The Right to Bail in Ethiopia: Respective Roles of the Court and the Legislature

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Introduction

An arrestee's right in release pending a criminal proceeding is of great importance. In highlighting the significance of this right, it has been explained that the arrestee's fundamental interest in liberty is "second only to life itself in terms of constitutional importance."[1] An arrestee's right to pre-conviction release is related with the presumption of innocence. The U.S. Supreme Court indicated the strong link between the right to bail and presumption of innocence when it stated that "unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[2] Moreover, detention may prejudice the arrestee's ability to prepare his defense which increases the likelihood of conviction. In fact, studies indicate that "some defendants unable to make bail are, for that reason alone, more likely to be convicted--- and more likely to be sentenced to jail."[3]

An equally important interest is that of the public. Once a person suspected to have violated the law is arrested, the community has a legitimate interest in ensuring that the person will continue to be subjected to the criminal process and eventually to punishment if found guilty. Another interest of the public that calls for continuity of the arrestee's detention is the risk that he, if released, may intimidate or otherwise make witnesses change their mind or destroy other evidence. Moreover, the public has an interest in insuring that a person released pending trial will not commit another offence. These public interests demand an adequate assurance that neither of these risks will materialize following release of the arrestee.

The bail system – a system which allows the arrestee to be released upon complying with conditions the court sets –is introduced to accommodate both interests.[4] The system provides an opportunity for the suspect to be out of jail pending his trial. And, the condition to be set by the court will be a disincentive for the released suspect not to

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[1] Van Atta v.Scott, 613 P.2D 210, 214 (Cal. 1980) in J. Dressler (3rd ed.), *Understanding Criminal Procedure* (2002), p.636.

[2] Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951) in L. Weinreb (ed.), *Leading Constitutional Cases on Criminal Justice*, (2001), p. 859.

[3] Hans Zeisel, Bail Revised, 1979 in J. Dressler, cited above at note 1, p. 637.

[4] "Bail: An Ancient Practice Reexamined," Yale L. J. vol. 70 (1960), pp. 966-70 in S. Fisher, *Ethiopian Criminal Procedure: A Source Book* (1969), p. 151

abscond, destroy evidence or commit another offence, safeguarding the interests of the public.

This system is recognized under the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution) and International Human Rights Instruments, which are integral part of Ethiopian law.[5] The right is not recognized in absolute terms though. Restrictions on the right are envisaged by the same instruments.

This article attempts to raise two issues related to the right to bail in Ethiopia. The first is whether a law providing for list of offence(s) the suspects of which are not to be released on bail would be in conformity with the FDRE Constitution and relevant Human Rights Instruments. The issue is basically related to the role of courts and the legislature in determining cases where the right to bail is to be restricted. Whether the court should weigh the evidence of the public prosecutor, during a bail hearing, with a view to see if the prosecutor has a *prima facie* case is the second major issue addressed in this article.

The article begins with a brief summary of rulings by the Federal High Court and the Federal Supreme Court followed by the Recommendation of the Council of Constitutional Inquiry(hereinafter the Council) on the issue. Then the legislative background of the laws that prohibit bail is examined with a view to give the context within which the laws were enacted. The writer evaluates the merits of the justifications given by the lawmaker to pass the laws and arguments forwarded by the courts and the Council to uphold the constitutionality of the laws. Finally, the author presents three reasons to conclude that such laws are not in conformity with the FDRE Constitution and relevant human rights instruments that provide for the right to bail. With the view addressing the second major issue stated above, the article presents a brief account of rulings of the Federal High Court and Federal Supreme Court on the issue. Then the writer offers two reasons to conclude that weight of evidence of the prosecutor should be one of the relevant factors to rule on question of bail.

I. Relevance of Type of Offence in a Bail Hearing

Arguably,[6] one of the relevant factors[7] in a bail hearing is the type of offence that the arrestee is suspected of having committed. The issue of bail regarding persons arrested in connection with vagrancy and corruption is governed by the Vagrancy Control Proclamation No. 384/2004 (hereinafter Vagrancy Control Proclamation) and the Revised Anti-corruption Special Procedure and Rules of Evidence Proclamation No.

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[5] See Article 9(4) of the FDRE Constitution. For particular provisions of the Constitution and the International Human Rights Instruments see notes 41, 42 and 43 below.

[6] What makes the relevance of the type of an offence that the arrestee is suspected of to the question of bail arguable are treated in the following pages.

[7] Article 59 of the Criminal Procedure Code indicates status of investigation being another relevant factor. Similarly, Article 67 of the Code provides for list of factors that may influence court's decision on whether bail is to be granted.

434/2005 (hereinafter the Revised Anti-Corruption Special Procedures and Rules of Evidence), respectively. The question of bail in other cases is exclusively regulated by the Criminal Procedure Code. All the three laws that have just been mentioned incorporate provisions that make the offence the arrestee is suspected of a relevant, perhaps a decisive, factor in a bail hearing.

Art.6 (3) of Vagrancy Control Proclamation states:

A person who is reasonably suspected of being a vagrant --- *shall not* be released on bail. [Emphasis added]

Art.4 (1) of the Revised Anti-Corruption Special Procedures and Rules of Evidence provides:

> An arrested person charged with a corruption offence punishable for more than ten years *may not* be released on bail.[8] [Emphasis added]

Art. 63(1) of the Criminal Procedure Code on its part states:

> 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.[9] *[Emphasis added]*

What makes these legal provisions similar is that if a person is charged with an offence which fits into one of the provisions the court does not have power to grant bail. As the laws provide for a blanket and automatic denial of bail, the court is obliged to refuse bail. There is a debate both among academics[10] and in the real world[11] as to the constitutionality of the above mentioned legal provisions. Strikingly, both sides of the debate rely on the authority of Article 19 (6) of the FDRE Constitution which provides:

> 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.

The first position is that the right of arrested persons to be released on bail, though a

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[8] One is suspected of a corruption offence punishable for not more than ten years does not guarantee his release on bail for he may be denied on grounds listed down under Article 4(4) of the Revised Anti-Corruption Special Procedure and Rules of Evidence.

[9] That the conditions required under this provision for release on bail are met does not necessarily mean that the suspect will be released on bail for he may still be denied of bail on grounds provided under Article 67 of the 1961 Criminal Procedure Code of Ethiopia

[10] Since the promulgation of the law, I always have students of Criminal Procedure on the side of each position. For more, refer to Wuletaw Mengesha, The Constitutionality of the Anti Corruption law with regard to bail, (unpublished) Addis Ababa University Law Library, 2002

[11] Two prominent cases where this issue was raised are discussed in the following pages.

principle, is not absolute. The issue of whether an arrestee should be released on bail is to be decided by law. The law may provide for factors to be taken into consideration by a court where it entertains the issue of bail or it may specifically list down particular offences which are not bailable. According to this position, the above stated laws which provide for automatic denial of bail to persons charged with particular types of offences are perfectly consistent with article 19(6) of the FDRE Constitution.

The second position is that whether a suspect should be released on bail is to be decided based on law but that law can only provide for factors that the court may use as guidelines while making a ruling on the question of bail. Proponents of this argument contend that the law envisaged under Article 19(6) of the FDRE Constitution may not provide for a mandatory prohibition of bail leaving no option for the courts except denying bail. According to this position, the laws that provide for mandatory denial of bail clearly contradict with article 19(6) of the Constitution and other relevant provisions of the Human Rights instruments ratified by Ethiopia.[12]

1. Court Rulings

The above issue had been raised before and addressed by our courts. Hereunder are two prominent cases where the issue was extensively debated. In the case between *Federal Ethics and Anti Corruption Commission v. Assefa Abrha et al,*[13] the suspects were charged with a corruption offence. The law in place at the time when this case was instituted provided for absolute prohibition of bail for a person who is arrested on suspicion of having committed a corruption offence.[14] The defense lawyers argued that the law providing for a blanket prohibition of bail is in contravention of Article 19(6) of the FDRE Constitution. Hence the court is supposed to set it aside. The Commission's prosecutor, on his part, argued that the accused persons are not entitled to be released on bail for there is a clear law against it. The prosecutor added that the argument of the defense lawyers as to the unconstitutionality of the law that prohibits bail is not acceptable since the Constitution provides for the denial of bail in exceptional circumstances.

The trial court noted that the law which prohibits bail in cases of corruption offences being clear does not call for interpretation. The court further indicated that it could not see any reason to refer the matter to the Council of Constitutional Inquiry since it had no doubt on the constitutionality of the law. The court went on stating that article 19(6) of the FDRE Constitution envisages cases where the right to bail may be denied by court based on exceptional conditions stipulated by law. As indicated by the court, the

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[12] For the details on with which international instruments may the laws that provide for mandatory denial of bail may contradict refer to pages 18-22.

[13] Federal Ethics and Anti Corruption Commission v. Assefa Abrha et al (Criminal file No 7366, Federal Supreme Court, November 5, 2001) (unpublished)

[14] Article 51 (2) of Proclamation No. 236/2001 added through amendment by Proclamation No. 239/2001 states "A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

exceptional circumstances envisaged under the Constitution are found in different laws. For corruption offences, the court stated, a special law prohibiting bail is enacted. To the court, for the purpose of the case at hand, the promulgation of the special law that prohibits bail to those who are suspected of corruption offence fulfils the requirement of exceptional circumstance as envisaged by the FDRE Constitution. In the face of such a clear law, the court concluded, it has no option but to apply it. Hence, the court dismissed the application of the defense lawyers as baseless.[15]

Similarly, the question of the constitutionality of the law that provides for automatic denial of bail was raised during the bail proceeding in the case between *the Federal Public Prosecutor v Engineer Hailu Shaoul et al.*[16] The public prosecutor in the first count charged the accused persons for attempting to commit outrages against the FDRE Constitution and the constitutional order in violation of Articles 32(1) (a) (b), 38, 34, 27(1) and Article 258 of the Criminal Code. It was clear that the offences the accused persons were charged with are punishable with life imprisonment or in exceptional circumstances with death. Furthermore, some people were killed in connection with the riots which were alleged to have been organized by the accused persons.[17]

Despite the fact that some of the accused persons seemed to concede that Article 63 of the Criminal Procedure Code,[18] as it stands, does not allow bail in such cases, they applied to the Federal High Court to be released on bail. In support of its power to grant their petition,, despite Article 63 of the Criminal Procedure Code, they argued that both the FDRE Constitution and International Human Rights Instruments ratified by Ethiopia give the power of deciding on question of bail to the court. Moreover, by stating that the FDRE Constitution does not allow the right to bail to be prohibited by law they tried to persuade the court to set Article 63 of the Criminal Procedure Code aside to the extent that it provides for automatic denial of bail.

