights of Meaningful Access to Courts,' *Denver University Law Review*, Vol. 89, No. 4, 2013.
- Abrahamson, S., 'Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence', *Ohio State Law Journal*, Vol. 64, No. 3, 2003.
- Adem K., 'A Constitution without a Guardian: Is the Ethiopian Constitution really Supreme?', *Ethiopian Human Rights Law Series*, Vol. 5, 2013.
- Adem K., 'Human Rights in the Ethiopian Constitution: An Overview', *Journal of African and International Law*, Vol. 3, No.3 2010.
- Adem K., 'Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power nonsensical', *CGHR Working Paper* 1, Cambridge: University of Cambridge Centre of Governance and Human Rights, 2012.
- Adem K., 'Towards more Liberal Standing Rules for the Enforcement of Constitutional Human Rights in Ethiopia', *African Human Rights Law Journal*, Vol. 10, No.2, 2010.
- Anderson, M., 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs', *Paper for Discussion at World Development Report Meeting*, 1999.
- Angell, E., 'The Amicus Curiae: American Development of English Institutions', *International and Comparative Law Quarterly*, Vol. 16, No.4, 1967.
- Assefa F., 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation', *Mizan Law Review*, Vol. 1, No.1, 2007.
- Assefa F., 'Separation of Powers and its Implications for the Judiciary in Ethiopia', *Journal of Eastern African Studies*, Vol.5, No.4, 2011.
- Assefa F., 'Some Reflections on the Role of the Judiciary in Ethiopia', *Recht in Afrika*, Vol. 14, No.1, 2011.
- Assefa F., 'Some Reflections on the Role of the Judiciary in Ethiopia', *Ethiopian Bar Review*, Vol. 3 No. 2, 2009.
- Ayodele, G., 'An Overview of the Plea of Non Est Factum and Section 3 of the Illiterates Protection Law (1994) of Lagos State in Contracts Made by Illiterates in Nigeria,' *Nigerian Current Law Review*, 2007 – 2010.

- Baker, B., 'Where Formal and Informal Justice Meet: Ethiopia's Justice Pluralism', *African Journal of International and Comparative Law,* Vol. 21, No. 2, 2013.
- Barber, N., 'Prelude to Separation of Powers', *Cambridge Law Journal,* Vol. 60, No.1, 2001.
- Beckstrom, J., 'Handicaps of Legal Social Engineering in Developing Nation', *The American Journal of Comparative Law,* Vol. 22, No. 4, 1974.
- Bedner, A. and Vel, J., 'An Analytical Framework for Empirical Research on Access to Justice', *Law, Social Development & Global Development Journal (LGD)* e-journal, 2010.
- Bedner, A., 'An Elementary Approach to the Rule of Law', *Hague Journal of the Rule of Law,* Vol. 2, No. 1, 2010.
- Bennett, W., 'Re-Introducing African Customary Law to the South African Legal System', *The American Journal of Comparative Law.* Vol. 57, No.1, 2009.
- Bhagwati, P., 'Judicial Activism and Public Interest Litigation', *Columbian Journal of Transnational Law,* Vol. 23, No. 3, 1985.
- Bidaguren, A. and Estrella, N., 'Governability and Forms of Popular Justice in the New South Africa and Mozambique: Community Courts and Vigilantism', *Journal of Legal Pluralism and Unofficial Law,* Vol. 34, Issue.47, 2002.
- Brown, D., 'Federal Mens Rea Interpretation and the Limitations of Culpability's Relevance,' *Law and Contemporary Problems,* Vol. 75, No. 2, 2012.
- Burbank, S., 'What do we Mean by 'Judicial Independence'?', *Ohio State Law Journal,* Vol. 64, No. 1, 2003.
- Burman, S. and Schärf W., 'Creating People's Justice: Street Committees and People's Courts in a South African City', *Law & Society Review,* Vol. 24, No. 3, 1990.
- Cappelletti, M. and Garth, B., 'Access to Justice: The Newest Wave in the World Wide Movement to Make Rights Effective', *Buffalo Law Review,* Vol. 27, 1977-1978.
- Cardenas, S., 'Emerging Global Actors: The United Nations and National Human Rights Institutions', *Global Governance,* Vol. 9, 2003.
- Cass, R., 'Ignorance of the Law: A Maxim Reexamined,' *William and Mary Law Review,* Vol. 17, No. 4, 1976.
- Chayes, A., 'The Role of the Judge in Public Law Litigation', *Harvard Law Review,* Vol. 89, No.7, 1976.
- Chiba, M., 'Legal Pluralism in Sri Lankan Society: Toward a General Theory of Non-Western Law', *Journal of Legal Pluralism and Unofficial Law,* Vol. 33, 1993.
- Chirayath, L., Sage, C., Woolcock, M., 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems', *World Development Report Background Papers,* the World Bank, 2005.
- Clapham, C., 'The Ethiopian Experience of Devolved Government', *Ethiopian Journal of Federal Studies,* Vol.1, No.1, 2013.
- Collins, P., Jr., 'Friends of the Court: Examining the Influence of Amicus Curiae participation in the U.S. Supreme Court Litigation', *Law and Society,* Vol. 38, No.4, 2004.

