የኢትዮጵያ ሕግ መጽሔት

JOURNAL OF ETHIOPIAN LAW

27ኛ ቮልዩም ቁ. 1 ታህሳስ 2008 ዓ.ም	በዓመት ቢያንስ አንድ ጊዜ የሚታተም Published at least once annually	Vol. XXVII No. 1 December 2015

Articles

Other Works

JOURNAL OF ETHIOPIAN LAW

Published at least once a year by the School of Law

Addis Ababa University

Founded in 1965

(To be cited as 27 J. Eth. L No. 1)

የኢትዮጵያ ሕግ መጽሔት

የኢትዮጵያ ሕግ መጽሔት ከኢትየጵያ ሕግና ተዛማጅነት ካላቸው ዓለም አቀፍ ሕጎች ጋር ተያይዘው የሚነሱ ሕግ ነክ፣ ፖለቲካዊና ማህበራዊ ጉዳዮችን የሚመለከቱ የምርምር ሥራዎች የሚታተሙባት መጽሔት ነች።

ሕግ ነክ የምርምር ጽሑፎችን፣ የመጽሃፍ ትችቶችን፣ እንዲሁም በፍርዶችና በሕጎች ላይ የተደረጉ ትችቶችን ብትልኩልን በደስታ እንቀበላለን። በተጨማሪም በኢትዮጵያ ሕግ መጽሔት ላይ ባለፈው ዓመት ታትመው የወጡ የምርምር ጽሑፎችን፣ የመጽሃፍ፣ የፍርድ ወይም የሕግ ትችቶችን የሚመለከቱ አስተያየቶችን ትጋብዛለች። በዚህ መሠረት የሚቀርብ አስተያየት ከ5 ገፅ መብለጥ የለበትም። የተመረጡ አስተያየቶች በፀሃፊው ትብብር አርትኦት ከተደረገባቸው በኋላ በመጽሔቱ ላይ ይታተማሉ።

አድራሻችን፣ ለዋና አዘጋጅ

የኢትዮጵያ ሕግ መጽሔት

የመ.ሣ.ቁ. 1176

አዲስ አበባ፣ ኢትዮጵያ

የስልክ ቁጥር 0111239757 ነው።

የመጽሔታችን ደንበኛ መሆን የምትሹ፣

የመጻሕፍት ማዕከል

የመ.ሣ.ቁ. 1176

አዲስ አበባ ዩኒቨርሲቲ

አዲስ አበባ፣ ኢትዮጵያ

ብላችሁ መጻፍ ትችላላችሁ።

የቅጅ መብት

የመጽሔቷ የቅጅ መብት የአዲስ አበባ ዩኒቨርሲቲ የሕግ ትምሕርት ቤት ነው። መብቱ በሕግ የተከበረ ነው። በዚህ እትም ውስጥ የቀረቡትን የምርምር ጽሑፎች ለትምህርት አገልግሎት ብቻ ማባዛት ይቻላል። ሆኖም፣ (1) የተደረገው ማባዛት ለትርፍ መሆን የለበትም፤ (2) በተባዛው ቅጂ ላይ የኢትዮጵያ የሕግ መጽሔትና የምርምር ጽሑፉ አዘጋጅ ስም በግልጽ መጠቀስ አለባቸው፤ (3) የቅጂ መብቱ የአዲስ አበባ ዩኒቨርሲቲ የሕግ ትምህርት ቤት መሆኑ በግልጽ መጠቀስ ይኖርበታል፤ (4) የአዲስ አበባ ዩኒቨርሲቲ የሕግ ትምህርት ቤት በቅጂ ስለመባዛቱ አስቀድሞ እንዲያውቅ መደረግ ይኖርበታል።

JOURNAL OF ETHIOPIAN LAW

The Journal of Ethiopian Law is a scholarly publication devoted to the legal, political and social issues arising in relation to Ethiopian law and related international law.

The Journal invites the submission of unsolicited articles, essays, case comments, book reviews and comments on law/legislation. The Journal also invites opinions/comments in response to articles, essays, case and legislation comments, book reviews and notes appearing in the Journal within the last year. Such opinions/comments should be brief (about 5 pages). Selected opinions/comments will be edited with the cooperation of the author and published.

Our Address is: The Editor-in-Chief
Journal of Ethiopian Law
School of Law, Addis Ababa University
P.O. Box 1176
Addis Ababa, Ethiopia
Tel. 0111239757

The Journal is distributed by The Book Centre of Addis Ababa

University. If you wish to subscribe, please address correspondence to:
The Book Centre, Addis Ababa University
P.O. Box 1176
Addis Ababa, Ethiopia

TABLE OF CONTENTS

Articles

Other Works

Executive Usurpation of Judicial Power: In Search of Constrained Exercise of Delegated Legislation in Ethiopia

Yemane Kassa Hailu [*]

1. Introduction

As in any modern administrative state, delegated legislation is a common practice in Ethiopia. As a result,, many delegated legislation are issued by the executive. Such practice by the legislature has in fact a constitutional basis. However, there seems to be a problem in controlling the legislature's discretion to delegate its power to the executive since there is no clear constitutional standard governing delegated legislation. Moreover, the absence of substantive and procedural requirements of administrative rule making in the delegating (parent) legislation and separate administrative procedure act resulted in unconstrained exercise of delegated power by the executive in a manner contrary to the fundamental rights of citizens. The delegated legislation are also used to limit the judicial power of reviewing the decision of agencies. It is worth noting that such abuse of delegated legislation by the executive seems to be confirmed by the decisions of the Federal Supreme Court Cassation Division and the Council of Constitutional Inquiry (hereafter the CCI). Other levels of courts are also relinquishing their power to decide whether or not the enactment of a delegated legislation amounts to an *ultra vires* act.

This article therefore makes a modest attempt to analyze the legal and practical aspects of delegated legislation in Ethiopia. The article does not look in to issues of sub-delegation, which in fact gives rise to many issues. It, however, aims at revealing the practice of broad delegation by the legislature and abuse of these delegated powers by the executive. To this end, one regulation issued by the Council of Ministers to administer employees of the Ethiopian Revenues and Customs Authority (hereafter the Authority) is selected to conduct a close scrutiny of the issue. After briefly describing the Regulation, the article critically examines decisions of lower courts, the Federal Supreme Court Cassation Division and the CCI.

---

[*] Lecturer, Mekelle University, School of Law; LL.B (Jimma University); LL.M (AAU), E-Mail: yemane_kassa@yahoo.com. I am grateful to the two anonymous assessors for their constructive comments on the earlier draft of this article.

Starting with the introduction, section two of the article provides a general overview about delegated legislation. The third section briefly deals with some controlling mechanisms of delegated legislation. The fourth section will deal with the practice of delegation of legislative power in Ethiopia. The fifth section will canvass executive override of judicial review of agencies action, particularly in Ethiopia. After providing an in-depth analysis and critique of the decisions of courts, the Cassation Division, and the CCI in section six, the article concludes in section seven.

2. Delegated Legislation- An Overview

Delegated legislation are legislation made by a body or person to whom the legislature has delegated its power to legislate on certain areas. Such legislation, also called as subordinate legislation , comprise those legislative instruments made by persons or bodies (other than the legislature) to which the power to legislate has been delegated by the legislature.[1] Delegated legislation may take various forms (e.g. rules, regulations, bylaws, ordinances, regulations, orders, etc) and tend to provide detail to a legislative scheme, setting out matters that are regarded as unnecessary for the legislature itself to address within a primary legislation.[2]

The delegation of legislative power to executive organs or agencies had, however, been challenged for various reasons. These include two important values of constitutional law, which are democracy and separation of powers. From the point of view of democracy, the person upon whom the power is conferred must be the one to exercise the discretion.[3] According to this point of view, which was also expounded by the 'non-delegation doctrine', the power to make law is delegated by the people to the legislature, thus to make laws that

---

* Lecturer, Mekelle University, School of Law; LL.B (Jimma University); LL.M (AAU), E-Mail: yemane_kassa@yahoo.com. I am grateful to the two anonymous assessors for their constructive comments on the earlier draft of this article.

[1] I. Ellis-Jones; Essential Administrative Law, (2nd ed., 2001), p.11

[2] S. Argument, "Delegated Legislation", in M. Groves and H. P .Lee (eds.) Australian Administrative Law: Fundamentals, Principles and Doctrines, (2007), p.134.

[3] D. Stott and A. Felix, Principles of Administrative Law, (1997), p.60.

may affect the subjects, they should first be submitted to the elected representatives of the people for consideration and approval.[4]

Furthermore, delegated legislation has often been criticized on constitutional grounds that it is as an infringement of the strict application of the theory of the separation of powers. The point is that the allocation of legislative, executive, and judicial functions to three different branches of government has the primary purpose of preventing arbitrary and tyrannical government that arise from the concentration of power.[5] Accordingly, when legislative power is delegated to the executive, it amounts to reinforcing the aggrandizement of the executive and the concentration of power in one government branch contrary to the objective separation of powers intends to achieve.

Despite the objection against delegation of law making powers, delegated legislation is common in modern state practice. This is because, for one thing, the non-delegation doctrine does not have currency these days for delegated legislation are routinely being enacted without passing through a democratic process in which the public is represented.[6] For another strict application of separation of powers is not feasible in a modern state with pressing administrative needs and exigencies. As a result, delegated legislation has become a common phenomenon and few had doubted the continued need for delegated legislation. A number of reasons have contributed towards the practice of delegating lawmaking powers to the executive as a necessary evil that a system resorts to. Agency expertise, the ability to fill legislative gaps, administrative flexibility in changing times, and the need to reduce pressure upon parliamentary time are some of the reasons that are often cited to justify delegated legislation.[7]

It is true that most delegated legislation are detailed and highly technical. It would be impractical to subject all delegated legislation to detail democratic scrutiny, thus delegated legislation is necessarily a compromise.[8] If one wishes the legislature to represent the community in the determination of the most

---

[4] Argument, cited above at note 2, p.136.
[5] E. Barendt, "Separation of Powers and Constitutional Government", in R. Bellamy (ed.), the Rule of Law and Separation of Powers, (2005) p.282.
[6] J. Alder, General Principles of Constitutional and Administrative Law (4th ed., 2002), p.140.
[7] D. H. Rosenbloom and R. O'Leary, Public Administration and Law, (2nd ed., 1997), pp.55-56
[8] Alder, cited above at note 6, p.281.

important matters, it would be impossible for the legislature to produce all the laws required to a country efficiently or to manage unforeseen events flexibly. Moreover, proponents of delegated legislation argue that even primary legislation is usually prepared and proposed by the executive, the legislature being essentially a reactive body that provides some scrutiny.[9]
The question is not; therefore, whether delegation of legislative power is proper. The question is rather, in which cases, under which conditions, and to what extent delegation of legislative power is tolerable. An equally relevant question is what mechanisms need to exist to control undue delegation of legislative power and subsequent exercise of this power by the executive.

3. Controlling Delegated Legislation

Owing to the expansion of administrative functions in modern regulatory states, delegation of law making power is a common practice. In general terms however, there are some concerns about delegated legislation that may give administrative agencies unduly wide powers. Such concerns call for effective and expedient controlling mechanisms that can be applicable both to the delegating authority and the delegated organ.

Regarding controlling the legislature's authority to delegate its power, one of the important issues is distinguishing between delegable – non-delegable matters i.e., matters that the legislature can delegate and those it cannot delegate. There is no uniform standard to decide this issue. However, some countries provide for a list of items that cannot be legislated through delegation. In Australia, for instance, rules governing appropriations of money, addressing significant policy questions, rules that have a significant impact on individual rights and liberties, provisions imposing obligations on citizens or organizations to undertake certain activities, provisions conferring enforceable rights on citizens or organizations, etc, can only be put in place by primary acts of the legislature.[10] Similarly, the German Constitutional Court has established the doctrine that the legislature cannot delegate its authority in relation to

[9] Id, p.110
[10] Argument, cited above in note 2, p135.

certain crucial issues to the executive, in particular, where the rights protected by the Basic Law are at issue.[11]

The other issue pertaining to the matter at hand is controlling the executive to ensure that it exercises its delegated power within the scope of delegation. Countries adopt different mechanisms to check that delegated powers are exercised within the ambit of delegation. These include legislative controls, judicial control[12] and control by other organs such as Human Rights Commission and Ombudsman. After providing a brief discussion on legislative control, the will give a detail account of judicial control of delegated legislation in the next sub-section.

3.1 Legislative Control

While there are differences in the nature and extent of control, the legislature in every democratic system provides different mechanisms to see whether the executive is exercising delegated power in a manner that is consistent with the spirit and scope of the relevant primary legislation. In the UK, for instance, delegated legislation normally requires the direct approval of Parliament through a process called 'laying procedure' except in some cases.[13]

Similarly, delegated legislation in the United States can only be implemented after strict compliance to the conditions set in the Administrative Procedure Act (APA) that are set in place to ensure that the delegated power is exercised in conformity with legislative intent and is not abused.[14] This Act sets procedures for formal and informal legislative rule making by agencies, which include requiring agencies to publish notice of the proposed rule in the federal register, accepting and considering comments from the public and interested

---

[11] Brandet, cited above in note 5, p. 282.

[12] P. P. Craig, Administrative Law, (5th ed., 2007), pp.174-179

[13] N. Hawke and N. Parpworth, An Introduction to Administrative Law, (1st ed., 1998), p.121. On those occasions when such approval is required, it is usually the case that delegated legislation is subject either to an affirmative resolution or a negative procedure. In either case, an item of delegated legislation will be laid before Parliament for 40 days. In the case of the affirmative procedure, a resolution is required within 40 days to bring the item of delegated legislation into force, whereas the negative procedure sees the delegated legislation in force after 40 days when no challenge has been made in that time.

[14] Rosenbloom and O'Leary, cited above at note 7, p.58.

parties, and conducting elaborate hearing on the proposed rule.[15] Other legislative controlling mechanisms are also applicable, especially in parliamentary systems such as requiring that delegated law making powers be subjected to additional controls such as scrutiny by parliamentary committees and requiring agencies to make consultations with relevant parties.[16]

3.2 Controlling Through Judicial Review

It is true that judicial review is one of the mechanisms which could be used to ensure that the executive remains within the scope of delegated power. However, one of the pivotal issues in administrative law is the scope of judicial review of with regard to the actions of administrative agencies. Particularly, the scope of judicial review of administrative acts in parliamentary systems may be diminished by statutory exclusions. Since (in countries where there is no constitutional supremacy) the Parliament is supreme, the role of courts to review agency decisions may be limited when the Parliament provide for 'ouster clauses' in legislation. 'Ouster clauses' are clauses provided by primary legislation that purport to exclude the courts from reviewing the decisions of a public body.[17] 'Ouster clauses' can be of different types, mainly, 'total ouster clauses' and 'finality clauses'. Total ouster clauses are those, which state that a decision of public body is *not to be challenged in any court of law*.[18]

'Finality clauses' on the other hand are clauses in the primary legislation, which provide that the decision of a public body *shall be final*.[19] Unlike total ouster clauses, finality clauses do not prevent judicial review, but only appeal.[20] At this juncture, appreciating the distinction between appeal and judicial review is important. Regarding this issue, the relevant literature reveals that appeal is a statutory right that the Parliament can deny or grant to litigants

---

[15] Id, pp.60-61; the APA's scope is not limited to administrative rule making. It rather additionally governs agency provision of public information and agencies formal adjudication procedure.
[16] Craig, cited above at note 12, pp.377-381.
[17] D. Longley and R. James; Administrative Justice: Central Issues in UK and European Administrative Law, (1999), p.160.
[18] Ibid
[19] Id, 161
[20] Ibid

whereas judicial review is an inherent power of the judiciary.[21] The effect of such distinction is that courts have an inherent power to review decisions of administrative agencies and the fact that a statute expressly provides that an administrative decision shall be "final" does not mean that courts cannot inquire into whether the agency has observed procedural requirements.[22] In both cases, however, ouster clauses imply the sovereignty of the Parliament to restrict courts' power of reviewing agency decisions.

Despite the variation in the scope of judicial power to review administrative decisions across systems, subordinate legislation are often susceptible to judicial control on various grounds. Even in countries where the Parliament is supreme, such as the UK, and various types of ouster clauses are inserted into legislation with the intent of precluding judicial review of agencies' decisions, these efforts have been found to be unsuccessful. This is because courts have time and again restrictively construed such exclusionary provisions of legislation in a way that defends their review power[23]

Thus, judicial review of administrative decisions cannot be totally excluded even where a statute contains a total ouster clause that says a decision of public body '*shall not be questioned before any court of law'*. This is because such clauses can only exclude courts from reviewing agency decisions on grounds of *intra vires*, but not for *ultra vires* (jurisdictional error) of administrative act.[24] This was the case in *Anisminic Ltd. v foreign Compensation Commission* (UK) where the Foreign Compensation Act of 1950 stated that a determination of the Commission should not be called in question in any court of law. The court before which the case appeared unanimously held that this only prevented *intra vires* determinations, and not of *ultra vires* determinations by the court.[25]

In Ethiopia too, there is a real practice of excluding judicial power to review administrative decisions through 'finality clauses'.[26] However, the way ouster

---

[21]Louis L. Jaffe, Judicial Control of Administrative Action, (1965), pp.153-154

[22] Ibid

[23] Craig, cited above at note 12, p.847.

[24] Id, p.849

[25] Id, p.849

[26] See for instance Urban Lands Lease Holding Proclamation, 2011, Art.29 (3), Proc. No.721, Fed. Neg. Gaz, 18th Year no. 4; the Social Security Agency Re-establishment Proclamation,

clauses are interpreted in Ethiopia is quite different from what is discussed above. A survey of decisions of the Federal Supreme Court Cassation Division (hereafter the Cassation Division) and the CCI reveals that judicial review is excluded when the legislation contain finality clauses. For instance, decisions of the Cassation Division on *Southern Region Hawassa City Manucipality v Hawassa Debre Genet St. Gabriel Church*[27] and *Social Security Agency v Berhanu Hiruy and Kebede G/Mariam*[28] stated that judicial review of agency decisions is totally precluded when such decisions are supposed to be final on the basis of the pertinent legislation.[29]

Thus, the jurisprudence in Ethiopia reveals that there is no need to make a distinction between appeal and judicial review. Thus, if a decision of an agency is said to be final in a statute, such decision cannot be reviewed by court of law. One of the reasons that are mentioned by the Cassation Division and the CCI is that judicial review of courts in Ethiopia emanates from laws, including legislation, and courts cannot claim to have an inherent power of judicial review.[30] In this way, one may safely say that there is no distinction between 'finality' clause and total ouster clauses in Ethiopia.

2006, Art.11 (5), Proc. No.495, Fed. Neg. Gaz, 12th Year, no. 31; and Charities and Societies Proclamation, 2009, Art.104 (2), Proc. No.621, Fed. Neg. Gaz. 15th Year no.25

[27] Southern Region Hawassa City Manucipality v Hawassa Debre Genet St. Gabriel Church, (Federal Supreme Court Cassation Division, January 27, 2010,), Federal Supreme Court Cassation Division, vol. 10, p. 260

[28] Social Security Agency v Berhanu Hiruy and Kebede G/Mariam, (Federal Supreme Court Cassation Division, File No.18342 , December, 2005. Similar decision is given by the court in the case Social Security Agency v Wubayehu Abebe where decision of the East Gojam High Court is reversed by the Cassation Division on the ground that the High Court does not have jurisdiction to see cases come from the decision of the Social Security Appellate Tribunal since its decision is made by law 'final'. See Social Security Agency v Wubayehu Abebe, (Federal Supreme Court Cassation Division, March 2, 2008), Federal Supreme Court Cassation Division, vol. 5, p.131

[29] For more on ouster laws and decisions of the Cassation Division and the CCI on the issues, see Yemane Kassa, the Judiciary and Its Interpretative power in Ethiopia: A Case study of the Ethiopian Customs Authority, (2011, unpublished, AAU Law library)

[30] Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, (Federal Supreme Court Cassation Division, May 23, 2011), Federal Supreme Court Cassation Division, vol. 12, p.482, and Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, File No 101, (CCI), February 9, 2010

4. Delegated Legislation in Ethiopia

It is an established fact that delegated legislation is a necessary evil that a modern state with many exigencies is forced to practice. However, apart from theoretical and practical justifications for the need of delegated legislation, there is no uniform authority that allows the legislature to delegate its power to the executive or specific agencies. For the better appreciation of the issue of delegation in Ethiopia, it would be useful to get some comparative perspective by looking at the legislatures' authority to delegate its power to the executive in the United States and Germany.

In the United States, the Congress' power to delegate the president to make a law has no direct constitutional authorization since Art. I of the Constitution clearly provides that all federal legislative power resides in the Congress. Thus, the practice of delegated legislation in the United States is something that developed through jurisprudence to meet the practical necessities of state administration. On the other hand, there are constitutions that provide for possible delegation of legislative power to the executive. The Basic Law of Germany is an example that provides that the legislature (constituting *Bundestag and Bundesrat*) may delegate its power to a very limited extent.[31]

In Ethiopia as well, the Constitution, though not directly, authorizes the legislature to delegate its power to the Council of Ministers (hereafter the CoM). It states "It [the CoM] shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives (here after HPR).[32]
The issue is therefore, what extent of delegation by the legislature is tolerated under the Constitution. Can the HPR delegate any power that it wishes to delegate to the CoM? Is there any standard based on which the discretion to delegate legislative power by the HPR is constrained? Our Constitution does not seem to have an explicit provision to address these issues. One may soundly argue that implied standards enshrined under the Constitution, such as separation of powers, the rule of law, and protection and enforcement of constitutional rights, can be invoked to control undue delegation of legislative powers. However, the absence of clear constitutional provisions on these issues

[31] The Basic law of the Federal Republic of Germany, 1948, Art.80 (1)
[32] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art.77 (13), Proc. No.1, Fed. Neg. Gaz, 1st Year, no.1

has resulted in the proliferation of unconstrained delegation of legislative power to the executive. Unconstrained delegation of law making power to the executive seems to be a common practice in Ethiopia and many laws can be mentioned as a proof for this.

In the Value Added Tax Proclamation, the HPR delegated the Ministry of Finance and Economic Development, not even the CoM, through directives, to increase or decrease the threshold, which was originally determined to be annual turnover exceeding 500,000 Birr, for Value Added Tax registration.[33] Furthermore, the HPR in the Income Tax Proclamation has delegated to the CoM, by regulations, to exempt any income recognized as such by the Proclamation for *economic, administrative or social reasons*.[34] This is unusual in that determination of tax issues involving a significant policy question is delegated without specific statutory conditions attached to it. In Australia, for instance, matters implying significant policy questions such as those involving significantly new policy or fundamental changes to existing policy can only be regulated through primary legislation.[35]

More ironically, the Proclamation that empowers the executive branch through delegation to demolish and restructure the federal government any time it wishes is concrete evidence that proves the assertion that the HPR considers itself to be free to grant the executive unconstrained powers to do whatever it deems necessary. Owing to the seriousness of the implications of this Proclamation, the most pertinent provision is reproduced as follows;

> *"The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or* ***for change of its accountability*** *or mandates or for the establishment of a new one."*[36]

---

[33] The Value Added Tax Proclamation, 2002, Art.16 (2), Proc. No.285, Fed. Neg. Gaz, 8th Year no.33

[34] The Income Tax Proclamation, 2002, Art.13 (e), Proc. No.286, Fed. Neg. Gaz, 8th Year no. 34

[35] Argument, cited above at note 2, p.135

[36] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Art.34, Proc. No.691, Fed. Neg. Gaz., 17th Year no. 1

The quoted provision reveals that the executive is given a blank cheque to decide on every matter regarding the very establishment or abolishing of ministerial offices and other executive departments without any say from the legislature. It is also given a power to change the accountability of executive bodies, which have already been determined by the parent legislation. This ultimately reinforces the fact that the executive may change the whole spirit and essence of the legislation that establishes the executive organs and their powers.[37]

It is true that such broad delegation may be attributed to the fact that we have parliamentary system of government where the government (including the chief executive) is elected by the Parliament (whose members are directly elected by citizens) whereas in presidential systems, the executive (president) and the legislature are elected in separate and independent elections by the citizenry. The effect is therefore, the executive in parliamentary systems needs to secure parliamentary (legislative) confidence in order to survive while this is not necessary for the President in the presidential systems.[38] As a result, one may argue that such flexible and broad delegation is justified on the ground that the executive is dependent on and subject to close parliamentary oversight.

5. Excluding Judicial Review by the Executive

As discussed above, the legislature especially in parliamentary systems may attempt to prevent any challenge to an administrative decision, usually by attempting to oust the jurisdiction of the court. With all the debate on the extent and practical enforceability of such ouster provisions, we can see that there is nothing novel about attempts by the legislature to preclude judicial review of the decisions of administrative agencies. However, excluding judicial review by the executive through secondary (delegated) legislation is not only unbearable and unusual but also a direct threat to judicial power. This is so

---

[37] This is true because the powers, functions, and accountability of existing executive organs have already been stipulated in the parent legislation. However, such legislative stipulation is made to be open for potential repeal by executive act, regulation, thus shows legislation may be repealed by executive acts. See Ibid for detail Definition of Powers and Duties of the Executive Organs

[38] Richard Albert, "Presidential Values in Parliamentary Democracies" Oxford University Press and New York University School of Law , vol.8, No.2 (2010), p.228

because the rule of law requires the existence of impartial tribunals that gives a remedy when individual rights are violated by the government.

In Ethiopia, legislative practices and the relevant case law seem to reveal that a restriction on judicial power may be put by an executive act. They also established, not only the power to impose limitation on judicial power, but also provide that claims can be made non-justiciable by subordinate laws of the executive organ. Owing to space limitation, the focus of this article is to see the delegated legislation issued by the CoM for the administration of employees of the Ethiopian Revenues and Customs Authority. Such discussion is also supplemented by an analysis of cases decided by various courts, the Cassation Division and the CCI on the issue.

The Ethiopian Revenues and Customs Authority (hereafter the Authority) is established by Proclamation in 2008 after the merger of three previously independent government institutions; the Ethiopian Inland Revenue Authority, the Ethiopian Customs Authority, and the Ministry of Revenue.[39] Following the new structure, the legislature delegated the CoM to issue a regulation regarding the administration of employees of the Authority. The primary legislation in its delegating provision stated that "The *administration of the employees* of the Authority shall be governed by regulation to be issued by the Council of Ministers."[40] Accordingly, the CoM issued a regulation (hereafter the Regulation) and Art.37 of same states;

1. Notwithstanding any provision to the contrary, the Director General may, *without adhering to the formal disciplinary procedures dismiss* an employee from duty whenever he has *suspected him of involving in corruption* and *lost confidence in him*.
2. An employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the *decision of any judicial body*.[41]

The reading of the preceding two paragraphs of the Regulation has many consequences; first, it denies procedural justice to employees since it provides no chance for them to be informed about and defend themselves from

---

[39] Ethiopian Revenues and Customs Authority Establishment Proclamation, 2008, Proc. No. 587, Fed. Neg. Gaz., 14th Year no.44

[40] Id, Art.19 (1) b

[41] Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, 2008, Reg. No.155, Fed. Neg. Gaz., 14th Year no.49

allegations made against them by the Authority. Obviously, the right to be informed of charges or accusations brought against oneself and to defend oneself from such allegations is an important aspect of due process of law. Second, a mere suspicion of corruption and loss of confidence by the Director General suffice for the Authority to exercise this power which has huge consequences on the rights of individuals. Third, it removes the remedy of reinstatement for illegal dismissal that aggrieved employees could have against the Authority. Finally, it undermines the jurisdiction of courts by rejecting their decision of reinstatement of employees. What is worthy to note here is that all this power is vested on a single man, the Director General, not even to a board or a committee.

These facts give rise to many issues some of which include; a) on the issue of delegation- is there any authority (legislative basis) for the executive to make a law with such content?; if yes, is it constitutionally appropriate for the legislature to delegate such power to the executive b) on the issue of judicial power- what is the impact of the Regulation on the power of judiciary? If there is adverse impact on the powers of the judiciary, how and to what extent is it? Such issues are addressed in subsequent sub-sections dealing with decisions of courts, the Cassation Division and the CCI.

6. A Discussion of Some Relevant Decisions

6.1 Decisions of Ordinary Courts

In the preceding sub-section, some issues are framed with a view to test the legality of the Regulation and its impact on judicial power in light of constitutional and legislative standards. At this level, the author found it important to appraise how courts (including administrative tribunals[42]) are interpreting and applying the provision of the Regulation so that it will provide an account on the issues raised above.

To begin with the Federal Civil Servants Administrative Tribunal (hereafter the Tribunal),[43] in the case *Tewodros Yilma v the Ethiopian Revenues and Customs*

[42] Decisions of the Cassation Division are excluded here since they are separately addressed in the subsequent subsections

[43] The Federal Civil Servant Administrative Tribunal is made to be part of the discussion for the reason that it is established to exercise judicial function in similar procedure as ordinary

Authority and other cases, declined to assume jurisdiction to hear cases brought before it from employees of the Authority claiming that its power to entertain such cases is ousted by the Regulation.[44] In its decisions, the Tribunal rejected to entertain the claims brought by dismissed employees of the Authority on suspicion of corruption saying that the claimant does not have legal basis to be heard as the Authority acted in accordance to the Regulation.

The Tribunal did not make any sort of scrutiny as to whether the grounds, which would entitle the Director General of the Authority to dismiss employees, exist or not. The grounds for the Director General are two; suspicion of corruption and loss of confidence on employees.[45] Thus, the Tribunal could be expected to see whether these grounds exist. In this regard, in the case of *Jemal Ahmed v the Ethiopian Revenues and Customs Authority*, the dissenting judge provides that the mere fact that the Director General has suspected an employee for corruption alone cannot suffice, rather some grounds of suspicion, real or circumstantial, should be submitted to the court.[46]

Furthermore, there is the practice of voluntary relinquishment of jurisdiction by the Tribunal to see some claims brought before it. In the Case *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority,* the Tribunal simply relinquished its jurisdiction over the case by itself and referred it to the CCI for the mere fact that the provision is said to be contrary to Art.37 of the Constitution while the issue raised in the case could have been disposed of by reviewing the regulation in light of the parent legislation. Cases decided by the Federal Supreme Court show a similar trend. In *Jemal Mehamed v The Ethiopian Revenues and Customs Authority* [47] and other cases[48], the court

---

courts. See the Federal Civil Servants Proclamation, 2007, Art.74, Proc. No.515, Fed. Neg. Gaz., 13th Year no.15

[44] Many cases show the act of surrendering jurisdiction of dismissal cases by the Authority. To mention some, the Tewodros Yilma v the Ethiopian Revenues and Customs Authority (File No.00828, Federal Civil Servants Administrative Tribunal, August 19, 2009), (unpublished); Amare Terfe v the Ethiopian Revenues and Customs Authority, (File No.00826, Federal Civil Servants Administrative Tribunal, August 27, 2009), (unpublished); and Jemal Mehamed *et al* v the Ethiopian Revenues and Customs Authority, (File No. 00833, Federal Civil Servants Administrative Tribunal, September 01, 2008), (unpublished).

