ENFORCEMENT OF HUMAN RIGHTS IN ETHIOPIA

Research Subcontracted by
Action Professionals' Association for the People (APAP)

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EXECTIVE SUMMARY

It has been 8 years since the 1994 Constitution of the Federal Democratic Republic of Ethiopia has come into force. The Preamble notes that it is strongly committed to guaranteeing a democratic order, and advancing our economic and social development. It is further firmly convinced that this requires the full respect of individual and people's fundamental freedoms and rights, to live together on the basis of gender equality and without any religious or cultural discrimination. The Constitution further makes all international human rights instruments ratified by Ethiopia an integral part of the law of the land. It further recognizes that human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable and thus shall be respected. It goes on providing that the fundamental rights and freedoms specified in the Constitution shall 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. However the domestic application of international standards of human rights cannot be assessed in the abstract on the basis of merely studying the provisions of the Constitution. What is more important and critical is whether courts of law apply human rights norms in their concrete decisions. This has proven to be a critical starting point to build a human rights jurisprudence, which will help in the effective legitimization of human rights standards in the whole country. However, eight years after the coming into force of the Constitution and thus the National Bill of Rights, Ethiopia has still not come up with a body of constitutional jurisprudence. Very few court decisions could be identified that directly or indirectly apply or refer to human rights standards. Action Professionals' Association for the People (APAP), on its part, had organized a National Conference on Enforceability of Human Rights in the first quarter of 2001 as part of its three years operational plan and program. As an outcome and follow up activity of that Conference, APAP undertook this Research on Enforcement of Human Rights in Ethiopia, to enable it identify the weaknesses and gaps in the national human rights law and their implementation modalities. The Research was undertaken over a period of three months by a Human Rights and Gender Consultant, with the assistance of a legal professional, mainly involved in the identification and collection of court cases dealing with human rights issues.

Overall Objective

The overall objective of this Research is to provide findings that would enable APAP, on one hand, lobby for the adoption of systematized, consolidated and comprehensive laws on human rights and their redressing mechanisms in Ethiopia and on the other, to develop its future intervention towards the protection, respect and promotion of human rights in Ethiopia.

Methodology

The approach adopted to undertake this Research is a qualitative one. This enabled us to provide an interpretive measurement in the enforcement of human rights. Due to the fact that the issue of human rights is sensitive and the lack of adequate data system of the legal system, a multi-methodology approach was adopted and that includes:

1. Document analysis to draw together existing data on the enforceability of human rights;
2. Interview with relevant governmental and non-governmental officials to assess the weaknesses and gaps in the enforcement of human rights in Ethiopia and to determine how different people, especially judges, understand the concept of human rights and its enforcement;
3. Literature review to compile in a form of an overview of what is currently known, and critically assess the practices experienced to date. This enabled us to point out which of the practices in implementing human rights correspond to wider patterns, and which are specific to the Ethiopian context.
4. Case study of cases dealing either directly or indirectly with issues of human rights standards in Ethiopia. More than a dozen of court cases were identified and collected from federal courts and the Amhara Regional courts. This is to give a sense of the human rights enforcement mechanism available in terms of what can be learnt from a single case. Case studies are further used for additional conceptual and theoretical analysis of human rights provisions with reference to the Constitution and international human rights standards.

Limitation of the Research

As stated above, the research was undertaken over a period of three months. Therefore, due to limitation of time and resources, the research could not have been undertaken over a longer period of time as to allow a thorough identification of court cases and an in-depth analysis, which might have enabled the development of a body of human rights jurisprudence in Ethiopia. The scope of the Research is also general and broad because of which it was not possible to identify and elaborate on each and every legislation and provisions that are inconsistent with constitutional and international human rights principles and propose recommendations. However, illustrative indications were made, though not exhaustive, to areas of the law that required in-depth analysis and revision pursuant to international and national human rights standards. The other challenge faced during the undertaking of the research is the record keeping of court cases of the legal system. The absence of a systematized information collection and classification of cases by the legal system hindered the identification of court cases for case study. The collection of cases had thus to mainly rely on the memory of judges and record keepers. This made the process of identification and selection of relevant court cases time consuming.

INTRODUCTION

The modern concept of human rights is rooted in the experiences of 'legal lawlessness' when crimes were committed with the authorization of the law, and when some human beings were denied their status as such. An answer to these experiences was the emergence of the international human rights law[1]. The main aim of this branch of international law is to prevent broad violations of fundamental rights from recurring in the future. Appreciating the worth of every human being, the international community decided to eliminate elements that could destroy the individual person, but also to create the conditions that would enable him or her to develop and flourish[2]. Accordingly, the Preambles to the International Bill of Rights[3] provide that the "foundation of freedom, justice and peace in the world" is the "inherent dignity and of the equal and inalienable rights of all members of the human family".

First of all, fundamental rights and freedoms are universal. This means that each and every human being has these rights by the mere fact of being born human. Universality is rooted in the inherent dignity of human beings and in the fact that human rights are inherent. By inherent, it is meant that human rights exist independently of the will of anyone. They are neither obtained, nor granted through any human action[4]. Secondly, these rights are also inalienable, in that they cannot be taken away by anyone, including the state, or that nobody can renounce them by her/himself. Pursuant to this approach, legal norms do not establish human rights but only recognize them and determine the ways of their realization. Thirdly, human rights are indivisible, in that none of the rights that is considered to be fundamental human right is more important than any of the others and, more specifically, that they are inter-related. The indivisibility of human rights was further confirmed during the World Conference on Human Rights in 1993 in Vienna[5].

The recognition of human rights, which derives from the recognition of dignity, is the basis of justice and therefore the basis of every legal system, which claims to be just. The State and the law exist for the individual living in a society. Despite the fact that the human rights law was created, among other things, to set a limit and a system of check and balance the powers of the state against individual persons, the State increasingly becomes regarded as a guardian of human rights[6].

The Universal Declaration of Human Rights (UDHR) proclaims a common standard of achievement for all peoples. The two covenants that followed on Civil and Political Rights and, Economic, Social and Cultural Rights further made these human rights standards legally binding. Most countries also recognize most of these rights and incorporate them in their constitution, national legislation and laws.

Today people everywhere are increasingly demanding and gaining respect for their rights and freedoms. The performance of governments, and even their legitimacy, is being measured against the standards of the International Bill of Rights. No government can afford to ignore these standards, and all governments are bound to feel their impact at home and in external relations[7]. With this regards, art.8 of UDHR provides that 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. For this to concretize, adequate mechanisms should be established for human rights to be implemented in national courts.

This paper strives to look into the level of enforceability of human rights in Ethiopia. For this purpose, it will assess whether the Ethiopian legal system incorporates laws that enables the redress of human rights violations and whether these laws, if any, are being implemented and how. Following the introduction, the first chapter gives an overview of the historical development of the International Bill of Rights and the practice in relation to the implementation of international human rights standards at the national level. Then the second chapter first identifies, though not exhaustively, human rights provisions whose redressing mechanisms are clearly stipulated in the Ethiopian Constitution; i.e., civil and political rights. The second section of the second chapter identifies, also not exhaustively, specific human rights provisions whose redressing mechanisms are not clearly stipulated in the Ethiopian Constitution; i.e., socio-economic rights, and analyzes the practices at the international and few jurisdictions in relation to the implementation of these rights. The scope of the Research being general and broad, it was not possible to exhaustively identify and elaborate on each and every legislation and provisions that are inconsistent with constitutional and international human rights principles and propose recommendations. Thus, only illustrative examples were used to indicate areas of the law that require in-depth analysis and revision pursuant to international and national human rights standards. The third chapter examines the practice relating to the enforceability of human rights at the court level in Ethiopia. For this, the chapter uses court cases as case studies where issues related to human rights were raised or where the Bill of Rights is used as an interpretative tool to clarify and expand domestic legislation. Finally recommendations and ways forward are suggested to ensure the protection, respect and promotion of human rights in Ethiopia.

CHAPTER 1

AN OVERVIEW OF THE INTERNATIONAL BILL OF HUMAN RIGHTS

1.1. Historical Development

After the trauma and abuse of the World War II, governments were motivated to establish a set of standards for the treatment of people and to avoid such atrocities in the future. The first attempt to codify such standards was made by the General Assembly that adopted UDHR on 10 December 1948. This Declaration has come to be recognized as a common standard for all peoples and all nations towards the promotion of human dignity.

Established to oversee and implement the UN human rights system, the United Nations Commission on Human Rights translated the Declaration's principles into legally binding human rights obligations – at least for those states that ratified them[8]. However the Commission was divided by political considerations between states with "market-oriented" or "capitalist" economies on one side and states with "planned" or "socialist" economies on the other. Though the General Assembly emphasized the interdependence of all categories of human rights and urged the Commission to adopt a single convention, states with "market-oriented" or capitalist economies succeeded in reversing the resolution in 1966 making the Commission adopt two separate documents one on civil and political rights and another on economic, social and cultural rights[9].

As a result of the two separate covenants, the UN human rights system tends to speak of two main categories of rights: civil and political rights and economic, social and cultural rights also known as "first" and "second" generation rights respectively. Though the UDHR does not mention of any prioritization among the rights, the weight and enforcement mechanisms afforded to civil and political rights remain far superior to those of economic, social and cultural rights.

K. Vasak, the former Director of the Division of Human Rights and Peace of UNESCO, was the one who originally classified human rights into different categories. The first category was called the "first generation rights" which derived primarily from the seventeenth and eighteenth century reformist theories, which were associated with the English, American and French revolutions. This category corresponds more or less to the rights incorporated in the International Covenant on Civil and Political Rights and

includes the right to life, to fair trial, to vote, freedom from arbitrary arrest among others. These rights are also referred as "negative rights", arguing that they only require the state to abstain from arbitrary interventions in the quest for human dignity[10].

The "second generation of rights" has its origins in the early nineteenth century, France, and was ever since reemphasized by socialist and various welfare movements and revolutionary struggles[11]. This category corresponds more or less to the rights incorporated in the International Covenant on Economic, Social and Cultural Rights and includes the right to work, to education, adequate standard of living, and health care, among others. These rights are also referred as "positive rights" contending that they require states to positively intervene in the quest for human dignity.

The "third generation of rights" also known as "solidarity rights" emerged in the last half of the twentieth century. These rights are still in the process of conceptual elaboration and have not yet as such been transformed into binding obligations[12]. This category includes the right to clean environment, to self-determination, to economic and social development, to participation in the "common heritage of mankind", to humanitarian disaster relief. Though the writer of this paper believes in the interdependence and interrelationship of rights, for the sake of brevity and due to the scope of the topic, this paper will not deal with "third generation rights". However such exclusion does not in any way mean that these rights are not equally significant.

Vasak's classification theory has been criticized for various reasons. First of all, not all the rights in the two covenants exclusively fit the positive or negative rights. There are civil and political rights that require the positive intervention by governments, while some of the socio-economic rights require the mere abstention of political authorities. The writer of this paper is also of the opinion that this classification of rights will only reinforce the argument that alleges that there is a conceptual difference between rights.

On the other hand, the progressive development of international human rights law at both the international and regional levels has led to the establishment of a comprehensive corpus iuris. This can generally be categorized into four:[13]

1. General conventions which concern all or a large proportion of human rights and have been adopted at a world or a regional level (UN Covenants, the European and American Conventions and the African Charter on Human and Peoples Rights);
2. Specific conventions which are intended to protect particular human rights and which concern genocide, war crimes and crimes against humanity; slavery, traffic in persons, forced labor; torture; asylum; freedom of information; private life; social security;
3. Conventions on group protection which correspond to the special needs of distinct groups: refugees, stateless persons, migrants, workers, women, children, combatants, prisoners and civilian persons in times of armed conflict; and

4. Conventions concerning discrimination, which seek to prevent discrimination based on race or sex, or discrimination in education and in employment and occupation.

Furthermore, some of the rules of the international law of human rights have apparently been recognized as ius cogens, or peremptory rules, binding the whole international community and from which no derogation is permitted, unless modified by a subsequent norm of general international law of the same character. In addition, one should not underestimate the importance of the extensive 'soft law' in the field of human rights contained in such instruments as resolutions, declaration, recommendations, codes of conduct, standard minimum rules, guidelines, basic principles, model treaties and other instruments. Despite the fact that they are not binding on states, they often express human rights policy guidelines or provide detailed arrangements for legislative unification of domestic systems. In certain circumstances, they constitute a first step towards the transformation of their provisions into 'hard law' in the course of the codification process.[14]

1.2. States' Obligations To Respect, Protect And Fulfill

According to art.2 (1) of the ICCPR each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without discrimination of any kind. Furthermore, States parties have under the ICESCR the duty to respect, protect and fulfill the incorporated rights. This description of state duty propagated originally by Henry Shue has received wide support and is frequently used in the analysis of human rights, in general, and socio-economic rights, in particular.[15]

At the primary level, States must refrain from directly infringing human rights. This corresponds more closely to the traditional conservative view, which argues that the obligation of the State is to abstain from arbitrary intervention on the freedom and autonomy of the individual.[16] This level provides a shield for citizens from unjust interferences by political authorities. Both categories of rights have this negative dimension in a sense that they require the State to respect the autonomy of the individual in the exercise of his/her rights.

At a secondary level, the State is required to protect or ensure citizens' rights from unjust interferences from others. Here the State is required to take positive steps towards the effective enjoyment of rights. This includes the obligation to enact legislation and create the framework to prevent violations of rights and enable citizens enjoy their protected rights without the interference from others.[17] Thus governments have to enact a set of minimum standards for the working conditions in order to prevent third parties from violating human rights.

At a tertiary level, the State has the obligation to fulfill by positively intervening and assisting, especially those who are in a vulnerable position to make better use of their

rights. For instance, to fulfill the right to housing, the State should at this level regulate the economy and land market, subsidize housing, monitor rent levels and other housing costs, provide public housing. The State should also consider society's unmet housing needs when allocating budget.[18] At this level, the duty involves active measures by the political authority necessary for guaranteeing for each individual to access the entitlements of his/her rights, which cannot be secured through exclusively personal efforts.[19] On the other hand, the right to vote requires the State to provide for voting facilities such as election stations, booths, safety and security for fair and free election, as well as to provide for mobile voting stations for people who are sick, in prison.