The prosecutor, on his part, argued that Article 19(6) of the FDRE Constitution envisages instances where right to bail may be denied in accordance with the law. Furthermore, the prosecutor brought to the attention of the court the Recommendation of the Council of Constitutional Inquiry that there is no unconstitutionality in

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[15] Same position was taken by the Federal High Court and Federal Supreme Court in the case of Federal Ethics and Anti Corruption Commission v. Tilahun Abay etal.

[16] Federal Public Prosecutor v Engineer Hailu Shaoul et al, (Criminal File No. 43246, Federal High Court, December 4, 2005) .The case arose in connection with the riots that occurred following the 2005 Ethiopian election. In this case the Federal Public Prosecutor framed seven counts against the leaders and members of the Coalition for Unity and Democracy, journalists and civil society activists. The prosecutor dropped one of the counts during trial.

[17] The Independent Inquiry Commission established by Proclamation No. 478/2005 reported that 193 people were killed in connection with the disorder that occurred following the 2005 Ethiopian election.

[18] On the debates relating to the interpretation of Article 63 of the Criminal Procedure Code refer to Taye Nigatu, "በዋስ የመፈታት መብትና ተፈፃሚነቱ በኢትዮጵያ" , *Wonber*, June 2007, pp.38-49

prohibiting bail by law.[19]

The Court found Article 9(3) of International Covenant on Civil and Political Rights (hereinafter ICCPR) and article 19(6) of the FDRE Constitution to be relevant to the issue. By applying these provisions, it could only deduce that release on bail pending trial is the rule and denial of bail the exception. The court rejected the argument that bail cannot be denied by law since the court was of the view that the argument does not hold water in view of article 19 (6) of the FDRE Constitution which, as far as its understanding goes, clearly allows the court to deny bail based on circumstances prescribed by law.

2. Position of the Council of Constitutional Inquiry [20]

In the case of *Federal Ethics and Anti Corruption Commission v.* Tilahun Abay *etal,* the accused persons, following the rejection by the Federal Supreme Court of their application for the law which prohibits bail to be set aside, petitioned the Council of Constitutional Inquiry to recommend the nullity of the law to the House of Federation. Article 51 (2) of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001,[21] the constitutionality of which is challenged, reads: "A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

The petitioners conceded that the proclamation did not allow them to be released on bail. Their claim was that the proclamation is not consistent with the FDRE Constitution since it absolutely prohibits bail for persons arrested in connection with corruption offence. They advanced three reasons in support of their claim. First, the proclamation, by prohibiting bail, violates the underlying principle of 'presumption of innocence' which makes it inconsistent with Article 20(3)[22] of the FDRE Constitution.

Second, the phrase "in exceptional circumstances prescribed by law" under Article 19 (6)[23] of the FDRE Constitution anticipates the lawmaker to provide for circumstances

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[19] The prosecutor is referring to the ruling given by the Council in connection with the case of Assefa Abrha and et al v. Federal Ethics and Anti-Corruption Commission where the Council rejected the application for the nullity of the law that prohibits bail to those suspected of corruption. The summary of the Council's decision is presented in the following couple of pages.

[20] Its position is derived from its recommendation on the issue of constitutionality of the law that prohibits bail. The issue was brought to its attention by defence lawyers of Ato Tilahun Abay and others who petitioned the Council to recommend to the House of Federation the nullification of the law, which prohibits bail exclusively on the basis of the offence one is suspected of.

[21] See above at note 14 on how this provision of the proclamation was included through amendment.

[22] The relevant part of Article 20 (3) reads: "During proceedings accused persons have the right to be presumed innocent until proved guilty according to law".

[23] See above on page 4 for the full text.

based on which the court may decide to grant or deny bail. It does not envisage cases where the lawmaker identifies a single offence or offences and prohibits bail for persons suspected of such crime(s). Hence, the proclamation by labeling a corruption offence as non-bailable goes against the aforementioned meaning of Article 19(6) of the FDRE Constitution. Furthermore, the proclamation, by making the question of bail non-justiciable, deprives the court of its judicial power on the matter contrary to Article 19(6) and Article 37 of the FDRE Constitution. [24]

Third, Article 13 of the FDRE Constitution requires the three organs of government both at federal and state level to respect and enforce human rights clauses of the constitution and these clauses to be interpreted in light of principles incorporated under the human rights instruments adopted by Ethiopia. The ICCPR, which forms part and parcel of Ethiopian law, under its Article 9(3), states that it shall not be the rule that persons awaiting trial be detained in custody. To the contrary, Article 51(2) of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.236/2001 (as amended) stipulates that a suspect in custody should be denied bail as a rule. This makes Article 51(2) inconsistent with Article 13 of the FDRE Constitution.

The issue framed by the Council was "whether or not Article 51(2) of Proclamation No. 236/2001 (as amended) which prohibits bail for arrested persons suspected of corruption offence is consistent with the FDRE Constitution?"

From the relevant provisions of the FDRE Constitution, the ICCPR and the African Charter on Human and Peoples' Rights the Council deduced that the right to bail is directly related with the right to liberty. The Council noted that the former is a means to secure the latter for those who are arrested on suspicion that they have committed a crime. A law that restricts the right to bail, said the Council, has a direct effect on the right to liberty. To the Council, the reading of Article 19(6) and Article 17[25] of the FDRE Constitution indicates that no one is to be deprived of liberty except on grounds and in accordance with the law. The Council emphasized that though the right to liberty calls for the pre-trial freedom of a person suspected of an offence, none of the human rights instruments provide for an absolute right to liberty. Like many other rights, the Council observed, it is subject to restriction. Both the FDRE Constitution and international human rights instruments envisage instances where a suspect may remain in custody.

The Council made a reference to the American experience on the matter. It stated that in all American State courts may deny bail to accused persons *"when* the proof is evident or the presumption is great that the accused committed the offence." The

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[24] Article 37(1) states: "Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other body with judicial power."

[25] Article 17(1) states: "No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law." Article 17(2) provides: "No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him."

Council also stated that homicide is a non-bailable offence in all American States. Furthermore, the Council indicated, in some of the States, magistrates are not allowed to grant bail for accused persons suspected of grave offences or where the accused persons were convicted for other crimes previously. In some other states, a list of non-bailable offences are provided by law. The Council also consulted the Federal Bail Reform Act of 1984 which, as understood by the Council, prohibits bail for those persons arrested in connection with serious offences.[26]

The Council identified two major points from Article 19(6) of the FDRE Constitution which provides "in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person." First, the court has two options where an application for bail is made before it: to accept or reject the application. The other point is that the court chooses one from the two options on the basis of the circumstances provided by law.

The Council observed that denial of bail being an exception to the rule of pretrial conditional release, the law maker and the courts have a responsibility to take maximum care while enacting and interpreting laws relating to restriction of liberty to ensure that release on bail remains the principle. Apart from such restriction, the Council emphasized, there is no ground to say that the law maker cannot single out an offence or offences and declare it/them non-bailable. According to the Council, the right to bail is to be restricted in accordance with "special circumstances prescribed by law." The council noted that these special circumstances may be provided by law in two different ways. First, by providing factors based on which a police officer or public prosecutor may object to the granting of bail and the court may deny bail. The second form of restricting the right to bail is by listing down non-bailable offences. The Council cited Article 67 of the Criminal Procedure Code as an example for the first type and Article 63 of the Code for the second.

The Council noted that enacting a law that declares a given offence as non bailable does not make the question of bail non-justiciable. In the final analysis, the Council argued, it is the court that decides whether or not bail is to be granted in a given case. That is so because it is the court that decides whether or not there is adequate reason to suspect and arrest someone in connection with a corruption offence and whether or not the facts alleged by the prosecutor constitute corruption. Hence, the Council could not see any reason to recommend the nullification of the proclamation, the constitutionality of which is challenged.

3. Examining Apriori Legislative Denial of Bail

3.1. Examining the Legislative Background

A reference to the legislative history of the laws which prohibit bail is made with a

[26] For the observation of the writer on the Council's understanding of the American Law on the matter refer to page 32-33.

view to get information as to what led the legislature to enact such laws. The history of the Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001 shows three grounds that led the legislature to come up with the law that instructs the court to deny bail[27]. First, the legislature was convinced that corruption is not of a lesser gravity than other offences the suspects of which were not entitled to release on bail[28]; second, the proposed law was believed to ensure that suspects would be tried and serve their sentence, if found guilty and; third, the proposed law was found to be the only effective means to avert the danger of corruption that the country had faced.

When we refer to the legislative background of the Vagrancy Control Proclamation,[29] researches conducted by the Federal Police Commission are said to have established that the crime of dangerous vagrancy, increasing from time to time, had reached at the stage where the peace and security of the society was clearly in danger. Moreover, the researches are said to have shown that both the substantive[30] and procedural laws were ill-suited and not responsive to the threat that the crime of dangerous vagrancy had posed against the society. The major procedural law identified to have created a problem in the government's effort to control the crime is that part of the Criminal Procedure Code dealing with bail. That is so because, despite the fact that the crime had posed a serious danger against the society, Article 63 of the Criminal Procedure Code does not deny bail to persons suspected of dangerous vagrancy. Nor did, as the practice is said to have revealed, the court deny bail by virtue of Article 67 of the Code.[31] In addition, the researches are said to have shown that when suspects of vagrancy were released on bail, on several occasions they intimidated witnesses and /or continue to commit other offences. Even where suspects of dangerous vagrancy who were released on bail were arrested again and brought before courts of law in connection with similar offences, the courts, without giving due attention to the fact that these persons were suspected of more than one crime of vagrancy, are said to have ordered their release on bail. This, in turn, is said to have made it difficult to get the suspects convicted and had caused loss of public confidence in the criminal justice system. These practical problems are said to have triggered the idea of prohibition of bail by law.

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[27] **የፀረ ሙስና ልዩ ስነስርዓትና የማስረጃ አዋጅ ቁጥር 236/93 ለማሻሻል የወጣ ረቂቅ አዋጅ መግለጫ፣ የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮች ምክር ቤት አንደኛ አመት የስራ ዘመን የፀደቁ አዋጆች የህዝብ ይፋ ውይይቶችና የውሳኔ ሃሳቦች፣ ጥራዝ ሁለት (1993 ዓ.ም.)**

[28] Though not expressly indicated, the lawmaker must have been referring to those offences the suspects of which are not allowed to be released under Article 63 of the Criminal Procedure Code. At the time when Proclamation No. 239/2001 was passed it was only Article 63 of the Criminal Procedure Code that prohibited bail exclusively based on the offence the arrestee is suspected of.