[45] The Regulation, cited above at note 41, Art.37 (1)

[46] Jemal Mehamed *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 44

[47] Jemal Mehamed v The Ethiopian Revenues and Customs Authority, (Civil File No.48872, October 20, 2009, Federal Supreme Court) (unpublished)

upheld the decision of the Tribunal on the ground that the court does not have the power to review decisions of the Authority made based on Art.37 of the Regulation.[49]

One can soundly deduct two major conclusions from the cases discussed above. First, the courts accepted the unconstrained discretion given to the Authority without scrutinizing the fairness and legality of the power given to the Director General under the Regulation. Second, there is the practice of voluntary relinquishment of jurisdiction by courts and the Tribunal with regard to some claims brought before them. The above mentioned cases revealed two main reasons for surrendering jurisdiction. First, for the mere fact that the applicants contend that the Regulation violates Art.37 of the Constitution (access to justice), the claims are referred to the CCI for constitutional interpretation. This tells us that there is a misconception that courts in Ethiopia cannot interpret the Constitution in order to determine the meaning, content and scope of any constitutional provision. Second, they declined to entertain complaints on the ground that the Regulation excludes courts from reviewing decisions of the Authority.

The decisions of the Tribunal and the Supreme Court in the above cases may be challenged on many grounds. However, for the sake of convenience, the issues are addressed in the section below which provides a critical reflection of the decisions of the Cassation Division and the CCI together since the reasoning of the decisions are substantially similar.

6.2 Decisions of the Cassation Division and the CCI

i. Summary of the Decisions

Decisions of the Cassation Division and the CCI play an important role in shaping our constitutional jurisprudence in general and the role of courts to review administrative decisions in Ethiopia in particular. This is because

---

[48]See also decisions of the Amare Terefe *et al* v the Ethiopian Revenues and Customs Authority, (Civil File No.48870, October 20, 2009, Federal Supreme Court) (unpublished) and Tewodros Yilma *et al* V. the Ethiopian Revenues and Customs Authority, File no.48873, October 20, 2009, Federal Supreme Court) (unpublished).

[49]Jemal Mehamed v The Ethiopian Revenues and Customs Authority, (Civil File No.48872, October 20, 2009, Federal Supreme Court) (unpublished)

decisions of the Cassation Division are binding over all courts below it[50] and as such, its decision that has the effect of excluding a specific matter from the scope of judicial power has a far-reaching effect. Similarly, the CCI is an organ established to give legal assistance to the House of Federation (HoF) in its role of upholding the supremacy of the Constitution through constitutional interpretation.[51] To this end, two relevant cases emanating from the Regulation in consideration and decided by the Cassation Division and the CCI are discussed in this section.

To begin with the Decision of the Cassation Division, the case *Welday Zeru et al v the Ethiopian Revenues and Customs Authority*[52] is very crucial. In this case, 61 complainants having the same cause of action, appealed to the Cassation Division against the defendant after lower courts declined to hear their complaint on the ground that the Regulation did prohibit them from reviewing decisions of the Authority. The applicants argued that they were dismissed by the Authority from their work based on Art.37 of the Regulation which is against their constitutional rights particularly the right of access to justice. The ruling of the Cassation Division in the case is summarized as follows;

> "*The Regulation is legitimately issued by the CoM as authorized by the legislature. Persons can bring their cases to courts only if the matters are justiciable. According to Art.37 (1) of the Constitution, an issue is justiciable only when the power to decide that case is not given by law to another institution. In the cases at hand, the power to give final decision is given by the Regulation to the Authority. Thus, issues of reinstatement*

[50] Federal Courts Proclamation Re-amendment Proclamation, 2005, Art.2 (4), Proc. no.454, Fed. Neg. Gaz., 11th Year no. 42

[51] The CCI is established by the Federal Constitution to give professional support to the HoF in its task of interpreting the Constitution. At least, eight out of the total eleven members of the CCI are lawyers. See the FDRE Constitution, cited above at note 32, Art.82 (1and 2). From this, one may easily guess that the professional support expected from it is giving legal expertise opinion on a constitutional issue presented to the HoF. Thus, the opinions and decisions of the CCI on issues involving judicial power to review administrative decisions have an impact on the final stand of the HoF regarding the same cases. See for detail on this the preamble and Art.6 of the Council of Constitutional Inquiry Proclamation, 2001, Proc. no.251, Fed. Neg. Gaz., 7th Year no. 40

[52] Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30

are made to be non-justiciable and courts' power to entertain such claims is thereby excluded."[53]

The other relevant case decided by the CCI is *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority.*[54] The claim by the complainants says "Art.37 (2) of the Regulation is contrary to the constitutional right of access to justice which provides that everyone has the right to bring any justiciable matter to courts…"

In this case the CCI did not address the main issue of delegation. It rather proceeded with the case with a presumption that the Regulation is issued by the CoM based on the power it acquired under the parent legislation. The reading of this decision implies that the scope of delegation includes the power to issue a regulation that may have the effect of totally excluding judicial review of decisions of the Authority. Accordingly, the CCI seems to believe that the controversial provision that is included in the Regulation is consistent with the intention of the legislature. Adopting a view similar to the position of the Cassation Division, the CCI stated that by on the basis of the delegated power it exercised, the CoM has excluded from the purview of the judiciary claims of employees that challenge the decision of the Director General to dismiss them and seek reinstatement thereby making such matters non-justiciable.

The gist of the decision of the CCI reveals that the Regulation is, for all legal purposes, considered as the act of the legislature that delegated its power. Accordingly, the CCI concluded that the Regulation has two legal effects; making claims of reinstatement non-justiciable and excluding judicial review of the Authority's decision. The CCI, in its opinion, provides;

> *"…the HoPR is the highest legislative organ in our Constitution; and* ***within the constitutional boundary****, it has an absolute power to do whatever it deems necessary. Yet, the power to decide as to what type of laws it should adopt is within its discretion; and so far as it* ***does not exceed the constitutional limit****, it can adopt any type of policy choice from among available alternatives when issuing*

---

[53]Ibid; the Cassation Division gave much emphasis to Art. 19(1) b of Proclamation No.587 (cited above at note 39) to justify Art.37 (2) of Regulation No.155 (cited above at note 41) and it concludes that the Regulation is issued within the appropriate scope of delegation under the parent Proclamation. The ruling of the Division quoted in this paragraph is not verbatim translation, rather summary of the main facts of the ruling.

[54] Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30

legislation. To decide whether or not the adopted law is appropriate is ***not the mandate of the Council****".*[55]

The quoted paragraph envisages the message that the Regulation is issued according to the policy choice of the legislature as delegated to the CoM. On this presumption the CCI firmly ruled that since the judiciary is established within a parliamentary system, it is up to the Parliament to decide 'these issues are justiciable and others are not', provided that it is in line with the constitutional limit. It further stated that "regarding the issue of whether or not [a] matter is justiciable, the decision the legislature made *according to the Constitution* saying this matter is justiciable or not, is correct even though it could be said that *it narrows judicial power*".[56]

ii. Critique on the Decisions of the Cassation Division and the CCI

To start with the issue of delegation, both the Cassation Division and the CCI concluded that the Regulation is issued within the scope of delegation. The author nevertheless finds it difficult to accept the decisions for at least two reasons. First, both the Cassation Division and the CCI did not make any attempt to scrutinize the contents of the Regulation's contested provisions in light of the parent legislation. The issue that should have been first addressed is whether the delegated power regarding '*administration of employees'* includes the power to exclude rules of procedural fairness in taking disciplinary measures and limiting the power of courts.[57] Particularly, a close look at the decisions reveals that the CCI has failed to see the real issue that needs to be solved at the constitutional level, i.e. the issue of delegation. It did not make any attempt to discuss the specific provision of the parent legislation based on which the Regulation is issued. The CCI, being an organ established to give legal assistance to the House of Federation (HoF) in its role of upholding the supremacy of the Constitution through constitutional interpretation, should have looked into the legality of the delegation in light of, if not express provisions, implied constitutional standards such as the rule of law, separation

---

[55] Ibid

[56] Ibid

[57] Scrutiny would have been proper if a critical look was made to the delegating clause under Art.19 (1) b of the parent Proclamation (cited above at note 39) and the Contested Art.37 of the Regulation (cited above at note 41)

of powers, and entrenchment of human rights and freedoms as will be discussed below.

Second, there is no clear or implied statement in the parent legislation that authorizes the CoM to issue a law with content that strips the judiciary from its review power and exclude minimum rules of fairness while taking dismissal measures. What is expressly delegated is the power to "issue a regulation regarding administration of employees of the Authority" and to argue that administration of employees includes determination of jurisdiction of courts is at any rate untenable. The main issue that needs to be settled here is that what constitutes 'matters of administration' since what is delegated (administration of employees) is a matter of administration. The question of what constitutes a 'matter of administration' is quite complicated. Literature provides that matters of administration "will include a wide range of governmental activity carried on by bodies other than the legislature and the judiciary, and arguably do not include 'policy' considerations; that is, the performance of executive or administrative functions.[58] The South Africa Administrative Justice Act similarly defines administrative action as "any decision or failure to take decision by an organ of state [...] which adversely affects the rights of any person and which has a direct, external legal effect; but does not include...the legislative functions of the Parliament, a provincial legislature, or a Municipal Council, the judicial function of judicial officers of court..."[59]

From the above definitions, one can easily infer that administration of employees cannot be extended to include determination of powers of other government branches particularly the judiciary. Apart from the definitions in the preceding paragraph, a look at the Federal Civil Servants Proclamation, though it did not have a direct definition, tells us something on the issue. The reading of the Proclamation which governs the administration of employees of federal agencies addresses matters related to the recruitment, promotion, salary, allowance, transfer, secondment, conditions of work, leave, working hours, overtime work, termination, etc of employees; not imposing limitation on courts power or rejecting decisions given by same.[60]

---

[58] Ellis-Jones, cited above at note 1, p.132
[59] The Promotion of Administrative Justice Act 3 of 2000, section 1 (as amended)
[60] Federal Civil Servants Proclamation, cited above at note 43

In fact, one may argue that 'administration of employees' includes deciding on the modalities of termination of employment contract which Art.37 (1) of the Regulation did; thus exclusion of courts' jurisdiction is only incidental. However, such argument is hardly sound since any power exercised by a delegated organ cannot, incidentally or otherwise, exceed the scope of delegation. 'Administration of employees' cannot be, even in a very broad interpretation of the phrase, construed to include excluding and limiting judicial power that is already constitutionally recognized. Looking at its effect as well, the exclusion of courts' jurisdiction ultimately solidifies the untouchable nature of the Authority and closes any room for remedy even when the Authority illegally dismisses individuals, which is not something that should be considered as a subsidiary but a primary issue in the Regulation.

The decisions are also erroneous in the way they interpret the content of Art.37 (2) of the Regulation. This sub-article states that "an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the *decision of any judicial body"*. It is clear from the provision that the Regulation does not exclude judicial review of the Authority's decision, but only rejects decision of the court that orders reinstatement of a dismissed employee.[61]

At this juncture, it is important to note that excluding courts from reviewing the decision of the Authority has different legal implication from rejecting the enforcement of courts' decision. In this regard, it is important to mention that, not only the case law developed in relation to the Regulation, but also academic works too took for granted that the Regulation ousted courts' power. Aron and Abdulatif, for instance, conclude that the Regulation has excluded judicial power to review the Authority's decision thereby abrogating the constitutional right of access to justice.[62] The author, however, argues that the

[61]This is also what Ato. Mekonen Ayele (Deputy Prosecutor General of the Authority) asserted. He stated that "we are not prohibiting courts from assuming jurisdiction on the issue; rather we are saying that the decision of a court that orders reinstatement of an employee is not acceptable by the Authority. See more on this in Yemane, cited above at note 29, p.117, in his interview conducted with Ato Mekonen Ayele, Deputy Prosecutor General of the Ethiopia Revenues and Custom Authority

[62]Aron Degol and Abdulatif Kedir, "Administrative Rulemaking in Ethiopia: Normative and Institutional framework", Mizan Law Review, vol. 7 No.1, (September 2013), pp.25-26. The authors seem to consider that the Regulation is issued based on the delegation given to the Council of Ministers without looking whether the contents of the power is really delegated by

Regulation does not, in its strict legal sense, exclude judicial review. In fact, it could be said that when the Regulation says decision of a court ordering reinstatement of an employee is not acceptable, it may have the same effect of excluding remedy options from courts; for courts' power to review agency decision is meaningless if the decision is not enforceable. This is nonetheless different from saying that the right to get remedy from the judiciary is eliminated. This is because the Regulation only prohibits the enforceability of reinstatement orders given by courts without negating the courts' power to entertain dismissal cases from the Authority. For instance, one may argue that the Regulation does not reject decision of courts ordering payment of compensation, instead of reinstatement. However, the CCI and the Cassation Division have failed to make distinction between making judicial decision unenforceable (which the content of Art.37 (2) of the Regulation clearly indicates) and excluding judicial review in its entirety.

The proper issue would, therefore be, is it constitutional to let the Authority reject decision of courts duly given based on law. One may not get a clear constitutional provision that requires the executive or agency to enforce decisions and orders given by courts. However, it is within the spirit of our Constitution that the principle of separation of powers requires each organ of government to exercise powers given to it by the Constitution. This principle has also the implication that each organ shall respect the power of another organ. If this way of construction of the principle is tenable, rejecting the enforceability of judicial decisions is violating the basic constitutional principle of separation of powers and ultimately reinforces arbitrary government.

Owing to the fact that our Parliament is the highest organ of government,[63] it may be said that courts cannot invalidate parliamentary legislation for their incompatibility with the Constitution. This is because testing the constitutionality of legislation requires constitutional interpretation, which is something that courts, arguably, do not have the mandate to engage in.[64]

---

the legislature. They rather gave emphasis on the effect of the Regulation on the right of individuals and the power of the judiciary.

[63] When the HoPR is declared to be the highest organ, it is meant that it is the highest organ of the three government branches. It does not mean that however that the Parliament is absolutely supreme; its supremacy is rather subject to the supremacy of the Constitution. see the FDRE Constitution, cited above at note 32, Art.9 (1)

[64] There is a debate, for instance, as to the determination of what amounts to constitutional interpretation is far from clarity yet its similarity or difference with constitutional dispute is

However, nothing prevents them from reviewing the Regulation for its compatibility with the parent legislation. What is expected from courts here is that, not to test the constitutionality of the Regulation[65], but to see whether it is issued within the scope of the powers delegated by the legislature. This would have been one opportunity for courts (including the Cassation Division) to act in defense of judicial power in our country by declaring the Regulation to be *ultra vires*. This is particularly true where our courts are, though arguably, excluded from reviewing the constitutionality of laws. Challenging regulations for exceeding their scope of delegation is one of the best rooms that courts can have to defend their powers and fundamental rights.

Even in the contestable rulings of the Cassation Division and the CCI that judicial review of the Authority's decision is precluded by the delegated legislation, they seemed to be confused of the conceptual difference between precluding judicial review and the issue of non-justiciablity. Justiciability is a doctrine which prohibits courts from assuming jurisdiction over certain matters because their nature and subject matter are such that they are not to be amenable to the judicial process,[66] not because judicial power of such matters

---

part of the issue. Additionally, the scope of the power of the HoF/CCI vis-à-vis the role of courts in constitutional interpretation seems to be unsettled issue. For detail account on the debates, see Getachew Assefa, "All About Words: Discovering the intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation", Journal of Ethiopian Laws, Vol.24 No.2, (2010), pp.139-175, Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation", Mizan Law Review, vol.1 No.1, (2007), p.10, Yonatan Tesfaye, "Whose Power is it Any Ways: the Courts and Constitutional Interpretation in Ethiopia", Journal of Ethiopian Laws, vol.22 No.1, (2008), pp.133-134, Takele Soboka, "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory", in Assefa Fiseha and Getachew Assefa (eds.), Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional practice in Ethiopia' Ethiopian Constitutional Law Series, vol.3, (2010), p.67

[65] Whether courts can test the constitutionality of laws (including regulations) other than proclamations is also debatable though providing detail account of it is beyond the scope of this paper. This debate becomes apparent when one looks at Proclamations No.250/2001 and 251/2001. These Proclamations similarly define the term 'law' that will be referred to the HoF for constitutional interpretation as "proclamations issued by the federal or state legislative organs and directives and regulations enacted by federal and state government institutions; and includes international agreements that have been ratified by Ethiopia". See Art.2 (5) and Art.2 (2) of Proclamation No.250/2001(cited above at note….) and Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, 2001, Proc. No.251, Fed. Neg. Gaz., 7th Year No. 41 respectively

[66] Paul Daly, "Justiciability and the 'Political Question' Doctrine", Public Law Series, 2010, p1; Prerogative powers such as those relating to the making of treaties, defense, the prerogative

is ousted by statute. Thus, when a legislature excludes certain matter from the purview of judicial review, it is not because the matter is non-justiciable.

Similar misconception in relation to justiciability could be observed particularly in the decisions of the Cassation Division. Not only in the case *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, the Cassation Division in other cases stated that "an issue is justiciable only when the power to decide that case is not given by law to another institution."[67] It further goes to say that if the power is given to other bodies with judicial function according to Art.37 (1) of the Constitution, thus the claim for reinstatement is made non-justiciable. Two important issues may be raised here. First, does establishing other organs to exercise judicial power mean that the matter is non-justiciable and courts can be totally excluded from entertaining the matter? Second, can the Director General of the Authority (a person who exercises the contested power under the Regulation) be considered as an organ established to exercise judicial power?

The author leaves the first issues untouched owing to the limited scope of the article.[68] But the second question will be addressed as it has a direct implication on the power of courts. Though Art.79 of the Constitution provides that judicial power is vested in courts, Art.37 (1) of the Constitution signifies the possible existence of other organs established to exercise judicial powers. However, this provision does not tell us what and how such organs should be established to exercise judicial power. In this regard, reference should have been made, which the Cassation Division failed to do, to a more relevant

---

of mercy, the grant of honors, the dissolution of parliament and the appointment of ministers as well as other similar matters are considered as non-justiciable.

[67]Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30, see also the Ethiopian Privatization and Public Enterprises Supervising Agency v Heirs of NurBezaTerga, (Federal Supreme Court Cassation Division, November 12, 2007), Federal Supreme Court Cassation Division, vol. 5, p.300, and Ethiopian Customs Authority v Abero Ergano *et al,* (Federal Supreme Court Cassation Division, March 20, 2007), Federal Supreme Court Cassation Division, vol.4, p108. The last cited case also reveals the broad interpretation by the Cassation Division of delegated power to the former Ministry of Revenue.

[68] I preferred not to get in to the issue because the issue of 'justiciability' is controversial by its nature and more so in the Ethiopian constitutional jurisprudence. It demands a thorough discussion of academic and jurisprudential opinions as to which matters are justicable, which matters are not, who determines such issue. Such issues are important in our Constitution since the Constitution only provide that judicial power is limited to justiciable matters without settling the issues of which matters are justiciable, which are not, and who determines it. Addressing such issue is obviously beyond the scope of this article and demands a separate scrutiny.

constitutional provision. The relevant provision provides that "special or ad hoc courts that take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which *do not follow legally prescribed procedures shall not be established*."[69]

In light of this constitutional provision, the Authority is not a kind of organ established to exercise judicial powers. For one thing, it is purely an administrative organ. For another thing, the Director General, let alone to follow legally prescribed procedures, is authorized not to follow such procedures while making decision. Thus the reasoning of the Cassation Division does not seem to be well founded in light of the Constitution.

Apart from the above contentions made based on clear constitutional and legislative provisions, the broad interpretation of the delegated legislation by the CCI and the Cassation Division does not also seem to be compatible with the spirit of the Constitution. There are principles and values that are incorporated under our Constitution that provide an implied limit on the exercise of power by each organs of the government. Of which, the rule of law and separation of powers are very important.[70] Accordingly, let alone in our country where there is constitutional supremacy, there is an established presumption in the UK, where the Parliament is absolutely supreme, that the legislature intends to legislate in line with the rule of law.[71] There is no legal or moral justification that impedes the CCI and the Cassation Division from operating on the basis of a presumption that the HPR, while delegating its power to the executive, intends to be consistent with the rule of law; for the rule of law is a founding principle that our Constitution aspires to uphold.

Thus, in the absence of clear legislative authorization, it is contrary to the intended scope of delegation by the legislature [thus the rule of law] for the

---

[69] The FDRE Constitution, cited above at note 32, Art.78 (4). When Art. 37 (1) of the Constitution says "… any other competent body with judicial power", the competence of such bodies is to be decided only if reference is made to Art.78 (4) of the Constitution i.e., such bodies need to follow certain legally prescribed procedures.

[70] The two principles are essential values of our Constitution, a reading of the preamble, the recognition/protection of human rights and their entrenchment (as revealed in their stringent amendment procedure), the supremacy of the Constitution, and the establishment independent judiciary is some indications that the rule of law is our constitutional value. The structure of the Constitution which provides the three organs with different powers also shows that separation of powers is duly recognized by our Constitution.

[71] D. E. Edlin, "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States", the American Journal Of Comparative Law, vol. 57, (2009), p.68

executive to issue a regulation that limits judicial power and makes the right to reinstatement non-justiciable. This is true because the rule of law requires the recognition of basic rights together with an independent tribunal capable of giving redress to violation of rights by government organs. However, this does not mean that, had the intention to exclude judicial power been made clear in the parent legislation or is made by the legislature itself, the exclusion would have been constitutional. Such statutory exclusion of judicial review by itself would inevitably be contestable.

Furthermore, it is a generally held view that the executive has no power to act in derogation of fundamental principles and rights; and more so when it is done without explicit legislative authorization.[72] This argument is forwarded from the perspective of the doctrine of separation of powers. In this regard, the German Constitutional Court has established an important doctrine which says "it is unconstitutional for the legislature to delegate its legislative authority in crucial principles to Federal Ministers, in particular, where the rights protected by the Basic Law are at issue".[73] If we see the Regulation in this connection, not only does it encroach upon judicial powers, but also puts the fundamental right of access to courts of every person in jeopardy. What is important to remember here is that the fact that the executive is authorized by the legislature to act in derogation of fundamental rights and judicial power (which the CCI believes to be the case) is not always constitutionally valid for the legislative authorization itself may run contrary to the Constitution of the FDRE.[74]

The Constitution in fact allows the legislature to delegate some of its powers to the CoM.[75] Nevertheless, this shall not be construed in such a way that the legislature is would be at liberty to delegate the whole regime of its power whenever it wishes. In a constitutional system which appeals to the rule of law

---

[72] E. V. Rostow, "the Democratic Character of Judicial Review", Harvard Law Review, vol. 66 no. 2 (2003), p.199.

[72] B. Neuborne, "Judicial Review and Separation of Powers in France and the United States", New York University Law Review, vol.57 no.3, (1982), p.420.

[73] E. Brandet, cited above at note 5, p.282.

[74] It is in this regard that the CCI could have played a role of upholding the supremacy of the Constitution. It could have, for instance, question whether the legislature can delegate the power with contents having negative implications on human rights and judicial power. Unfortunately however, the CCI firmly ruled that "…, it [HPR] can adopt any type of policy choice from among available alternatives when issuing legislation . To decide whether or not the adopted law is appropriate is *not the mandate of the Council*", see Ashenafi Amare *et al* v Ethiopian Revenue and Customs Authority, cited above at note 30

[75] The FDRE Constitution, cited above at note 32.

and separation of powers, delegating all or core legislative powers to the executive is aggrandizing the power of the later and may amount to unreasonably putting the HPR in an inferior position though it is constitutionally declared to be the highest organ of state. Thus, it would be within the appropriate mandate of the CCI, subject to approval by the HoF,[76] to provide a limit on the possible areas where legislative power can or cannot be delegated.

Rights recognized by the Constitution or other laws are not always absolute and are subject to lawful restrictions, often called limitation of rights.[77] The rights may be subject to limitation for the better utilization of other rights or to achieve a greater social good. However, the problem is the way the limitation is imposed and when the limitation becomes irrational. Such problems are exacerbated when a constitution does not contain basic standards prescribing how fundamental rights might be justifiably limited or in other words when constitutions do not have a "general limitation clause."[78]

There are jurisdictions that provide general limitation clause so that rights will not be unreasonably suspended, restricted, or derogated. The Constitution of the Republic of South Africa is illustrative in this regard as any limitation on the exercise of fundamental rights should be made to the extent it is reasonable and justifiable in an open democratic society based on human dignity, equality, and freedom and based on consideration of other relevant facts.[79]

---

[76] The CCI can only give recommendation when it finds constitutional interpretation of a given matter is necessary. See the FDRE Constitution and the CCI establishment Proclamation, cited above at note 49, Art.84 (1) and Art.6 (1) respectively. In the interview the author made with Dr. Fasil Nahom (member of the CCI) in July 11, 2011, regarding the acceptability of recommendations given by the CCI to the HoF on constitutional interpretation, the respondent stated that "it is hardly sound to think that there is high likely that recommendations by the CCI may be rejected by the HoF; it is rather more sound to think the other way round." See Yemane, cited above at note 29, for detail on this.

[77] Limitations are "lawful infringement of rights" also called "justifiable violations" which are imposed on the exercise of certain rights for some policy and practical reasons. The limitations may take many forms such as suspension, restriction, or derogations. See Tsegaye Regassa, "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", Mizan Law Review, vol.3 no.2 (2009), pp.313-314.

[78] Id, p.314, general limitation clauses are "limits to limitations" that requires the fulfillment of certain prescribed standards before exercising the power to limit rights.

[79] Constitution of the Republic of South Africa (1996), Section 36, in this section the Constitution provides that limitation on rights can only be exercised by taking in to account the extent of the right to be limited, the importance of the purpose of limitation, the nature and

To say a little bit more on the decision of the CCI, it would be useful to reproduce in Amharic for the sake of clarity a crucial part of the decision which has been quoted above. . The CCI, in explaining its reasoning behind the decision states;

> "ሕግ በማውጣት ከፍተኛ የመንግስት አካል የህዝብ ተወካዮች ም/ቤት ነው፡፡ ይህ ም/ቤት ሕገ-መንግስቱ በሰጠው የስልጣን ክልል ውስጥ አስፈላጊ ነው ብሎ ያመነውን ማንኛውንም ነገር የማድረግ ከፍተኛ ስልጣን አለው፡፡ ምን ዓይነት ሕግ ነው የሚከተለው የሚለውን የመወሰን ስልጣን የህዝብ ተወካዮች ም/ቤት ሀላፊነት ነው፡፡ የሕገ መንግስቱ ድንበር እስካላለፈ ድረስ ብዙ አማራጮች ሊኖሩት ይችላሉ፡፡ ከነሱ መካከል አንዱን ወስዶ ተግባራዊ ቢያደርግ ተግባራዊ የተደረገው ሕግ ትክክል ነው አይደለም የሚለውን ነገር መፈተሽ የጉባኤው [ሕገ መንግስት አጣሪ ጉባኤ] ስልጣን አይደለም፡፡"[80]

If one reads the above paragraph in light of the main constitutional values canvassed elsewhere above, two important issues arise. First, where is the constitutional limit on the power of the legislature? When is it possible to say that the legislature (HPR) has exceeded its constitutional limit while issuing legislation ? This was the central issue that the CCI ought to have addressed in the case. Second, if deciding on the constitutional appropriateness of a law adopted by the legislature is not the mandate of the CCI, who can exercise this function? This is a very strange statement forwarded by a body with a power of constitutional adjudication and[81] established to ensure that all branches of the government uphold the supremacy of the Constitution.

According to the comparative jurisprudence on constitutional adjudication, one of the core issues to be addressed by a constitutional adjudicator in relation to legislation that limit or remove rights is whether or not there are other or better approaches that could have been adopted by a legislature which are less restrictive of rights when compared with the legislation under review. Legislatures are expected to employ less restrictive means to achieve the

---

extent of the limitation, the relation between the limitation and the purpose, and less restrictive means to achieve the purpose.

[80] Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30, as quoted in note 55.

[81] This is to mean that, even though the CCI is not considered to be any of the power division in the constitutional structure, its functions are of important and it is only its rulings and decisions (subject to approval by the HoF) that the act of the 'supreme' legislature can be kept constrained.

objectives that the laws are designed to attain.[82] However, it is contrary to the rule of law to give the legislature a blank cheque to adopt any means of limiting fundamental rights and excluding judicial review. The CCI therefore failed to make a delicate balance between the two competing interests, which are the interest of ensuring the right to access to justice of employees of the authority and providing an expedient way of fighting corruption within the Authority.

Although there is no clear constitutional limitation on the power of the legislature to limit rights, such as the less restrictive means doctrine, the CCI should have relied on those implied limitations that our Constitution enshrined of which the rule of law is one. In this connection, it is said that if the constitution is to be the highest law, a law that controls state actions, its interpretations must be constrained by the rule of law.[83] Apart from the implied constitutional standards, the CCI should have also resorted to International Human Rights Instruments and Conventions that Ethiopia has adopted for they also serve as a guideline in interpreting the human rights provisions of the Constitution.[84] However, the stand of CCI seems to be that the legislature has no duty to see and choose better solutions from the available alternatives while limiting rights. This may go against the rule of law and normative values enshrined in the FDRE Constitution, because the rule of law can better be ensured if all government organs strive to employ better policy options that cause the least damage to the enjoyment of fundamental rights.