This delineation of obligations makes it clear that both categories of rights require both negative and positive action from the State depending the circumstances of the case. The argument that alleges that there is a conceptual difference between civil and political rights and socio-economic rights is thus tenable in as far as we are referring to the duty of the State toward socio-economic rights at the tertiary level as opposed to the duty toward civil and political rights at the primary level.[20]

The provisions of economic, social and cultural rights are also formulated in the form of obligations of result rather than obligations of conduct in order to respond to different situations.[21] The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.[22] For instance, in the case of the right to housing, the obligation of conduct will require the State to design and implement a sensitive plan of action to reduce the number of homeless people in the country within a certain period of time. The obligation of result, on the other hand, requires the State to achieve certain targets to satisfy a detailed substantive standard.[23] In the above example, this obligation will thus require the reduction of homelessness within the anticipated period of time. However, though the ways of their implementation may differ, both types of obligations are legally binding on States.

Moreover, many argue that, for instance, the right to food, to housing, to health care and adequate standard of living are too broad and general to enforce but contend that the right to life, to fair trial, freedom of expression and freedom from torture are absolute and directly enforceable. This seems dubious because it is the same socio-economic conditions cited above that make the protection of civil and political rights difficult and at times impossible. For instance, when people die of hunger or disaster, the right of life of these people is violated because the State and the international community failed to protect and fulfill their right to food and to the highest attainable standard of health.

The argument that contends that socio-economic rights are programmatic and can only be realized progressively while civil and political right can immediately be realized is disputable as the full realization of all fundamental rights is invariably progressive.[24] For instance, the full realization of the right to freedom from torture is a progressive undertaking as it requires the training of the political authority, the establishment of evaluating and monitoring system and a change in the whole attitude towards accused people which will not happen overnight. In addition, the fact that the full realization of a right is progressive does not mean that there is nothing that can be done immediately. The

Limburg Principle No.21 requires States parties to begin immediately to take steps to fulfill their obligations under the Covenant. It clarifies that the obligation "to achieve progressively the full realization of the rights" does in no way mean that States have the rights to deter indefinitely efforts to ensure full realization[25] and the Principles further provide that some obligations require immediate implementation[26]. The Maastricht Guidelines state that the "minimum core obligation" should at the very least be satisfied so that individuals can enjoy the minimum essential levels of each of the rights[27]. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[28]

The obligation of states to 'take steps'[29] indicates that states assume some immediate legal duties upon ratification of the Covenant. General Comment No.3 notes that while the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the ICESCR's entry into force for the states parties.[30]

Which takes us to the other assumption about socio-economic rights, which is the fact that the implementation of these rights is expensive. While this assumption is true, it should not be used as a 'scapegoat' for violation of these rights as implementation of civil and political rights has also financial implication but this justification has never been found good enough for their violations. The financial implication that a State incurs to implement the right to vote and fair trial is equally or even more important to that of socio-economic rights. The Maastricht Guidelines go on to elaborate that the minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.[31]

It is also argued that judicial review of socio-economic rights results in the transfer of power to an unelected and inherently conservative body namely the court.[32] However, suggesting that socio-economic matter should fully be left to the discretion of the political authorities will curtail the capacity of the judiciary to protect the rights of the most vulnerable and disadvantaged groups in society. While the theory of separation of powers should be respected along with their respective competences, it would also be appropriate to acknowledge that courts are generally already involved in a considerable range of matters, which have important resource implications.[33]

Though the Committee on Economic, Social and Cultural Rights has not designate 'deliberate retrogressive measures' as prima facie violations of the ICESCR, these kind of measures 'would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'[34]. With regards to art.41 (4) of the Ethiopian Constitution, the State has the obligation to allocate ever-increasing resources to provide to the public health, education and other social services.

1.3. Limitation

Fundamental human rights and freedoms are not absolute. They may be limited by the rights of other and interests of the society. General interests of the society, such as public order, safety, health and democratic values are considered as justified limitation of rights.

However, infringement of rights will only be justified as reasonable limitation only if there is a strong purpose, which is valid in an open and democratic society based on human dignity, equality and freedom. First other alternatives that could fulfill the purpose without any infringement of rights should be considered. Moreover, the mere benefits of others and general welfare should not be enough to justify an infringement as limitation of rights. The infringement of rights should not only have a strong purpose but must also be designed as to achieve the purposed it was designed to achieve. Care should further be taken not to exceed the purpose and infringe rights more than there is need to.

The limitation test is then to assess whether the infringement has a constitutionally acceptable purpose and that the balance is struck between the harm done by the infringement of fundamental rights and the benefits it is designed to achieve (the purposes of the law).

1.4. International Human Rights in National Law

Regional and international human rights instruments can only be enforced and be effective where they are ratified and States Parties recognize the competence of the respective enforcement body.

1.4.1. Discussion of Dualism and Monism

The relationship between international law and national law troubles both theorists and courts. Though there are various methods through which States implement international treaties into their domestic law, the methods were traditionally classified by using the rough dichotomy of ‘dualistic’ and ‘monistic’ countries, or theories.

On the one hand, monists argue that international law and domestic law together form a unified legal system, often characterized by the primacy of international norms. They further argue that municipal courts shall apply international law directly without the need for any act of adoption by the courts or transformation by the legislature. Hence, the monist position is often described as lending support to a ‘doctrine of incorporation’. On the other hand, dualists claim that domestic law and international law are two completely different legal systems, with the result that international law may be applied by domestic courts only if ‘adopted’ by such courts or transformed into local law by legislation.[35]

While maintaining that international law is not foreign law, monists have been compelled to accept that municipal courts cannot directly apply the whole body of international law binding on a state. This led to the emergence of the ‘harmonization theory’, which

qualifies the absolute monist position by acknowledging that in cases of conflict between international law and municipal law, the judge must apply his own jurisdictional rules.[36]

Nowadays, the classification of dualism and monism is largely regarded as outdated. There is rather a tendency of 'compromise' implementation methods like incorporation; the processes towards constitutional regulation of the legal effect of international norms; and the possibility of the judiciary to refer to or interpret their domestic law in compliance with international norms, even when these are not ratified and have become part of the law of the land. All these implementation methods diminished the relevance of the traditional distinction between 'dualism' and 'monism' in assessing the concrete operation of various international norms in the constitutional and legal framework of a given country.[37]

Though there is no generally accepted classification for the various implementation methods of international law at the domestic level, the following classification is applied in existing textbooks:[38]

Adoption: International treaties become part of the domestic law by way of ratification or explicit statement by the State to be bound by the treaty, and publication, without the need for additional legislative measures to be taken.

Incorporation: This rather relates to the traditional 'dualistic' theory. A separate domestic legal document has to be enacted before the provisions of an international treaty can be implemented in municipal courts. However, the domestic legal document does not have to repeat the text of the international instrument. The term incorporation is also used in a broader sense, referring to all implementation methods through which international treaty provisions become applicable as domestic law (i.e. adoption and incorporation).

Transformation: While international treaty provisions are not directly implemented in municipal courts (through adoption or incorporation), relevant domestic legal provisions are, however, amended to comply with international standards. This method is also classified within the dualistic theory.

Passive transformation: In exceptional cases, no amendments are needed to existing domestic laws, in order to achieve harmony with the treaty provisions.

Reference: A domestic enactment includes a clause on the applicability or even on the priority of international treaties in matters covered by the law in question; this method is also called 'sector-monism'.

Most States, including Ethiopia apply more than one of these methods. Transformation, incorporation and reference, for example, can be applied side by side, and the degree of 'dualism' or 'monism' is determined by which of the methods is used more often.

In addition, more and more countries, including those that are traditionally categorized as dualists, are binding the judiciary to take into account international norms, in general, and

human rights standards, in particular, for legal reasoning and interpretation. This practice further calls the relevance of a distinction between 'dualism' and 'monism' into question.

Professor Benedetto Conforti expresses the view of many contemporary scholars of international and constitutional law when he writes:[39]

I find little interest in the traditional approach to the question, based on the age-old dispute between monists and dualists, between those for 'adoption' and those for 'incorporation' or 'transformation' of international law into municipal law. Instead, I shall address from a practical rather than theoretical perspective the question of how to achieve the critical objective of consideration of international law as law within the State, complete with all legal safeguards including those related to adjudication.

However, though the old discussion between the two theories on implementation of international norms into the domestic law is largely outdated, it has not affected the importance of analyzing the elements of and obstacles to the effective implementation of these norms at domestic level. Nevertheless, the focus has shifted to more concrete problems of implementation.[40]

In Ethiopia, the power to conclude international agreements is entrusted to the executive. The House of Peoples' Representatives (Parliament) has then to ratify them (art.55 (12)). Once they are ratified, all international agreements, including human rights instruments, are an integral part of the law of the land (art.9 (4)). No additional measure to be taken by the legislature is provided for in the Constitution. However, art.2 (2) of the Federal Negarit Gazette Establishment Proclamation No. 3/1995 provides that all Laws of the Federal Government shall be published in the Federal Negarit Gazette, whereas art.2 (3) states that all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazette. According to these provisions, Ethiopia could be classified as dualist as a national legislation needs to be promulgated in order for the provisions of international instruments to be implemented at the domestic level.

The Bill of Rights in the Ethiopian Constitution, which is modeled on international human rights conventions, is further subjected to a special interpretative regime, which should comply with principles of the international law adopted by Ethiopia (art.13 (2)). However, international law is narrowly construed to cover only the UDHR and those conventions ratified by Ethiopia. In addition, art.9 (1) affirms the supremacy of the Constitution. It further noted that all laws, which contravene this Constitution, shall be of no effect. As no additional detail is provided for, it can be argued that where there is an inconsistency between the provisions of the Constitution and international human rights standards, the former prevails.

1.4.2. International Human Rights in Domestic Courts

Conforti, like many other scholars, considers the application of international law by municipal courts and other domestic legal operators as the 'keystone' of international law

itself. He emphasizes on the role and attitudes of the judiciary in determining the domestic effect of international law. For Conforti, the fact that the judges are liberal or conservative is more important than the characterization of a legal system as 'dualistic' or 'monistic'.[41]

The analysis of constitutional provisions of a country does not, on its own, show the domestic role and effect of international human rights standards. What is more important is the extent to which courts of law apply human rights norms in their judgments. A national judge could also take a more 'activist' or 'liberal' orientation in developing international human rights law by giving new answers to new questions.

However, there are certain 'drawback doctrines', which are also known the act of State doctrine or the political question doctrine, that have the effect of barring access to the courts or the applicability of international norms in certain issues.

The legal system of many countries requires treaty provisions to be sufficiently clear and unambiguous for their direct applicability. This line of argument relates to the doctrine of self-executing treaties that originated from the constitutional law of the United States of America. At worst, this doctrine can seriously weaken the domestic role of international human rights norms, as no reference will be made to the international norm, whether directly or indirectly, where it is found not to be sufficiently clear and unambiguous. This doctrine can be a barrier to applying international human rights norms in several ways and degrees, including using them as a yardstick for interpreting domestic legislation.

Extreme versions of the doctrine of self-executing treaties tend to limit the domestic applicability of international human rights to what are commonly known as the first generation rights. For many, 'right to vote' would be clear and unambiguous legal language than 'the right to education or social assistance'. The general pattern is that courts and other authorities tend to apply more readily civil and political rights than economic, social and cultural rights. However, it should be noted that there are no logical or legal reasons for this. Though the premise is not that there is absolutely no difference between the two categories of rights, there is clear evidence in the similarities in the performance of obligations by states that many of the assumptions are not well founded. It should further be noted that the main difference in the direct applicability of civil and political rights and socio-economic rights is one of degree, and that there is no conceptual difference between them.

What is commonly known as 'soft law' also plays a major role in serving as yardsticks or guidelines and exercises an influence in the interpretation and rendering judgments related to issues of human rights. For instance, the UDHR, which is often referred by domestic courts, is an indication of the contents of customary international law.

1.4.3. Other Aspects of Domestic Implementation of International Human Rights

Though discussions about the status of international instruments in the national legal system and their direct applicability in domestic courts is important to assess the

domestic implementation of international human rights standards, it should be complemented by other dimensions, including the non-legal ones, to have a fuller picture.

Many recent constitutional reforms and amendments around the world, at best incorporate international human rights norms as part and parcel of the constitution, at worst are developed by using international human rights instruments as a starting point for their work. This has led to the growing role of international human rights standards in the interpretation of domestic legislation, which further contributes to the harmonization of international and constitutional provisions. There is also a growing tendency to secure the observance of international human rights through special clauses in national constitutions.[42]

Where states incorporates the 'horizontal effect' and positive State obligations notions with regards to international human rights norms within their domestic legal system, the observance of human rights will also extend to individuals and other private parties; i.e., in addition to the State that have the duty not to intervene. In addition, the State will have the duty to take adequate measures to create a conducive environment where individuals can fully exercise their rights. For instance, in order for individuals to exercise their rights to education, the State has to build new schools where there are none, or ensure that access to existing ones is made available by building roads, among others.

Furthermore, the duty of States to respect and protect human rights might entail the enactment of legislation, calling for the legislature to take measures for the adequate protection and promotion of human rights at the domestic level.

In addressing the topic of enforceability of human rights at the national level, there is usually a presupposition that there is some understanding of how those laws actually work and some level of respect and identification with them. However, very few people are aware about their basic human rights and know about the organs of state and their respective duties. Human rights education is thus very vital to inform the society so that people may be able to pursue their rights more vigorously. In the absence of adequate knowledge of rights and the mechanisms available to realize them, violations cannot be recognized and rights cannot be protected.

Human rights institutions, such as ombudsmen and human rights commissions, also play major role in the domestic implementation of international human rights norms. Whether their decisions are legal or quasi-legal, these institutions are in a better position than courts of law to take into account the positive obligations of the State with regards to international human rights. In some countries, such institutions also have the jurisdiction to make recommendations that relate both to issues of law and policy. The domestic implementation of international human rights norms is thus not a matter for the judiciary alone.