- David, R., 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries', *Tulane Law Review*, Vol.37, 1962.
- Davis, D., 'The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?', *P.E.R.*, Vol. 15, No. 5, 2012.
- Davis, W. and Turku, H., 'Access to Justice and Alternative Disputes Resolution', *Journal of Dispute Resolution*, Vol.47, no. 1, 2011.
- Debebe H., 'Ethiopia', *International Journal of Not-for-Profit Law*, Vol. 12, No.2, 2010.
- Debebe H., 'Restrictions on Foreign Funding of Civil Society: Ethiopia', *International Journal of Not-for-Profit Law*, Vol. 12, No.3, 2010.
- Donovan, D. and Getachew A., 'Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism', *The American Journal of Comparative* Law, Vol.51, No.3, 2003.
- Economides, K., 'Reading the Waves of Access to Justice', *Bracton Law Journal*, Vol. 31, 1999.
- Elhauge, E., 'Does Interest Group Theory Justify more Intrusive Judicial Review?', *Yale Law Journal*, Vol. 101, No.1, 1991.
- Epp, C., 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms', *American Political Science Review*, Vol. 90, No.4, 1996.
- Fiss, O., 'The Limits of Judicial Independence', *University of Miami Inter-American Law Review*, Vol. 25, No. 1, 1992.
- Friedman, L., 'Access to Justice: Some Historical Comments,' *Fordham URB Law Journal*, Vol. 37, 2010.
- Galanter, M., 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law', *Journal of Legal Pluralism*, Vol. 19, 1981.
- Galanter, M., 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change', *Law and Society Review*, Vol. 9, 1974.
- Gallagher, M., 'Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness,' *Law & Society Review*, Vol. 40, No. 4, 2006.
- Garcia, R., 'A Democratic Theory of Amicus Advocacy', *Florida State University Law Review*, Vol. 35, 2008.
- Garoupa, N. and Ginsburg, T., 'Guarding the Guardians: Judicial Councils and Judicial Independence', *American Journal of Comparative Law*, Vol. 57, No. 1, 2009.
- Gebreamlak G., 'The Incorporation and Status of International Human Rights under the FDRE Constitution', *Human Rights Law Series*, Vol. III, 2008.
- Geck, K., 'Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices', *Cornell Law Quarterly* Vol. 51, No. 2, 1965.
- Getahun K., 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System', *Afrika Focus*, Vol. 20, 2007.
- Greco, A., 'ADR and a Smile: Neocolonialism and the West's Newest Export in Africa', *Pepperdine Dispute Resolution Law Journa*l, Vol. 10, No.3, 2010.

- Grimm, D., 'The Basic Law at 60: Identity and Change', *German Law Journal*, Special Issue, Vol.11, No.1, 2010.
- Haffajee, F., 'South Africa: Blending Tradition and Change', *UNESCO Courier*, Vol. 52, Issue 11, 1999.
- Hamm, B., 'A Human Rights Approach to Development', *Human Rights Quarterly*, Vol. 23, 2001.
- Harris, B., 'Judicial Review, Justiciability and the Prerogative of Mercy', *Cambridge Law Journal*, Vol. 62, No.3, 2003.
- Hassen T., 'Indigent's Right to State Funded Legal Aid in Ethiopia,' *International Human Rights Law Review*, No. *2*, 2013.
- Hayes, M., 'Access to Justice', *Studies: An Irish Quarterly Review*, Vol. 99, no. 393, 2010.
- Higginson, S., 'A Short History of the Right to Petition Government for the Redress of Grievances', *Yale Law Journal*, Vol. 96, 1986.
- Hirschl, R., 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review', *International Journal of Constitutional Law*, Vol. 9, No.2, 2011.
- Ip, E., 'Constitutional Review as Political Investment: Evidence from Singapore and Taiwan', *Institute of Law, Economics and Policy, Political Economy Working Paper No 2*, 2011,
- Jacobs, B., 'Deterrence and Deterrability,' *Criminology*, Vol. 48, No. 2, 2010.
- Jagwanth, S., 'Democracy, Civil Society and the South African Constitution: Some Challenges', *Management of Social Transformations (MOST), Discussion Paper* 65, 2003.
- Juma, L., 'Africa, Its Conflicts and Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives', *Michigan State Journal of International Law*, Vol. 13, 2005.
- Kane, M., Oloka-Onyango, J. and Tejan-Cole, A., 'New Frontiers of Social Policy, Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor', Conference Paper: Arusha Conference on New Frontiers of Social Policy, 2005.
- Kearney, J. and Merrill, T., 'The Influence of Amicus Curiae Briefs on the Supreme Court', *University of Pennsylvania Law Review*, Vol. 148, No.3, 1999-2000.
- Kelemework T., 'Conflict and Alternative Dispute Resolution among the Afar Pastoralists of Ethiopia', *African Journal of History and Culture*, Vol. 3, No.3, 2011.
- Khadiagala, L., 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights', *Development and Change*, Vol.32, 2001.
- Kimble, J., 'Answering the Critics of Plain Language,' *The Scribe Journal of Legal Writing*, 1994-95.
- Klarman, M., 'Brown and Lawrence (and Goodridge)', *Michigan Law Review*, Vol. 104, No. 3, 2005.
- Koo, J. and Ramirez, F., 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004', *Social Forces*, Vol. 87, No. 3, 2009.