7. Conclusion

In general, the author contends, not only the Regulation is beyond scope of delegation intended by the legislature, but also lacks constitutional basis. There is no constitutional or legislative authority for the executive to deny or grant jurisdiction to courts of law. The Regulation cannot also be justified by

---

[82] If limitations on fundamental rights are to be legitimate, such limitations must achieve a benefit that is proportional to the costs of the limitation. However, if there are less restrictive, but equally effective, alternative other than the chosen methods exist to achieve the purpose of the limitation, the limitation is not proportionate. This standard is widely used by the South African Constitutional Court. See for additional J. De Waal, I. Currie, and G. Erasmus, the Bill of Rights Handbook, (4th ed., 2001), pp.144-162

[83] R. Post, "Theories of Constitutional Interpretation", Special Issue: Law and the Order of Culture, vol.30, (1990), p.19

[84] The FDRE Constitution, cited above at note 32, Art.13 (2)

delegation of the lawmaker. This is so because the lawmaker cannot delegate its powers contrary to the Constitution. Any such delegation would be illegitimate and void. Arguably, the Parliament may limit judicial power but this power is subject to constitutional restrictions. The legislature, though constitutionally declared to be the highest organ is subject to constitutional supremacy. Thus, to argue that the legislature can issue or/and delegate any law that limits or removes judicial power and rights of individuals as it deems necessary without providing the corollary limitations on such power seems to be far beyond the very spirit and intent of our constitution.

The core source of the problem is the absence of standards and an oversight on part of the House of Peoples Representatives while delegating its legislative powers. There are laws issued by the executive in Ethiopia but many of them are not required by the parliament to comply with certain prescribed legislative standards. Absence of an administrative procedure code may also be another factor. This is because, had an administrative procedure code been issued, it would be less difficult to control administrative decisions and acts both by the Parliament and the judiciary through oversight and judicial scrutiny of the agencies' compliance with the procedure code.

However, the absence of standards cannot be invoked as a defense of the reactance of courts in reviewing the acts of the executive carried out on the basis of delegated authority. The government may have its own policy reasons that justify the promulgation of laws that impose restrictions on judicial power and on the enjoyment of certain rights. However, the judiciary should not endorse such policies without scrutinizing their implication for rule of law and the integrity of the overall constitutional order of the country. This is because in a system where the rule of law is constitutionally established, rights should not be subjected to limitations to achieve the momentary policy ends of a government and citizens should not required to be instruments of government policy that unduly burdens their basic rights and freedoms.[85]

Thus, unrestricted delegation of legislative power and the absence of a strong parliamentary oversight coupled as well as the judicial reluctance to overrule executive acts issued in excess of the power delegated to the executive are the main sources of unconstrained executive discretion which is ultimately a threat to the rule of law. Looking at the Regulation, decisions of the CCI and the

[85] F. A. Hayek, "Freedom and the Rule of Law", in R. Bellamy (ed.), The Rule of Law and Separation of Powers, (2005), pp.148-151

Cassation Division discussed above, employees of the Authority are left with the absolutely unfettered and arbitrary power of the Authority that is contrary to the Constitution, and violates their constitutionally guaranteed rights.[86]

[86] According to the official Newspaper of the Authority, 75 employees are dismissed at a time in the 2010/11 budget year by the Director General and are left with no remedy for possible abuse of power. Egna Legna, an internal Newspaper of the Ethiopian Revenues and Customs Authority, vol.3 No.1, July 2011, p.4

Medical Institutions' and their Employees' Obligation to Provide Emergency Medical Treatment for victims of Motor Vehicle Accident in Ethiopia

Bisrat Teklu *

1. Introduction

Motor vehicle accident is the largest single cause of death and common cause of hospital admission and life-long disability.[1] According to UN Reports, every year more than 1.3 million people die due to car accident.[2] Among these, 65 percent of deaths involve pedestrians, from which 35 percent are children.[3] Moreover, every year 20-50 million people suffer injury, and often are disabled due to motor vehicle accidents.[4]

In this respect, Ethiopia is categorized among countries that experience a high number of motor vehicle accidents.[5]The number of deaths and injuries due to motor vehicle accident is also consistently escalating.[6] For instance, a study conducted on Addis Ababa City showed that the number of burials due to car

---

* LL.B (Jimma University, School of Law). He can be reached at teklubisrat@gmail.com.

[1] Tekebash Araya *et al* (2010), 'Road Traffic Accidents in Addis Ababa (2001-2008): Evidence from Burial Surveillance', *Abstracts of Research Findings Presented on the 20th Annual Conference of Ethiopian Public Health Association* (Master Printing Press PLC, Addis Ababa), p. 27.

[2] The UN General Assembly (30 September 2011) A/66/389, Sixty-sixth session Agenda item 12 Global Road Safety Crisis: Improving Global Road Safety, p. 3.

[3] The Second African Road Safety Conference Report (Nov. 09-11, 2011), Addis Ababa, Ethiopia, p. 2.

[4] The UN General Assembly, *supra* note 2.

[5] Tebebe Beshah and Shawndra Hill, 'Mining Road Traffic Accident Data to Improve Safety: Role of Road-related Factors on Accident Severity in Ethiopia', p.2.<http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CB0QFjAA&url=http%3A%2F%2Fai-d.org%2Fpdfs%2FBeshah.pdf&ei=x3pAUKmFJYXEswbft4GoDA&usg=AFQjCNG-ADeVFdgdo86dRISzvmMyWE2KhA>, visited on 30 August 2012.

[6] Vehicle Insurance Against Third Party Risks Proclamation No. 799/2013, Federal Negarit Gazeta 19th Year No. 53 ADDIS ABABA 23rd July, 2013 (hereinafter Vehicle Insurance Against Third Party Risks Proclamation), preamble, para. 1.;

accidents is increasing.[7]There was a 4% increase in the number of deaths due to motor vehicle accidents in the City over the past Seven years.[8]This escalation is further evidenced in recent reports. In the year 2003 E.C, the FDRE's Transport Minister reported 2,500 deaths due to car accident, whilst in the year 2005 E.C 3,117 people died due to the same cause.[9] This shows an increase in fatalities within a period of two years that is more than 500. It is for this reason that, countries including Ethiopia come up with a law that intend to ensure a timely and organized response to the effects of car accidents so that the negative impacts of such accidents can be minimized.[10]These efforts particularly focus on the right to get emergency medical treatment for victims of motor vehicle accidents.

This article explicates medical institutions' and their employees' obligation to give emergency medical treatment for victims of motor vehicle accidents. In due course, the article goes through requirements and procedures medical practitioners should follow at times of emergency, and explicate the law that applies to the same. Accordingly, Section I provides a general overview what constitutes emergency medical conditions and treatment. Section II explicates medical procedures that medical institutions and their employees should follow in offering emergency medical treatment. Furthermore, in all sections the

---

[7] Tibebessilase Abera (2012), 'Compulsory Motor Vehicle Third Party Liability Insurance in Ethiopia: A Comparative Analysis' (LL.B Thesis, Mekelle University, unpublished) p.1.

[8] Tekebash Araya *et al, supra* note 1.

[9] **ሪፖርተር ጋዜጣ (መጋቢት** 22)፣ **ባለፈው አመት ከሶስት ሺህ በላይ ሰዎች በትራፊክ አደጋ ሞቱ፣ ገጽ** 15።።

[10] M. Kristensen *et al,* Participatory Design in Emergency Medical Service: Designing for Future Practice, p.161. Vehicle Insurance Against Third Party Risks Proclamation, Article 27. In fact, the best approach to alleviate the consequences of motor vehicles is to adopt the preventive approach. Nevertheless, car accidents are inevitable. As a result of this, the Ethiopian government took several measures in order to tackle road safety in a comprehensive manner, such as adopting a law that obliges medical institutions to extend emergency medical treatment for victims of motor vehicle accident. Other measures include adopting a new law on drivers' training and regulation, and issuing motor vehicles technical inspection standards. *See,* A. Thomas (2002), 'The Role of the Motor Insurance Industry in Preventing and Compensating RoadCasualties',p.1,<https://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&ved=0CFQQFjAG&url=http%3A%2F%2Fwww.heartsafeam.com%2Ffiles%2FCalifornia_Good_Samaritan_Act.pdf&ei=savsUvycMOGV7Aao0oF4&usg=AFQjCNFRBVcdPW3VmDgcx8uUwQj2l-5Fqg&bvm=bv.60444564,d.bGQ>, visited on 2 January 2014; *see* also Third Party Insurance to Help Lower Ethiopia's High Road-traffic Accident Toll (Nov. 8, 2011), <http://addisababaonline.com/third-party-insurance-to-help-lower-ethiopias-high-road-traffic-accident-toll/>, visited on 22 August 2015.

experience of other countries will be discussed to shed some light on of the law and practice in Ethiopia. In such a way, an attempt is made to highlight the loopholes that are prevalent in the Ethiopian legal system.

2. General overview on Emergency Medical Condition and Treatment

The meaning of the phrase "emergency medical condition and emergency medical treatment" is always central to emergency schemes. This is because emergency medical treatment is primarily there for the benefit of persons under emergency medical condition. Accordingly, this section is devoted to investigate the meaning of emergency medical condition and treatment under the Ethiopian legal system.

In fact, the meaning of emergency medical condition and the obligation to give emergency medical treatment are blurred under the Ethiopian legal system. However, a detailed analysis of the Food, Medicine and Health Administration Control Proclamation and the Vehicle Insurance Against Third Party Risks Proclamation seem to provide a comprehensive definition of the terms.

2.1 The concept of Emergency Medical Condition and Treatment

Emergency refers to a sudden, unforeseen hazardous event that necessitates an immediate response.[11]It refers to a condition that presents a substantial risk of serious harm.[12]It represents a situation that is a result of an accident,[13]and requires a prompt response to save life, property, health and/or environment.[14]In this respect, the sources of emergency can be natural, manmade or technological.[15]This includes terrorist attacks, war, fire and

---

[11] *Merriam Webster's Dictionary* (Library of Congress, USA, 2006).

[12] TITLE 31Welfare Welfare Agencies CHAPTER 39. ADULT PROTECTIVE SERVICES, <http://delcode.delaware.gov/title31/c039/index.shtml>, visited on 2 January 2014.

[13] From the perspective of motor vehicles the term "Accident" refers to the happening related to a motor vehicle causing personal injuries or material damages and therefore engages the third party liability of the policy holder. *See* Protocol on the Establishment of a Third Party Motor Vehicle Insurance (Lusaka, 1981) ANNEXE VI-10.

[14] I. Kelman and S. Pooley(eds.) (2004), Disaster Definitions, p.7. available at, www.ilankelman.org/miscellany/DisasterDefinitions.rtf , Last accessed on 26August 2013.

[15] General Assembly 4th Committee, Disaster Relief and Management, p. 1. < http://www.google.com/url?sa=t&rct=j&q=emergency%20can%20be%20either%20natural%2

diseases.[16]Based on the causes of the emergency the response taken towards it may differ. The response in this regard could either be medical and/or humanitarian.

While this is what we mean of emergency, emergency medical condition refers to a sudden and urgent medical state of a person that requires an immediate medical attention.[17] It is a physical and/or psychological state of a living being that requires an immediate clinical or psychiatric treatment in order to minimize the adverse consequences of trauma.[18]However, this does not mean that all medical conditions that require prompt medical attention necessarily qualify as emergency medical conditions. In other words, emergency medical condition only represents a sudden serious medical condition that requires immediate '*stabilization*'.[19]Consequently, in order to say a person is under emergency medical condition the patient must be in a critical state whereby s/he would either die or suffer from serious medical deterioration unless s/he is promptly stabilized. Moreover, in addition to the element of suddenness emergency medical condition assumes that the patient/victim has no opportunity to make arrangements for treatment by the time it encounters the emergency.[20]

On the other hand, the term emergency medical treatment refers to a medical treatment undertaken to mitigate the effects of emergency. It refers to a

---

0or%20manmade.&source=web&cd=4&cad=rja&ved=0CEgQFjAD&url=http%3A%2F%2Fmontessorimun.org%2Ffiles%2FFileUpload%2Ffiles%2FBackground%2520Guides%25202013%2FMontessori%25202013%2520SPECPOL%2520Disaster.pdf&ei=EOcpUvj5MIKshQfxkoHQAw&usg=AFQjCNG2KP1IqebRK7VAEnVn0563VYbD5w&bvm=bv.51773540,d.Yms>, visited on 24 June 2013.

[16] U.S Federal Emergency Management Agency, Version 2.0 of Comprehensive Preparedness Guide (CPG)101: Developing and Maintaining Emergency Operations Plans, p. intro-2. Available at www.fema.gov/pdf/about/divisions/npd/CPG_101_V2.pdf

[17] *Thiagraj Soobramoney* v. *Minster of Health* (Kwazulu-Natal), 27th Nov. 1997, Constitutional Court of South Africa (Case CCT 32/97), § 18. (hereinafter *Soobramoney* v. *Minster of Health*)

[18]Managing Emergencies and Traumatic Incidents, p. 10, <www.minedu.govt.nz/~/.../EmergencyManagement/TheGuideSm.pdf> , visited on 28 August 2013.

[19] Law Commission of India (201ST Report) (2006), *Emergency Medical Care to Victims Of accidents and During Emergency Medical Condition and Women Under Labor,* p. 7. On this part, this section restricts the concept of emergency medical condition from the perspective of human beings.

[20] *Soobramoney* v. *Minster of Health*, *Supra* Note 17.

medical treatment offered either to save the life of a patient, or minimize serious deteriorations on the medical state of a patient under emergency medical condition.[21] In this respect, the concept and scope of emergency medical treatment is better explained in *Soobramoney v. Minister of Health* before the Constitutional Court of South Africa[22] as follows;[23]

> *"... emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time."*

Accordingly, an emergency medical treatment only deals with unforeseeable tragedy that could befall on any person, at any place and at any time.[24] It is concerned with sudden and at times even unexpected medical complications.[25] In this respect, elements of non-foreseeability and imminence are crucial. Its purpose is also limited to stabilizing the patient. In other words, it does not entitle a right to ongoing treatments in case of chronic illnesses.

Consequently, as can be seen from the discussion in the previous paragraphs the concept of emergency medical condition and treatment are inseparable. This is because; emergency medical treatment is necessarily given for a person under emergency medical condition. The meaning given to one necessarily defines the scope and meaning given to the other.

---

[21] *Emergency Medical Services*, <http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Emergency_medical_services.html>, visited on 2 January 2014.

[22] Republic of South African Constitution expressly recognizes the right to emergency medical treatment. *See,* Constitution of the Republic of South Africa No. 108 Of 1996 (18th Dec. 1996), § 27(3).

[23] *Soobramoney* v. *Minster of Health*, *supra* note 17, § 51. The Case deals with the interpretation of § 27(3) and § 11of the South African Constitution. These two sections deal with the right to emergency medical treatment and the right to life respectively. In the case the Constitutional Court primarily deal with the issue of "Whether the right to emergency medical treatment include a claim for an ongoing treatment of chronic illnesses that would prolong life?"In conclusion, the Court reached a decision that the right to emergency medical treatment benefits only individuals that necessitate immediate medical treatment for stabilization.

[24] *Soobramoney* v. *Minster of Health*, *supra* note 17, § 51.

[25] *Ibid*, § 38.

Coming to the specific meaning given to each of the terms in different countries, the American College of Emergency Physicians defines the term emergency medical condition as *"Any condition perceived by the prudent layperson or someone on his or her behalf, as requiring immediate medical or surgical evaluation and treatment."*[26]Likewise, in the relevant literature emergency medical condition is defined as a medical condition that manifests acute symptoms of sufficient severity, which in the absence of immediate medical treatment would reasonably be expected to cause serious jeopardy to the patient´s health, bodily functions, and/or life.[27] This includes results such as serious dysfunction of any bodily organ or part.[28] Similarly, it can be observed that this same formula is employed in the laws of many countries.. For instance, the US law on emergency medical condition, EMTALA defines emergency medical condition as follows;[29]

> *"(a) A medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:*
>
> *1. Serious jeopardy to patient health, including a pregnant woman or fetus.*
>
> *2. Serious impairment to bodily functions.*
>
> *3. Serious dysfunction of any bodily organ or part.*
>
> *(b) With respect to a pregnant woman:*
>
> *1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;*
>
> *2. That a transfer may pose a threat to the health and safety of the patient or fetus; or*
>
> *3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes."*

---

[26] *Emergency Medicine: Introduction, < http://quizlet.com/12725854/emergency-medicine-introduction-flash-cards/>* visited on 24 February 2014. This definition gives the judgment of the situation whether it is an emergency condition or not to the victim, or person on the side of the victim. It did not also restrict the service to the pre-hospital medical service.

[27] James M. Brown (2011), Essentials of Emergency Medicine (2nd. Ed, Jones & Bartlett Learning
Canada) Richard V. Aghababian ed.), Regulatory Issues, 1029.

[28] *Ibid.*

[29] *See,* U.S. Code, Title 42, Chapter 7, Subchapter XVIII, Part E, §1395dd.

In addition to this, the Indian Law Commission adopted the verbatim copy of latter definition in giving meaning to the term emergency medical condition.[30]Similarly, in Ethiopia a person under emergency medical condition is defined as a patient who seeks medical attention at a health care facility for immediate treatment in order to preserve life or address a serious medical state that would affect the long time health condition of the patient.[31]

Furthermore, emergency medical treatment is defined as a medical treatment given for a patient under emergency medical condition with a view to stabilize him/her. It refers to "a [ ] service dedicated to providing out of hospitals acute medical care and/or transport to definitive care to patients with illness and injuries which the patient or the medical practitioner, believes constitutes a medical emergency".[32] In this respect, if such treatment is not given for the patient, s/he would reasonably suffer from weakened bodily functions, serious and lasting damage to his/her body or any of his/her organs, or at times die.[33]In

---

[30] *See* Law Commission of India, *supra* note 19. The position taken by the Indian Law commission after a detailed research on several countries experiences a person is said to be in an emergency condition where;

> *"an individual's medical condition manifest acute symptoms of sufficient severity (including severe pain) where the absence of emergency medical treatment could reasonably be expected to result in:*
>
> *(i) death of the person,*
> *(ii) serious jeopardy in the health of the person (or in the case of a pregnant woman, in her health and the health of the unborn child), or*
> *(iii) serious impairment of bodily functions,*
> *(iv) serious dysfunction of any bodily organ or part"*

[31] Ministry of Health, National Admission and Discharge Protocols for Ethiopian Hospitals (2012), p. 11. (hereinafter the Admission and Discharge Protocol for Ethiopian Hospitals)

[32] Canadian Emergency Medical Services Lead the Way!, <http://www.theogm.com/2012/08/10/canadian-emergencymedical-services-lead-the-way/> visited on 5 January 2013.

[33]Emergency Medical Conditions, <https://www.medicalschemes.com/medical_schemes_pmb/emergency_medical_conditions.htm>, last visited on 12th June 2015. In the European Union, emergency medical treatment is considered as part of emergency medical services that entitle a person under emergency medical condition the right to get appropriate medical screening, in-patient and outpatient treatment that targets stabilization, and transfer. In this respect, in Union emergency medical services system refers a broad and integrated health care system model which is a sub-set of the Emergency Heath System, and includes screening, stabilization, reporting an emergency, administrative and institutional oversees over emergency medical providers, resource allocation and facilitation. Emergency Health Services System on the other hand encompasses a broader domain that includes the consequences of management of disasters, war, civil unrest,

relation to this, it seems that the purpose of the right is to ensure that medical treatment be given to the patient/victim immediately, and that the treatment is not frustrated through bureaucratic requirements or other formalities.[34]

In conclusion, depending on the latter premises one can easily conclude that, first, all emergency perils are not emergency medical conditions. Second, it is only those emergency perils with severe magnitude that entitle a patient to an emergency medical treatment; and the scope of the latter may differ from country to country. However, on the general formula, there seems to be an agreement in all countries as to what constitutes an emergency medical condition and treatment.

2.2 The Concept of Emergency Medical Condition and Treatment under Ethiopian Laws

i. *The Concept of Emergency medical Condition and Treatment under Food, Medicine and Health Care Administration and Control Proclamation*

In Ethiopia, the issue of emergency medical condition and treatment is addressed in the Food, Medicine and Health Care Administration Proclamation,[35]and the Regulation[36] that followed it. According to the Proclamation, any health professional is obliged to give emergency medical treatment within the scope of his/her professional practice.[37] In association with this, the Regulation defines emergency medical treatment as a medical treatment provided in health institutions by a health professional to a patient suffering from a disease or injury that could result in imminent and life

---

terrorism, epidemics. World Health Organization (2008), Emergency Medical Services System in the European Union: Report of an Assessment Project coordinated by World Health Organization, pp. 17 and 50.

[34] *Soobramoney* v. *Minster of Health*, *supra* note 17, § 20.

[35] Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009, Federal Negarit Gazeta 16th Year No. 9 ADDIS ABABA 13th January, 2009 (hereinafter Food, Medicine and Health Care Administration and Control Proclamation).

[36] Food, Medicine and Health Care Administration and Control Council of Ministers Regulation No. 299/2013, Federal Negarit Gazeta 20th Year No. 11 ADDIS ABABA 24th January, 2014 (hereinafter Food, Medicine and Health Care Administration and Control Regulation).

[37] Food, Medicine and Health Care Administration and Control Proclamation, Article 38(1).

threatening or permanent health problem. This indicates that the obligation requires medical institutions to stabilize a patient under emergency medical condition.[38] Moreover, the Regulation requires a medical practitioner to transfer /immediately refer/ a patient under emergency medical condition to the appropriate medical institution that has the capacity to treat the patient in case stabilization is not possible given the health institution's standard and resources.[39]In this regard, such transfer is required to go through the referral system[40] which is a system regulated through a guideline issued by the Ministry of Health.[41]

On the other hand, though the Proclamation provides an obligation to give emergency medical treatment, it does not expressly require the treatment to be given freely. However, though this is not the case the purpose of the provision is to require medical institutions to give free emergency medical treatment.[42]In other words, the emergency medical treatment required in the Proclamation and its subsequent regulation is the right to get free emergency medical treatment. Moreover, if one looks at the Addis Ababa City Administration Health Service Provision and Health Institutions Control Directive, it is noticeable that all medical institutions found in the City are required to give emergency medical treatment without pay.[43]This is a reflection of the spirit of the Proclamations that emergency medical treatment should be given without pay.

---

[38] Food, Medicine and Health Care Administration and Control Regulation, Article 2(39).

[39] Food, Medicine and Health Care Administration and Control Proclamation, Articles 38 (1) & (2); *see* also, Food, Medicine and Health Care Administration and Control Regulation, Articles 53 and 54.

[40] Food, Medicine and Health Care Administration and Control Proclamation, Article 38 (2); Food, Medicine and Health Care Administration and Control Regulation, Article 54.

[41] FDRE Ministry of Health Guideline for Implementation of a Patient Referral System (May 2010). (hereinafter the Referral Guideline)

[42] Interview with Mr. Getnet Desta, Legal Officer at the Ministry of Health 22nd June 2015.

[43] Addis Ababa City Administration Provision of Health Service, Health Institutions Administration and Guidance Directive No. 26/2009, (hereinafter Addis Ababa City Provision of Health Service and Health Institutions Administration Directive)Article 11(e). Note that, the author sees only Addis Ababa Administration's Directive. In this regard, it is also expected from regional governments to come up with such stipulation, in case they have no.

ii. Emergency Medical Condition and Treatment under the Social Health Insurance Proclamation

The issue of emergency medical treatment is has recently been addressed in the social health insurance scheme.[44] One of the entitlements given for a beneficiary of the Social Health Insurance Scheme is the right to get outpatient health care service from health facilities that concluded a contract with the Ethiopian Health Insurance Agency to give a health service package for the beneficiaries of social health insurance.[45] In this regard, emergency medical treatment is part of outpatient care service under the Social Health Insurance Proclamation. Therefore, the scheme recognizes emergency medical treatment for the beneficiaries of the latter. Moreover, Article 5(1) of the regulation stresses that a beneficiary of the Insurance scheme shall follow a referral system except for *emergency cases.*[46]This provision also indicates that emergency medical treatment is recognized under the Social Health Insurance Scheme.

However, it is important to note that, the Scheme does not benefit all citizens. It is only citizens specified under Articles 5 and 7 of the Proclamation that are beneficiaries of the scheme.

iii. Emergency Medical Condition and Treatment under Motor Vehicle Insurance against Third Party Risks Proclamation

Proclamation No. 559/2008[47] and the newly enacted Vehicle Insurance Against Third Party Risks Proclamation No. 799/2013 that replaced the former came up with a new approach towards emergency medical condition and treatment. The former Proclamation for the first time, in Ethiopian history, provides an express stipulation that requires medical institutions and their personnel to

---

[44] In fact, under the Social Health Insurance Proclamation there is no provision that expressly state emergency medical treatment is part of the social health insurance scheme the recognition of outpatient care and a cross reference to Article 5 of the Social Health Insurance Scheme Regulation is indicative as to the incorporation of emergency medical treatment in the scheme.

[45] Social Health Insurance Scheme Regulation, Article 3(1)(a).

[46] The Amharic version states, <<ከድንገተኛ ሕክምና አርዳታ በስተቀር>>

[47] Vehicle Insurance Against Third Party Risk Proclamation No. 559/2008, Federal Negarit Gazeta 14thYear No 7 Addis Ababa 9th January 2008.

extend free medical service for all victims of motor vehicle accidents.[48]The latter also incorporated the same with a view of facilitating emergency medical treatment for victims of motor vehicle accident.[49]

Article 27(1) of the Vehicle Insurance Against Third Party Risks Proclamation entitles any person that sustains injury from motor vehicle accident to an emergency medical treatment to a maximum of Birr 2,000 (104.53 USD).[50] In doing so, the provision entitles the right to everyone,[51] including the perpetrator of the accident. Even though perpetrator causes the accident deliberately s/he fully benefits from this scheme.[52]This is because Article 27 does not make any other qualification than being a victim. The law indiscriminately treats victims of accident irrespective of one's contribution for the occurrence of the accident. This, on the other hand, indicates that the law wants the perpetrator to be rescued for s/he could face the consequences of his/her wrong.[53] However, the Proclamation does not define the term emergency medical condition. Nevertheless, among others, relying on reference to the meaning given to the term emergency medical treatment[54] and the spirit of the provision one can infer the meaning emergency medical condition within this proclamation.

Initially, it is important to note that Article 27(1) of the Proclamation gives the right to emergency medical treatment for victims of accident. Accordingly, when it says a person is entitled to medical treatment it refers only to an *emergency medical treatment*. The law does not entitle a right to get other

---

[48] Vehicle Insurance Against Third Party Risk Proclamation, Article 27.
[49] Vehicle Insurance Against Third Party Risk Proclamation, Preamble para. 2.
[50] The calculation is made based on the exchange rate on January 30, 2014 in the Commercial Bank of Ethiopia S.C, i.e., 1USD= 19.1315 ETB. *See* Commercial Bank of Ethiopia, <http://www.combanketh.et/More/CurrencyRate.aspx>, visited on 30 January 2014.
[51] The provision stipulates that any person that sustained injury due to vehicle accident is entitled to treatment irrespective of whether s/he is defined under the Proclamation or not as a beneficiary of compensation.
[52] Vehicle Insurance Against Third Party Risks Proclamation, Article 27. Even though the perpetrator was in a suicide mission, the medical institution shall treat him/her so that h/se can be brought to justice. Moreover, the presumption of innocence compels one to do the same.
[53] Law Commission of India, *supra* note 19.
[54] The incorporation of a meaning for the term "emergency medical treatment" is one of the new developments under the Proclamation. In the repealed Proclamation, the term was not defined. Rather, it was the Directive on Emergency Medical Treatment issued in accordance with it that used to provide a same verbatim meaning to the term under its Article 3(7).

treatments. Therefore, this implies the importance of identifying the presence of emergency medical condition. In relation to this, in order to get the specific meaning of the terms emergency medical condition and treatment it is necessary to resort to the relevant literature.

In this respect, as it is discussed in the previous section, emergency medical condition refers to a situation where the victim manifests a serious medical state to his/her life and/or health.[55] It refers to a health condition that requires immediate medical treatment and/or operation in which unless treatment is made available, the emergency could result in weakened bodily functions, serious and lasting damage to organs, limbs or other body parts, or even death to the victim.[56] In such a way, one can definitely identify victims eligible for treatment. However, in doing so it is important to follow a liberal construction. Accordingly, every victim of motor vehicle accident should be deemed to have a *prima facie* emergency medical condition.[57] This is important to avoid bitter consequences that may follow the contrary presumption. If one presumes the existence of an emergency medical condition in relation to all victims of motor vehicle accidents, the victims will at least get first aid and will be screened all the time. Therefore, all victims of motor vehicle accident should be diagnosed and screened to determine the presence of an emergency medical condition. Following the screening, if the victim is diagnosed to as having an emergency medical condition, efforts to stabilize his condition will continue. However, if the victim does not have a critical medical condition s/he will be given first aid services for minor injuries and scratches, and get discharged.

3. Procedures Medical Institutions and their Employees should follow at times of Emergency Medical Treatment

There are procedures that should be followed by emergency medical treatment providers: medical institutions and their practitioners. Moreover, there is a standard of care expected from the latter in order to provide an effective medical treatment for a victim. Therefore, this Section is devoted to explaining

---

[55] Admission and Discharge Protocol for Ethiopian Hospitals, p. 11

[56] *Ibid.*

[57] Emergency Medical Conditions, *supra* note 33.This is because it is not always possible to diagnose the presence of emergency medical condition on the patient before admitting hi/her for treatment.

and examining the procedure that should be followed in offering emergency medical treatment. Throughout the discussion the practical reality in Ethiopia is also examined. Such examination is necessary in order to identify any discrepancies that might exist between the standard procedure laid out in regulatory emergency schemes and the actual practice on the ground.

In general, the proven proper procedures that should be followed by medical institutions and their personnel during emergency medical treatment can be categorized into two or three. In the strictest sense, the obligations of hospitals and medical institutions can be classified into two: obligation to screen and obligation to stabilize a patient before transfer or discharge.[58]On the other hand, in the broadest sense, the obligation incorporates an obligation to screen, stabilize and transfer a patient.[59]

3.1 Obligation to undertake Medical Screening

Medical screening is a diagnosis undertaken by a medical practitioner to identify the presence, magnitude and type of medical complications.[60] It refers to an inevitable procedure in any medical treatment that allows a practitioner to extend the appropriate treatment.[61]In general terms, medical screening is all about information gathering. It is a means through which the medical practitioner knows the medical state of an individual.[62] Then the information

---

[58] E. C. Liu (2010), EMTALA: Access to Emergency Medical Care (Congressional Research Service) p. 11.