CHAPTER 2

ETHIOPIAN BILL OF RIGHTS

2. ETHIOPIAN BILL OF RIGHTS

The 1994 Constitution is a consequence of and a reaction to Ethiopia's history. A new constitution often represents a break from that part of the past, which is unacceptable. As stated in the Preamble, the Ethiopian Constitution is cognizant that our common destiny can best be served by rectifying historically unjust relationships. It also aims to consolidate, as a lasting legacy, the peace and the prospect of a democratic order, which our struggles and sacrifices have brought about. The Constitution tries thus to build 'a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order'[44] by putting an end to inequality, dictatorship and repression. It aspires for a future based on the full respect of individual and people's fundamental freedoms and rights, and living together on the basis of equality and without any sexual, religious or cultural discrimination. It is further premised on a transparent and accountable government (art.12).

One third of the provisions of the Constitution deal with fundamental rights and freedoms. The importance given to these rights and freedoms is further illustrated in the interpretation requirement that has to conform to international standards of human rights but also by imposing an extra stringent amendment requirement than the other provisions in the Constitution (art.105)[45]. Despite the principle of indivisibility of rights, the Constitution has categorized fundamental rights and freedoms into three - human rights, democratic rights and socio-economic rights.

2.1. A Human Right As A Normative Standard And A Legal Relationship

Each human right constitutes either a public law relationship between human beings and public authorities or a relationship between private parties. While the first kind of normative standard aims at having the most fundamental human values and needs protected against excessive interference by public authorities (the vertical dimension), the second aims at protecting individuals from private parties' acts that violate their human rights (horizontal dimension). When the State seeks to implement the obligation to protect, it is required to impose duties on persons subject to their jurisdiction.

The most typical normative structure of a human right is composed of four characteristic components. First, a subject, or more precisely, a right holder, by whom we mean an individual (natural person), a group of individuals or a non-governmental organization entitled to the legal rights and, depending on their procedural capacity, to take legitimate action to secure those rights. Secondly, a duty-holder, that is an entity, normally the State or the Government, obliged either to realize the subject's demands or to create the conditions necessary for their realization. Irrespective of the domestic principle of separation of powers, under international law these are governments, which represent all the three powers in international relations (the executive, the legislature and the judiciary) and thus assume responsibility for their conduct. Thirdly, an object, that is the content of any given right and any corresponding duties of the bipolar parties in the realization of that right. Finally, implementation, that is, a set of measures aimed at realizing and supervising the realization of the right concerned.[46]

Two aspects of implementation are deliberately distinguished. Firstly, the State is required to create a conducive environment to enable the actual exercise of rights by not only abstaining from infringing individual rights but also by enacting adequate legislation and taking administrative measures. Secondly, the State is required to establish or strengthen the existing mechanisms and procedures to monitor the realization and violations of human rights.

Proper identification of the different components is important as it enables one to effectively protect human rights.

Though the identification of a right-holder, duty-holder and the object of a specific human right might not give rise to particularly difficult problems, a proper determination of implementation modalities of any human rights remains a significant task.[47]

2.2. Application of the National Bill of Rights

Application of the Bill of Rights relates to issues of whether and how the Bill of Rights applies in a legal dispute. This further raises at least two questions: who benefits from the Bill of Rights? And who is bound by the Bill of Rights?

The issue how the Bill of Rights applies to legal disputes also raises another question: how is the relationship between the Bill of Rights and the principles or rules of ordinary of law going to be determined? There are three possibilities.[48] First, the Bill of Rights may be a yardstick against which the ordinary law is tested. In this case, ordinary law will apply to the extent that it complies with the Bill of Rights. Secondly, the provisions of the Bill of Rights may be used as guidelines that influence the interpretation and application of the ordinary law and legal reform. Here, ordinary law will not only be applied to the extent that it is in compliance with the Bill of Rights, but also as infused with the values contained in the Bill of Rights. In these two possibilities the Bill of Rights is indirectly applied. It thus does not override ordinary law or generate its own remedies but rather respects the procedural rules, the purpose and remedies of ordinary law, but demands furtherance of the values contained in the Bill of Rights through the operation of ordinary law. Lastly, the Bill of Rights may also govern legal disputes directly. This means that both the Bill of Rights and ordinary law may apply to the same legal dispute. In this case, the Bill of Rights overrides ordinary law and any conduct that is inconsistent with the Bill of Rights and subject to considerations relating to justiciability and constitutional jurisdiction, it generates its own set of remedies.

The purpose of direct application is thus to determine whether there is, on a proper interpretation of the law and the Bill of Rights, any inconsistency between the two or between the Bill of Rights and conduct. The purpose of indirect application is, on the other hand, to determine whether it is possible to avoid any inconsistency between the law and the Bill of Rights by a proper interpretation of the two.[49]

2.2.1. Direct Application of the Ethiopian Bill of Rights

While interpreting legislation, one has to promote the values incorporated in the Bill of Rights because it has to be assumed that the legislature intends to further these values when passing legislation. Such interpretation shall be the rule, unless it can be established otherwise by showing that the legislation is genuinely ambiguous or unclear.

However, the principle that constitutional issues should be avoided is not an absolute rule. Where the violation of the Constitution is clear and directly relevant to the matter, and there is no apparent alternative form of ordinary relief, it is not necessary to waste time and effort by seeking a non-constitutional way of resolving a dispute. This will often be the case when the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by the provision.

Where the consistency of a law or conduct is challenged under the Ethiopian Constitution, the court or a party to a dispute has to bring it to the attention of the Council of Constitutional Inquiry, which will either remand the case to the competent court where it has found no ground for constitutional interpretation or submit its findings to the House of Federation for final deliberation. The latter has the power to interpret the Constitution and decide upon a constitutional dispute submitted to it by the Council of Constitutional Inquiry (arts. 62, 82 and 83). This, however, should not be misunderstood as meaning

that no one else can interpret the Constitution, including the Bill of Rights. The interpretation and implementation of the Constitution is a daily occurrence that goes on throughout the system. The House of Federation is, however, the ultimate authoritative interpreter of the Constitution.[50]

Where the House of Federation finds the law or conduct to be inconsistent with the Bill of Rights, it will declare the law or conduct constitutionally invalid. Such kind of constitutional remedy is only available in the case of direct application of the Bill of Rights and not in the case of indirect application. However, whenever the Bill of Rights merely applies indirectly to a dispute, ordinary courts and not the House of Federation is primarily responsible for the application and interpretation of the Bill of Rights.

Most federal systems around the world give the mandate of constitutional interpretation to a Constitutional Court or the Federal Supreme Court, thus making it a purely legal matter. Ethiopia has, however, adopted a system that gives such mandate to a political organ, thus making the process of constitutional interpretation a political matter. Nevertheless, it is argued that the constitutional interpretation is not purely a political matter as the Council of Constitutional Inquiry mostly composed of legal experts of high standing, headed by the Chief Justice of the Federal Supreme Court is to examine constitutional issues and render advice to the House of Federation before the latter makes its final decision.[51]

2.2.2. Indirect Application of the Ethiopian Bill of Rights

The Constitution holds that all laws and conducts shall be in consistency with the Bill of Rights. In addition, the Bill of Rights incorporates a set of values that have to be respected during interpretation, application and development of legislation and statutory laws. Direct and indirect applications of the Bill of Rights in legal disputes have, each, their own procedural rules relating to standing and remedies.

The principle has a number of consequences. On the one hand, even when the Bill of Rights applies directly, a court must apply the provision of ordinary law to resolve the legal dispute, especially in so far as the ordinary law is intended to give effect to the rights contained in the Bill of Rights. Recent legislation or amendments, such as the Amended Family Law of Addis Ababa and Dire Dawa Administration is intended to implement the relevant provisions in the Bill of Rights, including arts.34 and 35, which provide for marital, personal and family rights, and rights of women respectively. The amended provisions must first be applied and if necessary interpreted generously to give effect to the Bill of Rights, before a direct application is considered. On the other hand, when the Bill of Rights is directly applied in disputes governed by legislation, the implementation of the latter should first be challenged before the provisions of the legislation itself.

2.3. The Reach of the Bill of Rights

To determine when the Bill of Rights may be directly applied to law and conduct, it is important to consider who the beneficiaries of the Bill of Rights are, and who is bound by it. This is known as 'the reach of the Bill of Rights'.

There are, at least, two elements, which determines the 'reach' or the direct application of the Bill of Rights. The first relates to beneficiaries, the second to the duties imposed by the Bill of Rights. The first element is the least difficult to determine as most of the rights in the Bill of Rights have universal application, in the sense that they are for the benefit of 'everyone'. Only in few instances are rights restricted in their application to a particular class of beneficiary such as 'citizens' or 'children' or 'women'. The question whether certain rights benefit juristic persons does present few difficulties, but since this research focus on the enforcement of human rights, we shall not endeavor in this particular discussion in depth.

To determine the duties imposed by the Bill of Rights is more difficult. Who is bound by the Bill of Rights? Which persons or institutions have direct duties imposed on them by the Bill of Rights? This question further raises two questions of its own. What types of conduct may be challenged for being inconsistent with the Bill of Rights? And similarly what forms of law may be challenged? The latter two questions are concerned with the extent to which the Bill of Rights operates directly on the 'horizontal' level, that is, in respect of the relations between private individuals.[52]

Traditionally, a Bill of Rights regulates only the relationship between the individual and the state; i.e., vertical application of the Bill of Rights. Since the State is more powerful than the individual person, and is endowed with 'state authority', a bill of rights is adopted to protect the individual against abuse of the state's powers.

2.4. Remedies

As argued above, constitutional issues should be avoided whenever that it is possible. One consequence of this principle is that remedies set down by ordinary legislation should be exhausted before resorting to constitutional remedies.

The supremacy provision (art.9) of the Constitution automatically makes any unconstitutional law, customary practice or decision of an organ of state or a public official of no effect. Invalidity, therefore, is a consequence of inconsistency, whereas a remedy is granted by the court to bring about justice in legal disputes. The source of constitutional remedies is, in general, found in the Constitution itself, and in rare circumstances in legislation, while remedies for private or state conduct are often found in ordinary legislation. Though the source of the remedies may vary, there are only three major types of constitutional remedies: declarations of invalidity; prohibitory and mandatory interdicts; and awards of constitutional damages.

Constitutional remedies aim to stop a harm caused on the society at large and to vindicate the right. In general, constitutional remedies are thus forward-looking, community-oriented and structural rather than backward looking, individualistic and retributive[53]. Considering other factors, such as the identity of the violator, the nature of the violation and the extent of damage caused, additional remedies or measures may be awarded.

2.5. Civil and Political Rights

The Bill of Rights gives legal protection to the 'first generation' rights also known as 'negative' rights. More or less similar to the ICCPR, the Constitution of Ethiopia guarantees a fairly comprehensive catalogue of civil and political rights enumerated in Chapter three. Most of the rights are formulated in rather general terms. Detailed provisions are expected to be found in ordinary legislation.

2.5.1. Beneficiaries of the Civil and Political Rights: Who is Protected?

Most of the rights in the Ethiopian Bill of Rights are for the benefit of 'everyone', 'every person' or phrased in the negative tense, may be denied to 'no one'. For example, art.15 of the Constitution provides that every person has the right to life, and art.17 states that no one shall be deprived of his or her liberty. These rights are accorded universally; i.e., to all human beings.

On the other hand, other rights are accorded to specific group of beneficiaries. For instance, art.20 (1) restricts the right to a public trial by an ordinary court of law within a reasonable times to accused persons, while art.32 only recognizes the right to freedom of movement within the national territory to every Ethiopian or foreign national lawfully in Ethiopia. Similarly, art.35 is restricted to women, while art.36 to children. The right to vote (art.38) is restricted to every adult Ethiopian.

The next question is whether rights accorded to 'everyone' or 'every person' are also applicable to juristic persons. Though the Constitution of Ethiopia does not specifically extend the application of all rights to juristic persons, it requires the application of certain rights to juristic persons. For instance, art.29 (4), which guarantees the right of thought, opinion and expression, provides that in the interest of the free flow of information, ideas and opinions, which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions (emphasis added). Though some rights may not reasonably be applied to juristic persons, the application of certain rights should be extended to juristic persons depending on the nature of the rights and that of the juristic person.

2.5.2. Duties under the Civil and Political Rights: Who is Bound?

Article 13(1) provides that the legislature, executive and judiciary are all bound to respect and enforce the provisions of the Bill of Rights. Article 9(1) further states that any law, customary practice or decision of an organ of state or a public official, which contravenes

this Constitution shall be of no effect (emphasis added). A person may therefore challenge the actions of any of these state organs for violating his or her human rights and for not abiding by its duties under the Bill of Rights.

2.5.2.1. Legislature

The term legislature refers to the Parliament, the regional states legislatures and municipal councils. The legislature's primary responsibility is the making of legislation, which they have to make sure it complies with the provisions of the Bill of Rights. A provision of a federal or regional statute, a ministerial regulations or other statutory regulation, which is inconsistent with the Bill of Rights, is of no effect.

There is no doubt that the availability of specific national legislation play a major role in the implementation of human rights at the country level, though legislation might not be sufficient on its own. In fulfilling its duty to fill in the gap and bring the constitutional principles into reality, the legislature has enacted specific laws, such as the Press Law Proclamation No. 34/92, the Proclamation Establishing the National Election Board and the Labour Law Proclamation No. 42/93[54]. Legislation, such as the Family Law[55], Penal Code and Criminal Procedure Code are also being revised.

Though the process of bringing national legislation in line with constitutional principles and international standards of human rights is to be encouraged, the process is rather slow and at times incorporates provisions, which are still inconsistent with international standards. In addition, there are still numerous gaps to be filled such as a national legislation to prohibit or prevent discrimination, which provides for the application of the right to equality, provides remedies for victims of discrimination and persons whose right to equality is infringed by government authorities or private individuals and determines how and what other forms of differentiation amount to discrimination. Enacting legislation, such as law of evidence is also fundamental in the administration of justice.

On the other hand, the first aspect of privacy as provided by art. 24(2) of the Constitution, consists of a right to be protected from intrusion against an individual's home, person or property from the law, giving the individual a sphere of personal autonomy. However no right is absolute, more so for the right to privacy. The Constitution puts a limitation clause to the right to privacy for purposes of 'safeguarding the national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others'. But what amounts to violation of 'public morality' or 'the rights and freedoms of others'? Terms of such nature may be interpreted to incorporate a wide variety of acts, making the need for elaboration very essential. Legislation that properly defines the power of the authorities is crucial, as wide discretionary powers must be avoided in order to safeguard the right to privacy.