[29] **አደገኛ ቦዘኔነትን ለመቆጣጠር የተዘጋጀ ረቂቅ ህግ መግለጫ፣ የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮች ምክር ቤት አራተኛ ዓመት የስራ ዘመን የፀደቁ አዋጆች የህዝብ ይፋ ውይይቶች እና የውሳኔ ሃሳቦች ጥራዝ 3 (1996 ዓ.ም.)**

[30] Lack of a clear definition of the crime of dangerous vagrancy is said to be the problem of the substantive law.

[31] Refer to note 52 as to the content of Art. 67 of the Code

Before passing the law that prohibits bail, efforts were made to see if prohibition of bail by law contravenes any principle that the FDRE Constitution or relevant international human rights instruments uphold. Moreover, the lawmaker consulted the laws of the United States of America and regional human rights conventions[32] to get information on how the question of bail is treated in different systems. The law maker was convinced that such law is perfectly compatible with the FDRE Constitution and the human rights instruments which are of relevance to Ethiopia. Furthermore, according to the lawmaker there are laws in the US, both at federal and state level that prohibit bail on the basis of the offence that one is suspected of. Also, it is the lawmaker's belief that the European Human Rights Convention, under Article 5 (1) (c), expressly allows denial of bail with a view to control dangerous vagrancy.

Convinced that the proposed laws are compatible with the FDRE Constitution and other human rights instruments and in keeping with the experiences of other legal systems and acknowledging its significance in the fight against the crimes, the law maker passed the laws that prohibit bail to those who are arrested on suspicion that they have committed crimes of corruption and/or dangerous vagrancy.

As can be understood from the legislative history[33] of the two laws that ban the right to bail, two common factors led the law maker to enact both laws. First, the lawmaker believed that a ban on the right to bail ensures that suspects of the offences will stand trial and serve their sentence, if found guilty. Second, the lawmaker was convinced that a law which prohibits bail to suspects of such offences is indispensable to control the crimes. Let us see the merits of the two justifications turn by turn.

3.1.1 The 'necessary to prevent the suspect from fleeing' reason

Obviously, denial of bail offers reasonable guarantee that suspects, once arrested will not flee. However, as indicated at the beginning of this article, putting a suspect in jail pending investigation or/and trial, as the case may be, is against the suspect's interest in liberty and goes against the principles of 'presumption of innocence' and 'prohibition of punishment before conviction.' Also, it has been indicated above that the idea of bail (conditional release) was introduced to accommodate the individual's interest in liberty and the society's interest to see to it that the suspect will stand trial and serve his sentence, if found guilty. Despite this merit of the bail system, the lawmaker decided that in these two particular cases bail should be prohibited by law to ensure that suspects do not abscond.

The problems that led the lawmaker to ban bail for those suspected of corruption on the one hand and for those suspected of dangerous vagrancy on the other are different.

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[32] The document on the legislative history of the Vagrancy Control Proclamation indicates that the African Charter on Human and Peoples' Rights, American Convention on Human rights and European Convention for the Protection of Human Rights and Fundamental Freedoms were consulted.

[33] See above at notes 27 and 29

Prohibition of bail for suspects of corruption is said to have been necessitated by the fact that corruption is not of a lesser gravity when compared to other offences the suspects of which are not allowed to be released on bail.[34] The justification for denial of bail to suspects of dangerous vagrancy is said to be the failure of the courts to apply the law properly. In the paragraphs that follow we will see how the proposed solution of denial of bail would not be the appropriate solution to the problems that are said to have necessitated these laws.

A. Gravity of Crime of Corruption as a Justification

The conventional way of measuring the gravity of a crime is the punishment attached to it.[35] The punishment for the crime of corruption ranges from simple imprisonment of one year to twenty five years of rigorous imprisonment.[36] It follows that a person suspected of corruption which is as serious as crimes the suspects of which are not allowed to be released on bail will not be released on bail. A case in point is that of Ato Tamirat Layne[37] who was denied bail on the ground that the corruption offence he is suspected of is punishable with fifteen years rigorous imprisonment. If the lawmaker is of the opinion that every offence which falls within the category of corruption is as serious as those offences which are not bailable, the appropriate measure to be taken is to amend the substantive law and increase the punishment for corruption so as to make it the same as the punishment attached with the non bailable offences. Such amendment will automatically make every corruption offence non-bailable making the proposed law of bail redundant and hence unnecessary. However, if the law maker simply makes every type of corruption offence non bailable without increasing the punishment (without making all corruption offences as grave as non bailable offences), then it is hardly possible to see how the gravity of the offence can be used as a justification to make such offences non-bailable

The revision[38] made on Proclamation No. 236/2001 (as amended) suggests that gravity

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[34] See above at note 28.

[35] H. Barbara, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory, (*1996), pp.43-46

[36] Articles 407 and ff. of the 2004 Criminal Code. For the punishments attached to corruption before the enactment of the Criminal Code refer to Special Penal Code of 1974.

[37] public prosecutor v Ato Tamirat Layne etal, (Criminal File No. 1/1989, Federal Supreme Court) (unpublished)

[38] Its history shows that the amendment was made to avoid the problem that the previous law is said to have created on the investigation process. As its history shows, practice had revealed that the law which prohibited bail for everyone suspected of corruption did negatively impact the investigation activity. To have reliable evidence/information before arresting some one who is suspected of corruption is particularly important since he will remain in custody once arrested. To get adequate evidence that warrants arresting the suspect had been found to be very difficult. First, calling witnesses to give their testimony while the suspect is at large is not likely to be fruitful for the witnesses may fear possible intimidation and reprimand. Second, since most suspects of corruption are civil servants, collecting reliable evidence needs access to their office which is hardly possible without their knowledge. Moreover, the fact that the investigating

of the offence was wrongly used as a ground to make all corruption offences non bailable. Under the Revised Anti-Corruption Special Procedures and Rules of Evidence it is not suspects of all sorts of corruption offences that are ineligible for bail. It is only those who are suspected of corruption offence punishable with more than ten years of imprisonment who are not allowed to be released on bail. Still a corruption offence which is punishable with more than ten years but less than fifteen years is not as serious as offences which are not bailable under Article 63 of the Criminal Procedure Code. Had that been the case, there would have been no need to have a special law as Article 63 would have covered the case.

B. Misapplication of law by courts as a justification

The problem that is said to have led the lawmaker to pass a law that prohibits bail to suspects of dangerous vagrancy is different. The law maker understood that the crime is not as serious as crimes which are non-bailable under Article 63 of the Criminal Procedure Code and hence suspects of such offences could not be denied bail under this provision. However, the legislature, on the basis of the researches which were allegedly conducted by the Federal Police Commission, concluded that in many occasions suspects were wrongly released on bail on the face of adequate reasons/grounds to deny bail under Article 67 of the Criminal Procedure Code. For the legislature, the solution to this problem was to pass a law that obliges the court to deny bail.

Even assuming that the research based on which the legislature passed the Vagrancy Control Proclamation is well founded; the legislature's approach does not seem to be right. There are both legal and administrative solutions to rectify the problem said to have been disclosed by the research. Though, under Ethiopian law,[39] the prosecutor does not have right to appeal from a court ruling that grants bail, he may petition for cassation where he believes that a court has erred in applying/interpreting the law. The records of the Cassation bench of the Federal Supreme Court, however, do not show that such efforts were made by the public prosecutor. In the absence of studies that indicate the ineffectiveness of petition for cassation, the problems said to have been identified by the Federal Police Commission cannot be attributed to the judiciary as an institution. Rather, it is to be attributed to individual judges.

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police officer is required to have reliable evidence to arrest someone in connection with corruption makes confession of the suspect not to be a useful source of information. There is no indication as to whether the revision/amendment was motivated by the concern for liberty. See above at note 27.

[39] The cumulative reading of Articles 75 and 184 of the Criminal Procedure Code shows that the public prosecutor is not allowed to appeal from the ruling of the court that grant bail. That is not so where the case relates to corruption as Article 5 of the Revised Anti-Corruption Special procedure and Rules of evidence Proclamation expressly allows the prosecutor to appeal from a ruling that grants bail. In the case of Amhara National Regional State Justice Bureau v. Sergent Mekonnen Negash (File No. 35627), the Cassation Division of the Federal Supreme Court interpreted Article 75 of the Criminal Procedure Code to allow the prosecutor to appeal.

Moreover, the decision of the legislature to take the power of the judiciary to itself on the ground that the court is not exercising it properly, if at all that is the case, is neither logically sound nor wise. What if there is concrete evidence to the effect that accused persons against whom there is adequate evidence that warrants their conviction are acquitted? Will the legislature pass a law the effect of which is to convict suspects without a hearing or will it adjudicate the case? What if there are indications as to the fact that sentences passed on criminals are not proportional with the crime they are convicted for? Will the legislature take care of sentencing convicted persons?

When the legislature discovers such problems it is supposed to resort to other solutions instead of usurping the judiciary's power. The legislature should focus on the root causes of the problem and devise a mechanism that is appropriate to address the problem. If the problem is related with capacity, it is advisable to design capacity building measures; If there are indications that the judges made erroneous rulings deliberately or by gross negligence or because of incompetence there are administrative mechanisms such as subjecting the judge to disciplinary measures through the Judicial Administration Council.[40] On top of these, the legislature, while overseeing activities of the judiciary, can pay particular attention to such problems identified through research and give the appropriate instruction to the institution to address the problem by itself.

3.1 2. The 'necessary to control the crime' reason

Another common ground invoked to justify the law that prohibits bail is that such law is an indispensable means to control the crimes of corruption and dangerous vagrancy and protect the public from the harm caused by these crimes. The legislative history of the laws that ban the right to bail do not show how denial of bail serves as an absolutely necessary means to control the crimes. The legitimate purposes of denying bail are to ensure the suspect's attendance during trial, to prevent him from committing other offences and to prevent him from destroying evidence**.** If it is by preventing such risks from happening that the legislature intended such law to serve as a means of preventing the crimes, such laws would not escape criticism on the ground that they are one sided, disregarding the liberty interest of the suspects. If the lawmaker intended the laws to meet their objective -- controlling the crimes of corruption and dangerous vagrancy -- by inculcating a sense of fear among potential criminals or punishing suspects who in fact have committed the crime but against whom adequate evidence does not exist, the law that prohibits bail is made to meet its intended objective through illegitimate means, the issue of its effectiveness being another matter.

Since the laws have already been enacted despite the fact that they are not appropriate solutions to the problems that they are intended to deal with, now let us turn our attention to see whether or not these laws can be objected to on other grounds.

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[40] See Judicial Administration Council Proclamation Number 24/1996 and Article 79 of the FDRE Constitution

3.2. Examining the apriori legislative prohibition of bail in light of other concerns

The FDRE Constitution,[41] the Universal Declaration of Human Rights[42] and the ICCPR[43] in the light of which the Human rights chapter of the FDRE Constitution is to be construed[44] recognize the right to liberty and prohibit arbitrary arrest. According to these instruments, liberty is to be restricted only on such grounds and in accordance to procedures that are provided by law.[45]Absence of either or both conditions makes the arrest – restriction of liberty – arbitrary.