[59] R. A. Bitterman, 'Transferring and Accepting Patients under EMTALA', *Providing Emergency Care under Federal Law: EMTALA* (Chapter 7) p. 103.

[60] Medical Screening and Surveillance, <https://www.osha.gov/SLTC/medicalsurveillance/> , visited on 23 August 2013; *See also,* J. Zibulewsky (2001), 'The Emergency Medical Treatment and Active Labor Act (EMTALA): what it is and what it means for physicians', *Baylor University Medical Center Proceedings* (Volume 14, Number 4) p. 340. EMTALA states that, "In the case of a hospital that has a hospital emergency department, if any individual [ ] comes to the emergency department and a request is made []. for examination or treatment for a medical condition, the hospital must provide an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department to determine if an emergency medical condition exists."

[61] R. S. Ledley and L. B. Lusted (Jul. 3, 1959), 'Reasoning Foundations of Medical Diagnosis', *American Association for the Advancement of Science* (Science New Series, Vol. 130, No. 3366) p. 9, <http://www.jstor.org/stable/1758070>, visited on 2 January 2014.

[62] Definition of Emergency Medicine, <http://www.emergencymedicine.in/EMFAQ/EMdefinition.htm.>, visited on 4 January 2014.

gathered through screening will be used to undertake the proper action to heal the patient.[63] Therefore, in order to get the most reliable information the medical practitioner may investigate both the present medical state of the patient and his/her medical history.[64]In fact, the present state of the victim can be examined through physical and laboratory examinations undertaken in the medical institution after the victim has sustained the injury.[65] On the other hand, the medical history of the victim is gathered from hospital records and medical personnel that treated the victim in earlier times, including, the patient's personal physician.[66] Therefore, for any medical condition necessitating treatment medical screening is necessary to detect the presence of an emergency medical condition, and identify its medical complications and magnitude. This is because appropriate medical screening is indispensable for appropriate treatment.[67]Accordingly, a person under an emergency medical condition should be diagnosed before treatment.[68]

In this regard, the medical institution where the victim is found should appoint qualified personnel that could diagnose the victim.[69] The medical personnel can either be a physician or non-physician.[70] However, s/he must be qualified to diagnose the victims' medical condition.[71]Such diagnosis includes checking

---

In fact, primarily when the patient is brought to a medical institution emergency is defined by the perception of the patient or the attainders that bring the patient to the emergency department. What the emergency physician perceives may not be the same.

[63] Ledley and Lusted, *supra* note 61.

[64] *Ibid.*

[65] *Ibid.*

[66] "Screening exam should include appropriate medical history, physical examination, and diagnostic testing; consulting with pertinent on-call physicians or other health care providers; and reassessing the patient prior to discharge/transfer." *See* www.ena.org/government/emtala/article2asp; *See also,* Trauma Assessment, <http://www.patient.co.uk/pdf/217.pdf>, p. 4, visited on 15 November 2013.

[67] United States General Accounting Office, (2001), EMERGENCY CARE EMTALA: Implementation and Enforcement Issues, p. 16, <https://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCUQFjAA&url=http%3A%2F%2Fwww.gao.gov%2Fnew.items%2Fd01747.pdf&ei=fK0MU66KMYKKyAPw1YDQBg&usg=AFQjCNFem0vkhMU8rjzvJZyt1h4l-B1UpA&bvm=bv.61725948,d.bGQ,> visited on 15 January 2013.

[68] Liu, *supra* note 58, p. 3.

[69] Certification and Compliance for the Emergency Medical Treatment and Labor Act (EMTALA), p. 3, <https://www.cms.gov/Medicare/Provider-Enrollment-and Certification/CertificationandComplianc/downloads/EMTALA.pdf> , visited on 12 June 2013.

[70] *Ibid.*

[71] *Ibid.*

for vital signs, [72]medical history of the victim,[73] physical examination[74] and laboratory tests.

Moreover, in order to determine whether legally stipulated standards necessary to say that a person is under emergency, it is necessary to diagnose him/her in advance. Even though a person came with a *prima facie* emergency medical condition, it is after medical screening that the practitioner will determine whether the patient is under emergency medical condition. This shows, medical screening serves two purposes: to determine both eligibility to emergency medical treatment and give the appropriate treatment necessary to stabilize the victim.

Under the Ethiopian legal system, neither the Motor Vehicle Insurance Against Third Party Proclamation, nor other laws, and subsequent directives that followed it have clearly made medical screening mandatory. However, this does not mean that medical screening is not necessary. Since medical screening is inherently necessary to administer appropriate medical treatment it should always be administered. The medical practice requires this. Therefore, medical

---

[72] G. M. Garmel, 'Approach to Emergency Patient', in S. V. Mahadeevan and G. M. Garmel (eds., 2005), *An Introduction to Clinical Emergency Medicaine*(Cambridge University Press, New York) p. 9. Checking on vital signs include checking the heart rate of the patient, respiratory system lines and the temperature of the victim as the case may be. Vital signs are promptly checked because they are scientifically proved important to identify complications in all emergency patients.

[73] Department of Health and Human Services, Center for medicine and medical services, *Medical Program; Clarifying Policies Related to the Reasonableness of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions* (Vol. 68, No. 174) (Federal Register, 42 CFR parts 413, 482 and 489)Final Rule , p. 53225. Nonetheless, it is important to recall the fact that consulting the medical history of the victim shall not jeopardize the interest of the victim. If such consultation would delay or affect the immediate treatment of the victim then it shall not be effected. Rather, in such circumstances the medical personnel shall turn its face to stabilizing the medical condition of the victim. Normally, at some points differentiating medical screening and stabilization may become difficult. Even more, sometimes they may come concurrently. Legislatures and medical practitioners also believed this. It may be hard to determine at what specific point stabilization begin, of screening ends. However it is important to note that the existence of screening and stabilization can be determined y medical practitioners in accordance with the practice in the profession and logic

[74] Garmel, *supra* note 72, p. 8. Physical examination concentrates on the general appearance of the patient and checkups made on focus areas of the human body. This includes examining areas of the body that may contribute to the condition may allow emergency personnel to prioritize the likelihood of other diagnoses causing the symptoms.

screening is always mandatory. In this regard, it is important to note that medical screening shall be interpreted broadly. At times, the emergency condition is unconcealed, one can identify the medical condition through customary examination, this includes on sight medical examinations through perceptions via sense organs (e.g., by looking the reaction of the patient). On the other hand, the medical screening may become tough and technical, in a way that the medical personnel should even use laboratory tests in order to identify whether there exists an emergency medical treatment. Related to this, identifying whether the patient's medical condition is the direct or indirect consequences of motor vehicle accident itself requires an appropriate medical screening. The medical screening can also be undertaken either by physicians or formally appointed non-physician practitioner capable to undertake the same.[75]This is justified through the usage in the medical industry[76] and the very low physician/patient ratio in Ethiopia.[77]Nevertheless, in Ethiopia, during medical screening the practice of resorting to the medical history of the victim is very poor. Moreover, medical institutions and their personnel, especially in private medical institutions claim that the victim should in advance cover the cost for medical screening.[78]

---

[75] Todd B. Taylor (2011), Emergency Medical Treatment & Labor Act (EMTALA), (American College of Emergency Physicians), p. 17, <http://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCIQFjABahUKEwjw57mNjMnHAhUJPxQKHebDAsQ&url=http%3A%2F%2Fwww.acep.org%2FuploadedFiles%2FACEP%2FMeetings_and_Events%2FEducational_Meetings%2FEDDA%2FPhase_II%2F26%2520Taylor%2520-%2520EMTALA.pdf&ei=z-veVbDEHIn-UOaHi6AM&usg=AFQjCNFK6Jf3-2wDaGdhs7gL4kA387eZIw>, visited on 27th August 2015. A non-physician practitioner may include interns and public health professionals.

[76] Ledley and Lusted, *supra* note 61.

[77] World Health Organization Global Health Workforce Alliance, Country Case Study: Ethiopia's Human Resources for Health Programme, p. 3, <https://www.google.com.et/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.who.int%2Fworkforcealliance%2Fknowledge%2Fcase_studies%2FEthiopia.pdf&ei=pbUMU-z5F6m57AaKpYGoAw&usg=AFQjCNGX2cG323hIu-1CwyPoAmgcOGH-Qg&bvm=bv.61725948,d.Yms>, visited on 12 August 2013. Sticking to physician practitioners would not be possible due to lack of number of physicians in Ethiopia. In a country where the physician patient ration is 1:29,777 allowing only physicians to undertake medical screening is not realistic.

[78]According to a pilot survey made by the author in medical institutions located in Addis Ababa, Bishoftu, Adama and Jimma, 76.68% of respondents working in medical institutions

Lastly, the obligation of the institution to screen the patient is limited by the equipment, facilities, and expertise the medical institution has.[79] If the medical institution has no competence to identify the threatening medical condition of the patient, it should screen and attempt to stabilize the patient to the extent possible in its competence. Afterwards, the medical institution may transfer the victim to a better medical facility.[80]

3.2 Obligation to Stabilize

In ordinary parlance, stabilization refers to a firm and dependable state free from fluctuations.[81] Similarly, in medical law stabilization refers to providing treatment for a patient under emergency medical condition with a view to stabilize his/her medical condition.[82] Instantly, a stable medical condition refers to a medical condition in which there is a reasonable medical certainty that material deterioration of the patient's medical state would not occur at during transfer or discharge.[83]This stability could be stability of physical or psychological health.[84] Hence, from the above stipulation one can infer two things: *stability for transfer* and *stability for discharge*. The medical condition of a patient is said to be ***stable to transfer*** when it is reasonably certain that his/her medical condition would not materially worsen during transfer.[85] On the other hand, the medical condition of the patient is considered ***stable for discharge*** when his/her medical condition reasonably let a prudent medical

---

claim that emergency medical treatment is given to a victim of motor vehicle accident only if s/he covers the cost of medical screening and stabilization in advance. In addition to this, 18% of the respondents stress that the victim shall cover the cost for card and other medical accessories, such as glove, syringe and glucose. Moreover, 4.58% of the respondents believe the victim should cover the cost of every emergency medical procedure except professional assistance. It is only 0.75% of the respondents that believe the victim shall not be obliged to cover the cost of treatment before 48 hours.

[79] Enhancing Public Health Delivery System in India, p. 29, <http://saneinetwork.net/Files/10_05___M_P_Ram_Mohan.pdf>, visited on 13 August 2013.

[80] Note that the issue of transfer is dealt in subsequent heading. However, readers should note that the medical institution is out rightly obliged to transfer the victim to a better facility. Rather, this matter is not clearly regulated under the Ethiopian legal system.

[81] *Merriam Webster's Dictionary*, *supra* note 11.

[82] Taylor, *supra* note 75 p. 13.

[83] Liu, *supra* note 58, p. 4.

[84] Managing Emergencies and Traumatic Incidents, p. 10, <www.minedu.govt.nz/~/.../**Emergency**Management/TheGuideS m.pdf> *visited on 15 August 2013.*

[85] United States General Accounting Office, *supra* note 66.

practitioner conclude that s/he can be treated as an outpatient or hospitalization can be deferred.[86]

Therefore, the obligation to give emergency medical treatment extends until the individual under emergency medical condition is discharged, hospitalized or transferred to another medical institution before hospitalization.[87]In association with this, in the latter regime if an individual's medical condition is not convenient to transport him/her to another medical institution, or if an intense bleeding is not stopped one cannot say that a patient's medical condition is stabilized.[88] Consequently, among other procedures, stabilization involves extending first aid to a victim under emergency medical condition. Hence, stabilization may be either simultaneous with medical screening or it may come after medical screening.

Once the presence of emergency medical condition is ascertained stabilization is compulsory.[89]If it is proved that there exists an emergency medical condition, medical institutions and their personnel are obliged to offer the necessary treatment based on the institutions capability and capacity for the victim with a view to stabilize him/her.[90]In fact, the instance where a patient's health is said to be stable is open for argument. A medical state one practitioner believes is to be stable might not be the same for another practitioner. For this reason, it is important to provide a proper standard to determine when one shall

---

[86] *Ibid.*

[87] Liu, *supra* note 58, pp.5-6. World Health Organization, *supra* note 33, p. 50. In countries like USA and member states of the European Union,

[88] Bitterman, *supra* note 59.

[89] Liu , *supra* note 58, p.6.

[90] Certification and Compliance for the Emergency Medical Treatment and Labor Act, *supra* note 68, p.2. In addition to this, the experience of other jurisdictions prove that a medical institution may transfer a patient under emergency medical condition if it does not have the necessary capability and capacity to stabilize the patient, or if waiting stabilization in that medical facility would take time and is of high risk to the patient. In such cases, the transfer is made before the patient is fully stabilized.[90] Nevertheless, in these jurisdictions medical institutions and their personnel can order transfer after ascertaining the existence of the above two exceptional conditions, and up on the fulfillment of conditions necessary to order transfer. These rigorous provisions that regulate transfer are also known as *patient anti-dumping provisions.* Moreover, if a medical institutions and its practitioners transfer a patient violating these conditions they will be held liable. Due to this, medical practitioners did not obstruct them mostly. The requirements for transfer are dealt in the next sub-heading. *See,* Zibulewsky *supra* note 60, p. 344.

say the medical condition of a patient is stable. In making such a determination, the researcher believes that it is important to take a prudent medical practitioner as a threshold. In other words, one should make the same determination that an objective and reasonable medical practitioner in a similar circumstances would make regarding whether a patient is stabilized.[91] Other than this, the expertise of the practitioner, his/her age, experience and so on shall not be taken in to consideration. The practitioner should be judged by the standard of his/her peers.[92] This is because, if one is highly inclined to the subjective standard, it would give a wide leeway for the violation of the obligation.

In Ethiopia, medical institutions and their employees have an obligation to stabilize victims of motor vehicle accident under emergency medical condition. According to article 27(1) of Motor Vehicle Insurance Against Third Party Risk Proclamation, any victim of a motor vehicle accident is entitled to medical treatment, in any medical institution, to a maximum of ETB 2,000. This means, once it is identified that a victim of a motor vehicle accident is under emergency medical condition, the medical institution and its personnel are obliged to provide medical treatment to the victim.[93] Consequently, the obligation of medical institutions and their personnel is not curing the patient; it is rather stabilizing him/her.[94]In this regard, the National Admission and Discharge Protocol defines clinical stability as a condition, where, the patient's vital signs are found to be within an acceptable/normal range after blood tests and further investigations.[95] Accordingly, the type of treatment that should be offered to the victim should be a treatment that would bring a reasonable medical certainty to his/her medical state.[96] By doing so, if the patient's medical condition is stabilized before the institution spends the maximum legal amount specified above it will not be obliged to extend further treatment to the victim without advance payment. However, a problem arises in the Ethiopian

[91] A. Grubb (ed.) (2004, 2nd edn.), *Principles of Medical Law* (Oxford University Press, USA) p. 371.
[92] *Ibid,* p. 370.
[93] Vehicle Insurance Against Third Party Risk Proclamation, Article 27(1).
[94] Under Emergency medical treatment laws, the primary obligation of hospitals is to stabilize the patient. When they act they should act with a view of stabilizing the patient, and not with a view of curing. *See* Zibulewsky, *supra* note 60, pp. 342-543.
[95] Admission and Discharge Protocol for Ethiopian Hospitals, p. 11.
[96] Liu, *supra* note 58, p. 4.

legal system when one raises questions such as, "Is the legally stipulated amount sufficient to cover the cost of stabilization?", "What would be the fate of a victim if s/he is not stabilized after getting treatment to the maximum legal amount?", "Wouldn't the difference in amount charged in privately owned medical institutions for diagnosis and treatment affect the emergency scheme?",[97]and, "To what extent does the obligation to give emergency medical treatment extend to medical practitioners working in private wing's in government hospitals?" Such questions are ongoing concerns that do not seem to have answers within the existing relevant laws.

As it is stressed in the previous paragraph, the first concern that requires a solution relates to the adequacy of the legally stipulated maximum amount for treatment. In relation to this, primarily a problem arises due to the position taken by the lawmaker. The lawmaker has limited the scope of medical institutions obligation through monetary terms rather than providing a general formula for stabilization. In other words, had the lawmaker determined the scope of treatment using terms such as, '... *medical institutions are obliged to stabilize the victim*" than determining the obligation of medical institutions through reference to a specific amount of money, this problem could have been avoided. [98] Consequently, it is recommended if the lawmaker replaces the present stipulation with a general standard dictating stabilization. Nevertheless, if the legislature does not accept the latter recommendation and sticks to limiting the amount to be paid for emergency medical treatment in monetary terms, it is would have been better to delegate the authority to determine the

[97] This is because the amount medical institutions charge for their service will affect the scope of treatment the person under emergency medical care would get. Exorbitant fees charged for treatment in some privately owned medical institutions is also threatening the emergency medical treatment scheme, An interview with Mr. Tilahun Melaku, an official in FDRE Ministry of Health,

[98] The writer argues that such formulation is supported by other rationales. First, the rationale behind the incorporation of an obligation to give emergency medical treatment is to reduce trauma. The primary aim of the Proclamation is establish a system that facilitates the provision of emergency medical treatment for victims of vehicle accident. Therefore, this being the primary aim of the lawmaker, *i.e.,* reducing trauma, it was better if it simply stressed that medical institutions are obliged to give primary health care services and stabilize the patient. Conversely, the present stipulation in the law chiefly risks the interest of individuals with serious bodily injury. Second, the lawmaker oversees matters associated with inflation in fixing the legal maximum. Due to this, in order to fight the problem that may arise due to inflation it would have been better if the lawmaker opted for a different stipulation. *See,* Vehicle Insurance Against Third Party Risk Proclamation, preamble para. 3.

legal maximum amount to another organ, particularly to the Council of Ministers. This could be a better solution to accommodate economic changes easily.[99]Such an arrangement will make the stipulation of the maximum amount flexible for change.

Nonetheless, even in the presence of such stipulation that limits treatment to a maximum of ETB 2,000, the author argues that, medical institutions and their personnel cannot abandon treating a victim of motor vehicle accident for simple reason that the cost of treatment has reached ETB 2,000. A closer look at the Food, Medicine and Health Administration and Control Proclamation, and the Addis Ababa City Administration Provision of Health Service and Health Institutions Administration Directive gives an indication as to this possibility of extended emergency medical treatment. The Food, Medicine and Health Care Administration and Control Proclamation impose an obligation to provide an ongoing emergency medical treatment for patients under emergency medical condition.[100] Following this, Addis Ababa City Administration Provision of Health Service and Health Institutions Administration Directive provides that all health institutions found in Addis Ababa are required to give a 24-hour free emergency medical treatment for any individual under emergency medical condition.[101] Accordingly, the author is of the opinion that an obligation to give emergency medical treatment should extend for victims of motor vehicle accident even beyond the legal maximum ETB 2,000 in case the victim of motor vehicle accident is not stabilized. This is because, Motor Vehicle Against Third Party risk Proclamation is not issued in order to narrow the right of a victim that she or he is entitled in other legislations. On the other hand, though the Food, Medicine and Health Administration and Control Proclamation establishes a right to emergency medical treatment, it does not expressly require the treatment to be given freely. However, the understanding is that medical institutions are obliged to give emergency medical treatment freely.[102]As a result, in order to make the extent of the obligation clear and

[99] Inflation is substantially changing the economic reality in Ethiopia. For this reason, if the provision is kept like this we would witness what a change of circumstances did cause to the maximum amount to be paid for moral damage in Article 2116(3) of the Ethiopian Civil Code.
[100] Food, Medicine and Health Care Administration and Control Proclamation, Article 38.
[101] Addis Ababa City Administration Provision of Health Service and Health Institutions Administration Directive, Article 18(1).
[102] Interview with Mr. Getnet Desta, *supra* note 42.

avoid ambiguity, the Ministry of Health should come up with a directive that stipulates the same.

3.3 Obligation to Transfer

Transfer is a broad concept inherent in emergency medical treatment schemes.[103] In a broader sense, it refers to moving a thing/individual from place to place.[104]However, in emergency medical treatment laws the meaning of transfer is limited. Transfer does not include every movement of a patient within the premises of the medical institution.[105] Moreover, neither discharge of dead body of a victim, nor departure of a victim of motor vehicle accident without the permission of the medical institutions personnel is regarded as transfer.[106] Narrowly constructed, in emergency medical treatment laws, transfer refers to one of the following three: moving a patient under emergency medical condition from the site of accident to a hospital, transferring a patient from one medical institution to another, and discharging a patient under emergency medical condition from a medical institution after stabilization.[107] The former type of transfer is called primary transfer; whereas, the latter two are called secondary transfer.[108]

Primary transfer is effected when stabilizing the patient at the site of accident is not possible. Secondary transfer can be of two types. The first type of secondary transfer is discharge. As the nomenclature dictates, discharge refers to either releasing the patient after appropriate stabilization, or else admitting a patient as an inpatient in the medical institution for further treatment. On the other hand, the other type of secondary transfer is transferring a patient from one medical institution to another. This type of transfer could either be referral, or transfer administered through the victims informed request.[109] Referral is

---

[103]M. J. G. Dunn *et al* (2006), Critical care in the emergency department: patient transfer, *An Occasional Series on Critical Care*, p. 40, <www.ncbi.nlm.nih.gov?pmc?articles/PMC2658153/pdf/40.pdf>, visited on 26 February 2014.
[104] *Merriam Webster's Dictionary*, *supra* note 11.
[105] Bitterman, *supra* note 59.
[106] *Ibid.*
[107]*Ibid.*
[108] Dunn *et al*, *supra* note 103.
[109] Note that the term "through the victims informed request", include a transfer administered through the informed request of the victim or his/her representative.

principally administered when stabilizing the victim is beyond the capacity of a medical institution.[110] During such times, the referring medical institutions medical personnel should do their best to examine the medical conditions of the victim, provide him/her all possible stabilizing treatments up to the institutions competence,[111]undertake appropriate assessment concerning the potential risks and benefits of the transfer, and order the transfer if the benefits of the transfer overweight the risk.[112]During such times, if the law allows free emergency medical treatment the referring medical institution should transfer the victim irrespective of his ability to pay, or insurance coverage limit.[113] Note that such medically indicated transfer is administered after the authorized medical personnel in the medical institution authorizes the transfer.[114]

Alternatively, as it has been indicated above secondary transfer can be effected through the victims informed request.[115]During such times, the premise is that there exists no medically indicated transfer. Or it might be the case that the victim can get an equal or better treatment from the medical institution to which she or he is being transferred to. It is also possible that, s/he requires the transfer for other reason that s/he or his/her representatives have in mind. During such times, the victim should cover the cost of transfer. Moreover, the right to free medical treatment does not persist at the receiving institution.

---

[110] World Health Organization, *supra* note 33, p.44.

[111] Certification and Compliance for the Emergency Medical Treatment and Labor Act, *supra* note 68, p. 2. Such medically indicated transfer is administered either due to lack of qualified personnel and/or equipment in the medical institution. *See* Bitterman, *supra* note 59, p. 104.

[112] Taylor, *supra* note 75, p. 4. The transfer of unstable patient should be made through qualified personnel and appropriate equipment. Such shall include the provision of appropriate equipments to sustain the life of the victim at the cost of the medical institution. In other words, the ambulance/cab used to transfer a patient must be adequately equipped through both, equipments and personnel. *See* Certification and Compliance For The Emergency Medical Treatment and Labor Act (EMTALA), *supra* note 69, p. 2; South Asia Network of Economic Research Institute (2010), *Enhancing Public Health Delivery System in India: Impact of Judicial Decisions towards Access to Universal Health Care* (New Delhi, The Energy and Resources Institute) (Project Report No. 2008IA05), p. 28.

[113] Zibulewsky, *supra* note 60. In countries that establish government owned primary health care centers like India such primary health care centers should transfer a stabilized patient to government owned medical institutions only where the victim is stabilized. Nevertheless, in other countries there exists no such rule. *See* South Asia Network of Economic Research Institute, *supra* note 112.

[114] Bitterman, *supra* note 59.

[115] *Ibid*, p. 104.

Turning back to medically indicated secondary transfer, the jurisprudence evidences that referring medical institution should meet certain stringent formality requirements before transferring the victim. First, the medical institution should ascertain that the accepting institution has the capacity and expertise to treat the victim's medical condition and secure the consent of the receiving medical institution.[116] In the second place, the medical personnel of the transferring medical institutions should fill a transfer form that evidences transfer is the best option and make the victim sign on it.[117] Nonetheless, if securing the consent of the victim or a person responsible for him/her is not possible the medical institution can transfer the victim without securing his/her consent. This is because emergency medical care schemes always stand for the best interest of the victim. Conversely, if the medical institution claims that the victim refuses the transfer it should prove it using documentary evidences signed by the victim or his/her representative.[118]In the third place, if transfer is effected the transferring institution should send the transfer form and copies of the medical records of the victim together.[119]

---

[116] Liu, *supra* note 58, p. 6. The consent of the accepting medical institution is primarily necessitated in order to protect the victim from inconveniences created due to lack of communication among medical institutions. For instance, it is possible to avoid problems that may arise due to denial of admission in the accepting medical institutions for reasons of lack of space in emergency room, and claims of inappropriate transfer. For such reasons countries like USA require the transferring institution to secure the consent of the institution towards whom referral is proposed to be made in advance.

[117] *Ibid*, p. 7. The consent of the victim is necessary because his/her treatment should always be supported by an informed consent. In this regard, the victim's consent for the transfer must be indicated in form prepared by the medical personnel that decides the transfer. This transfer form is a uniform document that primarily summarizes the medical condition of the victim and the reason why transfer is recommended. Note that, the form has a place to record necessary information to identify the patient, the transferring medical institution and the medical personnel that signs the transfer. In other words, the transferring medical institution should provide the reasons for transfer and certify its necessity and let the victim give his/her consent for transfer.

[118]Bitterman, *supra* note 59, p. 107. Refusal must always be proved using the signature of the victim, or his representative on the form prepared for transfer indicating that s/he refuses transfer after s/he is informed the potential risks and benefits of the transfer. Such stringent requirement is imposed on medical institutions in order to protect victims from falsified testimonies of the medical institution's personnel. Instantly, if the patient of his/her legal representative refuses to sign on the document the medical institution should effect the transfer.

[119] Liu, *supra* note 58, p. 6; Bitterman, *supra* note 59, p. 106. Medical records contain relevant details necessary for the proper treatment and management of the patient. Associated with this, a good medical record is a symbol of good practice. Medical personnel are obliged to keep

Accordingly, in countries like the US, unless a medical institution made a transfer fulfilling these conditions one cannot say that the transfer is appropriate one.[120]Such failures would make the institution and the medical practitioner liable.[121]

Under the Ethiopian legal system, an obligation to transfer is clearly stipulated under the Motor Vehicle Risk Against Third Party Proclamation, the Food, Medicine and Health Administration and Control Proclamation, and its subsequent Regulation. Moreover, it is regulated under guidelines issued by the Ministry of Health. In relation to this, the two proclamations indicate the incorporation of both types of transfer i.e. primary and secondary. Primary transfer is incorporated under Article 2(16) of the Motor Vehicle Risk Against Third Party Proclamation. This provision stresses that emergency medical treatment includes medical treatment given to a victim from the site of the accident to an emergency medical ward. Therefore, it indicates that emergency medical condition includes an obligation to transfer a victim under emergency medical condition. Accordingly, primary transfer is explicitly recognized under the Motor Vehicle Risk Against Third Party Proclamation. Nevertheless, this Proclamation does not expressly provide for an obligation to make secondary transfer. However, this does not mean that secondary transfer is not part of the emergency scheme. This is because, one can find secondary transfer inherent in the existing stipulation under the Motor Vehicle Risk Against Third Party Proclamation as well as in in the Food, Medicine and Health Administration and Control Proclamation, the Regulation that followed it, and the mandatory Referral Guideline issued by the Ministry of Health. The latter laws provide for secondary transfer for all persons under emergency medical condition, including victims of motor vehicle accident.[122]

In this regard, the first type of secondary transfer, i.e., discharge, is impliedly recognized under the Motor Vehicle Risk Against Third Party Proclamation. In association with this, this type of transfer stems from the inherent purpose of

---

detail, accurate, legible, comprehensive and contemporaneous notes in a medical record for it is necessary to extend appropriate treatment for patients.

[120] Liu, *supra* note 58, p. 7.

[121] *Ibid.*

[122] Food Medicine and Health Care Administration and Control Proclamation, Article, 38(2); Food Medicine and Health Care Administration and Control Regulation, Article 54(2).

emergency medical treatment: discharging a patient at times clinical stability is secured. As a result, it is rational to conclude that discharge is an inherent part of the emergency scheme under Article 27 of the Motor Vehicle Against Third Party Risk Proclamation. In relation to this, "clinical stability ready for discharge" refers to a condition where the patient's vital signs are found to be within an acceptable/normal range after blood tests and medical condition.[123] According to the Admission and Discharge Protocol for Ethiopian Hospitals, a patient is 'fit for discharge' if s/he no longer requires emergency medical treatment within a secondary care setting, as an inpatient, and where:[124]

- ✓ "review of the patient's condition can be shared with the appropriate health professional including adjustments to medication;
- ✓ ongoing general, nursing, and rehabilitation needs can be met in another setting at home, in those cases where applicable, or through primary/community/intermediate/social care services, and;
- ✓ additional tests and interventions can be carried out in an outpatient or ambulatory care setting."