- Krieger, L., 'Afterword: Socio-Legal Backlash', *Berkeley Journal of Employment and Labor Law*, Vol. 21, No. 1, 2000.
- Krislov, S., 'The Amicus Curiae Brief: From Friendship to Advocacy', *Yale Law Journal*, Vol. 72, No.4, 1962-1963.
- Larkins, C., 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law*, Vol. 44, No.4, 1996.
- Lever, L., 'Democracy and Judicial Review: Are They Really Incompatible', *Perspectives on Politics*, Vol. 7, No. 4, 2009.
- Lewis, M. and McCrimmon, L., 'The Role of ADR Processes in the Criminal Justice System: A View from Australia', A Paper Presented at ALRAESA Conference, Entebbe, 2005.
- Loux, A., 'Losing the Battle, Winning the War: Litigation Strategy and Pressure Group Organization in the Era of Incorporation', *The King's College Law Journal*, Vol. 11, No.1, 2000.
- Lutzenhiser, J., 'An Open Courts' Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence,' *Washington Law Review*, Vol. 87, 2012.
- Macfarlane, J., 'Working towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with Formal Legal System', *Cardozo Journal of Conflict Resolution*, Vol.8, 2007.
- Mark, G., 'The Vestigial Constitution: The History and Significance of the Right to Petition', *Fordham Law Review*, Vol. 66, Issue 6, 1998.
- Maru, V., 'Access to Justice and Legal Empowerment: A Review of World Bank Practice,' *Hague Journal on the Rule of Law*, Vol. 2, 2010.
- Mattei, U., 'Access to Justice: A Renewed Global Issue?', *Electronic Journal of Comparative Law*, vol. 11.3 2007.
- Mcbride, J. 'Access to Justice and Human Rights Treaties', *Civil Justice Quarterly*, 1998.
- McQuoid-Mason, D., 'Access to Justice in South Africa', *Windsor Yearbook of Access to Justice*, Vol. 17, 1999.
- Mennen, T., 'Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan', *Hague Journal on the Rule of Law*, Vol. 2, 2010.
- Michels, A., 'Psychosocial Support for Children: Protecting the Rights of Child Victims and Witnesses in Transitional Justice Processes', *Innocenti Working Paper*, No. 2010-14, Florence, UNICEF Innocenti Research Centre.
- Milovanovic, D., 'Dueling Paradigms: Modernist v. Postmodernist Thought,' *Human and Society*, Vol. 19, No.1, 1995.
- Minase H., 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the 'Republic's' – *cucullus non facit monachum'*, *Cardozo Journal of International and Comparative Law*, Vol. 13, No.1, 2005.
- Mohammed A., 'Challenges Facing the New Ethiopian Ombudsman Institution', *International Ombudsman Yearbook*, Vol. 6, 2002.