As correctly pointed out by the Council of Constitutional Inquiry[46], the right to bail has a direct relationship with the right to liberty. The right to liberty, in principle, requires the pretrial release of suspects. Bail being a means to secure the liberty of an arrested person, any law that restricts the right to bail prolongs the restriction of the right to liberty. It follows that bail is to be denied -- the continuation of restriction of liberty of the arrested person is to be ordered-- by the court only where there is a justification for the continuation and only in accordance with the procedures provided by law. If it is in the absence of either or both conditions that bail is denied the arrest resulting from the denial of bail will be arbitrary deprivation of liberty.

The Human Rights Committee, in its 1990 report, interpreted 'arbitrariness' as follows.

> Arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include the elements of inappropriateness, injustice and lack of predictability such that remand in custody must not only be lawful but also reasonable in all circumstances. [47]

From such interpretation of the concept of "arbitrariness" follows that a restriction of liberty made on the basis of law may still be arbitrary arrest -- an arrest prohibited by the Constitution and relevant international human rights instruments -- in so far as the arrest made in accordance with the law is not reasonable or appropriate. The Council of Constitutional Inquiry has inferred from the Committee's interpretation of 'arbitrariness' that the law which restricts liberty shall, *inter alia*, fulfill the

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[41] Article 17 of the FDRE Constitution. .

[42]Article 9 of the Universal Declaration of Human Rights (http://www.un.org/overview/rights.html) last visited November 10, 2008.

[43] Article 9 of the International Covenant on Civil and Political Rights.

[44] Article 13 (2) of the FDRE Constitution .

[45] Apparently, the Amharic version of Article 17 of the FDRE Constitution seems to speak in terms only of procedural requirements

[46] Recommendation by the Council of Constitutional Inquiry on the issue of constitutionality of the law that prohibits bail (unpublished), cited above at note 20.

[47] The interpretation of the Human Rights Committee is significant in light of article 13(2) of the FDRE Constitution which requires its chapter three to be understood in conformity with international instruments.

requirements of *fairness, appropriateness and predictability.*[48] Hence, the constitutional provision safeguarding the right to liberty imposes restriction not only on the judiciary but also on the lawmaker.

That is, restriction of liberty through denial of bail, be it by the court or the lawmaker (by legislation), can be challenged for being arbitrary. Had the restriction been only on the courts, the existence of a law providing for denial of bail would have been adequate to disregard challenges on denial of bail made on the basis of that law.

Therefore, the conclusion of the Federal High Court, the Federal Supreme Court and the Council of Constitutional Inquiry[49] that denial of bail cannot be challenged where there is clear provision of law, based on which the denial is made, is not a valid one. The existence of a law is not sufficient for the arrest not to be arbitrary. Because the existence of a law that authorizes denial of bail *per se* does not make the denial immune from being arbitrary, the appropriateness and fairness of the arrest resulting from the denial of bail needs to be examined before taking a position on its arbitrariness.

The assessment on the fairness and appropriateness of the law that prohibits bail is to be made in light of relevant criteria, such as whether the law has the features envisaged by the Constitution, the purpose the law is meant to serve, and the implication of release on bail, release being the rule under the FDRE Constitution and relevant international human rights instruments.

3.2.1. Constitutional Requirements

Article 19(6) of the FDRE Constitution provides that "persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or---" This provision recognizes the right of arrested persons to bail as a matter of principle while envisaging restriction on it in rare situations. It allows denial of bail only in exceptional cases and according to circumstances provided by law. The term 'circumstance', which is supposed to be provided by the law that restricts the right to bail, refers to a fact or condition.[50] There are two features that the circumstances to be provided by law, as envisaged under article 19(6) of the FDRE Constitution, are supposed to have. First, the circumstances should make the court deny bail only rarely -- hence qualified by the term "*exceptional.*" For the denial of bail to occur only rarely the circumstances to be provided by law should be those which result in denial of bail where the denial is justified by its purpose. That is, it is only factors which would indicate that releasing the suspect on bail is risky for any of the justifications of denial of bail—risk of absconding, interfering with the integrity of the criminal proceeding,

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[48] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

[49] This conclusion of the Council contradicts its own premise that for an arrest not to be arbitrary apart from being effected in accordance to the law the fairness and appropriateness of that law need to be established

[50] Bryan A. Garner (ed), *Black's Law Dictionary* 7th ed., 1999, p.236.

and security of the society—that should be provided by the law as grounds for denial of bail.

As properly indicated by the Council,[51] the FDRE Constitution allocates different roles to the lawmaker and the court in the denial of bail. The roles of the court and the legislature can be identified from the phrase "in exceptional circumstances prescribed by law the court may deny bail ---" which appears under Article 19(6) of the FDRE Constitution. The lawmaker is supposed to enact legislation providing for facts which may serve as grounds for denial of bail. And the court decides whether such facts exist in each case before it. In other words the circumstances should be designed in such a way that they give the court a final say on whether bail is to be granted or denied.

Denial of bail under Ethiopian law can be categorized in two categories. To the first category belong Article 67 of the Criminal Procedure Code[52] and Article 4(4) of the Revised Anti-Corruption Special Procedure and Rules of Evidence[53] which list down factors that the court should take into account while considering question of bail. According to these provisions, the court will on a case by case basis decide whether bail should be allowed or not. These provisions list down possible factors that the court should take into consideration while conducting a bail hearing. By evaluating the case at hand in the light of the factors listed there under, the court will decide on the issue of bail. These provisions are consistent with Articles 17 and 19(6) of the FDRE Constitution in that if the provisions are properly applied they would result in denial of bail only in rare occasions, in which case denial is legitimate. Moreover, under these provisions, the respective constitutional roles of the lawmaker and the court on the question of bail are maintained.

Under the second category fall Article 63 of the Criminal Procedure Code, Article 4(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence, and Article 6 of the Vagrancy Control Proclamation which, instead of providing facts based on which bail may be denied, provide that suspects for certain types of offences are not entitled to be released on bail. The Federal Supreme Court and the Council of Constitutional Inquiry treated these provisions as providing for '*legal circumstances*' and considered them as being within the ambit of Article 19(6) of the FDRE Constitution. It is hardly possible to say that such laws provide for 'circumstances' envisaged under Article 19(6) of the FDRE Constitution. Circumstance, as indicated above, refers to facts as distinguished from laws. These legal provisions do not indicate facts to be considered during a bail hearing.

The lawmaker, by enacting these laws, has made a decision that persons who are

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[51] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

[52] According to Article 67 of the Code an application for bail shall not be accepted where: a) the applicant is of such a nature that it is unlikely that he will comply with the conditions 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.

[53] Provides same grounds for denial of bail as does Article 67 of the Criminal Procedure Code.

arrested on suspicion that they have committed offences referred to by these laws are not to be released on bail. These provisions by instructing the court, to deny bail whenever a suspect is charged with offences referred to there under, deprives it of its constitutionally granted power. These laws satisfy neither the requirement that the law provides 'circumstances' as grounds for denial of bail nor the requirement that the law empowers the court to have a final say on whether the arrested suspect should be released on bail or not.[54] Hence, the laws providing for list of offences as non bailable are not the kind of laws envisaged under article 19(6) of the FDRE Constitution.

3.2.2. Purpose of bail

An item of evidence which would convince a reasonable police officer to suspect someone's involvement in the commission of crime suffices to restrict the liberty of the person against whom there is a suspicion.[55] The presumption of innocence, no punishment before conviction and other interests of the accused call for the pretrial release of the person who is arrested on suspicion**.** There is a risk that if the suspect is released, he may abscond so that he will not stand trial, and serve his sentence; interfere with the evidence to be presented against him (destroy those accessible to him, make witnesses change their mind etc.). Thus, a bail system which allows the suspect to be out of custody on condition that he brings a personal guarantor or deposits a sum of money that would assure the public that the aforementioned risks do not materialize is introduced.[56] The right to bail is not recognized in absolute terms for there may be cases where the condition of release does not safeguard these interests of the public. That is, recognizing the right to bail as an absolute right may have the effect of many offenders absconding, destroying the prosecutor's evidence, and committing other offence all of which would have the potential to cripple the criminal justice system.[57]

Hence, bail is rightly to be denied, where it does not reasonably assure the public that the aforementioned risks would not materialize. For the law that prohibits bail to be fair and appropriate it should be designed with such purposes in mind. In so far as the prohibition of bail, though made in accordance with the law, is not justified by any of the aforementioned grounds, the law based on which bail is denied could not be considered as fair and appropriate. In this case, the restriction of liberty resulting from the denial of bail made on the basis of such law would be an arbitrary arrest -- one which is prohibited under the constitution[58] and international instruments[59] to which

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[54] The Council of Constitutional Inquiry is of the opinion that such laws do not deprive the court of its power to decide on bailability in a given case. Refer to page 11 above.

[55] Articles 25, 26, 50 and 51 of the Criminal Procedure Code.

[56] There may be cases where a suspect may be released on his own personal recognizance. Weaver, L. Abramson, J. Burkhof and C. Hancock, *Principles of Criminal Procedure* (2004), P. 262.

[57] Had there not been for such risks every arrested person would have been released on bail as there is no other justification for denial of bail.

[58] Article 17 (2) of the FDRE Constitution.

[59] Article 9 of the UDHR (http://www.udhr.org/UDHR/default.htm) and Article 9 of the ICCPR, see above at note 43

Ethiopia is a party.

It is practically difficult, perhaps impossible, for the lawmaker to anticipate, while making the law, cases where a suspect, if released on bail, would abscond, tamper with the evidence of the prosecutor or commit a crime, and conclude that bail should not be allowed in such cases exclusively on the basis of the offence he is suspected of.

To relate the discussion with the issue at hand, it is not possible to conclude that any one suspected of corruption offence punishable by more than ten years of imprisonment or vagrancy or an offence punishable by 15 years or more or by death penalty or an offence which jeopardizes victim's life would abscond if released on bail. Nor is it possible to conclude that any one suspected of any of the aforementioned offences would tamper with the evidence of the prosecutor or would commit another crime if released on bail. Because there is a risk that some suspects, if released on bail, may abscond or tamper with evidence of the prosecutor or be tempted to commit other offences the right to bail should not be recognized as an absolute right for suspects of any type of offence including the aforementioned ones. Where there is no way of knowing, on the basis of the offence which one is suspected of, who may abscond and who may not; who may tamper with the evidence of the prosecutor and who may not; who is likely to commit a crime and who is not (the only relevant factors to the question of bail), it is not reasonable to rule out release on bail *apriori*.