The other type of secondary transfer is referral. In this respect, referral is recognized under various laws in the country. First, the Food, Medicine and Health Administration and Control Proclamation requires medical institutions to administer secondary transfer/referral to the appropriate health institution where a person under emergency medical condition cannot get the proper treatment in the medical institution due to the institutions lack of competence.[125]Moreover, the Regulation that followed it requires medical institutions to effect the referral in accordance with the referral directive. To this effect, the Ministry of Health has come up with a mandatory Referral Guideline that every medical institution should observe. According to this Guideline, before referral the referring medical institution's personnel need to ascertain that referral is necessary for the benefit of the patient.[126]Accordingly, referral is said to be necessary when transferring the victim to another medical establishment is a must in order to stabilize him/her. The referral in this regard

---

[123] Admission and Discharge Protocol for Ethiopian Hospitals, p. 11.
[124] *Ibid.*
[125] Food Medicine and Health Care Administration and Control Proclamation, Article, 38(2); Food Medicine and Health Care Administration and Control Regulation, Article 54(2).
[126] Referral Guideline, § 8.1.

could be vertical, horizontal or diagonal.[127] Moreover, the medical personnel that decided the transfer should know where to refer the patient.[128]S/He can do this by cooperating with the referral coordinator found within the medical institution.[129]In due course, the referral coordinator should ascertain that the receiving institution has the capacity to administer effective stabilization within its capacity.[130]In addition, s/he should contact the receiving institution and secure its consent and convenience of admitting the victim in that institution for emergency medical treatment.[131]In other words, the referral should be named to a specifically named medical institution, and also the willingness of the admitting institution should be secured before transfer. The referral medical institution cannot make the referral in a "To whom it may concern/ To any" manner. Above all, the receiving medical institutions cannot refuse such referral as long as it is capable to treat the victim, and has available personnel and space to admit the emergency patient/victim.[132]Lastly, once the referral hospitals personnel secures the consent of the receiving institution, the practitioner who recommended the referral should fill the referral form,[133] secure the consent of the victim for the referral,[134] and refer him/her to the receiving medical institution. The Referral Guideline further requires the

---

[127] A referral is said vertical if it is made in a hierarchical arrangement of the health services from the lower end of the health tier system to the higher ones. That is if it is directly made from Health centers to General Hospitals , or when it is directly made from General Hospitals to Specialized hospitals. On the other hand, it is said horizontal when it is made between medical institutions found in similar level for reasons of facility in the interest of patients for cost, location and other reasons. Moreover, a referral is diagonal when a lower level health facility directly refers patients to a specialized facility without necessarily passing through the hierarchical system. This is the case for instance when the referral is directly made from health centers to specialized hospitals. *See,* Referral Guideline, p. 4.

[128] Referral Guideline, § 8.

[129] Referral Guideline, § 9.

[130] Medicine and Health Care Administration and Control Regulation, Article 54(4).

[131] Medicine and Health Care Administration and Control Regulation, Article 54(4); Referral Guideline, § 8.

[132] Medicine and Health Care Administration and Control Regulation, Article 54(3); Referral Guideline, § 9.

[133] The referral form is found attached to the Referral Guideline.

[134] Medicine and Health Care Administration and Control Regulation, Article 52. In fact, at times securing the consent of a victim that sustains motor vehicle accident is not possible. Moreover, at times s/he may refuse to consent for referral. However, though this is the case, the referral could be effected if, either the consent is given by his/her representatives. Such representative could be appointed by law, agreement or court order. In addition to this, at times delaying referral would cause irreversible damage to the victims health the medical institution may refer him/her without securing his/her consent.

referring medical institution to facilitate the transportation of the victim under emergency medical condition.[135]

However, both primary and secondary transfers are not sufficiently utilized in Ethiopia. Due to this, patient dumping is being witnessed in government owned medical institutions.[136] The fear of law enforcement agencies about the fee that would be charged in privately owned medical institutions is affecting the scheme. While there are sufficiently equipped privately owned medical institutions near accident sites, law enforcement agencies are transferring victims to distant government owned medical institutions.[137]Moreover, the fact that the Referral Guideline is not sufficiently publicized and which the resulting lack of awareness about the obligation of medical institutions and their employees' obligation to give emergency medical treatment is seriously affecting the enforcement of the scheme.

3.4 Obligation to Accept/Admit a Transferred Patient

An obligation to admit a transferred patient follows an obligation to transfer. As a result, an obligation to accept a transferred patient includes admitting both primary and secondary transfers.[138]Admitting a primary transfer involves admitting a victim under emergency medical condition while s/he is transferred from the sight of accident.[139] On the other hand, for the purpose of emergency medical law, secondary transfer refers to transfer from one medical institution to another through referral.[140] Nevertheless, in all times, it is effected in order

---

[135] Referral Guideline, § 8.2.

[136] An interview with Ato Tilahun Melaku, *supra* note 95.

[137] *Ibid.* For instance, through qualifying the transfer requirement into *"transfer to a nearby institution"* it is possible to avoid a transfer to distantly located medical institutions while there a nearby medical institution capable of treating the victim. Otherwise, transferring a patient to a medical institution located far without justification is equivalent with denial of treatment. Furthermore, in order to protect the financial interest of privately owned medical institutions the lawmaker allows secondary transfer only to government owned medical institutions. Through this it balance the interest of victims with profit making objective of privately owned medical institutions.

[138] Bitterman, *supra* note 59, pp. 103 and 110.

[139] *Ibid.*

[140] Referral Guideline, p. 4. Moreover, referral is defined under Social Health Insurance Scheme Council of Ministers Regulation No. 271/2012 . Article 2(5) of the Regulation provides that referral system means transferring a patient from one health facility to the next higher level health facility. But this definition is narrower. This is because referral could also

to secure the best interest of the patient.[141] Hence, if there is an appropriate transfer made in accordance with the procedure described in the previous section, the medical institution is obliged to accept a victim. However, this does not mean that a patient whose transfer is not appropriate is not eligible for treatment at the medical institution where the transfer is made. As a rule, the institution towards which the transfer is made should treat a victim whose transfer is not appropriate.[142] After treating the victim, the admitting institution is entitled for a remedy against the institution that made inappropriate transfer. Such remedy could be sought through patient anti-dumping provisions.

In Ethiopia, medical institutions obligation to receive a referred victim under emergency medical condition is recognized under the Food, Medicine and Health Control and Administration Proclamation, its subsequent Regulation and Ministry of Health Referral Guideline. The Regulation obliges every medical institution to admit a patient sent to it in accordance with the referral system, and confirm the same to the sending medical institution.[143]In this regard, the Guideline issued by the Ministry of Health provides a mandatory framework regulating the scheme. Though it is referred to as a Guideline, the Ministry issued it as a directive and it is also functioning as a binding directive. According to this Guideline, in case referral is requested by the transferring medical institution, the receiving institutions referral coordinator should promptly consult the request,[144] inquire the necessary information about the medical state of the victim to be transferred and promptly admit the victim in case the referral request is proper facilitate the admission without delay.[145]At this juncture, it is important to note that the referral is said to be proper when the referral by the referring medical institution is justified as well as when the receiving medical institution has the capacity and space to admit the referred victim.[146]

---

be effected among medical institutions found in the same level as it is indicated in the Referral Guideline.

[141] Bitterman, *supra* note 59.

[142] *Ibid.*

[143] Food, Medicine and Health Control and Administration Regulation, Article 54(3).

[144] Referral Guideline, § 8.4 and 8.5.

[145] Referral Guideline, § 8.5.

[146]Food, Medicine and Health Control and Administration Regulation, Article 54(2), (3) and (4) Cumulative with the Referral Guideline, § 8.5.

4. Conclusion

Ethiopia adopted a law that entitles all victims of motor vehicle accident a right to emergency medical treatment to the maximum of ETB 2,000. This right is further extended through various legislations that give right to emergency medical treatment for all persons under emergency medical condition. In this respect, the proper explanation of the right includes the right to get appropriate medical screening, stabilization and transfer.

Nevertheless, in Ethiopia we do not have an in-depth analysis and description of the obligation of medical institutions and their personnel. Moreover, these specific obligations are found scattered in various legislations and in the professional codes and norms of the medical profession. In other words, the obligations are not comprehensively stated in one single document addressed. This, has limited the extent to which the public is aware of the obligation of medical institutions and their personnel. Furthermore, due to their fragmentation, provisions that constitute the scheme and the fact that the scheme is not comprehensive have made it difficult to understand rights and obligations related to the scheme. The scope of emergency medical treatment is also not plainly determined. Even more, due to lack of publicity, medical institutions and other stakeholders do not know the presence of the Referral Guideline and the Health Protocol that regulates the scheme. The existence of this Guideline comes as a surprise even for experts at the Ministry of Health, including the legal department. Some experts at the Ministry did not know the presence of the Guideline and the exact obligation of medical institutions. On the other hand, due to the dispersed existence of the relevant provisions, it has become hard to understand the relationship between the Motor Vehicle Risk Against Third Party Proclamation and other related legislations, such as, the Food, Medicine and Health Control and Administration Proclamation and the Referral Guideline. Lastly, though the Referral Guideline and the Protocol are said to be binding documents by the Ministry of Health, they have not went through the exact procedure for issuing a directive. Their nomenclature also does not indicate that they are directives. Thus, it seems that the two documents have not attained a status of directive proper.

Consequently, the author is of the opinion that Ministry of Health and the Insurance Fund Agency should come up with a comprehensive directive that regulates emergency medical condition and treatment. Through such directive, it is possible to properly explain the procedures that should be followed in emergency medical treatment. In due course, the directive could further provide a clearer demarcation of the scope of emergency medical treatment, and the relationship of the Motor Vehicle Risk Against Third Party Proclamation with other legislations. Moreover, the Ministry and the Agency should design and launch an effective awareness creation campaign about emergency medicine and the law. In addition, it is better if the government revisits the limit it provided on the right to emergency medical treatment that is currently set at ETB 2,000 under the Motor Vehicle Risk Against Third Party Proclamation. In this respect, it would be better if the government provides stabilization as a requirement than limiting the scope of emergency services through monetary terms.

The Implications of 2009 Ethiopian CSOs Law on the Right to Freedom of Association

Mizanie Abate Tadesse *

1. Introduction

Before the adoption of the 2009 Charities and Societies Proclamation (hereinafter the Proclamation)[1], the laws that governed charities and societies or civil society organizations (hereinafter CSOs)[2] were the Civil Code of 1960 and the Associations Registration Regulation of 1966. Later on, these laws were unable to accommodate the level of development, characteristics and activities of CSOs in Ethiopia. Consequently, several problems were observed regarding registration, control and administration of CSOs.[3] As a response to these problems, the Ministry of Justice prepared various drafts for a new legislation concerning the registration and regulation of CSOs and presented them for discussion in different years.[4] The discussion on various draft legislations culminated in the adoption of the Proclamation by the parliament of the Federal Democratic Republic of Ethiopia on 6 January 2009. The adoption of this Proclamation has faced strong criticism from national civil society organizations, regional and international human rights activists and global and African regional treaty monitoring bodies. Although some of

---

* LL.B (Addis Ababa University), LL.M (University of Pretoria), PhD (University of Alabama); Assistant Professor of Law, Addis Ababa University; lawmizane@yahoo.com

[1] Charities and Societies Proclamation, 2009, Proclamation No. 621, Neg. Gaz. Year 15, no. 25.

[2] The term CSOs has quite diverse definitions. This article adopted the definition used by the Word Bank. According to the World Bank, CSOs 'refer to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.' See The World Bank, Defining Civil Society, (http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html), last visit June 12, 2015 As discussed below, while the Proclamation defines the term 'charity' or 'society' separately, both can be subsumed under CSOs. Thus, this article uses the term 'charities and societies' and 'CSOs' interchangeably.

[3] Ethiopian Civil Society Organizations, Comments of Ethiopian Civil Society Organizations on the Charities and Societies Draft Proclamation (13 May 2008), (http://www.fssethiopia.org.et/CSO%20Bill%20-%20Gen%20Comts%20-%20Eng.pdf) last visit on September 2, 2009

[4] Ibid, the years on which the draft laws were tabled for discussion include: 2002, 2003, 2004 and 2008.

criticisms were raised against the draft Proclamation, they equally work for the adopted Proclamation as it was passed without making any change on the controversial articles.

The Ethiopian civil society organizations, in commenting on the draft law, argued that the new law could restrict funding and the scope of charities' activities and deny the appeal right of international non-governmental organizations to courts.[5] Among international human rights groups, Amnesty International[6] and Human Rights Watch[7] regarded the Proclamation as repressive and meant not only to undermine and frustrate the work of independent civil society organizations in Ethiopia, particularly the work of human rights defenders and CSOs, both Ethiopian and international but also to bar foreign nongovernmental organizations. Both Amnesty and Human Rights Watch argued that the Proclamation contravenes fundamental human rights guaranteed by international law and by the FDRE Constitution, notably the right to freedom of association. Recalling that the Proclamation was passed by the Parliament despite considerable efforts on behalf of national, regional, international organizations as well as the diplomatic community to bring about significant amendments to the bill, the East and Horn of Africa Human Rights Defenders Network deplored the passing of the law arguing that the Proclamation threatens the very future of human rights work in Ethiopia.[8]

In response to the Ethiopian initial and periodic report, the African Commission on Human and Peoples' Rights in its concluding observation has expressed the concern that "the Charities and Societies Proclamation No.

---

[5] Ethiopian Civil Society Organizations, Comments of Ethiopian Civil Society Organizations on the Draft Charities and Societies Proclamation (16 Nov.2008) (http://www.crdaethiopia.org/Documents/Comments%20of%20the%20CSO%20Task%20force%20on%20the%20Fourth%20Draft%20Legistlation.pdf) last visit on September 2, 2009

[6] Amnesty International, Comments on the Draft Charities and Societies Proclamation (1 October 2008), (http://www.amnesty.org/en/library/asset/AFR25/008/2008/en/6ec4fbd7-a748-11dd-8899-8f759187dd0e/afr250082008en.html) last visit on August 21, 2009

[7] Human Rights Watch, Human Rights Watch's Analysis of Ethiopia's Draft Civil Society Law (13 October 2008) (http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/CJAL-7N4SXA full_report.pdf/$File/full_report.pdf) last visit on September 12, 2009

[8] The East and Horn of Africa Human Rights Defenders Network, Regional rights network condemns charities and societies law (17 January 2009) (http://en.ethiopianreporter.com/content/view/561/1/) last visit on September 13, 2009

621/2009 has the potential to violate the rights of freedom of expression as specified by the African Charter, especially the provision that requires CSOs not to raise more than ten percent of their funding outside of Ethiopia."[9] Once again, the Commission, deeply concerned with the human rights situations of Ethiopia, adopted a specific resolution on Ethiopia in May 2012.[10] In this resolution, the Commission, *inter alia*, denounced 'the excessive restrictions placed on human rights work by the Charities and Societies Proclamation, denying human rights organizations access to essential funding…'[11] and it urged the Ethiopian Government to amend the Proclamation in a manner consistent with the United Nations (hereinafter the UN) Declaration on Human Rights Defenders.[12]

The CEDAW Committee in its concluding observations on Ethiopia has also raised similar concern. According to the Committee, the proscription of foreign and foreign funded CSOs from engaging in human rights and gender activism by the Proclamation 'has obstructed the capacity of local women's rights organizations to provide legal aid and other support to women victims of human rights violations.'[13] Apart from the recommendation to amend the law, the Committee urged Ethiopia to put in place provisional 'strategies to mitigate the adverse impact of the CSO Law on the capacity of local human rights CSOs,'[14] Moreover, the UN Special Rapporteur on the Rights to Freedom of Assembly and Association and the Human Rights Committee opined that the actual enforcement of the provisions of the Proclamation that restrict foreign funding of local human rights CSOs and prohibit foreign CSOs from engaging

---

[9] African Commission on Human & Peoples' Rights, Consideration of Reports Submitted by States Parties under Article 62 of the African Charter on Human and Peoples' Rights, Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia Para. 45

[10] Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, t*he African Commission on Human and Peoples' Rights (the African Commission), meeting at its 51st ordinary Session held in Banjul, The Gambia from 18 April to 2 May 2012*
(http://www.achpr.org/sessions/51st/resolutions/218/) , last visit on December 20, 2014

[11] Id, Preamble, 8th paragraph.

[12] Id, Para iv.

[13] Committee on the Elimination of Discrimination against Women, Forty-ninth session 11 – 29 July 2011 Concluding observations of the Committee on the Elimination of Discrimination against Women, Para 28.

[14] Id., para. 29.

in human rights works in Ethiopia has seriously obstructed individuals' ability to form and run associations.[15]

The Ethiopian Government has dismissed the aforementioned criticisms. In an interview with the Voice of America, Ato Bereket Simon, the former Minister of Government Communications Affairs said that the criticisms are simply ridiculous assertions.[16] The former Prime Minister, in highlighting the position of the Government, has also defended the Proclamation firmly arguing that the restriction on foreign funding of local human rights CSOs and the embargo on foreign human rights CSOs from engaging in human rights activities in Ethiopia are instrumental to curb foreign political influence in the domestic affairs of the country.[17] Moreover, the Ethiopian Government entrained a position that the proscription of foreign and foreign funded CSOs from participating in human rights works is a reflection of the "stipulation of the FDRE Constitution' that limits the right to freedom of association (as a 'democratic right') only to Ethiopian citizens.[18]

The purpose of this article is not to entertain the whole debate on the entire provisions of the Proclamation. Instead, its intention is to reflect on one of the most controversial issues in the Proclamation; viz., whether the prohibition of foreign and foreign funded local CSOs from engaging in promotion of human rights constitutes a violation of the right to freedom of association. None of the

---

[15] Human Rights Committee 102nd session Geneva, July 2011 Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee Ethiopia, para 25. See also UN Human Rights Council, Report of the Special Rapporteur on the Right to Freedom of Assembly and Association, Maina Kiai, April 24, 2013).

[16] P. Heinlein, "US Says Draft Ethiopian CSO Law Would 'Close Political Space" Voice of America, Oct. *21, 2008.*

[17] A cited in, M. Sekaggya, Report submitted by the Special Rapporteur on the situation of human rights defenders: Addendum Summary of cases transmitted to Governments and replies received, A/HRC/10/12/Add.1 (2009) Para. 979. This position of the Government was also reiterated by the Ethiopian delegate during the dialogue with members of the CEDAW Committee. See Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 28. See also Ministry of Justice, Commentary on the Draft Charities and Societies Proclamation, September 2009, P. 11.

[18] This argument of the Government is expressed in Users' Manual for the Charities and Societies Law, 2011, prepared by the Taskforce on Enabling Environment for Civil Society in Ethiopia, available at (http://csf2.org/sites/default/files/Users%20Manual%20for%20the%20Charities%20and%20Societies%20Law%20(1).pdf), last visit June 12, 2015

existing literature on this issue meticulously and deeply analyzes the matter relying on national and international human rights standards.

This article canvasses the issue under its five sections. Section one highlights the global, European, African regional and domestic human rights standards relating to the right to freedom of association. Because the right to freedom of association is not an absolute right, states may limit the enjoyment of the right. However, the fact that the right could be limited does not give states a free license to deny the enjoyment of the right-by-right holders arbitrarily. Section two is devoted to analyzing the extent to which Ethiopia is permitted to restrict the enjoyment of the right to freedom of association. Section three introduces the reader to the relevant provisions of the Proclamation. In section four, the writer turns his attention to the crux of the matter. In this section, the author investigates the issue of whether the prohibition of foreign and foreign funded CSOs from working on promotion of human rights constitutes an interference with the right to freedom of association. The author also addresses the issue of whether or not the interference is a permissible interference in light of the relevant human rights standards. Finally, the author concludes the discussion in section five.

2. Human Rights Standards Governing the Right to Freedom of Association

2.1 Global and European Human Rights Standards

The right to freedom of association is recognized in a number of human rights instruments.[19] The Universal Declaration of Human Rights (hereinafter the UDHR)[20], under article 20, provides that 'everyone has the right to freedom

[19] Besides the human rights treaties mentioned below, the right to freedom of association is dealt in many International Labor Organization (ILO) conventions, such as ILO 87 concerning the Freedom of Association and Protection of the Right to organize (1948); and ILO 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949).

[20]Universal Declaration of Human Right, adopted in 1948. Despite the fact that the Universal Declaration of Human Rights was not meant to be a binding document, scholars argued that most of the provisions therein attained the status of customary international law. Under international law, rules of customary international law impose obligations on all states. See J. Dugard, International Law: The South African Perspective, (2005), p. 315.

of… association', and that 'no one may be compelled to belong to an association.' Using similar wording, the same right is enshrined in article 22 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR).[21] From trade unions point of view, article 8 of the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR)[22] guarantees 'the right of every one to form trade unions and join the trade union of his choice' and 'right of trade unions to function freely'. The right to freedom of association is also incorporated in other specialized human rights conventions, such as the United Nation Convention on the Rights of the Child (hereinafter the CRC)[23] and the International Convention on the Protection of the rights of All Migrant Workers and Members of Their Family.[24]

The most recent UN document dealing with the right to freedom of association is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter the UN Declaration on Human Rights Defenders).[25] The Declaration stipulated a series of principles and standards aimed at ensuring that states fully support the efforts of human rights defenders and ensure that they are free to conduct their activities for the promotion, protection and effective realization of human rights without hindrance or fear of reprisals. The term 'human rights defender' within the meaning of the Declaration refers to 'any person or group of persons working

---

[21]Adopted and open for signature, Ratification, and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976. Ethiopia acceded to it on 11 June 1993. For ratification status of international human rights treaties, visit http://treaties.un.org./

[22] Adopted and open for signature, ratification, and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976. Ethiopia acceded to it on 11 June 1993.

[23] Adopted and open for signature, Ratification, and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September1990, Art.15. Ethiopia acceded to it on 21 October 1991.

[24] Adopted by General Assembly resolution 45/158 of 18 December 1990, enters into force on 1 July 2003, Art. 26.

[25] UN Declaration on Human Rights Defenders, Adopted by the General Assembly in 1998, A/RES/53/144, and 9 Dec. 1998. The UN Declaration on Human Rights Defenders, as a General Assembly Resolution, is not legally binding. Significantly, however, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments and was adopted by consensus—therefore representing a strong commitment by states to its implementation.

to promote human rights.'[26] This definition indisputably includes human rights CSOs and their members.

As can be deduced from the above international human rights documents, the right to freedom of association enables individuals to join together to pursue common interests in groups.[27] Although the right to freedom of association is framed in different treaties as an individual right, it has been increasingly argued that the right has a hybrid character.[28] That is, it has an aspect of both an individual and a collective right.[29] As a right of individuals, it encompasses the right of individuals to form and join any association freely. For this individual right to be fully enjoyed, however, the collective aspect of this right must be protected. That is, the associations formed must be able to function freely without unjustifiable governmental intrusion.[30] In support of this, it is further argued that article 8 of the ICESCR that requires State Parties to ensure 'the right of the trade union to function freely' "shows an understanding that the right to 'form and join' an organization may not be sufficient to enable an individual to fully realize his or her right to freedom of association" even if it specifically refers only to trade unions.[31]

Neither the Human Rights Committee nor other international treaties monitoring bodies address the issue of whether and how the right to freedom of association, a right typically formulated in various convention as a right of individuals, can be extended to other entities, such as CSOs.[32] The landmark

---

[26] H. Jilani, Promotion and Protection of Human Rights: Human Rights Defenders, Report submitted by the Special Representative of the Secretary-General on human rights defenders, E/CN.4/2006/95 (2006)Para 29. This definition can also be implied from article 1 of the UN Declaration on Human Rights Defenders.

[27] M. Sepulveda, T. Banning, G. D. Gudmundsdottir, C. Chamoun and W. Genugten, Human Rights Reference Handbook, (2004), PP. 302-303.

[28] Id, P.303. See also, Human Rights First, The Neglected Right: Freedom of Association in International Human Rights Law (1997) (http://www.humanrightsfirst.org/pubs/descriptions/neglrt.aspx) last visit on September 13, 2009

[29] Id, P.302-303.

[30] Human Rights First, cited above at note 28.

[31] Ibid

[32] This does not include trade unions. In a number of convections negotiated under the auspices of the International Labor Organizations (ILO), it is unambiguously affirmed that trade unions have the right to freedom of association. See, Freedom of Association and Protection of the Right to Organize Convention (ILO No. 87); Right to Organize and Collective Bargaining

decisions of the European Court of Human Rights have, however, affirmed that international law recognizes the right of individuals to from associations and that, once the associations are formed; the associations have the right to function freely.

In the *United Communist Party of Turkey and Others v. Turkey*[33], the Court, in deciding that Turkey could not dissolve a political party that had engaged in no illegal activities, *inter alia*, said that:

> *[T]he Convention [the European Convention on the Protection of Human Rights and Fundamental Freedoms] is intended to guarantee rights that are not theoretical or illusory, but practical and effective. . . . The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision.*[34]

The European Court of Human Rights has also addressed the right of individuals to require registration of legally recognized associations that are not political parties. In the *Sidiropoulos and Others v. Greece*[35], in holding that Greece could not refuse to register an association named the 'Home of Macedonian Culture' the purposes of which were exclusively to preserve and develop the traditions and folk cultures of the Florina Region, the Court, *inter alia*, said that:

Convention (ILO No. 98); Workers' Representatives Convention (ILO No. 135); and Labor Relations (Public Service) Convention (ILO No. 151).

[33] United Communist Party of Turkey and Others v Turkey, (19392/92, European Court of Human Rights, January 30, 1998), available at (http://www.unhcr.org/refworld/docid/4721cf132.html) last visit on September 15, 2009

[34] Id, Para. 33.

[35] Sidiropoulos and Others v. Greece, (57/1997/841/1047, European Court of Human Rights: Chamber decision, July 10, 1998), available at (http://www.icnl.org) last visit on September 15, 2009

> *[T]he right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.*[36]

By finding in the latter case that 'the right to form legally registered associations was 'inherent' in the right of individuals to freedom of association, the Court avoided the disputes over whether legal entities themselves enjoy the right to freedom of association.'[37] Moreover, by finding in the former case that the protection of Article 11 of the European Charter on Human Rights 'extends throughout the life of an association, the Court has effectively conferred the protections of the right to freedom of association on legal entities.'[38]

Although the decisions of the European Court of Human Rights do not set precedents other than for States Parties to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR), the fact that the wording of Article 22 of the ICCPR to the wording of Article 11 of the ECHR are identical can serve as a basis of a strong argument that article 22 of the ICCPR must be interpreted in a manner similar to Article 11 of the ECHR.[39]

2.2 African Regional Human Rights Standards

The leading African regional human rights treaty is the African Charter on Human and Peoples' Rights (hereinafter the ACHPR).[40] The ACHPR, under article 10, recognizes the right to freedom of association as 'every individual shall have the right to free association provided that he abides by the law' and

---

[36] Id, Para. 40.

[37] L. E. Irish and K.W. Simon, Freedom of Associations: Recent Developments Regarding the 'Neglected Rights' (http://www.iccsl.org/pubs/promotingthefreedomofassociation.pdf) last visit on September 10, 2009

[38] Ibid

[39] Ibid

[40] Adopted in June 1981 and came into force in October 1986. Ethiopia acceded to the Charter on 15 June 1998.

that 'no-one may be compelled to join an association'. The right to freedom of association is also recognized under article 8 of the African Charter on the Rights and Welfare of the Child (hereinafter the ACRWC).[41]

Availing its power of monitoring the implementation of the ACHPR, the African Commission on Human and Peoples' Rights (hereinafter the African Commission) has passed two resolutions pertinent to the right to freedom of association. One of these resolutions is the Resolution on the Right to Freedom of Association.[42] This Resolution, among others, provides that, 'in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom.'[43] The second resolution is the Resolution on Protection of Human Rights Defenders in Africa[44], which was adopted by the African Commission in response to the persistent human rights violations that human rights defenders face in Africa with regard to their rights such as freedom of association.[45] In this Resolution, the African Commission urged State Parties to promote and give full effect to the UN Declaration on Human Rights Defenders[46] and to take all necessary measures to ensure the protection of the rights of human rights defenders.[47]

The African Commission has also decided on a few communications pertaining to the right to freedom of association. In *Civil Liberties Organization in Respect of the Nigerian Bar Association* v *Nigeria,*[48] the African Commission held that a governmental decree establishing a governing body for a bar association appointing the majority of nominees itself violated the freedom of association. The African Commission has also found in *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization* v. *Nigeria* that the right to freedom of association

---

[41] Adopted in July 1990 and came into force in November 1999. Ethiopia acceded to the Charter on 2 October 2002.
[42] Resolution on the Right to Freedom of Association (1992), ACHPR/Res 5 (xI) 92.
[43] Ibid.
[44] Resolution on Protection of Human Rights Defenders in Africa (2004), 35th Ordinary Session, Banjul, the Gambia.
[45] Id, Preamble Para. 2.
[46] Id, Para 4.
[47] Ibid.
[48] Civil Liberties Organization in Respect of the Nigerian Bar Association v Nigeria (Communication No. 101/93, African Commission on Human and Peoples' Rights, 1995).

is violated when the state unjustly tried and convicted members of a community organization.[49] In another communication, *Interights and others v Mauritania,*[50] the African Commission finds that the dissolution of the main political party by the Mauritanian Government is disproportional to the nature of the acts committed by the political party and, thus, a violation of Article 10 of the ACHPR.

In these communications, the African Commission, the main African regional human rights body, allied itself with its European counterpart, the European Court of Human Rights, in defining the scope of the right to freedom of association. That is, the right not only entitles individuals to form associations freely but also safeguards the association from unacceptable government intrusion.

2.3 National Human Rights Standards

The supreme domestic Ethiopian legislation that prescribes human rights principles is the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter the FDRE Constitution).[51] The specific provision that deals with the right to freedom of association is article 31 which provides that '[e]very person has the right to freedom of association for any cause or purpose.' It further provides that '[o]rganizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.'

It is apparent from article 31 that the right to freedom of association clause is generally applicable to everyone without regard to one's color, race, nationality or other factors. Such formulation is different from the formulation of some other constitutional rights, such as the right to vote and to be elected and the

---

[49] International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria (Communications Nos. 137/94, 139/94, 154/96 and 161/97, African Commission on Human and Peoples' Rights, 1998).

[50] Interights and Others v Mauritania (Communication No., 242/2001, African Commission on Human and Peoples' Rights, 2004).

[51] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1, no. 1.

right to property,[52] which are guaranteed only to Ethiopian nationals. Article 31 does not prescribe specific purposes for which associations must be established. It guarantees freedom of association regardless of the purpose for which the association is set up as long as the association is established for lawful purposes.

At this point, it is important to note the position of the Ethiopian Government on the scope of applicability of the right to freedom of association. The Government recognizes the right to freedom of association only as a right of Ethiopian citizens.[53] This position of the Government is reflected in the Proclamation itself. The preamble of the Proclamation, in stipulating the purpose of the law, partly provides that the law is meant 'to ensure the realization of *citizens'* right to association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia.' (Emphasis added) What is implicit in this provision is that the Government does not have a duty arising out of the freedom of association to of non-citizens.

This position stems from the classification of fundamental rights and freedoms into two categories in the FDRE Constitution; namely, human rights guaranteed in articles 14–28 and democratic rights recognized in articles 29–44. Partly supported by article 10 of the Constitution, the Government contended that since the right to freedom of association, recognized under article 31, is a democratic right; only citizens can exercise it. Put differently, its position is that 'since freedom of association is a right that exclusively pertains to citizens, foreigners cannot exercise it either directly by establishing a CSO, or indirectly by funding local CSOs.'[54]

This position of the Government is indefensible on two counts.[55] First, even if the right to freedom of association is placed under category of democratic rights, this

---

[52] These rights are recognized under article 38 and article 40 of the FDRE Constitution respectively.