- Mohammed A., 'The Ethiopian Human Rights Commission: Challenges Confronting Its Effective Functioning', *Chinese Year Book of Human Rights*, Vol. 4, 2006.
- Mohammud A., 'The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities', *International Journal on Minority and Group Rights*, Vol.14, 2007.
- Mueller, P., L. Solan, & J. Darley., 'When Does Knowledge Become Intent? Perceiving the Minds of Wrongdoers,' *Journal of Empirical Legal Studies*, Vol. 9, No. 4, 2012.
- Mulugeta G., 'Law Schools' Access to Legislations and Decisions: Overlooked but Critical Source of Legal Education and Research', 2009.
- Murray, C., 'Litigating in the Public Interest: Intervention and the Amicus Curiae', *South African Journal on Human Rights*, Vol. 10, 1994.
- Odinkalu, A., 'Pluralism and the Fulfillment of Justice Needs in Africa', 2005.
- Oliver, M., 'Theories of Disability in Health Practice and Research', *British Medical Journal*, Vol. 317, 1998.
- Oppermann, B., 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Law in Egypt, South Africa and the United States', *Hastings Women's Law Journal*, Vol. 17, No.1, 2006.
- Overseas Development Institute (ODI), 'What Can We Do with A Rights-Based Approach to Development?', *ODI Briefing Papers*, London, 1999.
- Pinedo, M., 'Access to Justice as Hope in the Dark in Search for a New Concept in European Law', *International Journal of Humanities and Social Science*, Vol. 1, No. 19, 2011.
- Prempeh, K., 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa', *Tulane Law Review*, Vol. 80, No.4, 2006.
- Rakeb M., 'Enforcement of Human Rights in Ethiopia', Research Report, APAP, Addis Ababa, 2003.
- Re, L., 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations', *Melbourne University Law Review*, Vol. 14, No.3, 1983-1984.
- Roach, K. & L. Sossin., 'Access to Justice and Beyond,' *University of Toronto Law Journal*, Vol. 60, 2010.
- Robbins, J., 'False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead/Asbestos Doctrine', *Harvard International Law Journal*, Vol. 44, No.1, 2003.
- Rosenn, K., 'The Protection of Judicial Independence in Latin America', *University of Miami Inter-American Law Review*, Vol. 19, No. 1, 1987.
- Roux, T., 'Principle and pragmatism on the Constitutional Court of South Africa', *International Journal of Constitutional Law*, Vol. 7, No.1, 2009.
- Sackville, R., 'Some thoughts on Access to Justice', *New Zealand Journal of Public International Law*, Vol. 2, 2004.

- Sand, P., 'Roman Origins of the Ethiopian 'Law of Kings' (Fetha Nagast)', *Journal of Ethiopian Law*, Vol. 11, 1980.
- Schärf, W., 'Non-State Justice Systems in Southern Africa: How should Governments Respond?', Paper delivered at workshop on 'Working with Non-State Justice Systems held at the Overseas Development Institute', Institute of Development Studies, 2003.
- Seyoum Y., 'Towards Inclusive Employment: The Features and Impact of Proclamation 568/2008 on the Employment of Persons with Disabilities', *Journal of Ethiopian Law*, Vol. 24 No. 1, 2010.
- Singer, N., 'The Ethiopian Civil Code and the Recognition of Customary Law', *Houston Law Review*, Vol.9, 1971-1972.
- Spanbauer, J., 'The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth', *Hastings Constitutional Law Quarterly*, vol. 21, 1993.
- Stableford, S. & W. Mettger., 'Plain Language: A Strategic Response to the Health Literacy Challenge,' *Journal of Public Health Policy*, Vol. 28, No. 1, 2007.
- Susman, S., 'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation', *Wisconsin International Law Journal*, Vol. 13, No.1, 1994/1995.
- Takele S., 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory', *African Journal of International and Comparative Law*, Vol. 19, No. 1, 2011.
- Takele S., 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', *Journal of Ethiopian Laws*, Vol. 23, No. 1, 2009.
- Tamanaha, B., 'A Non-Essentialist Version of Legal Pluralism', *Journal of Law and Society*, Vol.17, No.2, 2000.
- Thio, L., 'Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go before I Sleep'', *Yale Law Human Rights and Development Journal*, Vol. II, 1999.
- Tiemessen, A., 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', *African Studies Quarterly*, Vol.8, No.1, 2004.
- Tobias, C., 'Standing to intervene' *Wisconsin Law Review*, 1991.
- Tom, S. and Nicholas W., 'The Social Model of Disability: An Outdated Ideology?' *Research in Social Science and Disability*, Vol. 2, 2002.
- Tomasic, R., 'A Review: Access to Justice', *Legal Services Bulletin*, Vol. 5, 1980.
- Tsegaye R., 'Making Lega' Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia" *Mizan Law Review*, Vol. 3, No.2, 2009.
- Twibell, T., 'Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems', *Loyola of Los Angeles International and Comparative Law Review*, Vol. 21, No.3, 1999.
- Van Doren, J., 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System', *Journal of Transnational Law and Policy*, Vol. 3, No.1, 1994.