Such complete prohibition of bail by law, as is the case under Article 63 of the Criminal Procedure Code, Article 4(1) of the Revised Anti-Corruption Special Procedure and the Rules of Evidence, and Article 6 of the Vagrancy Control Proclamation, is not justified by any one of the acceptable grounds for denial of bail. There can be cases where persons suspected of the aforementioned offences may comply with the conditions of bail and appear before a court when so required.[60] Denial of bail for persons who would have complied with condition of bail had they been released is not fair. However, application of the aforementioned provisions would definitely have such result which makes the law authorizing the restriction of liberty of such persons unfair and the restriction, made in accordance with such laws, arbitrary.

It follows that a law which prohibits bail for persons arrested on suspicion that they have committed a given type of offence, exclusively on the basis of the crime they are suspected of, is either based on an unwarranted premise – that if such person is released one of the risks stated above would occur – or it denies bail for purposes that are not legitimately supposed to be served through denial of bail.

The best way to minimize[61] the probability of denial of bail to a suspect who would

[60] Attachment with the community, family ties, asset and the fact that he has not committed the crime he is suspected of may have the effect of making the suspect to comply with the bail conditions.

[61] Even where the power is given to the court there is a possibility for persons who would have complied with bail conditions had they been released to be denied bail. After all, there is no

have complied with condition of bail had he been released is to leave the determination of whether bail should be granted or not to the court. The court has proximity to facts of particular cases which puts it in a better position to make a more plausible and fair decision on question of bail as compared to the lawmaker who can deal only with hypothetical cases. In recognition of this, it seems the Constitution enshrines a division of responsibilities between the two arms of the government on the question of bail. The tasks are allocated based on the specialization of the two institutions. The role of the legislature is to provide circumstances which may serve as guidelines for the courts while entertaining the issue of bail. That of the courts is to decide whether, on the basis of the guidelines provided by the lawmaker and facts at hand, bail should be allowed or not -- the final say being in their hands.

3.2.3. Release on Bail is the Principle

As we have seen above, both the ICCPR and the FDRE Constitution declare pretrial release on bail as the norm and detention pending trial as the exception. This was affirmed by both the Federal High Court[62] and the Federal Supreme Court.[63]

The position that the lawmaker can enact laws that order the courts to deny bail, which is espoused by the prosecutors and endorsed by the courts and the Council of Constitutional Inquiry, would face another challenge if viewed from another angle. If this interpretation were to be accepted, how would the lawmaker be checked not to come up with as many restrictive laws as the number of crimes known in the Criminal Code, eventually eroding the right to bail? In other words, what safeguards the principle of right to bail from becoming an exception if there is no restriction on the lawmaker? Is it self restraint on the part of the lawmaker that guarantees the right to bail to remain the norm?

The fear raised here is not a hypothetical one. In addition to Article 63 of the Criminal Procedure Code, we have already witnessed two laws restricting the right to bail exclusively based on the offence allegedly committed. Different interest groups are advocating for a law that prohibits bail to different category of suspects. African Child Policy Forum (ACPF) [64] has been promoting the idea of denial of bail to those suspected of having committed certain crimes against children. Similarly, the Ethiopian Women Lawyers' Association (EWLA)[65] is advocating the idea of denial of bail for those suspected of having committed certain crimes against women. A draft policy document of the Federal government[66] reflects this trend. It incorporates the ideas

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scientific mechanism to know who would comply and who would not with the bail condition.

[62] Engineer Hailu Shaoul et al v. Federal Public Prosecutor, cited above at note 16.

[63] Assefa Abrha etal v. Federal Ethics and Anti Corruption Commission, cited above at note 13.

[64] Ayalew Melaku, የዋስትና መብት አፈፃፀም በህፃናት ላይ የወሲብ ወንጀል ፈፅመዋል ተብለው ከሚከሰሱ ሰዎች አንፃር a study sponsored by African Child Policy Forum , May 2006 (unpublished)

[65] Workshop organized by Ethiopian Women Lawyers Association, November 8, 2008, Nigeste Saba Hotel, Addis Ababa.

[66] መንጀል ፍትህ አስተዳድር ፖሊሲ ነሃሴ 2000

promoted by ACPF and EWLA. Furthermore, the policy document provides for denial of bail to those suspected for terrorist acts.

If the right to bail is to continue to be the norm, which I think is the spirit of the Constitution, Article 19(6) of the FDRE Constitution[67] should be construed to prohibit the lawmaker from passing laws that would result in abridgment of the right to liberty. Article 19(6) of the FDRE Constitution is meant to safeguard the interest of the accused from illegitimate arrest by the government through any one of its three organs. If article 19(6) is to be construed as not imposing any restriction on the legislature, the restriction on the court imposed by this constitutional provision will have no significance in protecting the right of the accused persons as the lawmaker may dictate the court abridging the right to bail of the accused which was meant to be protected by this very provision. The purpose of the provision would be served if it is construed to have allowed the lawmaker to list down circumstances to be used as guidelines by the court instead of deciding by itself bailable and non-bailable cases.

If the drafters of the Constitution had intended to grant the lawmaker the power to deny bail by law, the Constitution would have been worded "unless otherwise provided by law, persons arrested have the right to be released on bail" or phrases with the same effect would have been used instead of its present wording. The difference between this way of drafting the law which would give unfettered power to the law maker and what is provided under Article 19(6) of the FDRE Constitution is obvious. In the former, the lawmaker is free to restrict the right at any time whereas in the latter case the lawmaker does not have such freedom. In other words, under Article 19(6) of the FDRE Constitution, the accused is entitled to judicial determination of bail. Hence, no law should circumvent the judicial process.

The Council of Constitutional Inquiry, in its recommendation[68] on the constitutionality of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001 (as amended), indicated that the law which expressly prohibits bail for persons suspected of certain category of offences does not deprive the court of its power to decide on whether or not persons suspected of such offences are to be released on bail. According to the Council, the court may exercise its power to decide on question of bail in two ways. It may, during a bail hearing, assess whether or not the prosecutor has a *prima facie* case and if it finds no *prima facie* case, the court has the option to order conditional release of persons suspected of such non-bailable offences. Moreover, the Council indicated that the court determines whether or not the facts alleged on the charge constitute the non-bailable offence. That is, the court may release accused persons on bail though charged for non- bailable offence if the court does not see the facts stated on the charge as constituting the non-bailable offence.

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[67] According to Article 13(2) of the FDRE Constitution, this provision has to be construed in light of Article 9(3) of the International Covenant on Civil and Political rights. As to the relevance of Article 9(3) of the ICCPR see below at p.30.

[68] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

Apparently, the Council's argument seems convincing. But when one looks at the argument very closely he can easily notice that it is erroneous. In both instances that the Council sees as avenues for the court to exercise its judicial power on question of bail, there would be no need to make the release conditional. If the prosecutor does not have a *prima facie* case, it has been indicated in this writing[69] that strictly and logically speaking there is no need to conduct trial. Hence there is no point in making the suspect's release conditional. The issue of bail arises only where there is a *prima facie* case[70] as it is only then that there would be a need to secure the attendance of the arrested person for his trial. Also, where the facts stated on the charge do not match with the offence that the prosecutor alleges to have been committed, there is no probability of the accused person to be convicted[71] as charged, making the trial of the accused person unnecessary. Therefore, in both cases where, as observed by the Council, courts could exercise their power on question of bail in cases related to non-bailable offences, there is no need to make the release of the accused conditional**.** It is in cases where the accused should be released unconditionally that the court is said to have the power to release the accused conditionally. This does not make sense.

3.3. Foreign Experience

Interestingly, in *Caballero v. UK*[72], the European Court of Human Rights was faced with exactly the same question -- whether or not the law which does not allow a judge to grant bail to those who are suspected of particular type of offence is a valid law. The relevant part of Section 25 of the Criminal Justice and Public Order Act 1994 of UK, the validity of which was challenged by the applicant, provided *inter alia* that "a person who was charged with rape having previously been convicted of such an offence or culpable homicide, should not be granted bail."[73]

The material part of Article 5 of European Convention on Human Rights, in light of which the court was asked to evaluate the validity of the Act, provides as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. ---
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent

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[69] See below at pp. 37-38.

[70] The position of the Council clearly implies that the court would not have power to decide on question of bail where the prosecutor has a prima facie case.

[71] Though there is a possibility for the court, as per Article 113 of the Criminal Procedure Code, to convict an accused for an offence he is not charged with that is not an obligation of the court.

[72] Caballero v. United Kingdom, in S. Trechsel, *Human Rights in Criminal Proceedings*, (2006), p.511

[73] Caballero v. United Kingdom quoted by the High Court of Justice in Northern Ireland Queen's Bench Division in the Matter of an Application by Sean Pearse McAuley for Judicial review, http://www.courtsni.gov.uk

his committing an offence or fleeing after having done so ---

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

In *Caballero v. U.K.*, the applicant had previously been convicted of homicide and was then charged with attempted rape.[74] No doubt that the applicant's case falls under Section 25 of the Criminal Justice and Public Order Act 1994. The European Commission of Human Rights observed that "---the possibility of any consideration by a judge of the pretrial release of the applicant and of, accordingly, his release on bail had been excluded in advance by the legislature."[75] The Commission held by majority that the domestic law which compels the judge not to grant bail is a violation of article 5(3) of the Convention[76] for it deprives the judicial officer of its judicial power. During the proceeding before the European Court of Human Rights, the UK government adopted the Commission's view and the Court accepted this concession.[77] Both the Commission and the Court interpreted the phrase "---*a judge or officer authorized by law to exercise judicial power*" under Article 5(3) of the European Charter of Human Rights as empowering the judge to determine, by reference to legal criteria, whether or not the detention of the person who appears before him/her is justified. The European Court interpreted the convention provision, emphasizing on the italicized part, as requiring that the judge has the power to make a binding order for the detainee's release.[78] The same phrase is found under Article 9(3) of the ICCPR, an integral part of Ethiopian law,[79] and said to be source of article 5(3) of the Charter.[80]

Article 9 (3) of the ICCPR reads:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject

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[74] Ibid.
[75] Ibid.
[76] S. Trechsel, cited above at note 72, pages 510-511.
[77] Ibid. S. Trechsel was of the opinion that the position taken by the Commission and the Court is wrong. He criticized the position on the ground that it is a mistake to say that there is no room for the judge to release a suspect in such cases. In his view, the judge still has to examine whether there is a reasonable suspicion that the person concerned has committed the crime. It is interesting to note that his position is the same as that which was taken by the Council of Constitutional Inquiry.
[78] Schiesser v. Switzerland; Ireland v. United Kingdom; Assenov v. Bulgaria in S. Trechsel, cited above at note 72, P.510
[79] FDRE Constitution, Article 9(4).
[80] S. Trechsel, cited above at note 72, p.508

to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

During the bail hearing in the case of *Engineer Hailu Shaoul etal v. the Federal Public Prosecutor,*[81] the Federal High Court found this Convention provision as relevant to the issue of bail. However, the court emphasized on the second statement in the convention provision to conclude that the provision merely indicates release on bail being the principle and refusal of bail the exception. The court did not see any other relevance of the convention provision to the issue. Regrettably, the Federal High Court did not even consider the second part of the provision as relevant to the issue of whether or not prohibition of bail by law is allowed.