[53] Taskforce on Enabling Environment for Civil Society in Ethiopia, cited above at note 18. See also Ministry of Justice, cited above at note 17, p.11.

[54] Debebe Hailegebriel, Restrictions on Foreign Funding of Civil Society, (https://chilot.files.wordpress.com/2011/08/restrictions-on-foreign-funding-of-civil-society.pdf), last visit June 12, 2015.

[55] For further discuss on this or related issue, see Debebe Hailegebriel, Restrictions on Foreign Funding of Civil Society; Adem Kassie Abebe, "Human Rights under the Ethiopian

in itself does not take away its status as a human right. A number of human rights including the right to freedom of movement, rights of children, rights of women, right to property, marital and family rights and right of access to justice are placed under the democratic rights category. It is bizarre to argue that all these rights are democratic rights that non-citizens are disallowed to exercise. As mentioned above, the FDRE Constitution indicates, on article-by-article basis, whether a certain right is applicable to everyone or citizens only. For instance, the Constitution clearly indicate that rights to nationality, electoral rights, the right to self-determination and the right to property as guaranteed under articles 33, 38, 39 and 40 respectively are citizens' rights.[56] On the contrary, the Constitution unequivocally states that everyone can exercise the right to freedom of association: citizens and non-citizens. Second, the position that supports relegating the right to freedom of association only to citizens' right is at odd with Ethiopian international human rights commitments. All international human rights treaties including those ratified by Ethiopian including the ICCPR and the ACHPR treat the right to freedom of association as the right of both citizens and non-citizens.

Being a constitutional provision, article 31 does not set out the detailed content of the right to freedom of association and the specific obligation of Ethiopia in protecting and promoting the same. Nor do we have jurisprudence interpreting this constitutional provision. The good thing, however, is that as provided under article 13 (2), 'the rights and freedoms envisaged in the FDRE shall be interpreted in a manner conforming to the principles of the Universal

---

Constitution: A Descriptive Overview", Mizan Law Review, Vol. 5(1) (Spring 2011), p. 57; Gedion Timothewos, "Freedom of Expression in Ethiopia: The Jurisprudential Dearth", Mizan Law Review, 4(2) (2010), pp. 207-213; and Sisay Alemayehu Yeshaneh, "The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia", African Human Rights Law Journal, 8(2) (2008), pp. 275 &276.

[56] With respect to the right to property, although the FDRE Constitution seems to confine its application to citizens, other laws of the country give foreigners the right to acquire, use and alienate private property in Ethiopia. According to article 390 of the Civil Code, foreigners can own immovable property upon securing special government permit and movable property without meeting this requirement. The restriction on ownership of immovable property by the Civil Code is set aside by Proclamation No. 270/2002. This Proclamation, under article 5(4), states that articles 390-393 do not apply to foreign nationals of Ethiopian origins. Put differently, this Proclamation extends the rights of Ethiopian nationals to own immovable property to foreign nationals of Ethiopian origin. The restriction that the Civil Code imposes on ownership of immovable property by foreigners is also eased by the Investment Proclamation No.769/2012. This Proclamation, under article 24, allows a foreign national investing in Ethiopia 'to own a dwelling house and other immovable property requisite for his investment.'

Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.' Thus, the norms enshrined in international human rights instruments, resolutions and declaration of the political organs of the UN adopted by Ethiopia and the jurisprudence of human rights treaties monitoring bodies can be used to interpret article 31 of the FDRE Constitution.[57]

3. Can the Right to Freedom of Association Be Restricted?

In the preceding section, I have shown that the right to freedom of association is guaranteed under the FDRE Constitution and international and African human rights treaties to which Ethiopia is a party. The next issue worth addressing is whether and how this right may be restricted. The brief answer to this question is that the right to freedom of association may be limited. Under human rights regime, there are only few absolute rights, which permit no qualification under any state of affairs.[58] The right to freedom of association is not among this category of rights.

If the right to freedom of association can be restricted, what are the circumstances under which it can be restricted? To begin with the FDRE Constitution, article 31 places two restrictions to the right to freedom of association. Firstly, individuals are prohibited from setting up associations, which aim at illegally subverting the constitutional order, or promoting such activities. Secondly, restrictions may be imposed on the right to freedom of association by appropriate laws. As to what should be the 'appropriate laws' that may legitimately restrict the right to freedom of association are not clearly and specifically figured out under article 31. Since the phrase 'appropriate laws' is too broad, it warrants interpretation. However, since there is no domestic jurisprudence as to how this phrase shall be interpreted, it is quite

[57] A reference to 'principles' in article 13(2) of the Constitution should itself be construed to cover not only the general principles recognized in human rights instruments adopted by Ethiopia but also the jurisprudence of human rights treaties monitoring bodies, such as their general comments, their findings in response to communications and concluding observations. As long as the cross-reference to human rights instruments adopted by Ethiopia is aiming at giving detailed content to provisions of chapter three of the Constitution in case where the provisions are too general, silent, etc, such liberal understanding of 'principles' is quite significant.

[58] The classic absolute right is freedom from torture, inhuman, or degrading treatment.

sound to refer to the relevant provisions of international human rights instruments and the interpretations of these instruments by the bodies that are meant to supervise their implementation and enforcement.

A case in point is article 22 (2) of the ICCPR, which prescribes the permissible grounds of limitation to the right to freedom of association. It states that:

> *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.*

Article 22 (2) of the ICCPR conveys a message that while the right to freedom of association is not unlimited, governments are prevented from arbitrarily restricting the right. In particular, it emphasizes that governments that seeks to restrict or interfere with the right to freedom of association are supposed to justify their actions or inactions by satisfying certain requirements.
The Human Rights Committee reiterates these requirements. In respect of the rights contained in the ICCPR including freedom of association, the Human Rights Committee stated that:

> *States Parties must refrain from violation of the rights recognized by the Covenant and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.*[59]

As can be observed from article 22(2) of the ICCPR and the Comment of the Human Rights Committee, any interference with the right to freedom of

[59] Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant (May26, 2004, CCPR/C/21/Rev.1/Add.1), Para. 6.

association should comply with five requirements, namely, legality, justification, necessity, proportionality, and non-discrimination. The final requirement, the prohibition on discrimination, is applicable to all claims of human rights violations.

The UN Declaration on Human Rights Defenders, echoing what has been stated by article 22(2) of the ICCPR and the Human Rights Committee, also specifies the acceptable grounds of limitations to the right to freedom of association and other rights from human rights defenders point of view. It provides that human rights defenders, whether individuals or organizations, 'shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'[60]

Similar to the FDRE Constitution and the ICCPR, the ACHPR allows limitation to the right to freedom of association. Article 10 of the same guarantees everyone's right to freedom of association 'provided that he abides by the law'. From this, it is clear that the law can limit the right to freedom of association. In absence of any reference to certain interests, which the law is supposed to protect, however, such kinds of limitation may open the door to unwarranted limitations. States are the lawmakers and the most frequent violators of human rights. In view of this fact, attaching this limitation amounts to putting the right to freedom of association under the mercy of the very institution, which attacks them.[61] Cognizant of the adverse effect of such open-ended limitation clauses, the African Commission has developed a strict interpretation of these clauses. In doing so, the Commission invoked article 27 of the ACHPR in support of its argument. In its view, 'the only legitimate reasons for limitations to the rights and freedoms of the Charter are found in

[60] UN Declaration on Human Rights Defenders, cited above at note 25, Art. 17.
[61] In the context of ACHPR, the phrase 'claw-back clauses' has been used to generally refer to those provisions of the Charter that tend to limit some of the rights guaranteed under the Charter. See, V. Nmehielle, The African Human Rights System: Its Laws, Practice, and Institutions, (2001) p. 114.

article 27(2)',[62] which stipulates that the rights of the Charter 'shall be exercised with due regard to the right of others, collective security, morality and common interest'.[63] It went on and held that 'the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.'[64] In another communication, the Commission remarked that article 27 (2) is the only legitimate reason for limitations to the rights and freedoms of the Charter,[65] which in effect amounts to including other article-specific limitation clauses with the ambit of article 27(2). Now, let us examine the content of the five requirements.

3.1 The Requirement of Legality

In ascertaining whether the limitation to the right to freedom of association is acceptable or not, the first requirement is that the interference must be prescribed by a law of general application. The essence of this requirement, as indicated in the Siracusa Principles[66] is that limitations should have a formal legal basis and must be precisely formulated so as not to confer upon authorities wide discretionary powers. The requirement of legality also means that the laws limiting rights must be accessible to everyone so that an individual or association will have an opportunity to know the prohibited action and consequent penalties for violating the prohibition. The requirement of legality also entails that laws must be passed by an organ that has a mandate of making laws following proper procedures.

---

[62]Media Rights Agenda and others v Nigeria (Comm. Nos. 105/93, 128/94, 130/94 and 152/96, African Commission on Human and Peoples' Rights, 1998) Para. 68.
[63] Ibid
[64] Id, Para 69.
[65] Prince v South Africa (African Commission on Human and Peoples' Rights, 2002) African Human Rights Law Report 105(2000) Para. 43.
[66] "Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights", doc. E/CN.4/1985/4 (1985). Para. 17. These principles were developed in 1984 by a panel of 31 international experts who met in Siracusa (Italy) to adopt a uniform set of interpretations of the limitation clauses contained in the ICCPR. While they do not have the force of law, they offer important and authoritative guidance as to the meaning of the terms contained in the Covenant, especially in areas not covered by a general comment of the Human Rights Committee.

3.2 The Requirement of Legitimate Justification

The second test requires that restriction to the right to freedom of association not only shall have a legal basis, but also must have a legitimate aim that can justify the interference. These acceptable grounds of restriction include: national security, public order or safety, protecting the rights and freedoms of others, and protecting public health and morals.

With a view to avoiding a loose interpretation of these purposes, the Siracusa Principles stipulate various guidelines on how these purposes should be interpreted. The Principles, for instance, state that 'national security may be invoked by states to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.'[67] 'National security cannot be invoked as a reason for imposing limitations on rights if the threats to law and order are local or relatively isolated.'[68]The Siracusa Principles defines Public order as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'[69]

3.3 The Requirement of Necessity in a Democratic Society

The existence of one or more legitimate purpose, although a necessary condition for government interference with the right to freedom association, is not a sufficient condition to justify the interference. In order to justify the interference with freedom of association, it should be shown that the interference is necessary in a democratic society. It is up to the state that imposed the limitations 'to demonstrate that the limitations do not impair the democratic functioning of the society.'[70] According to the Siracusa Principles, a certain society can be taken as a democratic society where it 'recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights.'[71]

---

[67] Id, Para. 29.
[68] Id, Para. 30.
[69] Id., Para 22.
[70] Id, Para. 20.
[71] Id, para. 21.

3.4 The Requirement of Proportionality

Both the Human Rights Committee[72] and the African Commission[73] have found out that any measures that restrict the right to freedom of association must be proportionate to the legitimate aim to be pursued, and should be imposed to the extent, which is absolutely necessary for the advantages to be obtained. Thus, interference may be deemed to be proportional only if the means employed is actually necessary to achieve one of the legitimate purposes, and that the means employed is the least restrictive means among those that might achieve the desired results.

Applying these yardsticks, the African Commission, in *Interights and others v Mauritania,*[74] found out that the dissolution of the main political party by the Mauritanian Government on the ground that the leaders of the Party engaged in actions and undertakings which were damaging to the good image and interests of the country; incited Mauritanians to violence and intolerance; and led to demonstrations which compromised public order, peace and security is disproportionate to the nature of the breaches and offences committed by the political party and, thus, a violation of Article 10 of the ACHPR.

3.5 The Requirement of Non-discrimination

As part of the requirement of acceptability of any restrictions on human rights including the right to freedom of association, the issue of discrimination must be addressed. The principle of non-discrimination is a basic principle incorporated in the FDRE Constitution,[75] various international[76] and African regional[77] human rights documents. These documents require states to ensure

---

[72] Human Rights Committee, cited above at note 59, Para. 6.
[73] Media Rights Agenda and others v Nigeria, cited above at note 62, Para. 69.
[74] Interights and Others v Mauritania, cited above at note 50.
[75] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, cited above at note 70, Art. 25.
[76] Such as, the Universal Declaration of Human Rights (Articles 2 and 7), the ICCPR (Articles 2(1) and 26) and the CRC (Article 2). Some instruments are expressly aimed at addressing specific prohibited grounds for discrimination, such as the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).
[77] See, for example, article 2 of the ACHPR and article 3 of the ACRWC.

that all persons within their territory and subject to their jurisdiction enjoy the guaranteed rights without distinction on grounds, such as race, religion, nationality or ethnicity. Even when a state is allowed to limit a right as the case of the right to freedom of association, such measures must not be discriminatory.[78] Nevertheless, not all distinctions amount to discrimination. According to the Human Rights Committee, a differentiation of treatment will not constitute discrimination 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[79]

4. An Overview of the Pertinent Provisions of the Proclamation

The Proclamation is meant to deal with the formation and operation of CSOs. The two broad purposes of the Proclamation, as set forth in the Preamble, are ensuring 'the realization of citizens' right to association'[80] and aiding and facilitating 'the role of Charities and Societies in the overall development of Ethiopian peoples.'[81] The Proclamation divided CSOs into two broad categories known as 'Charity' and 'Society.' It defines a 'Charity' as 'institution…established exclusively for charitable purposes and gives benefit to the public.'[82] In similar vein, it defines a 'society' as 'an association of persons organized on non-profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes.'[83] Depending on their place of registration, source of income, composition of members' nationality, and place of residence, the Proclamation also creates three categories of charities and societies, namely, 'Ethiopian Charities' or 'Ethiopian Societies', 'Ethiopian Residents Charities' or 'Ethiopian Residents Societies' and 'Foreign Charities'.

'Ethiopian Charities' or 'Ethiopian Societies' are 'Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians,

---

[78] This is implied from Para. 2 of General comment No. 18 of the Human Rights Committee.
[79] Human Rights Committee, cited above at note 59, Para. 13.
[80] Charities and Societies Proclamation, cited above at note 1, Preamble, para 1.
[81] Id, Preamble, para 2.
[82] Id, Art. 14(1). The definition of charity is the same as the definition of CSOs in most literature.
[83] Id., Art. 55 (1).

generate income from Ethiopia, and wholly controlled by Ethiopians.'[84] With respect to funding, the law envisages a strict qualification. That is, charities or societies shall be regarded as an Ethiopian charities or societies on condition that 'they receive not more than ten percent of their funds…from foreign sources.'[85] 'Ethiopian Residents Charities' or 'Ethiopian Residents Societies', on the other hand, are 'Charities or Societies that are formed under the laws of Ethiopia and consist of members dwelling in Ethiopia, and who receive more than 10 percent of their funds from foreign sources.'[86]

The third category is 'Foreign Charities'. Charities that fall under this category are 'those charities that are formed under the laws of foreign countries or consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.'[87] Foreign sources include 'the government, agency or company of any foreign country; international agency or any person in a foreign country.'[88]

One of the upshots of the above classification is that only Ethiopian Charities or Societies are allowed to engage in promotion of human rights.[89] Other categories of charities and societies (non-Ethiopian CSOs) are authorized to carry out only service delivery undertakings, such as: 'the prevention or alleviation or eradication of poverty or disaster';[90] the advancement of animal welfare,[91] education,[92] health or the saving of lives,[93] arts, culture, heritage or

---

[84] Charities and Societies Proclamation, cited above at note 1, Art.2 (2).
[85] Ibid
[86] Id, Art. 2(3).
[87] Id, Art.2(4).
[88] Id, Art. 2(15).
[89] Id, Art. 14 (5) cum (2). For the purpose of this article, promotion of human rights is comprised of those activities that are listed under article 14 (2) (j), (k) and (l). These activities are the advancement of human and democratic rights; promotion of equality of nations, nationalities, peoples, gender and religion; and promotion of the rights of the rights of the disabled and children. Although the Proclamation treats these activities separately, the latter two can be subsumed in the former. Apart from promotion and protection of human rights, promotion of conflict resolution or reconciliation and, promotion of the efficiency of justice and law enforcement services are reserved to Ethiopian Charities and Societies.
[90] Id, Art. 14 (2)(a).
[91] Id, Art. 14 (2)(c).
[92] Id, Art. 14 (2)(d).
[93] Id, Art. 14 (2)(e).

science,[94] amateur sport or welfare of the youth,[95] 'capacity building on the basis of the country's long term development directions',[96] and 'the economy and social development and environmental protection or improvement',[97] and 'the relief of those in need by reason of age, physical and mental disability, financial hardship or other disadvantage.'[98]

5. Analysis

Having briefly discussed the content and limitations to the right to freedom association and the pertinent provisions of the Proclamation, this section is devoted to an in-depth analysis of the issue of whether the prohibition of foreign and foreign funded CSOs from working on promotion of human rights constitutes an interference with the right to freedom of association. This section is also intended to address the issue of whether or not the interference is a permissible interference in light of the applicable human rights standards. For the sake of convenience, the issue will be scrutinized under the following two headings. First, does the restriction on foreign funding of local human rights CSOs amount to an interference with their right to freedom of association? If the answer is in the affirmative, is the interference valid? Second, does the exclusion of non-Ethiopian charities and associations from carrying out activities to promote human rights constitute an interference with their right to freedom of association? If so, is such interference a legitimate one in the light of the appropriate human rights principles?

5.1 Restriction on Foreign Funding

A close scrutiny of the provisions of the Civil Code of Ethiopia[99] reveals that a CSO established in accordance with Ethiopian law and by Ethiopian nationals is regarded as an Ethiopian CSO without considering its activities and sources of funding. According to article 2(2) of the Proclamation, however, a CSO

---

[94] Id, Art. 14 (2)(f).
[95] Id, Art. 14 (2)(g).
[96] Id, Art. 14 (2)(i).
[97] Id, Art. 14 (2)(b).
[98] Id, Art. 14 (2)(h).
[99] Civil Code of the Empire of Ethiopia, 1960, Arts. 545-549, Proclamation No.165, Neg. Gaz. Gezette Extraordinary, Year 19, no.2.

'formed under the laws of Ethiopia' and 'all of whose members are Ethiopians' is regarded as an Ethiopian CSO provided that not more than ten percent of its funds are received from foreign sources annually. If the latter requirement is not satisfied, the CSO will not be qualified as an Ethiopian CSO with a consequence that it cannot carry out activities of promotion of human rights.
The question worth asking is: what is the implication of restricting access of domestic human rights CSOs to foreign funding on the right to freedom of association of these CSOs?

As discussed in section one, the right to freedom of association is not confined to guaranteeing individuals' right to form associations for lawful purposes. It also confers upon the organizations themselves the right to function effectively without unreasonable government interference. The organizations will operate effectively only when they have sufficient funds to carry out their activities. Prohibition or restriction on funding may have the effect of rendering the organization inoperative.[100] Given the indispensability of funding, it can convincingly be argued that the right to freedom of association shall include the right of CSOs 'to seek and secure funding from legal sources'.[101] 'Legal sources should include individuals and businesses, other civil society actors and international organizations, as well as local, national, and foreign governments.'[102]

In spite of the fact that the availability of sufficient fund is vital to the active functioning of CSOs, restrictions on the receipt of funding, and especially on the receipt of foreign funding by human rights CSOs have grown increasingly in many countries.[103] In response to such growing trend, various bodies of the

[100]Unlike business enterprises, CSOs do not undertake income generating activities. In order to run their day-to-day activities, they heavily rely on contributions from their members and funding from others sources, such as donors.
[101] World Movement for Democracy *et al,* Defending Civil Society: A Report of World Movement for Democracy (2008), (http://www.wmd.org/documents/Defending%20Civil%20Society%20-%20English.pdf) last visit on August 12, 2009.
[102] Ibid
[103] For example, in the Transnistria region of Moldova, the president of the separatist government signed a decree in 2006 prohibiting foreign funding of CSOs registered in Transnistria. Specifically, CSOs were prohibited from receiving funding directly or indirectly from any international or foreign organization, foreign government, Transnistrian organization with a foreign capital share in excess of 20 percent, foreign citizen or stateless person, or any

UN made direct statements on the right of human rights CSOs to solicit and receive funding, particularly foreign funding.

The UN Declaration on Human Rights Defenders addresses this point explicitly. Article 13 provides that '[e]veryone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.' Interpreting article 13 of the UN Declaration on Human Rights Defenders, the Office of the UN High Commissioner for Human Rights, in Fact Sheet 29,[104] elucidated that 'the Declaration provide[s] specific protections to human rights defenders, including the right to… solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from abroad)'. It went on and contended that legislation banning or hindering the receipt of foreign funds for human rights activities curtail human rights defenders including human rights CSOs from legitimately exercising and enjoying their rights, such as the right to freedom of association.[105]

The Special Representative of the Secretary-General on human rights defenders, in her 2006 Report, indentified 'the trend in many countries to pass laws and regulations' that impose restriction on funding as a measure that stifles operations of human rights defenders.[106] The Special Representative asserted that '[g]overnments must allow access by CSOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same

---

anonymous source. An CSO Bill was enacted in Zimbabwe in 2004 (though never signed into law) that would have prohibited local CSOs engaged in "issues of governance" from accessing foreign funds. In Eritrea, the government issued Administration Proclamation No. 145/2005 that broadly restricts the UN and bilateral agencies from funding CSOs. Egypt's Law No. 153 of 1999, which "gives the Government control over the right of CSOs to manage their own activities, including seeking external funding. See World Movement for Democracy, cited above at note 101.

[104] See, Office of the U.N. High Commissioner for Human Rights, Fact Sheet No. 29:Human Rights Defenders: Protecting the Right to Defend Human Rights, (2004) PP. 21-22.

[105] Id, p.13.

[106] Jilani, cited above at note 26, Paras 50-51.

extent as Governments. The only legitimate requirements of such CSOs should be those in the interest of transparency.'[107]

To sum up, restricting access of local human rights CSOs to foreign funding fatally affects their operation and amounts to an interference with their right to freedom of association. The ramification of restricting access of local human rights CSO to foreign funding in Ethiopia (which includes funding from Ethiopians residing aboard) is extremely severe. Although the country has been showing tremendous economic growth over the past few years and per capita income has increased to some extent, a sizeable number of its people are still living in poverty.[108] Ethiopian is also a country where '[t]here is little societal tradition of giving funds to CSOs'[109]even for the business people and other affluent members of the society. Given these facts, the author does not think that local human rights CSOs will be able to raise the funds that are necessary to run their day-to-day activities from local sources. This is evident from the reality at hand. For example, in 2009, about 95 percent of the local CSOs received more than 10 percent of their budget from foreign sources.[110] Let alone the CSOs, assistance and loans from foreign sources covers a significant portion of the Ethiopian Government's capital and recurrent expenditures.[111] In

---

[107] Id, Para 31.

[108] According to the 2014 Ethiopian National Human Development Report of the United Nations Development Program, the GDP per capita of Ethiopia for 2014 was US $ 550. The same report showed that 26% Ethiopian people were living with poverty in 2012/2013. See United Nations Development Program, National Human Development Report 2014, Ethiopia: Accelerating Inclusive Growth for Sustainable Human Development in Ethiopia, Addis Ababa, Ethiopia, p. 4 & 44, (http://hdr.undp.org/sites/default/files/nhdr2015-ethiopia-en.pdf), last visit June 4, 2015

[109] Jeffrey Clark, Civil Society, CSOs, and Development in Ethiopia: A Snapshot View, The World Bank Washington, D.C., 2000, p. 14, (http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/873204-1111663470099/20489508/CSandDevEthiopiaSnapshotView.pdf), last visit June 4, 2015

[110] See, the Observatory for the Protection of Human Rights defenders, The Observatory for the Protection of Human Rights defenders denounces the adoption on January 6, 2008 of a law that considerably restricts the activities of CSOs in Ethiopia (http://www.fidh.org/IMG/article_PDF/Ethiopia-Freedom-of-association-in.pdf) last visit October, 2009

[111] For example, out of the 137.8 billion birr budget approved by the parliament for the 2012/13 Ethiopian budget year, 79% was expected to be financed from domestic sources while the remaining 21 % was expected to come from foreign sources in the form of donations and loans. See Capital, House endorses 137.8 bln birr budget a week after schedule, Monday, 23 July 2012,

brief, it was obvious that requiring local CSOs working on human rights issues to cover more than ninety percent of their finances from local sources under the Proclamation would undoubtedly result in the closure of most such organizations.. This has been borne out in reality since the coming in to force of the Proclamation. For example it is in the aftermath of the coming into effect of the CSOs Proclamation and the freezing of 90% of their assets by the Government, the activities of the two notable local human rights CSOs, EWLA and Human Rights Council (HRCO), have been gravely curtailed.[112] Out of more than 127 CSOs working in human rights issues in Ethiopia in 2008,[113] most of them were forced to change their mandates to other "non-human rights activities" or were dissolved entirely.[114] An empirical study conducted in 2012 to assess the impact of the Proclamation on the perception, growth and programs of non-governmental organizations disclosed that there is a decrease on the total number of CSOs as a result of the coming into force of the Proclamation.[115] It also revealed that 'the financial restriction imposed has limited the opportunity to form new CSOs.'[116]

It is true that in order to fill the gap created by the weakening of human rights CSOs, the Government has tried to fund the limited CSOs that decided to

---

(http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=1424:house-endorses-1378-bln-birr-budget-a-week-after-schedule-&catid=54:news&Itemid=27) last visit June 6, 2015.

[112] Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 29. See also Amnesty International, Ethiopia: Briefing to the UN Committee on Elimination of Discrimination Against Women, 2011, http://www2.ohchr.org/english/bodies/cedaw/docs/CSOs/AI_for_the_session_Ethiopia_CEDAW49.pdf (last visited Sep. 30, 2011). See also Human Rights Council, The Impact of the CSO Proclamation on the Human Rights Council, July 2011, 9.

[112] Human Rights Council, The Impact of the CSO Proclamation on the Human Rights Council, July 2011, 9.

[113] European Commission Civil Society Fund in Ethiopia, Updated Mapping Study of Non State Actors in Ethiopia, September 2008, p. 3 July 2011, http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/main_report_en.pdf), last visit October 10, 2012

[114] Human Rights Council, cited above at note 112, p. 1.

[115] Abiy Chelkeba, Impact Assessment of the Charities and Societies Law on the Perception, Growth and Programs of Non-Governmental Organizations: A Survey Study of Addis Ababa City Administration, Addis Ababa, Ethiopia, (LL.M Dissertation, 2011, Unpublished, AAU Library), p.76. According to this study, just between four years (2007-2011), the total number of CSOs decreases dramatically by about 43 percent (2586 in 2007 and1761 in 2011).

[116] Ibid

continue working on human rights issues or newly established human rights NGOs through the Ethiopian Human Rights Commission.[117] However, the support from the Ethiopian Human Rights Commission is extremely inadequate to fill the gap. [118] Moreover, the support from the government is limited to mainly on projects aiming at providing legal aid and awareness creation.[119]

Thus, it can be concluded that the labeling of local CSOs that receive more than ten percent of their funding from foreign sources as non-Ethiopian CSOs with the concomitant prohibition from engaging in human right related works is an interference with their right to freedom of association.

In the preceding paragraphs, it has been shown that foreign funding restrictions provided in the Proclamation that have the effect of stifling the ability of local human rights CSOs to pursue their goals constitutes an interference with their right to freedom of association. Now, the focus of the article will turn to an analysis of the issue of whether the interference is a justifiable one or not.

Definitely, the interference with the right to freedom of association has the Proclamation as its legal basis. Thus, the fulfillment of the requirement of legality is not as such controversial. The fulfillment or otherwise of the requirement of a legitimate aim that can justify the interference, however, requires a meticulous scrutiny.

The specific rationale of the Ethiopian Government to put in place a restriction on foreign funding of local human rights CSOs cannot be traced from the preamble or provisions of the Proclamation. It can, however, be discerned from the utterances of senior Government officials and pertinent documents emanating from the Government. The former Prime Minister, for example,

---

[117] For example, in 2010, the Commission signed a memorandum of understanding with the Ethiopian Women Lawyers' Association as well as regional Women's Association to support to support five projects focusing on: legal support project for vulnerable sections of the society; awareness raising project on human rights, especially on women's and children's rights; legal support service project for the destitute section of the society; awareness creation project in the area of the rights of persons with disabilities; and awareness creation and Alternative Dispute Resolution service projects. The Commission spent a total of 817,500 birr (more than $ 20, 000) to fund these five projects. See Ethiopian Human Rights Commission, Annual Performance Report, June 2010-July 2011.

[118] Committee on the Elimination of Discrimination against Women, cited above at note 13, para 28.

[119] Ethiopian Human Rights Commission, cited above at note 117, p.65.

took the position that the provision of the Proclamation against foreign funding of local CSOs is a way of protecting Ethiopia against foreign political interference.[120] The Ethiopian delegate to CEDAW Committee also reiterated this position of the Prime Minister during the dialogue with members of the Committee.[121] According to the commentary of the Ministry of Justice on the draft Proclamation, because protection of human rights is a 'political issue', it is an exclusive matter reserved to citizens; consequently, foreigners are not allowed to undertake human rights related activities.[122] The main concern of the Government is that foreign organizations or individuals, by sponsoring local CSOs, would manipulate these CSOs and unduly influence domestic political affairs of Ethiopia. In a nutshell, the restriction on foreign funding of local human rights CSOs aims at curbing foreign political interference.
Protecting Ethiopia from foreign political interference is one of the policy objectives and principles enshrined in the FDRE Constitution,[123] and, thus, one can argue that the limitation fits in with one of the legitimate ground of restricting the right to freedom of association, which is the preservation of public order. It can also be argued that the limitation is indispensable in a democratic society. Conducting of internal affairs without foreign interference does not hamper the democratic order of the country.