With respect to implementation of ratified international human rights documents at the domestic level, ICCPR generally leaves it to the State Party to choose its method of

implementation of civil and political rights in its territory within the framework set out in art.2. Article 2 (2) of the Federal Negarit Gazette Establishment Proclamation No. 3/1995 provides that all Laws of the Federal Government shall be published in the Federal Negarit Gazette. To date, only the Convention on the Rights of the Child among the international human rights instruments ratified by Ethiopia, is given the force of domestic law by the Federal Negarit Gazette. However, even in this instance, the Federal Law Gazette did not translate the provisions of the Convention into the working language of Ethiopia and publish them[56]. While Amharic is the working language of the Federal Government, members of the Federation may by law determine their respective working languages.[57]

The Committee on the Rights of the Child has further put forward its concerns that the Convention has yet to be published in the 'Official Gazette', as recommended in the Committee's concluding observations to the State party's Initial Report[58]. The Committee was also concerned that Ethiopia failed to make its domestic law compatible with the provisions and principles of the Convention on the Rights of the child, that the process of drafting and adopting new legislation is slow.

With respect to the other activities of the legislatures, including when they perform non-legislative functions, the High Court of South Africa has the following to say:

The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution… [T]he nature and exercise of parliamentary privilege must be consonant with the Constitution. The exercise of parliamentary privilege, which is clearly a constitutional power, is not immune from judicial review. If a parliamentary privilege is exercised in breach of a constitutional provision, redress may be sought by an aggrieved party from law courts whose primary function is to protect rights of individuals.[59]

2.5.2.2. Executive and Organs of State

Article 9(2) binds all organs of state as well as their officials to observe the Bill of Rights. The executive, which normally refers to those political appointees who collectively head the government, whether it is at the federal or regional level, is also bound to respect and enforce the Bill of Rights (art.13 (1)).

However, it has been complained various times that the Executive fails to fulfill its responsibility in this matter. Concern has been put forward by the Committee on the Rights of the Child that some customary practices, which are prejudicial to children's rights may still be applied instead of modern domestic legal provisions.[60]

On the other hand, in addition of the Press Law, the legislature promulgated a Broadcast Proclamation in 1999 providing for a broadcasting authority to review applications for

private radio and television licenses. However, the authority is still not functional as of November 2002. Furthermore, in July 2000, the outgoing Parliament unanimously approved the proclamations establishing the Ethiopian Human Rights Commission[61] and the Office of the Ombudsman[62], days before the end of its five-year tenure. However, both institutions are not yet functional as of November 2002. Though lack of available resources and expertise are commonly used as excuses, it has been witnessed that the resources and expertise have been made available to undertakings that have the backing of the Government, such as the amendment of the Anti-Corruption legislation and the establishment of the Commission on Ethics and Anti-Corruption.

On the other hand, in relation to other activities of the Executive, some jurisdictions, methods have specifically been developed to exclude the conduct of the executive from judicial scrutiny for consistency with the Bill of Rights. For instance, in the United States, this method is known as the political question doctrine[63]. The effect of labeling an issue 'a political question' is to limit the court's power to review the conduct of the executive, in the assumption that courts are wrongly placed to decide the matter.

However, even in jurisdictions where such methods are not specifically developed as in Ethiopia, courts are likely to show considerable deference to executive choices of a political nature. However, in principle and pursuant to art.9 (1), policy developed by the Cabinet under the executive powers should not be inconsistent with the Bill of Rights. It can further be argued that an individual has the right for redress where a failure to implement legislation or to execute a law amounts to a violation of his or her rights. In such circumstances, there is no reason why a court should not order the executive to enforce the Bill of Rights.

2.5.2.3. The Judiciary

The judiciary is similarly bound by the Supremacy of the Constitution and thus the Bill of Rights. Some provisions of the Bill of Rights, such as art.19 (3), which provide that on appearing before a court, arrested persons have the right to be given prompt and specific explanation of the reasons for their arrest, are indeed specifically directed at the conduct of the judiciary. Though the courts show signs of independence, the judiciary is weak and overburdened. Contrary to the constitutional provisions, lengthy pretrial detention is common, closed proceedings occur and at times, detainees are allowed little or no contact with their legal counsel. Often these lengthy detentions are due to severe shortage and limited training of judges, prosecutors and attorneys in many regions. Serious financial constraints further add up to the problem.

It may further be argued that since the judiciary is bound to enforce the provisions in the Bill of Rights, private conducts and acts that conflict with the Bill of Rights will not be uphold in a court of law. However, religious and customary courts that are recognized by the Constitution have led to numerous violations of human rights, especially children and women's rights, as cases are brought to these courts without their consent despite the constitutional requirement (art.34 (5)).

2.5.2.4. Private Actors

The Constitution of Ethiopia goes further than the traditional vertical application of the Bill of Rights, in that it binds, in art.9 (2), all citizens, organs of state, political organizations, other associations as well as their officials to ensure observance of the Constitution and to obey it (emphasis added). Article 13 (1), further binds the State to ensure citizens' rights from unjust interferences from others.

Though all rights in the Bill of Rights might not be applicable to private actors and juristic persons, certain provisions of the Bill of Rights are applicable, taking into account the nature of the rights and the nature of the duty imposed by the right. The State is thus required to take positive steps towards the effective enjoyment of these rights. This includes the obligation to enact legislation and create the framework to prevent violations of rights and enable citizens enjoy their protected rights without interference from others[64]. The application of the Bill of Rights is thus not confined to protecting the individual against abuse of the state's powers but also against abuses of their rights by other individuals; i.e., horizontal application of the Bill of Rights.

Questions concerning the horizontal application of the Bill of Rights cannot be determined a priori and in the abstract. Although this is not explicitly stated, whether a provision of the Bill of Rights applies horizontally can only be determined by reference to the context within which it is sought to be relied upon[65]. For instance, the right to assemble peacefully could be applied horizontally, as the right could be applied where employees assemble in the property of the employer. However, the horizontal application would not be appropriate where individuals assemble in or in front of someone's private home.

Furthermore, the purpose of a provision is an important consideration in determining whether it is applicable to private conduct or not. For example, the purpose of the right of nationality is, in principle, to prevent the state from denying Ethiopians their nationality and thus the right to the enjoyment of their rights as citizens. It follows from this that this right is not intended to have a horizontal application.

The other general consideration that must be taken into account is the nature of the duty imposed. This consideration recognizes that private individuals or juristic persons are primarily driven by a concern for themselves, while the primary concern of the state is the well being of the society as a whole. This consideration is of particular importance when it comes to the imposition of duties, which entail the spending of money. For instance, the application of art.38 (1)(c), which ensures the rights to vote and to be elected by universal and equal suffrage and shall be held by secret ballot, may not be extended to private actors. This is because the activities undertaken to guarantee the free expression of the will of the electors are funded from public funds and not from individual own pockets.

In some instances, specific mention is made in the provisions of the Bill of Rights themselves that a particular rights may be applied to private conduct or not. For example,

art.35 (3), which states that women are entitled to affirmative measures to remedy the inequality and discrimination suffered by women, clearly indicates that such measures should be undertaken by both public and private institutions.

Putting the above arguments into considerations, certain rights such as the rights of arrested, accused, detained and imprisoned persons, rights of nationality, right of access to justice, rights of Nations, Nationality and People may not be directly applicable to private actors. The remaining rights may, depending on the circumstances of particular cases, be directly applicable to private actors, so as to conform their conducts to the Bill of Rights.[66]

2.6. Socio-Economic Rights

Although the international community has consistently proclaimed that all human rights are indivisible, interrelated and interdependent, responses to violations to economic, social and cultural rights – both procedural and substantive – are lower compared to the level of seriousness accorded to infringements of civil and political rights.

The inclusion of socio-economic rights as justiciable rights in a national constitution is a relatively recent development. While some guidance could be obtained from the experience in other countries, main guidance should be sought at the international level since much conceptual and interpretative progress in this area of law has been made over the past decade and legal protection of socio-economic rights has largely its roots in international law.

The primary UN human rights instrument dealing with socio-economic rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Ethiopia has ratified and incorporated as part of its law of the land. The other instruments that also deal with socio-economic rights are the UDHR, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. Ethiopia has incorporated all these instruments as part of its law of the land. Ethiopia has also ratified the African Charter on Human and Peoples' Rights.

The Ethiopian Constitution has recognized a number of socio-economic rights as justiciable human rights. However, all socio-economic rights are categorized under one heading 'economic, social and cultural rights', separately from the civil and political rights. This does not only give the impression that the interdependence, interrelatedness and indivisibility of human rights is not given due emphasis, but are not also well elaborated as to ensure their justiciability with ease. However, the rights to property[67] and of labor[68] are given one article each separately. The terms in which the socio-economic rights are described are more general and in some instances, lack clarity. Nevertheless, the Constitution has formulated among others, the right to engage freely in economic activity, the right to choose his or her means of livelihood, occupation and profession, right to equal access to publicly funded social services in clear terms.

2.6.1. National Policy Principles and Objectives

In addition to incorporating socio-economic rights, the Constitution has incorporated various social, economic and cultural objectives and principles that the State has to observe for formulation of national policies under Chapter Ten. This kind of incorporation of socio-economic needs in the form of directive principles of State policy is also adopted by other jurisdictions, such as the Namibian, Indian and Irish[69]. Though these principles are not directly enforceable, they may affect the interpretation of other rights by being 'read into' those rights or may be relevant in the interpretation of legislation[70]. Some of the substantive socio-economic areas for which the principles and objectives are provided in the Constitution are health, welfare and living standards, education, clean water, housing, food and social security (arts.89 and 90).

The Ethiopian Constitution has incorporated a number of principles and objectives that public authorities are obliged to be guided by in the implementation of the Constitution, laws and policies (art. 85(1)). The Constitution stipulates that the Government has the duty to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them (art. 89(2)). The Constitution further stipulates that policies shall aim at providing all citizens access to health, education, clean water, housing, food and social security (art. 90(1)).

The Indian Supreme Court has interpreted the fundamental rights in conjunction with the Directive Principles to require the State to regulate the activities of private institutions so as to protect socio-economic rights[71]. In Krishnan v State of Andhra Pradesh[72], a note was also made in relation to art.45, which requires the State 'to endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years'. It was indicated that the fact that 44 years passed since the Constitution came into force is enough to convert the obligation into a directly enforceable fundamental right to education of every child under the age of 14 years. This was necessary in order to prevent the Directive from becoming a 'mere pious wish'. Finally, in State of Tamil Nadu v Abu Kavier Bai[73] the Indian Court held that it had a duty to harmonize the Directive Principles and fundamental rights.[74]

2.6.2. Beneficiaries of the Socio-economic Rights: Who is Protected?

Most of the social, economic and cultural rights in art.41 are formulated for the benefit of every Ethiopians, though some are for the benefit of a defined group of beneficiaries, such as the physically and mentally disabled, the aged and children who are left without parents or guardian, Ethiopian farmers and pastoralists. Most of the socio-economic objectives and principles for State policy in arts.89 – 91 are also formulated for the benefits of all Ethiopians, though some are for the benefit of a defined group of beneficiaries, such as nations, nationalities and people least advantaged, women, victims of disasters and the People. None of these rights is explicitly formulated for the benefit of 'everyone'; i.e., the Bill of Rights has excluded non-citizens from claiming the socio-economic rights in the Bill of Rights. With regard to this issue, art.2 (3) of the ICESCR

provides that 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.

2.6.3. Duties under Socio-Economic Rights: Who is Bound?

Article 13(1) places a duty on the State at all level to respect and enforce the provisions of this Chapter, including socio-economic rights. It can further be argued that the wording of most social, economic and cultural objectives and principles place a duty on the State to promote and fulfill the socio-economic needs of all Ethiopians.

The duty to respect socio-economic rights consists of reviewing legislative or other State conducts, which gives rise to a breach of these rights. With this regard, socio-economic rights are at least to some extent justiciable in that they can be negatively protected from improper interference. The obligation to 'respect' implies an immediate obligation on the State to refrain from interventions in people's access to, or enjoyment of, socio-economic rights. This obligation is violated where the State deprives, for instance, people of the access they enjoy to these rights through legislation or conduct. If we take the example of art.41 (4), which places the obligation to allocate ever increasing resources to provide to the public health, and other social services, the government has the duty to abstain from arbitrary intervention by way of demolishing the only health care center in one area without providing other alternatives for the inhabitants who cannot afford to travel to the next center for health care services. Arbitrary forced evictions will also amount to violation of the State's obligation to respect the right to equal access to publicly funded social services, including housing as provided by art.41 (3) where alternative suitable solutions are not provided for.

A breach of the obligation to respect socio-economic rights may also occur when legislation or State's conduct has the effect of denying or placing obstacles in the way of an individual or group gaining access to a particular right. For instance, it may be argued that requiring excessive school fees amount to violation of socio-economic rights as it has an effect of denying poor children access to their right to education. Another example is where social security benefits are terminated by administrative conduct in the absence of legitimate reasons. However, in considering whether a person has been deprived of access to a socio-economic right, account has to be taken of the fact that access is not solely dependent on State provision.[75]

The duty to protect or ensure obliges the State to prevent private actors from infringing the socio-economic rights of others. For instance, art.41 (6) places a positive duty on the State to pursue policies, which aim to expand job opportunities for the unemployed and the poor. The State is further bound in art.41 (7) to create a conducive environment for the creation of employment opportunities in which citizens can find gainful employment and improve their economic conditions. Sub-article 4 also states that the State has the obligation to provide to the public education. These impose positive obligation on the State to take steps by enacting laws and regulations to ensure that individuals enjoy their

rights to work and education, including protection against the interference of private actors.

The duty to promote and fulfill requires the State to take positive measures to assist individuals and group of individuals to obtain access to socio-economic rights. Here, the obligation of the State can take many forms and is less precise in its scope and definition than the other obligations[76]. On one hand, the duty includes, as in the instance of art.41 (5), the allocation of resources for the realization of the socio-economic rights. On the other hand, the duty may also include the direct provision of basic needs when no other alternatives are available to the individuals. For instance, art.36 (5) provides that the State shall accord special protection to orphans and shall encourage the establishment of institutions, which ensure and promote their adoption and advance their welfare and education. Here note has to be made that art.36 (5) is categorized among the civil and political rights but makes specific reference to socio-economic rights, proving the close interrelationship between the two categories of rights.