When we refer to procedural laws of other states, the type of the offence with which the suspect is charged does not serve as an exclusive ground to deny bail. In Canada, those suspected of an offence have the right not to be deprived of reasonable bail without just cause.[82] The right to bail may not be denied exclusively on the basis of the offence which the accused is suspected of. Rather, the prosecutor has to establish the necessity of continued detention on the primary ground that detention is necessary to ensure attendance of the accused at trial or on the secondary ground that detention is necessary for the protection or safety of the public including any substantial likelihood that the accused will, if released, commit a criminal offence or interfere with the administration of justice.[83]

In the United Kingdom, there is principle of release on bail. But, where the suspect is charged with murder, attempted murder, manslaughter, rape, attempted rape or one of the serious sexual offences and if he has previously been convicted in the UK of one of these
offences or of culpable homicide he has to convince the court that there are circumstances which justify release on bail. He has the burden to establish those circumstances and if he discharges the burden, the court will release him on bail. It is the court that finally decides on the question of bail. The law maker simply provides for the guidelines. [84]

In France, seriousness of the offence is not relevant for the purpose of a bail hearing. It is only for reasons related with the integrity of administration of justice that bail may be denied. Even then, it is the magistrate who, after holding an adversary hearing, decides on whether pretrial detention is the only way to ensure the integrity of the administration of justice.[85] Similarly, in Israel, the seriousness of the offence, in and of

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[81] Federal Public Prosecutor v Engineer Hailu Shaoul et al, cited above at note 16.
[82] Section 11(e) of the Canadian Charter of Rights and Freedoms as quoted in C. Bradley(ed.), *Criminal Procedure: A Worldwide Study*, 1999, p.71.
[83] Canadian Criminal Code Sections 515 (10) in C. Bradely, cited above at note 82, p.70.
[84] J. Sprack, *A Practical Approach to Criminal Procedure* (10th ed., 2004), p.96
[85] The French Code of Criminal Procedure, Article 145-2, in C. Bradley, cited above at note 82, p.165

itself, cannot serve as a ground to deny bail. An accused is to be detained pending trial only upon a finding by the court that the accused, if released on bail, is likely to tamper with evidence, harass future witness of the prosecutor, abscond or commit other offences.[86]

The relevant law of South Africa does not provide a list of offences persons suspected of which are not allowed to be released on bail. Nor does it provide for punishment as a relevant factor to decide on question of bail. In principle, every offence is bailable irrespective of the punishment attached to it. Because bail is not an absolute right, the prosecution may object to a release on bail. But the onus is upon him to convince the court that release is not in the interest of justice. Release is said to be not in the interest of justice where there is risk of absconding, interference with the investigation or witnesses, and commission of other crimes if the accused is released on bail. However, Section 60(11) of the Criminal Procedure Act of South Africa requires the accused to show that the interests of justice do not require his or her detention in respect of certain crimes such as murder, rape, robbery with aggravated circumstances, dealing in drugs.[87]

In the United States of America, an arrestee has the right to be released on bail. There is no single offence the suspect of which is to be denied bail solely because he is suspected to have committed such offence. The decision whether the accused is to be released or not depends on other factors. The judge is required to impose conditions of release so as to ensure return of the accused for trial, non-interference with the investigation activity and that he will not commit a crime. Denial of bail is valid when no condition is likely to assure the court that any of the aforementioned risks would not occur. [88]

The observations of the lawmaker and the statements of the Council of Constitutional Inquiry about the position of American procedural laws[89] on the issue do not seem to reflect the correct meaning of the laws. The American Criminal Procedural laws (both at federal and state level) do not prohibit one who is suspected of homicide from being released on bail solely because of that suspicion. Also, the Federal Bail Reform Act of 1984 does not in any way provide for denial of bail exclusively on the basis of the offence one is suspected of. Nature of the offence is just one of the several factors to be considered by the court during a bail hearing.[90]

The Federal Bail Reform Act simply introduces two rebuttable presumptions[91] against

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[86] Israeli Criminal Procedure Law of 1996, Section 21(a) (1), in C. Bradley, cited above at note 82, p.222

[87] C. Bradley, cited above at note 82, pp. 346-347.

[88] J. Dressler, *Understanding Criminal Procedure* (3rd ed., 2002), p. 642

[89] For the summary of the Council's ruling on the constitutionality of the Anti-Corruption Special Procedure and Rules of Evidence, refer to pp. 8-11 above.

[90] See the Federal Bail Reform Act § 3142 (e) and (f). Also refer to J. Dressler, cited at note 88 above, p.642

[91] Ibid.

accused persons. First, the accused is presumed too dangerous to be released if the prosecutor proves that the defendant has previously been convicted of one of the offences enumerated there under and that five years have not elapsed since the date of conviction or of release from imprisonment of the prior conviction. Second, there is a presumption that no conditions of release will reasonably assure that the defendant will not flee or commit a crime, if the judge determines that there is probable cause to believe that he committed one of the specified set of serious drug offences or an offence involving the use of or possession of firearms. Such presumptions are subject to rebuttal by the accused, in which case the court has the power to grant bail, are far from ordering the court not to grant bail by referring to the type of offence the accused is charged with.

The procedural laws in Argentina are different. Rules of Criminal Procedure at the Federal level as well as laws adopted in Argentine provinces provide that defendants charged with certain types of crimes cannot be released on bail. According to scholars, such laws, by depriving a person of his freedom before conviction violate Article 18 of the Constitution of Argentina which provides that "no inhabitant shall be punished without a previous trial."[92] Despite wide criticisms voiced against such blank denial of the right to bail, the Supreme Court has refused to invalidate any of those laws on constitutional grounds. The Supreme Court upheld a statutory provision making defendants charged with five or more separate crimes ineligible for bail.[93]

II. The Requirement for a *Prima Facie* case during a Bail Hearing

Another controversy that relates to question of bail in Ethiopia, in particular where the accused is charged with non bailable offence is whether the court should consider the weight of the prosecution's evidence at the time of bail hearing. During a bail hearing, suspects usually request the court to check if the state has a *prima facie* case[94] that shows the commission of the alleged crime and links him/her with the offence. The prosecution's position[95] is that the court is not supposed to go into assessing the evidence at the time of bail hearing.[96]

1. Court Rulings

This very issue was raised during the bail hearing in the case between *the Federal*

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[92] C. Bradley, cited above at note 82, p.36

[93] Ibid. Note that unlike Ethiopian Constitution, in the Argentine constitution there is no clear provision recognizing the right to be released on bail

[94] A prosecutor is said to have a prima facie case where he proves that there is a probable cause to believe that a crime was committed and that the defendant committed the crime charged.

[95] Cases where the prosecutor expressed such positions are discussed in the following pages.

[96] The Council of Constitutional Inquiry, in the case of the petition by Tilahun Abay etal , incidentally indicated that the court has the power to assess the evidence of the prosecution during a bail hearing. Refer to note 20 above.

Public Prosecutor and Engineer Hailu Shaoul et al.[97] The provisions under which the accused persons were charged are punishable with life imprisonment or death. The accused persons requested the court to consider whether the evidence produced by the public prosecutor is weighty enough to show a *prima facie* case against them to warrant denial of bail under Article 63 of the Criminal Procedure Code.[98] Some of them[99] argued that the court should not deny bail by simply referring to the criminal law provision alleged to have been violated by the accused. In stead, they argued, the court has to check whether or not the prosecutor has a *prima facie* case to support his allegation before denying bail; if the court does not engage itself in such exercise, it is hardly possible to say that the court decides on question of bail. According to the accused persons, let alone in criminal cases, even in civil cases, the party who brings action has to show a cause of action so that the court will accept his statement of claim.

The prosecutor, on his part, argued that Article 63 of the Criminal Procedure Code requires the court merely to refer to the provision alleged to have been violated and rule on bail on the basis of the punishment prescribed thereunder. The prosecutor further argued that no where does the law empower the court to weigh the evidence of the prosecutor at the stage of bail hearing; it is a matter to come later in the criminal proceeding.

The trial court rejected the argument of the accused persons for lack of legal basis. According to the court, whether the plaintiff has a cause of action or not is to be verified in civil cases for the law expressly requires so.[100] No where does the law require the court to do the same for criminal cases. In a criminal case, the court stated, it is the public prosecutor who weighs the evidence collected during investigation and decides if it is adequate to institute a charge.[101] According to the court, evaluating the evidence of the prosecutor during a bail hearing does not have a legal basis. The Federal Supreme Court confirmed the position of the Federal High Court indicating that to require the trial court to weigh the evidence of the prosecution at this stage is to wrongly require the court to take a position on the weight of the evidence of the prosecution at a preliminary stage.[102]

There are instances where the courts show extreme passivism by failing to assess whether the facts stated on the charge, if found to be true, would constitute the crime alleged to have been committed. In the case *Federal Ethics and Anti Corruption Commission v Assefa Abrha et al,*[103] the prosecutor charged 12 persons with corruption. Defense lawyer for the 11th and 12th accused persons requested the court to direct its

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[97] Engineer Hailu Shaoul etal v. Federal Public Prosecutor, cited above at note 16.

[98] Accused persons concede that Article 63 of the Criminal Procedure Code, the relevant provisions for the matter, does not allow them to be released on bail.

[99] Ato Daniel Bekele, Ato Netsanet Demissie and Ato Kasahun Kebede

[100] The court seems to have Article 231 of the 1965 Civil Procedure Code of Ethiopia in mind.

[101] The court refers to Articles 41 and 42 of the Criminal Procedure Code of Ethiopia.

[102] Daniel Bekele etal v Federal Public Prosecutor (criminal Appeal File No 22909, Federal Supreme Court, March 10, 2006) (unpublished).

[103] Federal Ethics and Anti Corruption Commission v Assefa Abrha et al, cited above at note 13.

attention to the alleged facts on the charge to have been committed by the two accused persons. The defense lawyer argued the alleged facts do not constitute corruption offence in which case the law[104] which denies bail to persons suspected of corruption should not apply to the accused. Accordingly, the defense lawyer pleaded the court to release his clients on bail. In response, the prosecutor stated that the lawyers are mistaken in appreciating the facts stated on the charge. The court ruled that since the prosecutor has alleged that the acts committed by each accused person, including the 11th and 12th accused persons, constitute or is related to the offence of corruption, it will not go into verifying the validity of the allegation to determine whether bail should be allowed or not. Despite such application of the defense lawyers, the court, without any inquiry into whether or not the facts, if proved, would constitute corruption, rejected their application for bail and continued the trial.