- Vanderlinden, J., 'Civil Law and Common Law Influences on the Developing Law of Ethiopia', *Buffalo Law Review,* Vol.16, 1966-67.
- Vaughan, S. and Tronvoll, K., 'The Culture of Power in Contemporary Ethiopian Political Life', *SIDA Studies No. 10,* 2005.
- Whittington, K., 'Legislative Sanctions and the Strategic Environment of Judicial Review', *International Journal of Constitutional Law,* Vol. 1, No.3, 2003.
- Xie, Z, 'Petition and Judicial Integrity', *Journal of Politics and Law,* Vol. 2, No. 1, 2009.
- Yeshanew S., 'The Constitutional Protection of Economic and Social Rights in The Federal Democratic Republic of Ethiopia', *Journal of Ethiopian Law,* Vol. 22 No. 2, 2008.
- Yonatan T. Fisseha., 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', *African Journal of International and Comparative Law,* Vol. 14, No.1, 2006.
- Zorza, R., 'Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation,' *Drake Law Review,* Vol. 61, 2013.

Unpublished Thesis

- Alemu, A., *Attitude towards Females with Disabilities: The Case of Wolayitta Ethnic Group,* School of Graduate Studies, Addis Ababa University, Unpublished Thesis, 2002.
- Birissa D., *The Right of Access to Justice of Persons with Disabilities in Ethiopia: The Law and the Practice,* Faculty of Law, Addis Ababa University, Unpublished Thesis, 2009.
- Eshetu A., *Competency of Ordinary Witnesses in Evidence: The Law and the Practice in Ethiopia*, Faculty of Law, Addis Ababa University, Unpublished Thesis, 1998.
- Kidane A., *Treatment of Insane Offenders under the Criminal Justice System in Ethiopia: the Law and the Practice*, Faculty of Law, Addis Ababa University, Unpublished Thesis, 2009.
- Mehret A., *Principal Features of the Legal Protection Afforded to Victims of Mental Disorder under the Ethiopian Mental Health Draft Legislation: A Comparative Analysis*, Faculty of Law, Addis Ababa University, Unpublished Thesis, 1995.
- Misrak T., *Challenges and Opportunities of Access and Mobility in Addis Ababa: the Case of people with Motor and Visual Impairments*, School of Graduate Studies, Addis Ababa University, Unpublished Thesis, 2006.
- Mitiku D., *Managing Inter-ethnic Conflict: The Case of Oromo and Gumuz in Anger and Dhidhessa Valley*, Unpublished MA Thesis, ECSC, 2009.
- Morhe, R., *Access to Justice and Resolution of Criminal Cases at Informal Chiefs Courts: The Ewe of Ghana,* Stanford University, PhD Thesis, 2010.
- Nardos A., *The Right of Children with Disabilities in Ethiopia,* Faculty of Law, Addis Ababa University, Unpublished Thesis, 2009.
- Tekalign G., *Vulnerability of Persons with Disabilities to HIV Infection: The Case of the Blind, the Deaf and the Physically Disabled in Gullele Sub-City of Addis Ababa*, Graduate School of Social Work, Addis Ababa University, Unpublished Thesis, 2007.

- Wondesson S., *Defense of Insanity under the Penal Code of Ethiopia: the Law and the Practice*, Faculty of Law, Addis Ababa University, 1999.
- Zeleke M., *The Role of Horizontal Intergovernmental Relations in the Management of Conflicts: The Case Study of Halaba and Arsi Oromo Ethnic Groups*, Unpublished LL.M Thesis, ECSC, 2011.

Cases

Ethiopia

- Benishangule Gumuz case, House of Federation (March 2003), House of Federation of the Federal Democratic Republic of Ethiopia, *Journal of Constitutional Decisions* Vol. 1, (July 2008).
- Case Concerning the Right to Appeal of the highest Officials of the State in Criminal Cases, Decided by the Council of Constitutional Inquiry (2 December 2013).
- Case Concerning the Validity of Ouster Clauses, Council of Constitutional Inquiry (10 February 2009).
- Dink Sira PLC, Federal Supreme Court, Cassation Division, File Number 54697/ 2003 E.C.
- Emergency Declaration Case, Council of Constitutional Inquiry (14 June 2004).
- Fistum Tesfaye *v.* W/ro Mamite Azimach and Kirkos Sub-city *Wereda* 01 Administration, Federal Supreme Court, Cassation Division, File no. 84757, May 05/2005 E.C.
- Kedija Beshir Case, House of Federation (May 2004), House of Federation of the Federal Democratic Republic of Ethiopia, *Journal of Constitutional Decisions*, Vol. 1, (July 2008).
- Organization for Social Justice in Ethiopia *et al v.* Ethiopian Election Board, Federal High Court, Case No 38472/2005.
- Organization for Social Justice in Ethiopia *et al*. *v.* Ethiopian Election Board, Federal Supreme Court, File No.19699/ 2005.
- Wolday Zeru and Others *v.* Ethiopian Revenue and Customs Authority, Federal Supreme Court, Cassation Division, File No. 51790/ 2003 E.C.
- *Federal Public Prosecutor v. Negussie Yenus*, Fed. High Court, Criminal File No. 09178, Sene 26, 2000 E.C., Unpublished.
- *Tsgereda Gezahegn v. Fed. Prosecuto*r, Fed. Sup Ct. Tikemet 30, 2002 E.C. Criminal Appeal File No. 42606, Unpublished.