With respect to horizontal application of socio-economic rights; i.e., binding private actors to respect these socio-economic rights, consideration must be made, similar to civil and political rights, to the nature of the duty imposed. Since private individuals or juristic persons are primarily driven by a concern for themselves, duties that entail the spending of large amount of money should not extend to them. For instance, art.41 (4), which provides for the allocation of ever increasing resources to provide to the public, health, education and other social services, may not be extended to private actors. This is because the activities undertaken by them are funded from their own pockets, while the duties imposed on an organ of state rely on public funds.

2.6.4. Access to Socio-Economic Rights

Most of these rights are qualified, in that the Government only provides 'equal access', or 'access', to the socio-economic need to be provided, that this be done 'within available means', or by 'allocating resources' or 'allocating ever increasing resources'. Surprisingly enough, the Constitution does not qualify the application of socio-economic rights with a view to achieving the full realization of these rights only progressively. These qualifications are similar in formulation to qualifications attached to socio-economic rights in the ICESCR. Guidance on the meaning of these terms may thus be obtained through reference to the international jurisprudence.

The use of the term 'equal access to' in art.41 (3) and 'access to' in art.90 (1) is intended to explicitly limit the obligation of the State towards individuals. The former sub-article, which provides that every Ethiopian national has the right to 'equal access' to publicly funded social services, does not impose an obligation on the State to provide social services to all Ethiopians for free.

The Committee on Economic, Social and Cultural Rights has identified a number of factors and essential features which bear upon economic and social rights, such as 'availability', 'accessibility', 'acceptability', 'affordability', etc.[77] Accessibility has three

overlapping dimensions[78]:
Non-discrimination: the right must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;
Physical accessibility: the right has to be accessible within safe physical reach. For instance, education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighborhood school) or via modern technology (e.g. access to a 'distance learning' programme). Physical accessibility also implies that adequate food must be accessible to everyone, including physically vulnerable individuals[79];
Economic accessibility: the right has to be affordable to all. It implies that personal or household financial costs associated with the acquisition of, for instance food, for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised[80]. Charges for basic social services should, thus, be affordable to poor people[81].

Social services may include, but not limited to housing, shelter, food, water, health care, social security and education. Thus, to provide access to publicly funded housing, for instance, does not include an obligation to provide individuals with free housing. It does, however, impose on the State a duty to assist individuals realize this right, by ensuring adequate and appropriate state assistance to individuals who are unable to secure access to housing and subsidizing, for instance, low income households. The State's role is, therefore, to create an enabling environment, which makes it possible for people to gain access to these rights and improve their life. It should further remove obstacles in accessing these rights and adopt measures to assist vulnerable and disadvantaged groups to gain access to these publicly funded social services.

Moreover, art.41 (3) specifically refers to 'equal access', making a clear linkage between the socio-economic right and equality clause. Here, the State will have the obligation to prevent laws or policies that have the effect of excluding particular groups from the full and equal enjoyment of publicly funded social services from being promulgated. The State has, in addition, to take positive steps to ensure that disadvantaged groups benefit equally from publicly funded social services. In addition, those with sufficient resources should also have access to housing through rental, purchase, etc.

2.6.5. Within [the State's] Available Means

The other limitation set for the State's obligation towards socio-economic rights is the availability of State's resources. The State may only be hold accountable for violation of socio-economic rights on the basis of its available resources. This provides a necessary flexibility, to reflect the realities of the real world and the difficulties involved for the country in ensuring full realization of economic, social and cultural rights. However, it imposes an obligation to move as expeditiously and effectively as possible towards that goal. In addition, any deliberate retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights and in the context of the full use of the maximum available resources.[82]

The Committee on Economic, Social and Cultural Rights is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon each State Party. Otherwise, socio-economic rights will loose their raison d' être. However, note has to be taken to the resources constraints that the country is facing when assessing as to whether the State has discharged its minimum core obligation[83]. The other critical question here is whether the 'available means' of the State refers to its existing budgetary allocations to a particular socio-economic need or whether it refers to the totality of the resources available to the State[84]. 'Available means' also refers to both the resources within a State and those available from the international community through international cooperation and assistance.[85]

For instance, art.41 (5) limits the obligation of the State, 'within its available means', while providing rehabilitation and assistance to the physically and mentally disabled, among others. With this regard, the Committee stresses the fact that even in times of severe resources constraints, the vulnerable members of society can and indeed must be protected[86]. It made the similar comment in General Comment No.5 and observes that the duty of the State to protect the vulnerable members of their society assumes greater rather than less importance in times of severe resource constraints.[87]

The Comment goes on to provide that where special treatment is necessary, the State is required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantage flowing from their disability[88]. The obligation of the State to promote progressive realization of the right to the maximum of its available resources clearly requires the government to do much more than merely abstain from taking measures, which might have a negative impact on persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[89]

2.6.6. The Integrated Approach: Protection of Socio-Economic Rights through Civil and Political Rights

On the international plane and in some jurisdictions, including the Indian one, the justiciability of socio-economic rights – or at least of some elements of them – has developed through the civil and political rights.

2.6.6.1 Non-Discrimination Clause

For instance, the Human Rights Committee has explained that the non-discrimination clause in art.26 of the ICCPR is applicable also in relation to the enjoyment of economic, social and cultural rights. The Committee stated that:

Although art.26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide

for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with art.26 of the Covenant.[90]

Article 25 of the Ethiopian Constitution, together with arts.35 (3) and 89(4), contains various elements. The first provides for the principle of equality before the law and confers the right to equal protection of the law. The second element contains a prohibition of discrimination on certain listed grounds. The third extends the prohibition of discrimination to other unlisted grounds. The fourth deals with affirmative measures/special assistance. Finally, through interpretation of art.25 in conjunction with art.9 (2), the prohibition of discrimination is extended to private actors.

Article 25 envisages that the equality clause should not only be interpreted in a formal way but also in a substantive way. Formal equality means to treat everyone the same way. Here the law regard all human beings as equal bearers of rights and treat them accordingly by extending the same rights and entitlements to all in accordance with the same 'neutral' norm or standard of measurement[91]. It does not take into account the social and economic disparities between people and individuals. This approach follows the notion that justice should be blind.

Substantive equality, on the other hand, takes these disparities into account and requires the law to ensure equality of outcome[92]. Such an individualized or group-based approach to difference is thus based on the inherent equal worth of all people. This is in line with the Aristotle's conception of equality which demands that 'alike should be treated alike and unalike should be treated unalike in proportion to their unalikeness'[93]. The Canadian court in the case of Andrews V. Law Society of British Columbia has also held as follows: "the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are 'similarly situated be similarly treated' and conversely, that persons who are 'differently situated be differently'…"[94]

Substantive equality is thus envisaged when art.35 (3) obliges the State to promote the achievement of such equality by providing affirmative measures to women to remedy the historical legacy. The terms 'special assistance' and 'assistance' provided in arts.89 (4) and 41(5) to Nations, Nationalities and Peoples least advantaged in economic and social development, and to the physically and mentally disabled, the aged and to children who are left without parents or guardian respectively, similarly envisages remedial equality.

The Ethiopian Constitution seems to favor the view that understands affirmative action as a means, which enable women to compete and participate on the basis of equality with men and disadvantaged nation, nationalities and peoples to fully and equally enjoy social and economic development. In this sense, affirmative action should be understood as an integral component of the right to equality and not as an exception of it.

However, the Constitution does not specifically provide for the application of the right to equality. For instance, where a person claims that her/his right to equality has been violated, it is expected that s/he has to first show that the challenged law or conduct differentiates between people or categories of people. Where that is proven to be the case,

then enquiry must be made into the rational behind the differentiation. If the differentiation has a rational basis or is legitimate, then the right cannot be said to be violated. However, where the differentiation is made on the basis of one or many of the listed grounds, such as sex, race, nation, religion, etc., then it is presumed to be a discrimination, unless otherwise proven, because differentiation on one of the listed grounds is presumed to impair the fundamental dignity as human beings and to perpetuate the oppression and marginalization of victims of the historical legacy of discrimination. However, where differentiation is made on unlisted ground, the unfairness or the discriminatory impact of the differentiation will have to be established by the complainant.

Here note has to be taken that not all differentiation amounts to discrimination. Differentiation will only amount to a violation of the right to equality where it results in unequal treatment under the law or deny equal protection of the law.

However, there is nothing in the Ethiopian law, which provides that differentiation on one of the unlisted grounds may amount for discrimination. In theory, any differentiation on the basis of an unlisted ground will have to be proven to constitute discrimination and to amount to a violation of the right of equality. The complainant will have to show that the differentiation is based on attributes and characteristics, which have the potential to impair the fundamental dignity of persons as human beings. Since grounds, such as disability, HIV status, gender and marriage are not listed by the Constitution, people in these categories will have to show that differentiation on these grounds imposes a burden on them and that the differentiation arises from certain attributes and characteristics of these groups of people. For instance, where someone infected with HIV is fired from his/her job on the mere ground of his/her HIV status, such differentiation will amount to discrimination as the differentiation is based on attributes and characteristics and impairs the fundamental dignity of persons living with HIV/AIDS as human beings. These types of detailed provisions, which bring the right to equality and the non-discrimination clause to life are expected to come out in a form of a national legislation.

2.6.6.2. Other Instances of Integrated Approach

The Supreme Court of India has further drawn on the Directive Principles to enlarge the scope of rights such as the right to life, as to include the right to the basic necessities of life such as adequate nutrition, clothing, reading facilities[95], the right to a livelihood[96], the right to shelter[97], the right to health care[98], and the right to an education[99]. Though the State is not expected to provide its citizens with adequate means of livelihood or shelter, the Indian constitutional jurisprudence has instead created a basis for negative review in the sense that persons may not be deprived of their livelihoods or other socio-economic needs without a just and fair procedure established by law[100]. Similar to the Ethiopian Constitution, art.21 of the Indian Constitution is formulated in a negative tense: 'no person shall be deprived of his life or personal liberty except according to the procedure prescribed by law'. It is well settled in the Indian jurisprudence that the procedure prescribed by law for the deprivation of these rights 'must be fair, just and reasonable'[101]. The Indian court has further interpreted the right to life in conjunction with the Directive

Principle requiring the State to protect and improve the environment to order the cessation of conduct which endangers health or breaches environmental standards.[102]

CHAPTER 3

IMPLEMENTATION OF THE BILL OF RIGHTS AT THE COURT LEVEL

The judiciary does not only have a duty to obey the Constitution, as an organ of state, but it has also the duty to ensure its observance. Furthermore, the Constitution provides that courts of any level shall be free from any interference of influence of any governmental body, government official or from any other source (art.79 (2)). This assumes a broader approach to standing for the effective enforcement of the Bill of Rights than of ordinary law.

Two distinctive mechanisms of norm enforcement of the Bill of Rights could be identified: the 'hard' and 'soft' mechanisms. The Bill of Rights may either be implemented through direct justiciability or indirectly through the 'hard' or legally binding enforcement. The 'soft' enforcement mechanism refers to the non-legally binding enforcement of the Bill of Rights.

At the international level, States Parties to the ICCPR are requested to take steps to ensure fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular States Parties should adopt relevant constitutional and legislative provisions, which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive and legislature.[103]

3.1. Implementation of International Human Rights Instruments

In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. Available international procedures are only supplementary to effective national remedies.[104]

Questions relating to the domestic application of international human rights standards must be considered in line with two principles of international law. The first, as reflected in art.27 of the Vienna Convention on the Law of Treaties[105], is that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

In other words, a State Party should amend the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in art.8 of the UDHR, according to which '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'.[106]

Article 2(1) of the ICCPR states that each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind … Furthermore, art.2 (3) provides that each State Party to the present Covenant undertakes:

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c. To ensure that the competent authorities shall enforce such remedies when granted.

The ICESCR does not contain similar provision, which obliges the State Party to, inter alia, 'develop the possibilities of judicial remedy'. Nevertheless, a State Party seeking to justify its failure to provide any domestic legal remedies for violation of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of art.2 (1), of the ICESCR or that, in view of the other means used, they are unnecessary.[107]

As mentioned above, ICCPR generally leaves it to the State Party to choose its method of implementation of civil and political rights in its territory within the framework set out in art.2. The duty of the State Party is not only limited to the respect of human rights, but also to ensuring the enjoyment of these rights to all individuals under its jurisdiction[108]. Similarly ICESCR does not stipulate the specific means by which it is to be implemented in the national legal order. However, the means used by which the rights are given effect in national law should be appropriate in the sense of producing results, which are consistent with the full discharge of its obligations by the State Party.[109]

Nevertheless, no matter how much progress the world has witnessed in the development of international human rights standards and the recent adoption of these provisions in national constitutions and legislation, the effective implementation of these standards in domestic courts remains critical for the full realization of human rights. In Ethiopia, though the Constitution provides that all international agreements (including international human rights instruments) ratified by Ethiopia are an integral part of the law of the land (art.9 (4)), reference at the court level to international human rights standards and the Bill of Rights is very minimal at best, nil at worst.

One of the instances where international human rights provisions are invoked, is in the arraignment and prosecution of 5198 persons formally charged with genocide and other war crimes under the previous regime. However, even in this instance, international human rights provisions are only invoked to a very limited extent. The first argument is that articles 281 and 522 (1) (a) of the Penal Code are not consistent with the definition of genocide as defined by the international Convention. The second argument is that the accused should be tried by an international court and not by domestic courts, which cannot be presumed to be neutral in adjudicating these cases.

With regard to other instances, several interviewed judges noted that the provisions of the Federal Negarit Gazette Establishment Proclamation No. 3/1995 hinder them from invoking international human rights standards at the court level. This Proclamation provides in its art.2 (2) that all Laws of the Federal Government shall be published in the Federal Negarit Gazette, while art.2 (3) states that all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazette.

A number of interviewed judges have noted that where the provisions of a ratified international instrument are not officially translated into the working language, their implementation at the domestic level is close to nil. Translation of international human rights standards will make these standards available to the public and thereby facilitate ease of reference for ordinary citizens. The publishing of a ratified international human rights instrument in an official document (i.e., Negarit Gazette) further facilitates the access to these instruments both to the judicial organ and ordinary citizens.