Similarly, in the case *Public prosecutor v Andarge Yalew etal v*,[105] some five persons were charged before the Federal High Court under Articles 58(1), 32(1) (a) and Article 523 of the 1957 Penal Code. The accused persons, through their lawyers, applied to the trial court that the prosecutor cited Article 523 not because the facts alleged in the charge constitute the crime referred to by that particular legal provision but to make sure that accused persons are not released on bail. They requested the court to see whether or not the facts on the charge, if found to be true, would constitute homicide in the second degree. The trial court did not accept the idea that the prosecutor's evidence be considered and evaluated during a bail hearing to decide whether bail is to be allowed. The appellate court[106] confirmed the lower court's ruling that for the purpose of bail what the court has to consider is the punishment prescribed under the law that the prosecutor has alleged to have been violated.

2. Examining the Requirement of a *Prima Facie* Case during a Bail Hearing

The position of the prosecution endorsed by both the Federal High Court and the Federal Supreme Court can be summarized as follows. To decide on question of bail, the court shall not assess whether or not the state has a *prima-facie* case to show the commission of a crime and the link that the crime has with the suspect; nor shall the court check whether or not the facts alleged in the charge, if proved, would constitute the offence alleged to have been committed. If the crime alleged to have been committed is non-bailable, the court will simply deny bail.

As will be shown in the following pages, this position is supported neither by the purpose of the bail system nor by the law of the country. Moreover, the international experience is not in favor of such approach.

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[104] The defense lawyers refer to Proclamation No. 236/2001 as amended.

[105] Federal Public prosecutor v Andarge Yalew et al.(criminal file No 1007/93, Federal High Court, 22 June, 2001) (unpublished).

[106] Andarge Yalew etal v. Federal Public prosecutor (criminal appeal file no. , Federal Supreme Court)

2.1. Purpose of Bail

The primary purpose of denying or setting bail is to ensure the attendance of the suspect at his trial and to serve his sentence if found guilty. From this follow two arguments. First, to deny bail with a view to ensure attendance of a suspect during trial, there should be indications that there will be a trial. It is by establishing a *prima facie* case that the prosecutor can show that there is a need to try the suspect with a view to formally and finally evaluate the validity of the prosecution's allegation through the trial process. If the prosecutor does not have a *prima facie* case that shows the commission of the crime or that relates the accused with the crime, strictly speaking there is no need to go to a full-fledged trial. In such cases, the society does not have a legitimate interest in the attendance of the suspect during his trial as no trial is necessary. In cases where the evidence of the prosecutor is not capable of establishing a *prima facie* case, one may even go to the extent of arguing that there is no need to make release of the suspect conditional since there is no need to try him.

Second, even if, for whatever reason, there is a need to conduct trial there is no reasonable risk that the suspect will flee. Where there is no *prima facie* case, a reasonable person would not fear possible conviction and punishment from which he wishes to escape. Lack of *prima facie* case shows either the suspect has not committed the crime or there is no adequate evidence that warrants his conviction. In both cases, there is no reasonable risk that the suspect, if released on bail, would escape for he does not fear conviction and punishment. There is nothing that tempts him to escape.

If, in cases related to offences which are said to be non-bailable, the court evaluates the evidence of the prosecution and grants bail where there is no *prima facie* case[107] and denies where there is, no legitimate societal interest is jeopardized. In any case, the court's involvement in such activities does not have the effect of releasing those against whom the prosecution has a minimal evidence that justifies conducting a trial. Therefore, the effect of the court's refusal to make an assessment of the prosecution's case is to deny bail even for those against whom the prosecution does not have such minimal evidence. This does not serve any interest of the society.[108] If releasing a suspect against whom the prosecution does not have a *prima facie* case does not prejudice the public's legitimate interest and if detaining those against whom there is no *prima facie* case does not serve any legitimate societal interest, what possible justification can one think of to explain the position that the court shall not weigh the evidence of the prosecution during a bail hearing? For what precise reasons would judicial scrutiny of the applicant's detention for the purpose of deciding bailability be objectionable? The author of this article finds it very difficult to think of any plausible answer for these questions.

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[107] As argued in the preceding paragraphs normally the suspect against whom the prosecution does not have a prima facie case should be released unconditionally.

[108] To conduct a trial which would certainly end up with acquittal of the accused is unacceptable wastage of time, resource and man power from the view point of the public in addition to causing unnecessary humiliation and anxiety to the accused.

One can not reasonably argue that the court is not competent to assess whether or not there is a *prima facie* case. How can the court which is competent to eventually decide on the adequacy of the prosecution's evidence to warrant conviction lack the capacity to determine whether or not there is a *prima facie* case? Such a position does not make sense. One may think that requiring the prosecutor to have a *prima facie* case to deny bail would be problematic where the issue of bail is entertained before investigation is completed as the prosecutor might not have all the evidence at hand at that time. This is a legitimate concern. The examination, if made while investigation is in progress, should necessarily be of a summary nature. If the investigation is at an early stage, it is quite possible that only rudimentary elements of evidence and information will be available. The court is not supposed to require the prosecutor to have strong evidence to deny bail. It does not mean, however, that the prosecutor's case should not be subject to a *prima facie* case test. One should bear in mind that the police officer is supposed to have some sort of evidence even at the time of arrest as the arrest is justified only where there is a reason to believe that the arrestee has committed an offence.[109]

2.2. Implications of Constitutional provisions

The argument of the prosecution, which is espoused by the court, emphasizes the absence of law that empowers the court to weigh the evidence of the prosecution during bail hearing. The Federal High Court in comparing its role in criminal cases with civil cases expressly stated that:[110]

> it is because the law expressly authorizes the court to verify whether or not statement of claim, in a civil case, shows a cause of action that it has to do the same unlike in criminal cases where there is no provision that allows it to evaluate the evidence of the prosecution during a bail hearing.

A similar argument was made by the Federal Supreme Court.[111]

Relevant provisions of the FDRE Constitution do not seem to support the position of the courts and the prosecutor. In support of the court's responsibility to examine whether or not the prosecution has a *prima facie* case, while dealing with the issue of bail, two arguments can be advanced. First, the constitutional right of the arrested person to be brought before court of law within 48 hours and to be informed of the reason for his arrest imposes a duty on the court, before which the arrestee appears, to check if the state has a probable cause against the suspect. Second, the duty of the court to enforce the right to liberty of suspected persons calls for the court's examination of the prosecution's reason for arresting the suspect

2.2.1 The right to be given specific explanation of the reason for arrest

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[109] See above at note 55.
[110] Federal Public Prosecutor v Engineer Hailu Shaoul etal, cited above at note 16.
[111] Daniel Bekele et al v. Federal Public Prosecutor, cited above at note 102.

Article 19 of the FDRE Constitution provides:

1. Persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.[112]

2. Persons arrested have the right to be brought before a court within 48 hours of their arrest. ---. On appearing before a court, they shall have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.[113]

No matter what the offence the arrested person is suspected of, he has a constitutional right to be brought before court within 48 hours. Another constitutional right follows his appearance before the court -- the right to be given prompt and specific explanation of the reasons for his arrest -- one of the explanations[114] for the right to appear before court within the prescribed time. One may rightly wonder as to what is new about Article 19(3) of the FDRE Constitution in light of Article 19(1). If, by virtue of Article 19 (1) of the FDRE Constitution, persons arrested are entitled to know the reason for their arrest at the time of arrest,[115] what other *"reason for arrest"* is envisaged under Article 19(3)? The only logical explanation is the following. Under Article 19(1), the officer who is making the arrest is responsible to let the arrested person know the reason for his arrest, which is simply telling him the offence of which he is suspected. Under Article 19(3), the court before which the arrestee appears is supposed to tell the arrestee that there is adequate reason for his arrest in connection with the crime that he is suspected of. The latter requires more than telling him the mere reason for his arrest. It entitles the arrestee to be told that there is a reason that warrants his detention in connection with the offence he is suspected of.

This distinction is clearer in the Amharic version of the aforementioned constitutional provisions.[116] The phrase "--- **ወዲያውኑ ፍርድ ቤት እንደቀረቡ በተጠረጠሩበት ወንጀል ለመታሰር የሚያበቃ ምክንያት ያለ መሆኑ ተለይቶ እንዲገለፅላቸው መብት**

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[112] The Amharic version goes as follows.-"**መንጀል ፈፅመዋል በመባል የተያዙ ሰዎች የቀረበባቸው ክስና ምክንያቶቹ በዝርዝር ወዲያውኑ በሚገባቸው ቋንቋ እንዲነገራቸው መብት አላቸው።**

[113] The Amharic version goes as follows. "**የተያዙ ሰዎች በአርባ ስምንት ሰዓታት ውስጥ ፍርድ ቤት የመቅረብ መብት አላቸው።** ---። **ወዲያውኑ ፍርድ ቤት እንደቀረቡ በተጠረጠሩበት ወንጀል ለመታሰር የሚያበቃ ምክንያት ያለ መሆኑ ተለይቶ እንዲገለፅላቸው መብት አላቸው።**

[114] Protection against ill treatment by the police is another justification for requiring arrested persons to be brought before court promptly. Although techniques have been developed which make it possible to inflict severe pain or suffering without leaving scars or other traces, there may still be a relatively good chance of finding evidence of ill-treatment on the body within one or two days.

[115] Article 56 (2) of the Criminal Procedure Code, by requiring the police officer who is to effect the arrest to read the arrest warrant to the person to be arrested tries to ensure that the arrested persons know the reason of his arrest at the moment of arrest.

[116] See above notes112 and 113.

አላቸው።።" Article 19(3) clearly shows that the arrested person has the right to know and the court has the responsibility to inform him that his arrest is justified by some reasons or facts which link him with the crime. The existence of the reason that justifies arrest can be verified by the court only through assessing the evidence collected by the investigating police officer. Unless the court has the power to evaluate the evidence of the police with a view to determine whether the officer has reason to suspect the arrested person has committed a crime, it will not be able to tell the arrested person that there is a justification to arrest him. Moreover, the right of the suspect under Article 19(3) would not have any content nor would it be different from the right under Article 19(1) of the FDRE Constitution, which makes it redundant, if it simply entitles the arrested person to be told the offence for which he is suspected.