Other Jurisdictions

- Anuak Justice Council *v.* Ethiopia, African Human Rights Commission, Communication No. 299/05 (25 May 2006).
- Haregewoin Gebre-Sellasie & IHRDA (on behalf of former Dergue officials) v Ethiopia, African Human Rights Commission, Communication No 301/05 (07 November 2011).
- Kesavnanda Bharathi *v.* State of Kerala, India, (1973) 4 S.C.C.
- R v Valente [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193 (Can. 1985).

- *Scudery v. Italy* (1995) 19 E.H.R.R.
- High Court of Botswana MAHLB-000836-10 (2012).
- Alexkor Ltd and Another *v.* Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).
- Shilubana and Others *v.* Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).
- *Darnell v. United Kingdom* (1994) 18 E.H.R.R.; *Robin v. United Kingdom* (1998) 26 E.H.R.R

Laws, International Instruments, and Official Documents

Ethiopia - Laws

- A Proclamation to Provide for the Establishment of *Kebele* Social Courts of the Amhara National Region, 1997, Proc.No.20/1997, *Zikre Hig*, 3rd Year, No.20.
- Addis Ababa City Government Revised Charter Proclamation, 2003, Procl. no. 361/2003, *Fed. Neg. Gaz.*, Year 9, No. 86.
- Agency for Government Houses Establishment Proclamation, 2007, Proc. No. 555/2007, *Fed. Neg. Gaz*., No. 2.
- Anti-Terrorism Proclamation, 2009, Proc. No. 652/2009, *Fed. Neg. Gaz.*, No. 57.
- Building Proclamation, Proc. No. 624, 2009, *Fed. Neg. Gaz*. 15th Year No. 31.
- Charities and Societies Proclamation, 2009, Proc. No. 621/2009, *Fed. Neg. Gaz.*, No. 25.
- Civil Code of Ethiopia, Proc. No., 165, 1960, *Neg. Gaz.* Year 19, No. 2.
- Consolidation of the House of Federation and the Definition of its Powers and Responsibilities Proclamation, 2001, Proc. No. 251/2001, *Fed. Neg. Gaz*., Year VII, No. 43.
- Constitution of the People's Democratic Republic of Ethiopia, Proclamation No. 1/1987, *Neg. Gaz*., Vol. 47, No. 1.
- Council of Constitutional Inquiry Establishment Proclamation, 2001, Proc. No. 250/2001, *Fed. Neg. Gaz*., Year 7, No. 40.
- Court Procedure Rules, Legal Notice No. 33/1943, *Neg. Gaz*. Year 3rd No. 2.
- Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, *Fed. Neg. Gaz.*, Proc. No.414, 10th Year, No.58.
- Criminal Procedure Code, Proc. No.185/ 1961, *Neg. Gaz.*, Extraordinary Issue No. 1 of 1961.
- Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proc. No. 691/2010, 2010, *Fed. Neg. Gaz* , 18th Year, No 1.
- Electoral Law of Ethiopia Amendment Proclamation, 2007, Proc. No. 532/2007, *Fed. Neg. Gaz.*, No 24.
- Ethiopian Constitution of 1931.
- Ethiopian Human Rights Commission Establishment Proclamation, Proc. No. 210/2000, *Fed. Neg. Gaz*., Year 6, No. 40.

- Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation, 2005, Proc. No. 455/2005, *Fed. Neg. Gaz.*, No. 43.
- Federal Civil Servants Proclamation, Proc. 515/2007, *Fed. Neg. Gaz.*, 13th Year No. 15.
- Federal Court Advocates' Code of Conduct Regulations, Council of Ministers Regulations No. 57/1999, *Fed. Neg. Gaz.*, Year 6, No. 1.
- Federal Courts Proclamation, Proc. No 25/1996, *Fed. Neg. Gaz*. Year 2nd No 13.
- Freedom of the Mass Media and Access to Information Proclamation, Proc. 590/2008, *Fed. Neg. Gaz.*, 14th Year No. 64.
- Higher Education Proclamation, Proc. No. 650, 2009, *Fed. Neg. Gaz.*, 15th Year No. 64.
- Income Tax Proclamation, 2002, Proc. No. 286/2002, *Fed. Neg. Gaz.*, No. 34.
- Institution of the Ombudsman Establishment Proclamation, Proc. no. 211/2000, *Fed. Neg. Gaz.*, 6th Year no. 41.
- Labor Proclamation, Proc. No 377/2003, *Fed. Neg. Gaz*., 10th Year, No. 12.
- Order of Establishment of the Rehabilitation Agency for Disabled, Proc. No. 70, 1971, *Neg. Gaz.* Year 30, No. 16.
- Penal Code of Ethiopia, Proc. No. 158/1957, *Neg. Gaz.*, Extraordinary Issue No. 1 of 1957.
- Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting, 1991, Proc. No. 3/1991, *Neg. Gaz.* Vol. 50, No. 4.
- Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State, 2001, Proc. no. 35/2001, *Debub Neg. Gaz.*
- The Afar National Regional State Constitution
- The Constitution of Somali National Regional State.
- The Ethiopian Penal Code of 1930.
- The Federal Negarit Gazette Establishing Proclamation Procl. No. 2/1995, *Fed Neg. Gaz*, 1st Year, No.2.
- The Revised Constitution of Ethiopia, Proc. No. 149, 1955, *Neg. Gaz.* Year 15, No. 2.
- The Revised Political Parties Registration Proclamation, 2008, Proc. No. 573/2008, *Fed. Neg. Gaz.*, No. 62.
- The Right to Employment of Persons with Disabilities, Proc. 568/2008, *Fed. Neg. Gaz.*, 14th Year No. 20.
- Trade Practices and Consumer Protection Proclamation, 2010, Proc. No. 685/2010, *Fed. Neg. Gaz.*, 16th Year no. 49.
- Transitional Period Charter of Ethiopia, No.1, 1991, *Neg. Gaz*. 50th Year No.1.
- Transport Proclamation, Proc. No 468, 2005, *Fed. Neg. Gaz.* Year 11 No. 58.
- Turn Over Tax Proclamation, Proc. No. 308/ 2002, *Fed. Neg. Gaz.*, 9th Year No. 21.
- Urban Planning Proclamation, Proc. No. 574, 2008, *Fed. Neg. Gaz.* 14th Year No. 29;
- Value Added Proclamation, Proc. No. 285/2002, *Fed. Neg. Gaz.* Year 8th No. 33.
- Vehicle Insurance Against Third Party Risks Proclamation, 2008, Proc. No. 559/2008, *Fed. Neg. Gaz.*, 14th Year, no. 7.

Ethiopia – Official documents

- Council of Ministers, *Criminal Justice Policy of the Federal Democratic Republic of Ethiopia*, Addis Ababa, 2011.
- Ethiopia's Report Submitted to the Human Rights Committee, 28 July 2009, UN, CCPR/C/ETH/1, 2009.
- Ethiopian Human Rights Commission, A Consolidated Five Years Activity Report, 2011.
- Ethiopian Human Rights Commission, Annual Report 2006/2007.
- Ethiopian Human Rights Commission, Annual Report 2007/2008.
- Ethiopian Human Rights Commission, Annual Report 2011/2012.
- Ethiopian Human Rights Commission, Bulletin, Vol. 1, No. 05, 2011
- Ethiopian Human Rights Commission, Bulletin, Vol. 2, No. 04/04, 2012.
- Ethiopian Human Rights Commission, Inaugural Report, 2011.
- FDRE Ministry of Justice, *Nine Months Performance Report of Ministry of Justice for the Fiscal Year 2006 E.C*., 2014.
- Federal Democratic Republic of Ethiopia National Human Rights Action Plan, 2013-2015.
- Inaugural Report of the Ethiopian Human Rights Commission, February 2011.
- Ministry of Labor and Social Affairs, *National Developmental Social Welfare Policy of the FDRE*,1996
- Ministry of Labor and Social Affairs, *National Program of Action for Rehabilitation of Persons with Disabilities*, June 1999, Addis Ababa, Ethiopia
- Public Defenders Office (FDRE Supreme Court), *Nine Months Performance Report of Public Defenders Office under the Federal Supreme Court for the Fiscal Year 2006 E.C*., 2014.
- Strategic Plan for the Ethiopian Human Rights Commission 2006-2011, Ethiopian Human Rights Commission, 2006.
- The Federal Supreme Court of Ethiopia, *Draft Business Process Reengineering Document on Criminal Proceedings*, 2009.
- Complaints Handling Manual, the Ethiopian Human Rights Commission, 2011.
- The House of People's Representatives, The Document to Elaborate Draft Laws to Establish the Commission and the Ombudsman, 1999 (in Amharic).
- The Office of Population Census Commission, *The 2007 Population and Housing Census of Ethiopia: Statistical Report at Country Level*, 2007.
- በአስተዳደራዊ አቤቱታ አፈታት ላይ የደ/ብ/ብ/ህ/ክ ተሞክሮ : የመልካም አስተዳደርና አካባቢ ጉዳዮች ጽ/ቤት : ሰኔ 11-12/2004.
- በደቡብ ብሔሮች፣ ብሔረሰቦችና ሕዝቦች ክልላዊ መንግስት አስተዳደር ሴክተር የቅሬታና አቤቱታ ጉዳዮች ውሳኔ አሰጣጥ ዋና የሥራ ሂደትን ለማስፈፀም የወጣ የአፈፃፀም መመሪያ: መጋቢት 2001 ዓ/ም ሀዋሳ::
- የቅሬታና አቤቱታ ጉዳዮች ውሳኔ አሰጣጥ ዋና የሥራ ሂደት የቡድን ቻርተር : መጋቢት 2001 ዓ/ም::
- የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ መንግስት የማስፈጸም አቅም ግንባታ ስትራተጂ እና ፕሮግራሞች፤ የማስታወቂያ ሚኒስቴር፣ አዲስ አበባ፤ 1994.