Some of the interviewees stated that even judges and attorneys who understand very well the languages in which international human rights instruments are written (i.e.; English, French, Arabic and Spanish), do not use these provisions in courts of law. According to the interviewees, this is due to the fact that most provisions of international human rights instruments are incorporated in one way or another in domestic laws, the Constitution in particular. Therefore, where a violation of human rights occurs, this will not only result in violation of international human rights but also in violation of constitutional rights. They, thus, find the reference to international provisions redundant.

As stated in the Second Chapter, the general principle is to decide civil and criminal disputes without resolving to constitutional issues where that is possible. The court must thus try to first apply provisions of ordinary law, which are intended to give effect to the rights contained in the National Bill of Rights.

However, some argue that constitutional provisions are too broad and general to directly implement them. It is, thus, necessary for the legislature to promulgate specific legislation, which elaborate and give effect to the general provisions of the Constitution. Though the premise is not that constitutional provisions may, in no way, be directly implemented, the legislature is better equipped and placed to ascertain the needs of the society, respond to those needs and express these in specific legislation. Instead of relying and expecting the court to make pronouncements on the meaning of the

Constitution on individual cases, the legislature should clarify and reform the law in accordance with its own interpretation of the Constitution and to changing circumstances.

One of the measures to be taken to ensure domestic application of human rights is amendment of existing laws and rules that are inconsistent with the Bill of Rights. Though inconsistent provisions shall have no effect by virtue of art. 9(1) of the Constitution, these have to be replaced by provisions that give better effect to the Bill of Rights.

In Ethiopia, due to lack of qualified judges, non-qualified personnel to whom legal training of short period is given are appointed. Where such circumstances exist, specific legislation becomes a necessity rather than an option. This is because knowledge and exposure to international human rights standards is very minimal even where there is a will.

Here, the important role that non-governmental organizations (NGOs) may play by way of resembling domestic pressure groups or lobbies towards the protection, respect and promotion of human rights at the country level should be noted. At the international, regional and national level, NGOs in particular those working for the protection, respect and promotion of human rights, have played a particularly important role in the evolution of the international system for the protection of human rights and in trying to make it work. In this particular context, NGOs should undertake research on national provisions that are inconsistent to constitutional principles and international human rights standards, propose and lobby for amendments to these provisions.

Furthermore, availability of human rights training for judges is minimal, especially at the regional level. NGOs may also involve themselves in human rights education to develop a human rights culture by making people aware of their rights and responsibilities, of the possibilities of redress.

On the other hand, though Proclamation No. 3/1995 has been promulgated in 1995, no other international human rights instrument, except for the Convention on the Rights of the Child, has been published on the Negarit Gazette. Irrespective of the provision in the Vienna Convention on the Law of Treaties, the provisions of the Proclamation No. 3/1995 are being invoked as justification for the failure of the judiciary to perform the State's obligations to a treaty that it has ratified.

On the other hand, Ethiopia can reasonably be classified as a dualist country, as international human rights instruments require a separate domestic legal document to be enacted before their provisions can be implemented in domestic courts.

3.2. Implementation of the Bill of Rights at the Court Level

As explained in Chapter Three, the mandate of investigating constitutional disputes is granted to the Council of Constitutional Inquiry; i.e., the direct application of the Bill of

Rights. Ordinary courts have, on the other hand, the mandate to indirectly apply the Bill of Rights in the sense that legislation may be interpreted or developed, with reference to the spirit, purport and objects of the Bill of Rights, so as to avoid inconsistency between the law and the Bill of Rights. Article 13 (2) of the Constitution of Ethiopia further states that the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and international instruments adopted by Ethiopia.

Thus even with the limits that Proclamation No.3/1995 imposes on the direct implementation of international human rights instruments, the Constitution affirms the important function that international human rights standards can play as a means of interpretation. This does not only enable the courts to give clarity to and expand national legislation in line with the principles of international human rights standards, but also to fill the gaps in the rules of domestic law that have an impact on the enjoyment of human rights.[110]

International human rights monitors, such as the Human Rights Watch and the US Department of State, have reported in 2002 with regard to the work of the judiciary and the enforcement of human rights at the court level in Ethiopia. The Human Rights Watch reported that:

. . . The courts routinely granted extensions allowing individuals to be held in detention without formal charges and without bail while the police "investigated," usually at a snail's pace. Rarely did they inquire into the need for holding suspects in custody. Court hearings convened every several weeks, only to have the court uncritically permit the police to investigate for months. Court cases historically lasted for years, during which time activists and government critics, apparently held only for their nonviolent criticism of the government, endured harsh detention conditions. Sometimes charges were eventually brought; sometimes prisoners were released after months of captivity without charge or trial.[111]

The US Department of State further reported that:

Often [these] lengthy detentions are due to the severe shortage and limited training of judges, prosecutors, and attorneys; however, detainees often remain in custody without charge or without bail for long periods of time in high profile cases that are considered to be somewhat political, including those detained for corruption or detainees who are opposition members. Such cases have been remanded at least 10 to 15 times, for 2 weeks each time, and courts allow police to conduct investigations that continue for months.[112]

In the aim of assessing the extent to which courts in practice interpret issues related to violation of fundamental rights and freedoms in a manner conforming to the international principles and standards, first instance courts, the Federal High Court, the Federal Supreme Court and the Amhara Regional High Court were visited. However, a number of challenges were faced during the data collection. One of the challenges was the lack of a systematized data collection of cases in courts. The process of identification and selection

of cases had thus to rely on the memory of the judges and record keepers. The other is the scarcity of cases related to the issue of human rights. While this is mainly due to the provisions of the Proclamation No. 3/1995, no explanation is given to the lack of reference to the Ethiopian Constitution at court level. Neither attorneys representing individuals nor judges rely on the Constitution of Ethiopia to support their arguments, let alone to international human rights standards. This could further be an indication of the level of confidence that counsels and judges have in the area of human rights.

Because of the above reasons, the following analysis mainly considers how international human rights standards and the Constitutional rights could be used as an interpretative tool and how these could be used to give substance and clarity to domestic legislation and more precisely to the enforceability of human rights at the national level. However, in the very few circumstances, where cases are found in which international and constitutional human rights are invoked, adequate reference are made in the aim of developing the jurisprudence of domestic court decisions in the area of human rights.

The case studies in this Chapter mainly relates to the right to proper administration of justice[113]. This is not particularly intentional but rather incidental. When discussing human rights in relation to the administration of justice, the very characteristics of fair trial and the right to judicial proceedings are fundamental questions. It has thus been justifiably maintained with respect to art.14 of the ICCPR that the right to a fair hearing in court as provided for in the article, is one of the cornerstones of the ICCPR as a guarantee of the rule of law. The aim of this principle is procedural equality between the accused and the public prosecutor.[114]

3.2.1. The right to have Opportunity to Communicate with one's Counsel

The 1994 Constitution
Art.20 (5): Accused persons have the right to be represented by a legal counsel of their choice, …
Art. 21(2): All persons shall have the opportunity to communicate with, and to be visited by, their …legal counsel of their own choosing.
ICCPR
Art.14 (3)(b): In the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.

In the case[115] of the State V. Dr. Taye Wolde Semayat and others[116], the accused were charged under art.252 (1)(a) of the Penal Code. Facing difficulties to consult with his defense counsel, the first accused complained that he was denied the opportunity to communicate with his counsel. The Court noted that if the counsels were truly denied the opportunity to communicate with the accused that is illegal. Any detained person has the right to freely communicate with his counsel. The Court further affirmed that this right is not only universal but also recognized by the Constitution. If, notwithstanding this provision, the accused are denied the opportunity to communicate with their counsels,

this conduct is then unconstitutional. The Court thus ordered the Prison Administration to revert for this kind of practice.

The Human Rights Committee further noted, in its General Comment No. 13, that the word 'facilities' must include access to documents and other evidence, which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. It also noted that this also requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.[117]

In this particular case study, the Court interpreted the right to have the opportunity to communicate with one's counsel in conformity with international human rights standards and ordered the relevant authorities to take the necessary measures to curb the violation of the accused persons. However, the US Department of State reported in 2002 that the President of the Ethiopian Teachers' Association, Taye Woldesemayat, was held separately from other prisoners, and although diplomats continued to visit Woldesemayat in prison during the year, he was not permitted to confer with his attorney without prison guards present.[118]

3.2.2. The Right to Bail

The 1994 Constitution
***Art.19 (4)*:** All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest. Where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.
***Art.19 (6)*:** Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.
***Art.20 (3)*:** During proceedings accused persons have the right to be presumed innocent until proved guilty according to law …
ICCPR
***Art.9 (3)*:** It shall not be the general rule that persons awaiting trial shall be detained in custody, release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
Criminal Procedure Code
***Art.59 (1)*:** The court before which the arrested person is brought shall decide whether such person shall be kept in custody or be released on bail.
***Art.63 (1)*:** Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen

years or more and where there is no possibility of the person in respect of whom the offence was committed dying.
***Art.66*:** Any court to which an application for bail is made shall consider it without delay and shall call upon the prosecutor or the investigating police officer in his absence for comments and recommendations. It shall make its decisions within 48 hours.
***Art.67*:** An application for bail shall not be allowed where:

a. the applicant is of such nature that it is unlikely that he will comply with the condition laid down in the bail bond;
b. the applicant, if set at liberty, is likely to commit other offences;
c. the applicant is likely to interfere with witnesses or tamper with the evidence.

***Art.69 (2)*:** The court shall decide the amount to be guaranteed having regard to:

a. the seriousness of the charge; and
b. the likelihood of the accused's appearance; and
c. the danger to public order which his release may occasion; and
d. the resources of the accused and his guarantors.

In the State V. Legesse Getachew and others[119], the Court denied the accused persons bail on the following grounds: the offense that the accused persons are alleged to have committed is one that is committed in groups at night. This behavior is one that aims to possess property that one has not worked for by the use of force and by putting the lives and well being of others in danger. Considering the graveness of the offense, the Court has thus denied bail to the accused.

In another case of the State V. Moges Teferra and others[120], the East Gojjam Zonal High Court similarly denied the right to bail of an accused by putting the following argument forward. 'Even though the crime that the accused is alleged to have committed is one that does not on its own prohibit bail, the facts of the case show that the accused tried to take advantage from an offence that he has skillfully planned and organized and delegated others to perform. Taking into consideration the circumstances of the region in which the offence is committed, it is not common for one to benefit from the outcome of an armed robbery in which he did not directly participate though he organized it and make use of the lower level of intellect of others. This kind of phenomena may result in the creation of groups and leaders of armed robbery in the society. The offence, which the accused is alleged to have committed and on whom the prosecutor has brought evidence against is the attempt of an armed robbery of an automobile that contained 500,000 ETB owned by the Ethiopian Commercial Bank. What we can infer from this is that the accused person has put the interest of the society on the side in favor of his own and endangered the good functioning of commercial activities in the region in particular and the country at large. This does not only negatively affect business people and governmental commercial institutions but also people who in one way or another wish to be involved in different activities.'

Despite the arguments put forward by the two courts, the provisions of the Constitution and ICCPR provide the test to be applied in bail decisions. Bail is granted to avoid punishing accused persons before conviction. In bail decisions, a balance must thus be struck between, on one side, the interests of justice (that the accused should stand trial) and, on the other, the right to freedom of liberty and presumption of innocence of the accused as affirmed by art.20 (3) of the Constitution. However, the Constitution favors liberty; i.e. the detainee is entitled to release unless it is in the interests of justice that he or she be denied bail.

The presumption of innocence is a principle that places the burden of proof squarely on the prosecution. In the Canadian case of R v Oakes[121], the importance of the presumption of innocence is put as follows:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

The overriding consideration should remain the evaluation of all interests involved. Most of the interests at stake, both those in favor and against the granting of bail are listed in arts.63 and 67 of the Ethiopian Criminal Procedural Code. According to these provisions, the question of the interests of justice mainly entails securing the attendance of the accused at trial and protecting the investigation and prosecution of the case against hindrance. The danger that a bail applicant may pose to society may also be taken into account. There must, however, be a likelihood that such a risk will materialize.

General Comment No. 8 of the Human Rights Committee has further reaffirmed that pre-trial detention should be an exception rather than the rule and should be as short as possible. And if preventive detention is opted for reasons of public security, it must be controlled by these same provisions; i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (art.9 (1)), information [of the reasons must be given (art.9 (2)) and court control of the detention must be available (art.9 (4)) as well as compensation in the case of a breach (art.9 (5)).[122]

However, in the case studies cited above, both courts dealt with the bail application as an issue of guilt and not of interests of justice. The courts, instead of rendering their judgment on the basis of grounds and procedures established by law (arts. 63 and 67 of the Criminal Procedure Code), merely considered the level of graveness of the alleged offence to deny bail and the impact of the offence on the society. This further goes against the principle of presumption of innocence as the arguments of both courts are

based on the assumption of guilt of the accused persons before judgment of guilt is rendered.

On the other hand, in the case of the State V. Mekwanenet Fekadu[123], the Amhara Regional High Court stated that art.20 (3) of the Constitution affirms that an accused person has the right to be treated as an innocent person until s/he is proven to be guilty of the alleged crime. The mere evidence that the appellant is allegedly accused under a different court to have committed another offence is not enough to presume that his release will endanger the public order. This Court thus overturned the decision rendered by the lower court denying bail and conditionally released the accused person with a surety of 3000 ETB.

However, in a similar case, State V. Telek Sew Bekele[124], the Federal Supreme Court denied bail to the accused persons on the grounds that the appellant is allegedly accused under a different court on a different account. The Court argued that this is enough evidence proving the danger that the bail applicant poses to the society.

With regard to these two similar cases with different results, it may be essential to consider the comment of the Human Rights Committee. It places the burden of proof of the charge on the prosecution and gives the accused the benefit of doubt by reason of the presumption of innocence. No guilt can be presumed until the charge has been proved beyond reasonable doubt. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial[125]. Therefore, the court should not start with the presumption that the accused has committed the offence for which s/he is charged. Moreover, the fact that the accused person is allegedly accused under another court of law for a different account should not a decisive factor to determine the dangerous nature of the accused, as neither court have yet established his/her guilt.