It is contended, however, that imposing a restriction on foreign funding of local human rights CSOs and thereby muzzling their operation is highly disproportionate to the nature of the threat that may arise in relation to the operation of these CSOs, namely, the risk that local CSOs may be used by their sponsors to interfere in the political affairs of Ethiopia. As elsewhere, while CSOs in Ethiopia have a pivotal role in terms of ensuring socio-economic development and good governance; they have also problems of financial

---

[120] A cited in, M. Sekaggya, Report submitted by the Special Rapporteur on the situation of human rights defenders: Addendum Summary of cases transmitted to Governments and replies received, A/HRC/10/12/Add.1 (2009) Para. 979.
[121] See Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 28.
[122] Ministry of Justice, cited above at note 17, p.16.
[123] Promoting 'mutual respect for national sovereignty and equality of states and non-interference in the internal affairs of other states' is one of the national principles and objectives of Ethiopia as set out under article 86(2) of the FDRE Constitution.

mismanagement and absence of transparency.[124] Moreover, there are also times when human rights CSOs were blamed by the Government for aligning themselves with opposition parties.[125] The Government has not only the power but also the duty to control and take appropriate and reasonable measures to ensure that CSOs are living up to their responsibilities. However, imposing foreign funding restriction on local human rights CSOs is not an indispensible measure to avert the threat that CSOs may be used by their funders to interfere in Ethiopian political affairs. In fact, there are other less restrictive means that are envisaged in the Proclamation that might achieve the same aim. The Proclamation gives the Charities and Societies Agency (the Agency)[126] and Sector Administrators[127] the power to supervise and control Charities and Societies.[128] With a view to discharging its power of supervision, the Agency has been given with the power to institute inquiries and conduct an investigation on any charity or society and compel the charity or society or an officer or employee thereof to furnish the Agency with the required documents and information.[129] If the inquiry or search discloses that any Charity or Society has been used for illegal motives, it shall result in the cancellation of the license of the Charity or Society[130], which may also give the Agency with the power of dissolving the Charity or Society.[131] The Agency can effectively employ this track to guarantee, in a case-by-case basis, that local human rights CSOs will not be used by their foreign funders to unjustifiably interfere in the domestic political affairs of Ethiopia. In view of this strong mechanism of control, restricting access of local human rights CSOs to foreign funding is based on a n warranted presumption that all local CSOs may be subject to

---

[124] Dessalegn Rahmato, Akalewold Bantirgu, Yoseph Endeshaw, CSOs/CSOs IN ETHIOPIA Partners in Development and Good Governance: A Report Prepared for the Ad Hoc CSO/CSO Task Force, Addis Ababa, 2008, p. 31, (http://www.crdaethiopia.org/Documents/CSOs-CSOs%20in%20Ethiopia%20 %20Partners%20in%20Development.pdf), last visit June 7, 2015

[125] Debebe Hailegebriel, cite above at note 54.

[126] The Agency is set up by article 4 of the Proclamation as an institution of the Federal Government to be accountable to the Ministry of Justice.

[127] Article 2(12) read together with article 66 tells us that Sector Administrator are relevant Federal Executive organs that shall be assigned by the minister of Justice as Charities and Societies Sector Administrators.

[128] Charities and Societies Proclamation, cited above at note 1, Art. 6(1) (a) and Article 67(3).

[129] Id, Art. 84 and 85.

[130] Id, Art. 92 (2)(b).

[131] Id, Art. 93 (1)(b).

manipulation by their foreign sponsors does not serve any public good. It rather seriously obstructs the work of local human rights CSOs that would otherwise significantly contribute for the protection and promotion of human rights in Ethiopia.

5.2 The Prohibition on Non-Ethiopian CSOs from Working on Human Rights fields

As discussed above, the Proclamation has taken the position that even if a CSO has Ethiopians as its exclusive members and is established under Ethiopian laws, is not an Ethiopia CSO (Charity or Society) if it receives more than ten per cent of its funding from foreign sources. One of the consequences of such stipulation is that the CSO faces the same restrictions that would be placed on foreign CSOs under the Proclamation, including the prohibition from working in the field of human rights, save circumstances where that particular CSO entered a special agreement with the Ethiopian Government.[132] In other words, the Proclamation excludes local CSOs that receive more than ten percent of their funding from abroad and foreign CSOs from carrying out activities of human rights protection and promotion. Now, a question worth pondering is: does not this exclusion amount to an interference with freedom of association?

The international human rights documents highlighted in section one have made everyone a beneficiary of the right to freedom of association. In particular, article 31 of the FDRE Constitution guarantees this right '*for any cause or purpose*'. (Emphasis supplied) The phrase 'for any cause or purpose' seems to imply that the right to freedom of association can be exercised to establish any association for any purpose without any restriction. Of course, the purposes for which the associations are established must be lawful purposes. In democratic society, the whole purpose of guaranteeing the right to freedom of association is to foster societal goals through the associations. If the associations are established to pursue illegal purposes, such as commission of crimes, it will be against the raison d'être of their establishment.

It is an obvious fact that the promotion of human rights both at national and international spheres is a lawful activity. That is why such activity has been taken as one of the purposes of different international, regional and national institutions, such as the UN, African Union and the Ethiopian Human Rights Commission. Given the fact that the right to freedom of association is

[132] Id, Art. 3(2) (b).

guaranteed to everyone for any legal goal and given the fact that engagement in the promotion and protection of human rights is a lawful activity, this author is of the opinion that the banning of non-Ethiopian Charities and Societies (within the meaning of the Proclamation) from engaging in human rights fields in the proclamation is an interference with right to freedom of association.

The next question is: is this interference a permissible interference in the light of pertinent norms of human rights law?

As is the case with foreign funding restriction, the exclusion of non-Ethiopian Charities and Societies from engaging in the protection and promotion of human rights has an unequivocal legal basis that is meant to have a general application. The reason forwarded for the exclusion is also similar to the limitation on funding, that is, involvement of foreign CSOs in human rights fields in Ethiopia will open a Pandora's Box for foreign political intrusion.[133] Restraining foreign interference in the political affairs of Ethiopia is a legitimate ground to limit the right to freedom of association. In this particular situation, however, I contend that the outright barring of non-Ethiopian CSOs from taking part in the protection and promotion of human rights is excessively disproportionate to the gravity of the concern. It is not in any way acceptable to impose a blanket prohibition on all non-Ethiopian CSOs from carrying out human rights related activities contending that this may open a room for foreign interference. The consequence of such exclusion is particularly grave in countries like Ethiopia where there are no well organized and autonomous governmental institutions for human rights protection[134] and local human rights CSOs that can raise their funds from local sources.

The sovereignty of states that prohibits outside interference in its domestic affairs is not relevant and valid with respect to the protection and promotion of human rights. The protection and promotion of human rights is not a task that

---

[133] Sekaggya, cited above at note 120, Para. 979.

[134] The Ethiopian Human Rights Commission is the primary government institution in charge of monitoring the implementation of human rights. However, it is difficult to say that it is living up to its legal mandate. The Human Rights Committee opined that the Commission undertook 'very few investigations on alleged human rights violations.' The Committee also indicated that the Commission does not comply with Paris Principles regarding its independence. See Human Rights Committee, cited above at note 15, Para. 6. For more discussions on the roles and challenges of the Ethiopian Human Rights including its independence, see Yemisrach Endale, The Roles and Challenges of Ethiopian National Human Rights Institutions in the Protection of Human Rights in the Light of the Paris Principles, (Unpublished LL.M Thesis, 2010, Central European University).

is entirely reserved to states and their nationals. The UN Charter[135] and the 1993 Vienna Declaration and Programme of Action[136] made it clear that human rights are a matter of legitimate international concern and, thus, foreign human rights activists and human CSOs have a right to react in the event of human rights violations in Ethiopia. They are entitled to engage in human rights activities in Ethiopia and express their concern to the Ethiopian Government when it infringes human rights and freedoms recognized in the FDRE Constitution and other human rights treaties to which Ethiopia is a party. This does not, however, mean that foreigners can interfere in other domestic affairs under the guise of human rights protection. In such a case, the Ethiopian Government has the power the take measures to prohibit and forestall such interference. Applying the less restrictive supervision approach already discussed in the preceding sub-section can effectively do this.

The prohibition of non-human rights CSOs from carrying out human rights activities is not only disproportionate but also discriminatory. As I have tried to show in section 1.3 above, in a manner consistent with human rights conventions, article 31 of the FDRE Constitution guarantees the right to freedom of association to everyone irrespective of one's nationality or place of residence. To put in other words, Ethiopians and foreigners alike are entitled to enjoy the right to freedom of association. This is self evident from the wording of article 31 itself which reads as *'[e]very person* has the right to freedom of association' (Emphasis added). With particular reference to the enjoyment of the right to freedom of association for the purpose of promoting and protecting human rights and fundamental freedoms, the UN Declaration on Human Rights defenders unequivocally affirmed that every person, be he or she a national of a given country or not, is entitled, 'individually and in association with others, at the national and international levels, to form, join and participate in non-governmental organizations, associations or groups.'[137] Since the right to

---

[135] Article 55 of the UN Charter proclaimed that 'the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; and pursuant to article 56 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

[136] Article 4 provides that 'the promotion and protection of all human rights is a legitimate concern of the international community'.

[137] UN Declaration on Human Rights Defenders, cited above at note 25, Art. 5 (b).

freedom of association is guaranteed to every person under the FDRE Constitution, the prohibition of non-Ethiopian CSOs from engaging in the field of human rights in Ethiopia amounts to differentiation on the basis of nationality and source of funding. It is true that a differentiation may not constitute discrimination as long as the grounds of differentiation are reasonable, objective and intends to achieve a legitimate purpose. However, given that the aim of banning of non-Ethiopian CSOs from engaging in the field of human rights is the desire to curb foreign interference in the domestic political affairs of Ethiopia and given that this aim can be achieved by the supervisory mechanisms that are put in place in the Proclamation, the exclusion is an unjustifiable discrimination.

6 Conclusion

Following the collapse of the Military Socialist Regime in 1991, CSOs proliferated and played an unprecedented role in the economic, social and political sphere in Ethiopia. At that time the Ethiopian Government had created an enabling environment for their smooth operation. In 2009, however, the Ethiopian parliament adopted a Proclamation that reverses the remarkable achievements in this area. The Proclamation denies local CSOs that receive more than ten percent of their funds from foreign sources the status of Ethiopian nationality and excludes them from working on human rights advocacy. Such funding limitation on local human rights CSOs by itself contravenes the right to freedom of association as envisaged under the FDRE Constitution, international and African regional human rights conventions to which Ethiopia is a party. Likewise, the prohibition on foreign and foreign funded CSOs from carrying out human right advocacy in the proclamation imposes illegitimate restriction on the right to freedom of association. Under international law, a state cannot invoke its domestic laws to justify its non-compliance with its international obligations. Therefore, to ensure that the Proclamation is in conformity with Ethiopian obligations and commitments under international and African regional human rights instruments, article 14(5) of the Proclamation that proscribes foreign and foreign funded CSOs from carrying out human rights related activities should be repealed.

When the Expert Turns into a Witch: Use of Expert Opinion Evidence in the Ethiopian Justice System

Simeneh Kiros Assefa [*]
Cherinet Hordofa Wetere [*]

1. Introduction

Contentions before the judiciary are about issues of facts and of law. Matters of fact are matters of evidence. Those facts that may be proved by witnesses come in two forms - facts in respect of which the witness may have personal experience and facts that may be proved by opinion evidence. Opinion evidence further comes in two forms - opinion evidence of lay witnesses and of experts. The subject of this article is expert opinion evidence.

Judges are called upon to dispose factual contentions of every sort. Where the determination of a fact requires expertise the court needs the assistance of an expert on the subject. Expert opinion evidence has to be relevant to the fact in issue and must not be otherwise inadmissible.

In order for the court to effectively use expert opinion evidence for the proper determination of facts, there are three fundamental requirements. First, the subject matter must be suitable for expert opinion. A subject matter is suitable for expert opinion evidence because it is scientific or technical or it requires otherwise specialised knowledge. Whether a fact is a subject matter of expert opinion evidence is determined by the law or by a decision of the court. In few cases, the law expressly provides for whether the fact needs to be proved by expert opinion evidence as in the case of criminal responsibility. Where the law does not so provide for and the court believes the subject matter calls for expertise, it may require that assistance of an expert. In many other cases the parties produce expert opinion evidence.

---

[*]Simeneh is Assistant Professor of Law at AAU Law School, Attorney-at-Law and member of California State Bar. He may be contacted at simeneh@simenehlaw.com
[*]Cherinet is Attorney-at-Law and was a Part-time Lecturer at AAU Law School; prior to that he had been a judge at the Federal First Instance Court between 1999 and 2003. He may be contacted at Cherinet@simenehlaw.com

Second, as the expert opinion evidence is based on the personal professional competence of the expert, the said person must possess relevant expertise. Third, all the constitutional and procedural requirements, such as, the right to confrontation of the witness and test the reliability of the testimony, must be complied with. The rules regarding the use of expert opinion evidence are meant to help the court have control in the use of such expertise by properly examining the competence of the expert and ensure that the reasoning process and that the ultimate finding is an outcome of the specialised knowledge of the expert.

It is only stating the obvious that the practice of utilising expert opinion evidence in Ethiopia is extremely poor. Many of the expert opinion reports presented to the court are not relevant to the fact in issue; substantial numbers of the reports are otherwise inadmissible while still others are not reliable. Therefore, the discussion on the current state of affairs regarding expert opinion evidence is made with a view to improve the use of such evidence.

In order to help the courts establish a uniform practice of disposing facts based on relevant, admissible and reliable expert opinion evidence, the topics determination of whether the subject matter is suitable for expert opinion evidence, determination of expertise, appointment of experts, the nature and extent of the assistance of the expert, presentation of expert opinion evidence, attendance of the expert in court, and how the expert testimony may be impeached by the other party are separately discussed.In doing so, the provisions of the law regarding expert opinion evidence and the related biding decisions of the Federal Supreme Court Cassation Bench are reviewed.

2. Subject Matters Calling for Expertise

Courts are called upon to decide on all sorts of facts. Some facts that are involved in litigation are highly scientific, technical or require otherwise specialised knowledge.[1] Regarding those facts which are known to be scientific

[1] A fact is a subject matter of expert opinion need not necessarily require "theoretical knowledge of the field" or "application of scientific principles." If it requires "skill or expertise based on observation" it is a subject matter of expert opinion evidence. David M. Godden and Douglas Walton "Argument from Expert Opinion as Legal Evidence: Critical Questions and Admissibility Criteria of Expert Testimony in the American Legal System"

or technical, or require otherwise specialised knowledge, the law identifies such facts and requires the assistance of an expert in their determination by the court. Many such provisions are found in the criminal and the criminal procedure codes - the most commonly used ones being criminal responsibility,[2] and medical examination.[3] There are also few such provisions in the civil code, such as, valuation of property.[4]

Where the law does not so require the assistance of an expert but the court finds the facts are of scientific or technical nature, or require otherwise specialised knowledge, it has the discretion to make use of expert opinion evidence on the subject.[5] This is made evident in the Code of Civil Procedure that where it is stipulated that if "the court considers it necessary or expedient that the facts in dispute between the parties should be verified, [by an expert] it may of its own motion or on application ...[appoint] one or more experts or other persons skilled in the matter, directing them to verify such facts and to report thereon to the court within such time as it shall fix."[6]

Further, the Federal Supreme Court Cassation Bench gave binding decisions[7] that provide that "where the determination of facts and the nature of the

---

in *Ratio Juris Vol. 19 No 3* September 2006, at 272. Further, it is difficult to make distinction between scientific or technical knowledge or skills that require otherwise specialised knowledge. Terrence F. Kailey (2006) *Forensic Evidence: Science and the Criminal Law, 2nd Ed.,* (New York: Taylor & Francis Group LLP) at 19.

2 Crim. C., Art 48

3 Crim. Pro. C., Art 34

4 Civ. C., Art 1006, 1084 and 2856

5 *Yessu PLC v. Dejene Bekele, et.al.,* (Federal Supreme Court Cassation Division, Cass. File No 65930, 21 June 2011) Vol 12, at 362; *Haji Abdulkadir Mohammed v. Desta Gebreyohannes and Sisay Gebreyohannes* (Federal Supreme Court Cassation Division, Cass. File No 31833, 22 May 2008) Vol. 6 at 122

6 Civ. Pro. C., Art 136 (1). For instance, the California Evidence Code, Section 801 provides that the subject matters in respect of which expert opinion may be sought must be one that is not the subject of common knowledge and that is helpful to the court.

7 Ethiopia is said to be a civil law tradition country principally because it follows a codified law and the decisions of courts are not binding precedents. By the Federal Courts Re-amendment Proclamation No 454/2005, Art 2(1) the concept of precedent is introduced. Therefore, where the Federal Supreme Court Cassation Bench made an interpretation by a panel of five judges, it becomes binding on all lower courts including the Federal Supreme Court regular bench provided it is published in the series the Court publishes. However, what is implicit is that the Cassation Bench is given the power to interpret the law where the provisions of the law are vague, contradictory or have gaps that may properly be addressed by such binding interpretations. Where there is law and it is clear, the Cassation

litigation require expertise the court should hear expert opinion testimony."[8] Certainly, matters that call for expertise are broader in scope.[9]

Examination of the practice of the judiciary indicates that the court frequently sought the assistance of experts in the subject matters discussed below.[10] There are also areas that are not discussed here but for which the courts have sought expert opinion evidence less frequently.

2.1 Criminal Responsibility

In criminal matters, the law expressly provides for certain categories of facts be established by expert opinion testimony. For instance, the Crim. C., Art 48(1) provides that a person "who is responsible for his acts alone is liable to punishment under the provisions of the criminal law." Where the person claims insanity as a defence, the existence and extent of the defendant's irresponsibility that existed at the time the defendant committed the alleged

---

Bench is not given the power to pass a different interpretation. Where it makes such interpretation the decision, arguably, is not binding.

8 *Yessu PLC*, *supra*, n 7; *Ethiopian Development Bank v. Hailu Ambo, et. al.,* (Federal Supreme Court Cassation Division, Cass. File No 61227, 21 July 2011) Vol 12, at 377; *Wogagen Bank S.C. v. Habitom Rezene* (Federal Supreme Court Cassation Division, Cass. File No 48608, 21 November 2010) Vol. 12, at 306; *Commercial Bank of Ethiopia v. Zenebech Alemayehu and Adugna Demissie* (Federal Supreme Court Cassation Division, Cass. File No 83771, 19 March 2013) Vol. 15, at 214.

Although expert opinion evidence has been used for several decades and it has always been marred by problems, the Cassation Division attempted to address the issue in greater depth only in Volume 12 of its publication where the Bench at least in 7 different cases (both recent and earlier decisions) addressed issues relating to the admissibility, impeachment and evaluation of expert opinion evidence.

9 Adrian Keane and Paul McKeown (2012) *The Modern Law of Evidence, 9th Ed.*, (Oxford: Oxford University Press) at 527, 528. In fact, all forensic science areas were classified into seven groups at the 2004 Interpol 14th Annual Forensic Science Symposium. They are: 1. Scenes of Crime Evidence; 2. Individual Identification Evidence; 3. Questioned Documents; 4. Forensic Acoustics and Imaging; 5. Chemical and Material Analysis Evidence; 6. Debris Analysis, Explosives, and Environmental Crime; and 7. Media Analysis. Kailey, *supra*, n 3, at 43

10 The material that is given to the expert for her examination must be admissible evidence. However, other materials which she uses in forming her opinion need not be admissible in evidence. Jonathan Grossman "Admissibility of Expert Opinion Testimony" available at <http://www.sdap.org/downloads/research/criminal/expert.pdf> last accessed on July 13, 2013

criminal act has to be established.[11] Certainly, the court is not competent to determine criminal responsibility unless such responsibility or irresponsibility is patent. Thus, where the responsibility of the accused is doubtful, or where the court is convinced defendant is irresponsible but the degree of irresponsibility is not clear, the court is required by law to "obtain expert evidence."[12]

The court is also required to seek expert opinion regarding "the character, antecedents and circumstance of the accused person."[13] Further, where "the accused person shows signs of a deranged mind or epilepsy, is deaf and dumb or is suffering from chronic intoxication due to alcohol or due to drugs" the law makes it imperative that such expert opinion evidence must be sought regarding the criminal responsibility of the accused.[14]

The purpose of such mental competence (psychiatrist) evaluation is for the determination of whether defendant was responsible for his actions by the time he committed the alleged criminal act. This is obviously because if defendant was irresponsible for his actions at the time of the commission of the alleged criminal act, he is not liable to punishment. On the other hand, if the defendant is partially responsible, he is liable to punishment to the extent of his responsibility. In this regard, we can review three separate cases decided by our courts at different periods. The first one is *Public Prosecutor v. Fitsum Eyasu*.[15]

In this case, the defendant was charged for first degree murder for killing his biological mother. The evidence presented includes confessions of the defendant made as per Crim. Pro. C., Arts 27(2) and 35, after-the-fact witnesses and autopsy.

---

11 Crim. C., Art 49(1) is clear in providing "...at the time of his act..."

12 Crim C., Art 51(1)

13 *Id.*

14 *Id.* Where the court orders such psychiatric examination it should adjourn the matter expecting the results of examination of the "mental stability of the accused...by an expert." Crim. Pro. C., Art 94(2)(j).

15 *Public Prosecutor v. Fitsum Eyasu* (Federal High Court, Crim. File No. 60743, 10 July 2008)

In his defence, defendant made statements coherent (in form) but irrational (in content) regarding the circumstances of the incident as per Crim. Pro. C., Art 142(3). Further, defence witnesses testified that the defendant had a mental problem and his mother used to take him to different places for traditional treatment. The court rejected their testimony on the ground that the witnesses were not experts and that their testimony in this regard was "irrelevant." The court then convicted Fitsum of first degree murder and sentenced him to death.

Fitsum appealed to the Federal Supreme Court both against his conviction and the sentence.[16] In his appeal, Fitsum stated that he was convicted without his mental treatment records being evaluated. The Court asked Fitsum whether he had been to Amanuel Mental Hospital to which he had replied in the negative. The Court in the course of the conversation had opined that appellant was conversing with the judges intelligibly. Appellant replied he had been on medication.

Fitsum was then referred to Amanuel Specialised Mental Hospital. The "Medico-Legal Committee" unanimously found Fitsum to be not only a "mentally ill person [but also] dangerous." The report further suggests that, Fitsum needs internment for treatment where there were medication and amenities. He also needs psychiatric evaluation before he is discharged to the community.

The Federal Supreme Court, after receiving such psychiatric evaluation result, for reasons that are not clear from the records of the court, affirmed the conviction and the sentence. The Court of course, went beyond the call of duty and wrote to the Ministry of Justice asserting that "in case [Fitsum] is released on pardon, he should be evaluated by psychiatrist before he is integrated into the society." [Translation ours].

---

[16] *Fitsum Eyasu v Public Prosecutor* (Federal Supreme Court, Crim. App. File No 40199, 9 March 2011). The grounds of his appeal are disregard of mitigating grounds by the court sentencing him to death and incompetent assistance of counsel, both of which were evident from the records of the court.

The second case is *Chala Qeneni v. Public Prosecutor*.[17] The established facts of the case were that appellant would approach herders far away from his residential area whom he never had prior acquaintance or contact with. He then said to them "Kill me! I want to die today!" and lied on the ground by his chest. The people around were terrified but one of the herders had stated his refusal. Appellant then took his walking stick and hit him on the head about three times. When prosecution first witness approached them to quell the fight, the defendant hit her over the head and she fell onto the ground. When another woman came to help, he also hit her several times and when he hit her over the forehead she died immediately.

While he was under detention, he also hit the police officer in charge and had killed him. He had then been charged for aggravated murder and for causing bodily injury.

On first hearing, he had raised the defence of insanity and was sent to Amanuel Specialised Mental Hospital. The records show that the report of the Medico-Legal Committee of the Hospital states that the "defendant Chala Qeneni is not a person with mental disorder; as such he is responsible for his acts." [Translation ours]. Accordingly, the proceedings went on; prosecution evidence had been heard and defendant was convicted and sentenced to death by the High Court.

Chala appealed to the Supreme Court both against his conviction and the sentence. The Supreme Court after examining the appeal and the records of the High Court held that, appellant is proved to have had committed the crime and therefore, affirmed the conviction. However, having regard to the circumstances of the commission of the crime and the mental health of the appellant, the Supreme Court had reservations regarding the sanity of appellant. The court then had called three witnesses living in the vicinity of the appellant regarding his antecedents. Those witnesses mentioning specific instances and general circumstances had testified that appellant had been mentally ill and that is how he had been perceived in his community.

---

[17] *Chala Qeneni v. Public Prosecutor* (Federal Supreme Court Panel Bench, Crim. App. File No 255/76, 5 May 1987)

The Court then held "even though their testimony cannot disprove the findings of Amanuel Mental Hospital, it is hard to disregard" and thus reduced the death sentence to life imprisonment.

The third case is *Public Prosecutor v. Woletemaryam Tigabu*.[18] Woletmaryam was charged for ordinary murder contrary to Crim. C., Art 540 for killing a person who attempted to rape her. At the hearing, because she had not been able to intelligibly communicate with the Court, the Court ordered her psychiatric evaluation on its own motion. The result of the evaluation states that "the accused Woletemaryam Tigabu is mentally ill and need [sic] treatment and follow up." Because there had not been objection on the part of the prosecutor, the court then dismissed the charge.

Several preliminary observations could be made from these three cases discussed here and other similar psychiatric evaluations results not discussed here. First, in a criminal case where there is psychiatric evaluation, at least for those cases decided by the courts seating in Addis Ababa, all of them are from Amanuel Specialised Mental Hospital. Second, the mental condition of the person is evaluated by the so-called Medico-Legal Committee of the Hospital, the body to which the psychiatrist who conducted the examination of the patient is a member. Third, the reports include only the findings of the Medico-Legal Committee in few words and signed by the Chairman of the Committee who may not have conducted the examination. For instance in *Fitsum*, the Committee stated that he is not only "mentally ill person [but also] dangerous." Likewise, in *Woletemaryam*, it stated that she is "mentally ill and need [sic] treatment and follow up." It does not state the reasons for its conclusions, the procedures employed in examination of the patient, etc.

Fourth, responsibility relates to the mental capacity of defendant to understand the nature and consequence of his actions and/or whether he is able to control himself according to such understanding. The capacity of defendant that is in issue is the one that existed at the time of commission of the alleged criminal act. However, the reports are all about the present condition of the accused

---

[18] *Public Prosecutor v. Woletemaryam Tigabu* (Federal High Court, Crim. File No 66908, 4 November 2008)

which is not in issue before the court.[19] Further, where such irresponsibility exists, it may either be full or partial. The reports are always about full (ir)responsibility; never about a partial (ir)responsibility.

Fifth, coming to the courts, the findings are introduced as documentary evidence;[20] and the expert did not appear in person to testify before the court about his/her findings and were never cross-examined by the other party against whose interest the report finds.[21] There may be reasons for the expert's failure to appear before the court but none is on legal grounds. Therefore, if the report includes only the findings of the evaluation, the court should certainly, hear directly from the expert as to her competence, the procedures she followed and her reasoning. This is important not only to test the reliability of the report but also because the defendant has a constitutional right to confrontation should the report be adverse to his interest.[22]

---

19 It is obvious that there is a significant time lapse between the time of the alleged crime and the time defendant is examined by a psychiatrist for insanity. At a workshop jointly organized by the AAU Medical School and the Law School to upgrade the skills of the psychiatrist (on September 18, 2014 at Churchill Hotel), the experts stated that when the person is sent to the respective institutions for examination, often it is his/her first time. There are no prior records. Therefore, the experts can only make a finding of the present mental health condition of the patient and they cannot, in the absence of any such prior records, state about the mental health conditions of the suspect that existed at the time of commission of the alleged crime.

20 It is all expert opinion report that is produced as "documentary" evidence. The practice is consistent in that they are always top in the list of documentary evidence the prosecutor presents as part of the charge sheet. However, the report is only a statement of the subject matter given to the expert for her examination, the findings of her examination based on the material given to her and her expertise, and that she would testify to those facts should she appear before the court unless the other party waives her right to cross-examination.

21 For instance, the reports indicate that Menelik II Hospital makes autopsy for several cases per week. Likewise, Amanuel Specialized Mental Hospital conducts examination of several patients per week for judicial purposes. The Federal Police Forensic Department examines several more documents for the same purpose. The authors have not encountered a case nor have we heard from our colleagues wherein any of those experts conducting the examination appeared before the court to explain their findings or for cross-examination by the party against whose interest the report operates. We cannot categorically assert there was none; there may be cases wherein such expert appeared which we might not have encountered but it would not be wrong to conclude that appearance of the expert before the court, if any, is a rare exception.

22 FDRE Const. Art 20(4)

Sixth, in *Fitsum*, while the High Court failed to send defendant for psychiatric evaluation, ironically, the Supreme Court completely disregarded the findings of the Medico-Legal Committee of the Amanuel Specialised Mental Hospital that *Fitsum* is criminally irresponsible. In *Chala*, while the ultimate decision on responsibility is that of the court, the Supreme Court in particular had difficulty believing that Appellant had mental illness. But it appeared to consol the appellant (and itself) by taking into consideration appellant's predicaments when changing the death sentence to a life imprisonment. In *Woletemaryam*, the High Court referred defendant to psychiatrist evaluation on its own motion, and it fully accepted the findings of the experts.

As illustrated in these three cases discussed above (and in all those cases discussed elsewhere in this article), the practice is that the court admits irrelevant and otherwise inadmissible expert opinion evidence. The expert reports are surprisingly divergent in all other aspects that there is no common thread we can draw from those decisions.

In addition to the determination of criminal responsibility, the law provides that in order to determine "what treatment and measures of an educational, corrective or protective kind would be most suitable" to the young convict, the court may seek the assistance of an expert regarding the physical and mental condition of such young person.[23] The authors did not have access to such examination reports of experts.

2.2 Medical Examination

Where the dispute relates to physical injury to a person, a medical examination is done with a view to determine whether there exists an injury and the nature and extent of such injury. Medical reports come from different institutions: it could be dentist reports or reports from clinics and health centres. For sex related offences, medical examination results often come from Ghandi Memorial Hospital, etc.

In criminal matters where, at the investigation stage, the investigating police officer believes medical examination is necessary for the investigation he may

[23] Crim. C., Art 54(2).

order a registered practitioner to conduct such medical examinations, including blood test.[24] Such medical examination may be ordered both for investigation as well as for treatment purposes. Where such examination is to be conducted on the victim, the police needs to get the consent of victim, her guardian or parent.[25]

One such medical report which usually comes from Menelik II Hospital Pathology Department is autopsy. As the purpose of examination is related to the determination of the cause of death, it is dealt with under causation.