While applying Article 5 (1) (c) of the European Convention on Human Rights which provides the right to be brought promptly before court, the European Court of Human Rights indicated the purpose of the right to be "the protection of the individual against arbitrary interferences by the state with his right to liberty."[117] The Court stated:[118]

> Deprivation of liberty--- is such a grave interference with a person's fundamental rights that administrative authorities responsible to the executive are only competent to make a provisional decision to detain a person; as soon as possible thereafter, the decision must be scrutinized and confirmed by the judiciary, who has been able to meet the detainee in person. This obligation remains even if there exists an arrest warrant issued by a judicial authority.

In connection with this convention provision, Trechsel states "during this first hearing, the representative of the judiciary will have to make a *prima facie* evaluation of whether the conditions for detention under paragraph 1(c) are fulfilled."[119]

2.2.2. Court's Duty to Enforce Right to Liberty

The position that in criminal cases it is the prosecutor, but not the court, which determines whether there is a *prima facie* case or not amounts to a blatant disregard of Article 13 of the FDRE Constitution. This constitutional provision imposes shared responsibility on all the three organs of the government in the enforcement and protection of the human rights part of the FDRE Constitution. One of these rights is the right to liberty recognized under Article 17 of the FDRE Constitution. This constitutional provision prohibits arbitrary arrest -- an arrest made not on grounds and/or procedures as are established by law. The provision safeguards one's right to liberty not to be restricted without substantive and procedural due process of law. From the cumulative reading of Articles 13 (1) and 17 of the FDRE Constitution one can conclude that with regard to respecting and protecting the right to liberty both the public prosecutor and the court do have their own role to play at different levels.

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[117] S. Trechsel, cited at note 72 above, p.506
[118] Id, pp.505-506
[119] Id., p.506

Article 17 is applicable not only at the moment of effecting arrest; it continues to apply throughout the time of arrest/detention. That is, for the continued detention to be justified, it needs to meet both procedural and substantive requirements. This right is available irrespective of the crime of which the arrestee is suspected. When an arrested person, no matter what offence he is arrested for, is brought before court of law within the prescribed time after arrest -- the first time the issue of bail is likely to be raised -- the court may order the arrest to continue -- through denial of bail -- if and only if the continuation of the arrest is not to be arbitrary for lack of either or both substantive or/and procedural requirements. Article 19 (3) of the FDRE Constitution steps in here. This provision, by entitling the arrested person to be informed of the reason for his arrest, reinforces the court's responsibility of enforcing and respecting the right to liberty under Articles 17 and 13 (1) of the FDRE Constitution. The court, if it denies bail, has to explain to the arrestee why he is arrested and why the arrest shall have to continue. In other words, the court should be convinced of the existence of indicators as to the commission of the crime and the suspect's involvement in the same. That is possible only through assessing evidence of the prosecution.

If there are no such indicators (no *prima facie* case exists) the court will have nothing to say to the arrestee as to the reasons for his arrest in which case it is supposed to grant bail, if not unconditional release. Denial of bail, in such cases, is a clear violation of the suspect's right to be free from arbitrary infringement of his liberty. This would be a failure on the part of the court to discharge its duty to enforce the constitutional right of the suspect to be free from arbitrary arrest.

The contention here is not to deny the prosecutor's role in assessing its own evidence. It too has responsibility in ensuring the suspect's right to liberty. By virtue of Articles 41 and 42 of the Criminal Procedure Code the public prosecutor is required to weigh his evidence to decide on whether or not a charge has to be instituted. If the case relates to a person who has not been released on bail, for there is a *prima facie* case, the decision of the prosecutor on whether to frame a charge or not is critical to the protection of the right to liberty of the suspect. If he decides to bring a charge, the suspect will remain detained. If the prosecutor decides not to frame a charge believing that he does not have adequate evidence to warrant conviction, the suspect will be released. Hence, the prosecutor should carefully weigh the evidence at hand so that the detention does not continue without a cause.

3. Foreign Experience

The idea that pretrial detention (denial of bail) is to be allowed only after considering the existence of a *prima facie* case is almost universally accepted. Just to cite few, in the United States, one of the factors to be considered during a bail/detention hearing is the *substantiality of the government's evidence* against the arrestee.[120]

[120] See § 3142(g) of the Bail reform Act of 1984 as quoted in L. Weinreb (ed.), *Leading Constitutional Cases on Criminal Justice* (2001), p.862.

In Canada, bail is to be denied where detention is necessary in order to maintain the confidence in the administration of justice provided that, *inter alia*, the prosecutor's case is apparently strong.[121] Under Israeli law, the accused cannot be detained in the absence of *prima facie* evidence that substantiates the accusations specified in the indictment.[122] Israeli Supreme Court, in the case of *Zada v. Israel*, has gone to the extent of declaring that "the prosecution's evidence must be subjected to a serious scrutiny that goes far beyond the examination of the evidence in rulings concerning direct dismissal of charges."[123] Article 384(1) of the Italian *Code Penal Procedure* expressly provides that there must be serious circumstantial evidence of guilt, not mere suspicions, for one suspected of crime to be detained. This standard was elaborated by the Supreme Court of Italy. According to the court, "where the circumstantial evidence would lead one to reasonably conclude that the crime charged occurred and that the suspect committed it," the statute is satisfied.[124]

Conclusion

As far as the lawmaker is concerned there is no constitutional issue with *apriori* legislative denial of bail to category of suspects, be it on the basis of the offence or the punishment attached to the offence they are suspected of. For the legislature, such law is in perfect conformity with the FDRE Constitution and relevant human rights instruments. Also, the Federal Courts do not see any reason to abstain from applying such law. Furthermore, the Council of Constitutional Inquiry could not see any reason to object to the application of the law. They support the law on a simple ground that restriction of the right to bail is envisaged under Article 19 (6) of the FDRE Constitution. Both the lawmaker and the Council found such law to be compatible with the international experience as well. As the Federal Government's unpublished policy document on criminal justice indicates there is a plan to include additional offences with in the category of non bailable ones.

Obviously, an arrestee's constitutional right to bail is not an absolute right. Both the FDRE Constitution and relevant human rights instruments which recognize the right allow its restriction in so far as it is made in accordance with law. A close reading of Article 19 (6) of the FDRE Constitution shows that the law which authorizes denial of bail does not necessarily make the denial made in accordance with such law constitutional. There are two features that the law should have so that the restriction authorized by the law will be that which is envisaged by the Constitution. First, the law should provide for circumstances – facts as distinguished from list of offences—that

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[121] Section 515(10)(c) of the Criminal Code of Canada as quoted in C. Bradley, cited above at note 82, p.71

[122] Criminal procedure Law, section 21(a)(1) as quoted in C. Bradley, cited at note 82 above, p.222

[123] Zada v. state of Israel, 50(2) P.D. 133 (1995) as quoted in C. Bradley, cited at note 82 above, p.222.

[124] Cass.I, sent 1090, (March 9, 1992) as quoted in C.Bradley, cited at note 82 above, p248.

may result in denial of bail only exceptionally. To use the words of the Constitution, it should provide for '*exceptional circumstances*' which would result in denial of bail only in rare situations. In other words, the possible grounds for denial of bail should not be so wide that it results in abridgment of the right. Second, the law should be drafted in such a manner that whether these circumstances—grounds for denial of bail--provided by law exist or not is to be determined by court of law on a case by case basis. The law that regulates restriction on the right to bail is, therefore, supposed to list down factors that the court should take into consideration during a bail hearing. Any law which provides for summary and automatic denial of bail to those suspected of particular types of offences is not envisaged by the Constitution. Such law puts handcuffs on courts of law and deprives them the power they are constitutionally entrusted with to judge whether or not an arrestee who is brought before them should be released on bail. Such law, apart from not being in conformity with the constitutional right of the arrested person to be released on bail, does not serve the legitimate purpose of denial of bail.

When Article 6 of the Vagrancy Control Proclamation, Article 4 of the Revised Anti-Corruption Special Procedure and Rules of Evidence, and Article 63 of the Criminal Procedure Code are assessed in light of the two features that the law envisaged by Article 19(6) of the Constitution is supposed to have, they meet neither condition. By providing the type of the offence or the punishment attached to the offence as a ground to deny bail, they fail to meet the requirement that circumstances be grounds for denial of bail. By providing for apriori refusal of bail where the court is obliged to summarily deny bail to certain category of arrested persons, without evaluating each case on its own in light of factors that support and militate against release on bail, but exclusively on the basis of the offence they are suspected of, the laws fail to satisfy the requirement that the court should have a final say on question of bail.

Nor are these laws found to be in conformity with the overwhelming international experience. As far as this writer understands, both the lawmaker and the Council of Constitutional Inquiry erred in appreciating the true meaning of the laws of other states and provisions of regional and international human rights instruments relating to the issue of *apriori* denial of bail. Perhaps, the laws that provide for *apriori* denial of bail might not have been passed by the lawmaker had it appreciated the true meaning of the foreign laws which it referred to. None of the foreign laws and the provisions of regional and international human rights instruments that were referred to by the Council and the lawmaker allow summary denial of bail. Under these foreign laws and conventions there is always room for the court to decide whether or not bail is to be granted on the basis of facts to be established by the parties, i.e. the prosecutor and the suspect.

As can be inferred from the cases consulted in this article, when it comes to the issue of relevance of the weight of prosecutor's evidence during a bail hearing, our courts are of the opinion that the law does not allow them to weigh the prosecutor's evidence at this stage of a criminal proceeding. In the face of Articles 13 (2), 17, and 19(1) and (3) of the FDRE Constitution, the position that there is no law which authorizes a court to

weigh the evidence of the police officer or the prosecutor during a bail hearing does not hold water. Rather, discharging its duty envisaged under the aforementioned constitutional provisions in a responsible way requires the court to weigh the evidence of the prosecution. If the court simply refers to the punishment prescribed by the provision alleged to have been violated as a sole basis for a ruling on issue of bail, in effect it is the prosecutor, by citing provisions relating to bailable or non-bailable offences, but not the court, that decides whether an accused should be released on bail or not. The court's abstention from weighing evidence of the prosecution, with a view to determine whether there is a *prima facie* case, during a bail hearing does not serve any legitimate purpose. The extreme passivism, the cases consulted for this research have disclosed, amounts to a manifest disregard of judicial responsibility. There is no reason for the court to wait for the evidence of the prosecutor to decide whether the facts alleged in the charge constitutes corruption or not. The evidence will only show whether the facts as alleged have been committed by the suspects. The public prosecutor has to allege in the charge the existence of facts indicating that someone is killed if he has to file a homicide case. It seems absurd if a court was to deny bail in the absence of such fact in the charge (if, for instance, the facts alleged in the charge indicate the commission of bodily injury) merely because the prosecutor's charge states that the accused person is suspected for homicide. Because the FDRE Constitution imposes a heightened responsibility on the courts to respect and enforce rights of accused persons, they should ensure that the prosecution has a *prima facie* case before denying bail to the accused.