Yet in another case[126], the accused argued that the right to bail as it is recognized by art.19 (6) of the Constitution is a fundamental right against which no limitation may be placed. This is further in line with international standards and art.9 (3) of the ICCPR that Ethiopia has ratified. However, the accused argued, the provision of art.63 of the Criminal Procedure Code is not in line with the constitutional right to bail. It is actually in contravention of the Constitution because it does not recognize the right to bail as a fundamental right and grants the power to a court of law to deny the right to bail for an alleged offence of a low degree. The accused further argued that the Criminal Procedure Code does not release on bail a person allegedly accused of an offence the punishment of which may go up to 15 years imprisonment. Since the Constitution is the supreme law of the land, he continued, any provision of the law, which contravenes with the Constitution is, pursuant to art.9 (1) of the Constitution, of no effect.

In rendering its decision on the issue of bail, the Amhara Regional High Court noted that art.19 (6) truly provides that persons arrested have the right to be released on bail. However, in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person. Since Chapter Three of the Constitution deals with fundamental rights and freedoms, it is

necessary to make reference to it, where it is deemed necessary, in relation to particular provisions. In this respect, it can reasonably be said that the right to bail does not only apply to arrested persons but also to accused persons. Accordingly, in principle the right to bail is a constitutional right. However, it may be limited in accordance with the grounds and procedures established by law. The provision of art.9 (3) of the ICCPR is no different than this. Therefore, this Court has not accepted the argument by the accused that the right to bail is a constitutional right, which may not be limited.

The other issue to be considered in grant of bail is the determination of where the interest of justice lies. As noted above, the issue of bail is not an issue of guilt but rather where the interest of justice lies. In determining the factors for and against the grant of bail, the court is, thus, to act as proactively and inquisitorially as may be necessary. With this regard, the Constitutional Court of South Africa noted that 'if neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court to be essential, it must itself take the initiative.'[127]

From the wording of art.59 (1) of the Ethiopian Criminal Procedure Code, it can similarly be argued that the court should take the initiative in raising the issue of bail where the parties fail to do so as it has the duty to decide whether the arrested person should stay in custody or be released on bail. Though art.66 provides that such decision shall be made within 48 hours, it is not clear from which date the clock starts ticking. However, taking into consideration that the same provision requires the court to consider the application for bail without delay, it can rationally be argued that the time starts ticking from the time the application for bail was made.

In ensuring the interest of justice here, we need to, on one side, secure the attendance of the accused at trial and protect the investigation and prosecution of the case against hindrance. On the other side, we need to protect the fundamental right of everyone who is arrested to be released on bail, subject to reasonable conditions. Here, it is also necessary to consider this in relation to art.9 (4) of the ICCPR, which provides an important guarantee by way of the right to control by a court the legality of the detention.

In the case of the State V. Professor Mesfin W/Mariam and Dr. Berhanu Nega[128], the accused persons did not apply for bail on their first appearance before the court of law[129]. The Federal High Court granted a 10 days remand pursuant to the application of the investigating police officer for a remand for 14 days to enable the investigation to be completed. The Court did not question the legality of the detention of the arrested persons and by so doing protect the interests of the arrested persons. On their second appearance at the court of law, the investigating police officer applied again for a remand for 14 days. The counsels of the accused, on the other hand, applied for a grant of bail. The Federal High Court granted 7 days remand without making any reference to the application for the grant of bail. Only at the third appearance did the Court decide to release the accused persons on bail.

Similarly in the case the State V. Legesse Getachew[130], the Federal High Court failed to address the application for grant of bail within 48 hours as per the provision of the Criminal Procedure Code. Instead, it adjourned the case for 20 days to consider the circumstances of the case before giving its decision on the grant of bail.

Here the Federal High Court not only failed to make its decision for or against the grant of bail within 48 hours as per the requirement of art.66 of the Criminal Procedure Code but also failed to protect the right of the arrested persons to be released from detention on bail as provided by art.19 (6) of the Constitution. This is despite the fact that no exceptional circumstances was shown to exist to struck the balance of the interests of justice in favor of detention of the arrested persons.[131]

Another issue in granting of bail is the amount of bail that is required as a guarantee for the release. According to art.69 (2) of the Criminal Procedure Code, we can infer that the amount of bail must not be excessive as to amount to a refusal of bail. An excessive amount of bail than is necessary to fulfill the purpose listed in art.67 of the Criminal Procedure Code thus amounts to a violation of the right to bail.

In the case of the State V. Amare Tadesse and others[132], the accused who has allegedly committed a petty offence was granted a bail for a guarantee of 300 ETB. Unable to deposit this amount, the accused is being detained for over two years. Considering the fact that the accused person is allegedly accused of committing a petty offence (thus a non-serious offence) and the resources of the accused as per the requirement of art.69 (2), the Court should have decided on an amount, which is enough to secure his appearance at trial. In addition, in this particular case, the accused is already being detained for more than two years for allegedly committing an offence the maximum punishment of which is six months of imprisonment. The accused person is not only being detained for a long time as a result of an excessive amount of bail that in practice amounted to an indirect refusal of bail, but has also his right to liberty restricted for a longer period of time than the law provides for. Though every constraints on the right to liberty might not amount to violation of this right, restriction of this right should be a 'just cause' and on such ground as is established by law. Even where the deprivation of liberty is with a 'just cause', the manner in which the deprivation is undertaken has to be in accordance with the procedure established by law as is required by art.17 (1) of the Constitution. Though the degree of procedural fairness will have to be determined on a case-by-case basis, the level of procedural fairness in this particular case is highly questionable because of the duration and purpose of detention of the accused person.

3.2.3. The Right Not to be Compelled to Confess

The 1994 Constitution
***Art.19 (5)*:** Persons arrested shall not be compelled to make confessions and admissions, which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

ICCPR
***Art.14 (3)(g))*:** The accused may not be compelled to testify against himself or to confess guilt.
***Art.7*:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment shall be prohibited.
***Art.10 (1)*:** All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
Criminal Procedure Code
***Art.27 (2)*:** He shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence.
Art.35
(1): Any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial.
(2): No court shall record any such statement or confession unless, upon questioning the person making it, it ascertains that such person voluntarily makes such statement or confession. A note to this effect shall be made on the record.
(3): Such statement or confession shall be recorded in writing and in full by the court and shall thereafter be read over to the person making the statement or confession, who shall sign and date it. The statement shall then be signed by the president of the court.

The Human Rights Committee noted that in considering the safeguard of art.14 (3)(g) of the ICCPR not to compel to testify, the provisions of art.7 and art.10 (1), of the Covenant, should be borne in mind[133]. Both the national and international provisions prohibit confessions and admissions, which are not voluntary. That is, any confession and admission, which is obtained out of threat or inducement from a person in authority is against the right to proper administration of justice.

In the case of the State V. Moges Teferra and others[134], the East Gojjam Zonal High Court put an argument forward with regard to arts.27 (2) and 35 of the Criminal Procedure Code. The Court noted that the Criminal Procedure Code does not determine whether a confession and admission not obtained in line with these provisions is admissible or not. Ethiopia does not have a law of evidence, which clarifies this either. The legislature was expecting that the admissibility requirement was going to be dealt with within the law of evidence. However, it could be argued that where the requirements of the above articles are fulfilled, a question of admissibility of the confession and admission should not be raised. According to the above provisions, confessions and statement given by the accused to the police (art.27) and to the court of law (art.35) should be made freely and voluntarily. In addition, the law affirms that the investigation police officer should not exercise any kind of inducement and coercion on the person who is confessing. Therefore, there is no reason why a confession and admission obtained freely and voluntarily without any inducement and coercion should not be admissible.

The Court continues stating that according to the experience of the Ethiopian courts, it is very common on the one hand, for accused persons to argue that the confessions and statement made pursuant to arts.27 (2) and 35 were not given freely and voluntarily. On

the other hand, the public prosecutor argues that the confessions and statement were given freely and voluntarily. A decision that favors any of the above arguments without proper reason will be against the interest of the public. If the court decides to only consider the argument of accused persons and does not admit confessions and admissions of accused persons made to the police and in courts of law, if additional evidence is not brought against him/her, then this will promote the commission of crimes in the absence of a witness. On the other hand, if the court favors the argument of the public prosecutor, then this might encourage the investigation police officer to investigate even by the use of coercion. Both ways, the interests of the public will not be safeguarded. People may, against their constitutional rights, also be forced to self incriminate themselves. Their right to be presumed innocent may further be violated. This results in breach of the public interests because when an individual right is violated or is not protected then we cannot say that the interests of the public is protected.

The Court strongly believes that a balance must be struck between the interest of the public to prevent crime and the protection of individual human rights. Where the admissibility of the confession and statement is questioned for reason of coercion or inducement, a balance may be struck between the two interests by requesting additional evidence to be brought against the accused.

However, with regard to confession and admission made in front of a court of law pursuant to art.35, the Court leaves the burden to prove the use of coercion or inducement on the accused person. This is because of the presumption that the use of coercion and inducement is very minimal in a court of law, which is open to the public and independent.

This argument by the East Gojjam Zonal High Court is different from the Constitutional Court of South Africa, which invalidated a provision of the Criminal Procedure Act (s 217(1)(b)(ii)), which placed a legal burden on an accused to show that a confession made before a magistrate was not made freely and voluntarily. The Court held that the common law rule that the state must prove beyond a reasonable doubt that a confession was made freely and voluntarily, was an integral part of the following rights which were entrenched in s 215C: the right to a fair trial, the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be compellable witness against oneself. These rights were, in turn, the necessary reinforcement of the principle that the state must prove the guilt of the accused beyond a reasonable doubt.[135]

The East Gojjam Zonal High Court went further into considering the circumstances in which confession and admission may not be admissible as evidence. In considering the circumstances of the first accused, it was testified that the investigation police officer did not informed the accused that he has the right to remain silent and that any statement he may make may be used against him. The Court identified this as one circumstance that could put the admissibility of the confession under question.

Moreover, in considering the confession of the fifth accused, the Court noted that the fact that the hands of the accused were chained during the confession is an evidence of the use

of coercion by the investigation police officer. The Court thus decided that this confession would not be admissible as evidence before court of law.

It may reasonably be argued that the interpretation of the right not to be compelled to confess of the East Gojjam High Court is in line with the provisions of the Constitution and international standards. Not only does it recognize that protection should be granted to accused persons against being compelled to confess or to testify against him/herself by rendering the confession inadmissible, but also recognize that different methods may be used to compel an accused person to confess.

3.2.4. The Right to a Speedy Trial

The 1994 Constitution
***Art.19 (4)*:** Where the interests of justice requires, the court may order the arrested person to remain in custody or, when request, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.
***Art.20 (1)*:** Accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged.
ICCPR
***Art.14 (3)(b)*:** In determination of any criminal charge against him, everyone shall be entitled to be tried without undue delay.

The Human Rights Committee notes that the guarantee of speedy trial relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place "without undue delay".[136]

The Constitutional Court of South Africa identifies three interests that the right to a speedy trial seeks to protect[137]. First, the right to security of the person is protected by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. Secondly, the right to liberty is protected by seeking to minimize exposure to the restrictions on liberty, which result from pre-trial incarceration and restrictive bail conditions. Thirdly, the right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

Though a certain time is essential to carry out the investigation and consider the case in a court of law, such time should be as short as possible as different interests may be endangered. Many have criticized the pace of a trial in Ethiopia as it takes years and years before judgment is rendered; i.e., sometimes 7 – 8 years.

For instance, let's take the circumstances of the case of the State V. Amare Tadesse Engeda and others[138]. Amare Tadesse and other seven persons were allegedly accused for petty offences, the maximum punishment of which may go up to six months in 05/04/92 (E.C.). The Federal First Instance Court granted bail for a surety of 300 ETB. Unable to

deposit this amount of guarantee, one of the accused persons is being detained up to the present time awaiting judgment. The case is adjourned for Hedar 1995 (E.C.).

In this case, as the accused is detained, unable to deposit the amount of guarantee decided upon by the Court, both his reputation and liberty are at stake. While investigation and prosecution of a case requires a certain amount of time, the prejudice that the accused person is facing should be taken into consideration. In addition, the nature and level of gravity of the case should also be considered.

In this particular case, the accused has allegedly committed a petty offence the maximum punishment of which may go up to six months of imprisonment. Even where the accused may be found guilty, his liberty has already been restricted for over two years. On the other hand, if the accused had pleaded guilty and he was sentenced to a certain period of imprisonment, he would have served his terms and sent free a long time ago. Without even going to the question whether the time is reasonable or not, if we try to consider whether the interests of justice is served in this case, the answer will be no, because even where the accused will be found guilty, he was detained more than the law provides for the offence he has allegedly committed.

The violation of the right to a speedy trial is reported to have forced an important number of arrested persons to plead guilty to avoid a lengthy trial from which neither the society nor the arrested person will benefit. This further jeopardize individual rights to a large extent as arrested and accused persons may be detained for unlimited and unreasonable period of time pending judgment for an offence if they were to be found guilty, will result in a much shorter restriction of their liberty. Worst yet, they might be found not guilty.

In the Proposal to Amend the Criminal Procedure Code by the Justice and Legal Reform Institute, it is proposed in art.53 of the Proposal to limit the investigation period by the police to 180 days, while the Ministry of Justice suggested to carry out the investigation without undue delay. In a country, where unreasonable delay is causing numerous violation of human rights of arrested, detained and accused persons, it is preferable to draw a formal limit between acceptable and unacceptable delay, as the amount of elapsed time is crucial to a trial, especially when the accused person is detained. However, systematic delays, such as lack of available resources that hamper the effectiveness of police investigation or the prosecution of the case should be given due consideration.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

It is a fact that there is already significant consensus on most of the international standards of human rights through the very deliberate and settled process by which they have been articulated and adopted over the years as well as the wide ratification of most international human rights documents[139]. The contention that the protection and promotion of one class of rights while the other is denied, is against the concept of universal human rights. Though it is argued that socio-economic rights are considered to be too general and vague to be considered for immediate implementation, there is no human right that could not be considered to have at least some significant justiciable dimensions. In fact human rights are indivisible and interdependent. Thus irrespective of the state's economic, political and cultural backgrounds and development, the protection and promotion of all human rights should be advanced and emphasized.