- የኢፌዲሪ የገንዘብ እና የኢኮኖሚ ልማት ሚኒስቴር : ለ ኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን: ሀምሌ 30 2005 ዓም::

South Africa and Uganda – Laws and Official documents

- Office of the Deputy President of South Africa, South African Integrated National Disability Strategy, *White Paper*, 1997.
- The Constitution of the Republic of South Africa, 1996.
- The Republic of South Africa's Policy Framework on the Traditional Justice System under the Constitution, 2009.
- The Republic of South African Traditional Leadership and Governance Framework Act, Vol. 462, No. 41, 2003.
- Ugandan Local Council Courts Act, 2006.

UN Documents

- Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, April 2005, Adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Res. No. 60/177).
- International Year for Disabled Persons, GA Resolution 31/123, 16 December 1976.
- Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties' Obligations', E/1991/23, 14 December 1990.
- Children's Rights in Juvenile Justice, UN Committee on the Rights of the Child, General Comment No. 10, 2007.
- Report of the Commission on Legal Empowerment of the Poor: Making the Law Work for Everyone, 2008.
- Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/14/26, 25 (March 2010).
- Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 2005.
- Convention on the Elimination of All forms of Racial Discrimination, 1965.
- UNDP, Democratic Institutions Program Annual Report, 2011.
- General Assembly Resolution 2856 (XXVI) of 20 December 1971.
- General Assembly Resolution 3447 (XXX) of 9 December 1975.
- General Assembly Resolution 46/119, 17 December 1991. Available
- International Covenant on Civil and Political Rights (ICCPR), 1966.
- International Rescue Committee/UNDP First Field Report on Customary Court Observations, 2006.
- Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, April 2010, Adopted by the Twelfth United Nation Congress on Crime Prevention and Criminal Justice (Res. No. 65/230).

- Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th plenary meeting, 20 December 1993.
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
- The Convention on the Elimination of All forms of Discrimination against Women (CEDAW), 1979.
- The Convention on the Elimination of All Forms of Racial Discrimination, 1969.
- The Convention on the Rights of Persons with Disabilities, 2006.
- The Convention on Vocational Rehabilitation and Employment of Disabled Persons (ILO Convention No 159).
- The Interagency Workshop on Human Rights based Approach in the context of UN reform, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies*, 2003.
- The International Covenant on Civil and Political Rights (ICCPR), 1966.
- The International Covenant on Economic Social and Cultural Rights, 1966.
- The Nairobi Declaration, Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, October 2008.
- The Special Rapporteur on the Independence of Judges and Lawyers (A/HRC/11/41 (2009).
- The United Nations Convention on the Rights of the Child, 1989.
- The United Nations Guideline on Justice in Matters Involving Child Victims and Witnesses of Crime, UN Economic and Social Council Resolution 2005/20, 2005.
- The United Nations Standard Minimum Rule for Administration of Juvénile Justice, 1985.
- UN General Assembly, The World Program of Action Concerning Disabled Persons A/RES/37/52, 3 December 1982.
- UN Human Rights Committee, General Comment no 32, CCPR/C/GC/32, 2007.
- UN International Human Rights Instruments, Core Document Forming the Initial Part of the Report of States Parties: Ethiopia, HRI/CORE/ETH/2008, 2009.
- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly Resolution, A/RES/67/187, 2013.
- Universal Declaration of Human Rights (UDHR), 1948.

AU and EU Documents

- The Lilongwe Declaration on Access to Legal Aid in Criminal Justice System in Africa, November 2004.
- The African Charter on the Rights and Welfare of the Child, 1990.
- The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001.
- The African Union Charter for African Cultural Renaissance, 2006.
- The African Charter on the Human and Peoples` Rights.

- Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice and their Explanatory Memorandum, Adopted by the Committee of Ministers, 1098th Meeting of the Ministers' Deputies, 2010.
- African Charter on Human and Peoples' Rights (ACHPR), 1982.