With regard to the record of Ethiopia in protecting, respecting and promoting human rights, the situation is quiet mixed. The 1994 Constitution offers a comprehensive agenda of human rights and incorporates all ratified international human rights instruments as the law of the land. It also provides for interpretation of domestic legislation to be in conformity with international human rights standards. However, lack of enforceability of human rights and serious breaches of human rights at domestic level have become a matter of great concern to everyone. This shows that implementation of human rights does not solely depend on constitutional or legislative provisions.

The primary responsibility for enforcing human rights lies with national authorities, mainly the legislature, executive and judiciary. In some countries, international human rights instruments are incorporated into the domestic legal system and can thus be directly implemented in domestic courts. In some countries, however, national legislation needs to be promulgated before international human rights provisions could be implemented at the national level.

Ethiopia mainly follows the dualistic approach, as all international human rights instruments ratified by Ethiopia need to be published in the Federal Law Gazette as per the requirement of Proclamation No.3/1995. However, only one treaty, among the ones that Ethiopia has ratified, has ever been published in the Gazette. For future instruments that may be ratified by the Executive (art.55 (12) of the Constitution), the House of the Peoples' Representatives may make two decisions by which it, on the one hand, gives its consent to the international ratification of a treaty, and on the other hand, translates and publishes the provisions of the treaty on the Federal Negarit Gazette and give them the force of domestic law. In this way, immediate and direct enforceability of legally binding international human rights standards may be facilitated.

With regard to the already ratified but not yet translated and published human rights instruments, the State must take the necessary measures to publish in a domestic

legislation and publicize them at least in the working language of Ethiopia to facilitate the enforceability of human rights in courts of law.

The Constitution further states that any law, customary practice or decision, which contravenes the Constitution, shall be of no effect. However, new laws need to fill in the numerous gaps that are created because of this constitutional provision. In addition, many contend that the restricted implementation of human rights is due to the general and vague language used and the absence of a precise elaboration of the normative content of each human right. It is recommended that the legislature takes steps to amend or enact legislation to ensure that domestic legislation is fully compatible with the principles and provisions of the Constitution and international human rights documents. The Executive should further ensure that domestic law is applied in preference to political decisions and customary practices, which may contradict human rights.

Nevertheless, identification and elaboration of areas of the law that require amendment or enactment, necessitates in-depth survey and analysis. While the legislature should play the major role in this area, NGOs, such as APAP, could also play an important role before and during the drafting of specific legislation and amendment of unconstitutional provisions. Since NGOs have a broad knowledge on the reality of human rights violations in the country and expertise in specific national issues and international human rights standards, they should undertake research on specific provisions that are inconsistent with constitutional and international human rights principles, propose amendment and persistently lobby the law making body for the protection, respect and promotion of human rights at the national level.

Nevertheless, for such kind of surveys and analysis to be successful, adequate and easily accessible information is a prerequisite. The data collection and recording system of the legal system needs to be reviewed and cases need to be properly categorized as to facilitate research and in-depth analysis. Legal institutions, with possible technical and financial assistance from NGOs, should also identify and record details of any significant jurisprudence from domestic courts that make use of and reference to provisions of human rights standards.

It is also very important that the society is aware what human rights are recognized by the Constitution and the international human rights standards Ethiopia has ratified. NGOs could also play an important role by providing public human rights education in its broadest sense, to develop a culture of human rights by raising the awareness of people of their rights because it is only when someone knows her/his rights that s/he strives to exercise her/his rights, respect other people's rights and seek remedy for the violation of her/his human rights.

In addition, all administrative and judicial authorities should also be aware of the obligations that Ethiopia has assumed in its Constitution and the international instruments it has adopted and ratified. The relevant authorities should also be trained and familiarized with the content of these instruments to enable them ensure that the State's conduct is in conformity with human rights standards. They should further be aware that

neglect of State's responsibility to protect, respect and promote human rights is inconsistent with the international obligation of Ethiopia and the principle of the rule of law. This will facilitate the legitimization process of human rights standards set down by the international human rights law and constitutional and legislative provisions in the country.

The Ethiopian Government should also give effect to the rights recognized by the Constitution, ratified international human rights standards and national legislation. Appropriate means of redress, or remedies must be available to any individual whose human rights have been violated by legislation, act of officials or private actors. Means of ensuring accountability by the government and impartiality and independence of the judiciary should also be developed. Otherwise, the unchecked power of the government can be a major threat to the dignity of the individual.

Finally, the importance of the right to an effective remedy by competent national tribunals for violations of human rights cannot be over-emphasized. However, judicial remedy should not be taken as the sole remedy for violation of human rights. In certain circumstances, administrative remedies, especially for violations of socio-economic rights, might be more appropriate and adequate. However, adequate measures should be taken to make such remedies accessible, affordable, timely and effective.

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53. *Ibid p.161.*
54. *The Labour Law Proclamation No.42/93 was being revised by the time this study was being undertaken.*
55. *The Addis Ababa and Dire Dawa Administrations and Tigray Region have already adopted a revised Family Law, while the Oromiya Region is reviewing it by the time this study was being undertaken.*
56. *Convention on the Rights of the Child Ratification Proclamation No.10/1992.*
57. *Article 5(2) and (3) of the 1994 Constitution.*
58. *Committee on the Rights of the Child Concluding Observations of the Committee on the Rights of the Child: Ethiopia (unedited version) CRC/C/15/Add.144 (31/01/2001) para 14.*
59. *De Lille V Speaker of the National Assembly 1998 (3) SA 430 (C) paras.25 and 33.*
60. *Committee on the Rights of the Child (note 58 above) para 14.*
61. *Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000.*
62. *Institution of the Ombudsman Establishment Proclamation No. 211/2000.*
63. *Baker v Carr 369 US 186 (1962) as quoted by De Waal J. (note 48 above) p.47.*
64. *De Vos P. (note 16 above) p.83.*
65. *De Waal J. (note 48 above) p.50*
66. *Ibid p.52.*
67. *One of the characteristics of the right to property is that it can neither be classified as an exclusively civil or political right, nor as a socio-economic right. Though it has been associated in the past to the first generation rights, it is often discussed now in the context of socio-economic rights as it has strong economic implications.*
68. *The right of labor constitutes a core of not only socio-economic rights, but also fundamental human rights. In the past, this right was only considered as a means of earning a livelihood, in other words solely as a means for economic survival. The concept of labor has now developed into a human value, social need and a means for self-realization and development of human personality.*

69. *Sandra Liebenberg Socio-economic Rights in Matthew Chaskalson et al (eds.) Constitutional Law of South Africa (1996: 3 rev 1998) p.41-21.*
70. *The Indian Supreme Court has stated that the right to life must be interpreted to include right to provision of emergency medical treatment in Pashim Banga Khet Mazdoor Samity v State of West Bengal AID (1996) SC 2426.*
71. *Ibid.*
72. *Krishnan v State of Andhra Pradesh & others (1993) 4 LRC 234.*
73. *State of Tamil Nadu v Abu Kavier Bai AIR (1984) SC 725.*
74. *Liebenberg S. (note 69 above) p.41-24.*
75. *Ibid p.41-29.*
76. *De Vos P. (note 16 above) p.86.*
77. *Committee on Economic, Social and Cultural Rights General Comment No.13 on Substantive issues arising in the implementation of the ICESCR: the right to education (article 13) adopted at its 21st session (15 Nov. – 3 December 1999) para.6.*
78. *Ibid para.6*
79. *Committee on Economic, Social and Cultural Rights General Comment No. 12: The right to adequate food (article 11) adopted at its 23rd meeting (20th session) (11 May 1999) para.13.*
80. *Ibid.*
81. *Sandra Liebenberg and Karisha Pillay (Eds.) Socio-Economic Rights in South Africa [A Resource Book] Community Law Center, University of Western Cape (October 2000) p.27.*
82. *General Comment No.3 (note 28 above) para.9.*
83. *Ibid para.10.*
84. *Liebenberg S. (note 69 above) p. 41-41.*
85. *The Limburg Principles (note 25 above) para.26.*
86. *General Comment No.3 (note 28 above) para.12.*
87. *Committee on Economic, Social and Cultural Rights General Comment No.5 Persons with Disabilities adopted at its 38th meeting (11th session) (25 November 1994) para.10.*
88. *Ibid para.5.*
89. *Ibid para.9.*
90. *Zwaan-de Vries v the Netherlands case (Communication No.182/1984) para.12.4 and in identical terms in the Broeks v the Netherlands case (Communication No.172/1984).*
91. *De Waal J. (note 48 above) p.184.*
92. *Ibid.*
93. *Aristotle Nichomachaen Ethics (1976) book 5, para. III as quoted by Loenen T. The Equality Clause in the South Africa Constitution: Some Remarks from a Comparative Perspective 13 SAJHR (1997) p.404.*
94. *As quoted by Nkeli J., The Right of Disabled Children and Equality Before the Law Paper presented at the International Seminar Unveiling Article 23 of the UN Convention on the Rights of the Child Hosted by Disabled Children Action Group (DICAG) Johannesburg, South Africa (5-8 April 1998) p.6.*
95. *Francis Coralie Mullin v The Administrator Union Territory of Delhi (1981) 2 SCR 516 at 529.*
96. *Tellis & others v Bombay Municipal Corp & others (1987) LRC (Const) 351.*
97. *Shantistar Builders v Narayan Khimalal Totame & others (1990) 1 SCC 520: Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & others (1997) AIR SC 152.*
98. *Pashim Banga Khet Mazdoor Samity v State of West Bengal (1996) AIR SC 2426.*
99. *Jain v State of Karnataka (1992) 3 SCC 666: Krishnan v State of Andhra Pradesh & others (1993) 4 LRC 234.*
100. *Liebenberg S. (note 69 above) p.41-22.*
101. *Ibid.*
102. *Ibid p.41-23.*

103. *Human Rights Committee General Comment No.13 (21) Article 14 adopted at its 516th meeting (21st session) (12 April 1984) para.3.*
104. *General Comment No. 9 (note 33 above) para.4.*
105. *United Nations Treaty Series Vol. 1155 p.331.*

106. *General Comment No. 9 (note 33 above) para.3.*
107. *Ibid.*
108. *Level adopted at its 311th meeting (13th session) (28 July 1981) para.1.*
109. *General Comment No. 9 (note 33 above) para.5.*
110. *Francesco Francioni The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience p.30 in Benedetto Conforti and Francesco Francioni (Eds.) Enforcing International Human Rights in Domestic Courts Martinus Nijhoff Publishers (1997) pp.15 – 34.*
111. *Human Rights Watch Report 2002: Ethiopia http://www.hrw.org/wr2k2/africa5.html (Accessed 19 May 2002).*
112. *US Department of State 2001 Country Reports on Human Rights Practices – Ethiopia (4 March 2002) http://www.state.gov/g/drl/rls/hrrpt/2001/af/8372.htm (Accessed 10 May 2002).*
113. *Translation of cases and arguments is that of the author.*
114. *Alfredsson G. and Eide A. (Eds.) (note 7 above) p.243.*
115. *Translation of the decision and argument in the case studies into English is that of the writer.*
116. *State V Dr. Taye Wolde Semayat and others (29 Hamle 1988 (E.C.)) Federal High Court የወ/መ/ቁ. 4780/88.*
117. *General Comment No. 13(21) (note 103 above) para.3.*
118. *US Department of State 2001 (note 112 above).*
119. *State V. Legesse Getachew and others (1988 (E.C.)) Federal High Court የወ/መ/ቁ.9/88.*
120. *State V. Moges Teferra and others (1987 (EC)) East Gojjam Zonal High Court የምዕራብ ጎጃም ዞ/ፍ/ቤ የወ/መ/ቁ.53/87.*
121. *R v Oakes (1986) 26 DLR (4th) 212-13 as quoted by De Waal J. (note 48 above) p.545.*
122. *Human Rights Committee General Comment No. 8 (16) Article 9 adopted at its 378th meeting (sixteenth session) held on 27 July 1982 paras. 3-4.*
123. *State V. Mekwanenet Fekadu (1994 (E.C.)) የአዲስ አበባ አ/አ/ፍ/ቤት የወ/መ/ቁ.00840/94.*
124. *State v Telek Sew Bekele (1988 (E.C.)) Region 14 Zonal Court የወ/መ/ቁ.76/88*
125. *General Comment No. 13 (21) (note 103 above) para.7.*
126. *State V Haile Meles and others (1990 E.C.)) የአዲስ አበባ አ/አ/ፍ/ቤት የወ/መ/ቁ.21/90.*
127. *S V Dlamini 1999 (4) SA 623 (CC) para.10.*
128. *State V. Professor Mesfin W/Mariam and Dr. Berhanu Nega (1993 E.C.)) የጊዜ ቀጠሮ መ/ቁ.2/93.*
129. *This may be because their counsels were not present during the first appearance as there was a confusion as to which court of law the accused were to appear.*
130. *State V. Legesse Getachew and others (note 119 above).*
131. *The US Department of State reported in 2002 that 'on May 8, authorities arrested Berhanu Nega and Mesfin Woldemariam, two prominent academics and human rights activists; 3 weeks later, they were charged with inciting the Addis Ababa University students to riot during an April 8 panel discussion on human rights and academic freedom that was organized by the Ethiopian Human Rights Council (EHRCO) and with organizing a clandestine political party, the Ethiopian Democratic League (EDL). On June 5, they were granted bail and released; the case was remanded again and their next hearing was rescheduled for April 2002.'*
132. *State V. Amare Tadesse Engeda and others (1992 (E.C.)) Addis Ababa Administration Municipal matters First Instance Court የወ/መ/ቁ.534/92.*
133. *General Comment No.13 (21) (note 103 above) para.14.*
134. *State V. Moges Teferra and others (1987 (E.C.)) East Gojjam Zonal High Court የምዕራብ ጎጃም ዞ/ፍ/ቤ የወ/መ/ቁ.53/87*
135. *S V. Zuma 1995 (2) SA 842 (CC) para.33.*
136. *General Comment No.13 (21) (note 103 above) para.10.*
137. *Sanderson v Attorney-General Kwazulu-Natal, Eastern Cape 1998 (2) SA 38 (CC) para.18.*
138. *State V. Amare Tadesse Engeda and others (note 132 above).*
139. *Abdullahi Ahmed Na'im (Ed.) Human Rights in Africa: Cross-Cultural Perspectives Bookings Institution (1990) p.172.*

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