2.3 Causation

Causation is a fundamental issue to be determined by the court, principally in criminal matters and tort claims cases. Often the determination of whether a certain fact is a result of another fact, or whether there is an intervening cause and whether such intervening cause is in itself sufficient to bring about the result, etc. is usually a subject of expert opinion evidence.

One such determination of causation by an expert commonly used in our courts is autopsy. There is a consistent practice, at least in Addis Ababa, that as soon as the investigating police officer learnt the death of a person, she sends the corpse to Menelik II Hospital for examination in order to determine the cause of death. A review of the cases where autopsy result is presented reveals that, the autopsy report is not turning evidence. Often, the facts are sufficiently proved by other evidence, such as, witnesses and exhibits. The autopsy report is meant to affirm the already established cause of death.

In *Public Prosecutor v. Mohammed Aman*[26] defendant was charged for ordinary murder contrary to Crim. C., Art 540. As indicated in the prosecution charge, defendant hit victim at the back of his head three times with his bare fist, and the evidence includes lay witnesses' testimony and autopsy report from Menelik II Hospital, the only documentary evidence. The autopsy report has four parts: (a) brief history - which is a tip the Hospital gets from the police

---

[24] Crim. Pro. C., Art 34.

[25] Crim. Pro. C., Art 34(2)

[26] *Public Prosecutor v. Mohammed Aman* (Federal High Court, Crim. File No 112738, 12 February 2013)

by the time the corps is delivered; (b) external examination - in this case, the report states that there is "no external sign of trauma;" (c) internal examination - which states "subarachnoid haemorrhage and bleeding into ventriere and hematoma in cerebral region;" and (d) the main cause of death - a finding. In this case the main cause of death is "head injury." Based on those evidence defendant was found guilty of ordinary murder.

One cannot help raising the fundamental question whether being hit three times with bare fist at the back of one's head would cause death in the normal course of things. As the expert did not appear before the court, this question was not raised and was not addressed. Neither extraneous causes were mentioned as possibilities nor were they ruled out.

Likewise, in *Public Prosecutor v. Constable Metew Akele, et. al.*[27] defendants were charged for murder contrary to Crim. C., Art 540. The autopsy report, presented as documentary evidence, finds that "the main cause of death" is "severe head trauma [of] unknown circumstances."

The expert opinion report presented as accepted by the court in these two cases and others not discussed here,[28] share the same shortcomings that other expert opinion evidences have which is the fact thatthey are statement of findings often using only phrases. But the autopsy results have two more shortcomings. First, they exclusively focus on internal and external physical examination. The reports do not include results of toxic substance and similar biochemical examinations and underlying factors, such as, prior illness that caused victim's physical frailty or compromised immunity.[29] Second, the report states only "the main cause of death" which is not recognized by the law. The autopsy examination is, therefore, incomplete in terms of scope regarding causation which makes the current methods of examination less helpful to the justice

---

[27] *Public Prosecutor v. Constable Metew Akele, et. al.,* (Federal High Court, Crim. File No 102904, 23 December 2011)

[28] Also see *Public Prosecutor v. Commander Girma Moges* (Federal High Court, Crim. File No 106053, 21 March 2013). All murder cases discussed in this article have autopsy reports.

[29] In examination of cause of death all known natural causes of death must be excluded; until all such known natural causes of death are excluded, the cause of death remains unknown. Keane and McKeown, *supra*, n 11, at 252.

system, and the finding is not relevant to the determination of the fact in issue - causation.

2.4 Police Technical Evidence

However, wrongly stated in the law, the police, by the very nature of the institution, host personnel that are experts with specific qualifications and able to conducts examinations of physical items because of the availability of certain observational devises.[30] Some of these examinations, frequently used by the court, are discussed below.

i. Examination of documents for genuineness of handwriting, signatures, stamps etc. -

In *Public Prosecutor v. Getahun Assefa*[31] defendant was charged for fraudulent misrepresentation in violation of Crim. C., Arts 27(1) cum. 692(1) and material forgery in violation of Art 375(c) for allegedly creating a CPO (Cashier's Payment Order) payable to him without authority.

The construction company the defendan owns submitted a bid for a construction work run by Addis Ketema Sub-City Education Department. Along with the bid document a bid-bond CPO for Birr 19,000 was also submitted. The company did not win the bid. Therefore the back of the CPO was marked, signed and stamped on by the Addis Ketema Sub-City Education Department for return of the said amount to the company which submitted the

---

[30] Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011, Art 6(15) provides that the Federal Police Commission "conduct[s] forensic investigation and submit its findings and provide expert witness [sic] to court or the requesting organ." This gives the impression that the Federal Police has monopoly of forensic examinations, and it is the only institution that provides expert "testimony."

[31] *Public Prosecutor v. Getahun Assefa* (Federal High Court, Crim. File No 94179, 10 May 2012)

bid. Defendant then presented the CPO to Awash International Bank for a refund. The Bank refused payment on the ground that the CPO was not issued by the Bank.

At the hearing the prosecutor presented three witnesses and only two of them were heard. The key evidence in this matter was the CPO which is said to be illegally created by the defendant and the police report on the result of the forensic examination.

The police forensic examination result report has five parts. The first part of the report states who requestd/ordered the examination; usually it is either the court hearing the matter or the police conducting the investigation that orders or requests such forensic examination. In the present case it is the Arada Sub-City Police Department which requested the forensic examination.

The practice shows that such request for forensic examination states what is to be examined, and usually other documents are also submitted for comparison. The second part of the report, therefore, states the document to be examined and the accompanying documents sent for comparison.

Here, the report states that (a) the document to be examined is the CPO (with specific number and date of issue) said to have been issued by Awash International Bank S.C., in the name "HAMER NOIHE CONSTRUCTON" in particular (1) the handwriting and signature, and (2) the circle stamp put at the back of the CPO. The report further states that (b) for comparison (1) a sample written and signed by Getahun Assefa (defendant) in the presence of the party requesting the forensic examination; and (b) the correct *Addis Ababa City Administration Education Bureau Addis Ketema Sub-City Education Department* circle stamp was also sent.

Part three of the report states that the objective of the forensic examination is whether those writing, signature and stamp stated under (a)(1) and (2) are similar or identical with those sent for comparison as stated under (b).

The fourth part of the report states the process of the forensic examination and the findings. The report thus states that "with the help of magnifying technical devises, those writing, signature and circle stamp that are stated under (a)(1)

and (2) were individually compared with those stated under (b)(1) and (2)." [Translation ours].

The finding is that "those stated under (a) are similar with those under (b) in style, character, in movement of word creation, in the creation of the alphabet, in size, shape and unique customary signs. Therefore, according to the results of the examination (1) the writing and signature stated under (a)(1) is written and signed by Ato Getahun Assefa; (2) the circle stamp stated under (a)(2) is also stamped by the correct *Addis Ababa City Administration Education Bureau Addis Ketema Sub-City Education Department* circle stamp." [Translation ours].

The last and fifth part of the report is name, title and signature of two individuals who conducted the forensic examination.[32]

The court, after evaluation of the evidence, found the defendant guilty and his appeal to the Supreme Court was also dismissed because the Supreme Court held it found no ground for intervention.[33]

ii. Matters relating to identity, such as, fingerprints and other traces left behind at the scene -

Often in criminal cases where identity of the offender is not established, the police conduct examination of traces, such as, fingerprints, footprints, tyre impressions, blood spatters, hairs, etc.[34]

In *Public Prosecutor v. Constable Atlabachew Lakew and Srgt. Andinet Kebede*[35] defendants were assigned to guard the then Ministry of Capacity

---

[32] The same process is used in *Public Prosecutor v. Tigist Tadios* (Federal First Instance Court, Crim. File No 171433, 14 July 2010) who is charged and convicted for correcting her age in her student report card without legal authority contrary to Crim. C., Art 378. Also in *Public Prosecutor v. G/Egziabiher Tewolde and Tadesse Berihun* (Federal High Court, Crim. File No. 10419, 27 October 2006) defendants were charged and convicted for violating the Special Penal Code (Proclamation No 214/1982) Art 17(1) for changing the vehicle sale value assessment figures.

[33] *Getahun Assefa v. Public Prosecutor* (Federal Supreme Court, Crim. App. File No 80801, 19 July 2012)

[34] For many more criminal forensics, generally see Kailey, *supra*, n 3; Keane and McKeown, *supra*, n 11, at 527-529

Building. They were charged for aggravated theft contrary to Crim. C., Art 669(2)(b) for allegedly stealing office items from Office No 2. The first defendant pled guilty while the second defendant pled not guilty. Because identity had to be established, one of the evidence the Public Prosecutor presented was fingerprint examination report drawn by the Federal Police Forensic Department.

The content of the report is similar in form and content with the document examination report presented in *Getahun* (*supra*). Fingerprint trace was found on the door knob of Office No 2. The fingerprint samples of 10 individuals were taken for comparison including that of the two defendants. The objective of the examination is stated to be determination of whether the fingerprint trace left at the door knob of Office No 2 match with any of the fingerprint samples of the ten individuals. .

The examination process involves the use of special lighting and magnifying glass. The finding of the examination was that the fingerprint trace found on the door knob of Office No 2 is similar to that of the second defendant's fingerprint.

Ironically, something is not clear from the readings of the records of the court. The Federal Police Forensic Department Report indicates that the examination is conducted regarding the identity of the person whose fingerprint traces were found on the door knob of Office No 2. However, the second prosecution witness Srgt. Tariku Tsegaye states that the second defendant's fingerprint traces are found on 6 of those items stolen from the office. This difference between the testimony and the expert opinion evidence then begs the question which one is correct, admissible and reliable.

The court, however, convicted the second defendant based on the evidence presented including the police forensic examination report.

iii. Ballistic test and other demonstrative examinations -

---

[35] *Public Prosecutor v. Constable Atlabachew Lakew and Srgt. Andinet Kebede* (Federal First Instance Court, Crim. File No 41392, 15 October 2012)

This test is conducted in order to determine whether, for example, a gun seized from a suspect has been shot with, or whether a specific bullet had been discharged from a specific gun, etc. Although it is closer to demonstrative examination, the matching of the marks on the barrel and the bullet are the 'fingerprints' of the gun without the need for other comparison. This examination is also conducted by the Federal Police Forensics Department.

In *Public Prosecutor v. Tilahun Eshete*[36] defendant was charged for aggravated murder for shooting and killing his wife and her sister. The Federal Police Forensic Department conducted technical examination on the bullets collected both at the scene of the crime and from one of the victims' body and the report concluded that those bullets were discharged from the gun that was seized from the defendant.[37] Based on such and several other evidence presented by the Prosecutor the defendant was convicted and sentenced to life imprisonment.

As discussed in these few cases, the police technical examination expert report are better than the other expert reports in two aspects. First, the reports directly address the issues pending before the court for resolution. Second, the reports state the process of examining the material given to that department.

2.5 Auditing of Financial Accounts

In many cases the dispute may involve auditing of financial accounts in order to help the court reach a reasonable conclusion regarding the respective rights and liabilities of the parties. The court in such cases requires the assistance of auditors, i.e., certified accountants. They examine documents and transactions in order to determine assets and liabilities.

At this juncture the authors would like to note that although the foregoing discussion has focused on criminal cases., this is mainly as a matter of convenience since the facts in criminal matters are straightforward and more

---

[36] *Public Prosecutor v. Tilahun Eshete* (Federal High Court, Crim. File No 68115, 26 August 2009)

[37] As defendant raised the defence of insanity, he was examined by Amanuel Specialized Mental Hospital and found to be responsible for his actions. Likewise, autopsy was conducted on the victims in Menelik II Hospital and the report shows both died of bullet wounds.

susceptible for intelligible discussion. Otherwise, expert opinion evidence is also used in civil matters much more frequently than it is used in criminal matters. For instance, valuation of property is one additional subject the law indicates calls for expertise (Civil Code, Art 1006, 1084 and 2856). Further, experts are appointed in liquidation of bodies corporate, determination of damage both in tort and contractual matters, etc.

Those subjects that call for expertise are either scientific, technical or requires otherwise specialised knowledge whether such assistance is sought by law or the decision of the court. Conspicuously absent from the practice are products liability and professional malpractice cases, including, medical malpractice and construction defect disputes. In products liability litigation, whether an injury is a result of defective product, experts may be heard to test whether such injury is caused by such product and the defect relates to production or design.

3. The Nature and Extent of the Assistance of the Expert

In order to properly determine the nature and extent of the assistance of the expert, courts may have regard to the nature of the facts, i.e., whether the subject calls for expertise,[38] responsiveness of the expert opinion to the issue framed by the court, and whether the report is a definite scientific finding or legal conclusion.

First, the nature of facts in respect of which the court requires the assistance of the expert must be scientific, technical or require specialized knowledge and skill. It is based on the unique nature of those facts that the law or the court determines whether such expert assistance is necessary. Therefore, where the facts do not possess such nature or a fact is a matter of common knowledge, the court may not require the assistance of an expert and it should reject such request by the parties as the evidence is inadmissible.[39]

---

[38] As indicated earlier, a fact calls for expertise if the court lacks expertise in the field. Following this, there is an argument that if the court lacks expertise, it also lacks the competence to assess the cogency of the argument the expert proposes. Therefore, the court blindly defers to the conclusions of the expert. Keane and McKeown, *supra*, n 11, at 526

[39] Keane and McKeown, *supra*, n 11, at 529; J. Grossman, *supra*, n 12, at 4

For instance, the interpretation and application of the laws of the country are the basic duty of the court; therefore, the courts have the final decision on the subject. In such cases the court does not need the assistance of an expert.[40]

In *Public Prosecutor v. Temesgen Desalegn and Mastewal Publishing and Advertising Enterprise*[41] the second defendant was the publisher of a newspaper called "*Fitih*" and the first defendant is the Editor-In-Chief. News articles (or commentaries) allegedly written by first defendant were published in the said newspaper. Based on such publication, defendants were charged for four different counts: provocation and preparation contrary to Crim. C., Arts 43(1)(a) and 257(a); defamation against the state contrary to Crim. C., Arts 43(1)(a) and 244; inciting the public through false rumours contrary to Crim. C., Arts 43(1)(a) and 486; and against the second defendant only, for participating in principal capacity by publishing and circulating newspapers with such unlawful content contrary to Crim. C., Arts 34(1), 44(1) and 257(a).

The defendants' defence was that the contents of articles published in the newspaper are covered by the provisions of Art 29 of FDRE Constitution which provides for the freedom of expression and some of the provisions of the Criminal Code are unconstitutional. Accordingly, three witnesses were heard and two of them were experts on the content and scope of the right to freedom of expression. They testified that what defendants wrote in the newspaper falls within the meaning of freedom of expression enshrined in the Constitution and few provisions of the Criminal Code are unconstitutional.

In the opinion of the authors, to begin with, what the witnesses did in their testimony is interpreting the law which is the essential duty of the court and the court should not have heard such testimony in the first place.

Second, when the court seeks the assistance of the expert, it may give the necessary instructions regarding the nature and scope of the examination such expert is required to conduct so that the finding of the expert is responsive to the issue at hand. For instance, regarding criminal responsibility, the issue is

---

40 J. Grossman, *supra*, n 12, at 4; Keane and McKeown, *supra*, n 11, at 544.

41 *Public Prosecutor v. Temesgen Desalegn and Mastewal Publishing and Advertising Enterprise* (High Court Crim. File No 123875, 17 October 2014)

whether defendant was able to understand the nature and consequences of his actions or he was able to control his actions in accordance with such understanding by the time he committed the alleged criminal act.[42] The expert opinion should be able to help the court resolve this issue. As such the report must contain the mental conditions of defendant and a condition that existed by the time the defendant committed the alleged criminal act.

Likewise, in medical examination the issue may be the cause of such injury, or the nature and extent of such injury sustained by victim. The medical report must address the issue to be determined by the court. It is only where the expert addresses such issues that the expert can properly assist the court in the determination of the facts.

Finally, only the court can decide on the fate of the report, i.e., if it accepts the report partly or rejects it entirely as it deems appropriate and logical. The law is abundantly clear that the final determination of legal issues is left exclusively to the court. As such, the court can use the factual findings of the expert as an input in its legal findings or it may disregard it. However, the court is bound only by the "definite scientific findings" of the expert.[43] This provision gives the impression that the expert is the final arbiter of the facts that are the subject matters of expertise. However, as discussed below, the court must be convinced that the data given to the expert are complete; the expert used a reliable methods or procedures in conducting her examination of the facts;[44] and the conclusion is the result of the information given to her and her expertise. If the court is not convinced that such standard procedural matters

---

42 Crim. C., Art 51(2) provides that the "expert evidence shall describe the present condition of the accused person and its effect upon his faculties of judgment and free determination...."

43 Crim. C., Art 51(3) and 54(3).

44 The standard procedure is not to maintain the status quo but to guarantee the validity of the reasoning. If a new method is developed, as long as it is scientific and a breakthrough from the already established practice, that may be accepted. The American Supreme Court added a new rule to the 70 years old "generally accepted procedure" in *Frye v. United States* to "relevant and reliable standard" in *Daubert v Merrell Dow Pharmaceuticals* which is later affirmed in *General Electric v. Joiner*. See Kailey, *supra*, n 3, at 11-19. How the standards for admissibility of expert opinion changed over the years, please see Godden and Walton, *supra*, n 3, at 264-271. Also see U.S. Federal Rules of Evidence, Rule 702 setting the criteria for admissibility of expert opinion evidence.

are met, it can reject even the so-called the "definite scientific findings" of the expert.

The expert cannot in anyway determine that somebody was negligent, or that he is guilty, or is in breach of his duty, etc.[45] For all that they are worth, he can only state the facts as they were. In many of the reports discussed here, that is exactly what the experts did except the cases involving psychiatrist examinations.

4. Appointment of Experts

Experts are liberally appointed at different stages of the proceedings by the parties or courts. In criminal matters, the investigating police officer selects the expert who conducts medical examination regarding the nature and extent of injury to a victim including an autopsy.[46] The police frequently send fingerprints identification, and signature and document genuineness examination to the Federal Police Forensics Department. The results of such examination are presented to the court by the prosecutor later at the hearing.

A defendant has a constitutional right to present evidence in his defence.[47] One such evidence may be expert opinion evidence.[48] However, the court may also require the assistance of experts as the case progresses. The practice indicates that whether or not insanity is invoked by the defendant, psychiatrist evaluation for criminal responsibility almost always is ordered by the court trying certain types of cases.[49]

The procedure in civil matters is more or less identical with the process in criminal matters. If the parties deem certain facts call for expertise, they may

---

45 J. Grossman, *supra*, n 12, at 8. In fact, we have extensive use of traffic police incident report in car accident tort claims and criminal responsibility for causing death or bodily injury. The officer appears in court and gives testimony. Usually, it is the police officer who decides which party is at fault and the court appears to be there only to assess damage. The conclusion of the officer is based on the traffic regulations and his is not as such expert in such matters.

46 Crim. Pro. C., Art 34.

47 FDRE Const. Art 20(4), second statement

48 Crim. Pro. C., Arts 124(1), 136(2), 142(3). See also *Fitsum, supra*, n 17; *Chala, supra*, n 19; *Woletemaryam, supra*, n 20; *Tilahun, supra*, n 38.

49 Crim. Pro. C., Art 94(2)(j), 95(3), 96(2); Crim. C., Art 51(2).

hire such experts. This may be read from the provisions of Civ. Pro. C., Art 112(2) which provides for expenses and remunerations when such experts are summoned by the parties.

We can therefore abstract from the discussions on the provisions of the law that experts may be appointed by the parties earlier in the proceeding and later by the court.

However, there is always one particular provision frequently referenced to by the decisions of the Cassation Bench - Civ. Pro. C., Art 136 - which provides that "where the court considers it necessary or expedient that the facts in dispute between the parties should be verified" by an expert, the court may appoint "one or more experts or persons skilled in the matter."[50] The Federal Supreme Court Cassation Bench in *Chilalo Contractors PLC v. Africa Engineers Construction*[51] gives a wrong impression that this provision is the only avenue for appointment of experts in civil matters.

The dispute was regarding construction machinery rent. On appeal the Federal Supreme Court ordered both parties to appoint one accountant each to work together and produce a joint report to the Court. Each auditor submitted his own separate report with different results. The Court accepted only one of the reports on the ground that it is "detailed and convincing" and rejected the other.

In reviewing this judgment, the Cassation Bench indulged itself in a shallow discussion about appointment of experts in other legal systems. It stated that in the common law system, it is the parties that appoint the experts while in the civil law system, it is the court that appoints experts. The Cassation bench also noted that we follow the civil law tradition and as a result , Art 136 of the Civil Procedure Code states that it is the court that appoints experts.

It therefore held that the Supreme Court should have appointed the expert itself. Because both experts violated the order of the Court appointing them,

---

50 Civ. Pro. C., Art 136(1).

51 *Chilalo Contractors PLC v. Africa Engineers Construction* (Federal Supreme Court Cassation Bench, Cass. File No 44522, 24 December 2010) Vol 12, at 404.

accepting one of the reports is contrary to the provisions of Art 136. It then overturned the decision of the Supreme Court.

The interpretation of Civ. C., Art 136(1) and the reasons provided are fundamentally flawed for at least two obvious reasons. First the Civil Procedure Code which provides for Art 136(1) is borrowed from the Indian Civil Procedure Code which is a common law system which is something that the Cassation Bench appears to have missed. Second, this interpretation disregards the provisions of Art 112 by which parties may also appoint their own experts.

However, the same Cassation Bench in *Yessu PLC* gave a biding interpretation of Art 136(1) that parties may also call their own expert witnesses.[52]

5. Determination of Expertise

Before the court admits the testimony of an expert, it must be affirmatively proved to the court that the person has the required and relevant expertise on the subject for her examination.[53] There is no well-established procedure provided for in the law or developed by the practice of the courts by which expertise of an expert would be established or tested.

The Federal Supreme Court Cassation Bench held that experts are those who, because of education, training or experience have special knowledge and that when courts call on them for their expertise, it must first establish they have the relevant expertise. If the expert opinion evidence is required in the area of engineering, then it must be established the person has knowledge in the field of engineering. Similarly, in the field of architecture, technology and similar fields, when the court believes such expert opinion is necessary, it may hear such expert testimony on its own motion or at the request of the parties.[54]

In the determination of expertise, the court may evaluate the relevance and sufficiency of the education and/or training the expert had in the field her expertise is sought where such fields are scientific or technical.[55] However,

---

52 *Yessu PLC*, *supra*, n 7.
53 Keane and McKeown, *supra*, n 11, at 533, 534.
54 *Yessu PLC*, *supra*, n 7.
55 Keane and McKeown, *supra,* n 11, at 534.

education is not given in all trades. In such cases, if the subject matter requires specialized knowledge and such person is engaged in this activity for a living and she has been doing it for a substantial period of time, certainly, she must be an expert because the market assessed her so.[56]

Where a person claims to be an expert in a certain field it does not mean that he is the only knowledgeable person in the subject matter, nor should he be the best. It only means he has the required knowledge, and skills, he has taken training or he has acquired a good experience, and he understands the procedures and the normal practice of the profession. If a certain amount of information is given to him, he will come up with a certain result using his knowledge, skills, and reliable methods or procedures in making such analysis.

The current state of affairs of expert opinion evidence creates a serious confusion regarding determination of expertise. As alluded earlier, autopsy is always conducted by Menelik II Hospital; technical examinations are conducted by the Federal Police Forensics Department; and psychiatric evaluations are conducted by Amanuel Specialised Mental Hospital, etc., each of which is a government institution. This is not because those institutions have monopoly of knowledge or expertise.

In practice, this created at least two fundamental problems seen in the determination of expertise of the person giving opinion evidence. First, there is this institutional bias that associates the competence of the experts with the institution hosting those professionals.

It is a reminiscent of this unstated belief implicit in the Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011 Art 6(15) which

---

[56] *Id.* Such is the case relating to artistic, cultural and similar 'practices'.
Unrelated to this, there are no administrative regulations in this country. Almost all corruption cases are related to administrative procedure. Because there are no administrative regulations or guidelines, the court always requires a written explanation about the administrative practice in that particular office. Such administrative practice has to be written by a person who has ample experience in the office and it is preferable if he is senior in his position. The practice of the court is that, it does not look into the competence of the person who wrote the letter; simply because it came from that office with a header and a stamp, it admits the letter into evidence and gives it effect disregarding any challenge by defendant. See for instance, *Public Prosecutor v. Wondewossen Alemu, et. al.*, (Federal High Court, Crim. File No 87233).

provides that the Federal Police Commission will "conduct forensic investigation and submit its findings and provide expert witness to court or the requesting organ." This is an otherwise expression that the institution of the Federal Police is competent to deliver such testimony on forensic matters. We believe this is a serious mistake on the part of the drafters of this Proclamation.

Because such bias is pervasive that the courts, at times, donot appear to understand how competence is established. In *Tilahun,* for instance, because defendant invoked insanity the court reasoned "Amanuel Hospital, which has the ***authority*** to conduct psychiatric examination found no illness"[57] therefore his defence is not acceptable. [Emphasis added].

Second, a major problem seen regarding expertise is either the result is produced by a body that has not conducted the examination and/or the person who is said to have undertaken the examination does not state his competence other than his title, e.g., Inspector Thomas, Dr. Dereje (Pathologist), etc. For instance, the psychiatrist evaluation conducted by Amanuel Specialised Mental Hospital is signed by the chairman of the Medico-Legal Committee who is also a psychiatrist but who may not have examined the patient.

This has a negative impact on the credibility of the report and the admissibility of the expert opinion evidence.

6. Presentation of Expert Opinion Evidence

Unlike lay witnesses, experts do not necessarily have personal knowledge of the subject matter they are required to testify about.[58] Therefore, the expert is given the relevant information at her place of work and she is expected to deliver a reasonable conclusion on the subject given to her for examination that is helpful for the disposition of the issue before the court. She may also be asked to answer hypothetical questions.[59]

The manner of giving opinion is not clearly provided for in the law. A review of the best practices in our legal system and in other jurisdictions (which makes

---

[57] *Tilahun*, *supra*, n 38
[58] Keane and McKeown, *supra*, n 11, at 541
[59] Ibid.

sense under the circumstances) is that, before the expert is required to appear before the court, she is required to prepare a report of her examination.[60] In order to meet the constitutional and procedural requirements of relevancy, admissibility and reliability of the testimony, the expert report is expected to have the following items.[61]

1. Competence of the Witness as Expert - the expert at the beginning of his report should state his competence as an expert on the subject under consideration. For instance, he may have to discuss his education, his experience on the subject (with specialisation and sub-specialisation), i.e., how long he has been engaged in this business, whether he has testified as an expert in similar cases, etc. The witness need not be the best in the profession but he must possess sufficient knowledge of the profession, of the preferred methods or procedures for the said investigation and so forth.

2. Content of the Information given to His Analysis and their Completeness/Sufficiency for the said Investigation - the expert witness is different from the lay witnesses in that he may never had personal experience of the facts given to him for examination. He is given the material, the subject matter of the examination and he is required to give his opinion on the subject based on his expertise. Therefore, he has to state the material that is given to him for examination and whether such material is complete for such purpose. Where the material is not complete to conduct the required examination he must proceed with the examination and turn in his report to the court.[62]

3. The Various Accepted Standards of Procedure in Conducting the Said Examination - the expert is expected to use preferred methods in his analysis of the material given to him. Such has to be stated in the report. However, where there are two or more procedures, he must state the widely employed standards of procedure in the profession and state which procedure he used and why. He must always use the preferred procedure under the circumstances. If he used a

---

60 Civ. Pro. C., Arts 136 and 176(3); *Id.*, at 548-551

61 Keane and McKeown, *supra*, n 11, at 552, 554-555

62 The U.S. Federal Rules of Evidence, Rule 702; Godden and Walton, *supra*, n 3, at 274.

new method, he should state so and why the procedure he used is the preferred procedure for the said examination.[63]

4. The Findings of the Expert - using the information given to him and based on his expertises, the expert needs to state the findings of his examination and the degree of his certainty.

5. Possible Alternative Findings - as indicated above, the information or the material given to the expert for his examination may not be complete for the examination; or there could be different procedures for conducting the examination. Such and other similar reasons may make one firm conclusion impossible. In such cases, the expert needs to state other possible conclusions of the examination. In such cases, he must also state the degree of likelihood of each possible conclusion. If he rules out any of those possible conclusions, he must also state so and explain why.

6. The Report must be Prepared under Penalty of Perjury - as indicated below the appearance of the expert before the court is not certain, particularly in civil matters. It is possible the court would act on the report without the need to call the witness to appear before the court for cross-examination. Therefore, the report must be prepared under penalty of perjury. This may be stated either at the beginning or the end of the report.

7. Personal Attendance of the Expert in Court

The expert report is not documentary evidence in the strict sense of the term; it is a statement of facts and findings the expert would testify should she appear in court. The procedural laws provide that where the parties call experts in their favour, such expert must appear in court, enter an oath or make an affirmation to testify the truth and be open for cross-examination by the other party.[64]

However, if the expert is appointed by the court under Civ. Pro. C., Art 136 it is the discretion of the court to require attendance of the expert after the court has received the report. Should the court decide to call for the personal

---

63 See n 46, *supra*.

64 Civ. Pro. C., Art 263(3); Crim. Pro. C., Art 137(3).

attendance of the expert, he shall be examined under oath.[65] The law is not clear, however, whether she could be subjected to cross-examination by the parties. The practice indicates that sometimes the courts allow the parties to cross-examine the expert, sometimes the parties' questions are put to the expert via the court.

In criminal matters, however, the accused has the constitutional right to cross-examine witnesses that testify against him whether they are prosecution or court appointed witnesses.[66] Therefore, if the expert is a prosecution witness (or the testimony is in anyway adverse to the interest of the defendant) the defendant has the right to confront the witness and the decision on the attendance of the witness should not be left to the discretion of the court.

8. Impeaching Expert Opinion Evidence or Testing Credibility

Always, when a proponent presents evidence, certainly the opponent wants to have that evidence excluded. Such impeachment may be done by discrediting the evidence either on relevancy, admissibility or reliability grounds. This may be done either intrinsically by using the evidence itself or extrinsically by producing counter evidence. Likewise expert opinion evidence may be impeached either intrinsically based on the facts in the evidence itself or extrinsically by presenting countering evidence.

7.1 Impeaching the Expert Opinion Evidence Intrinsically

Cross-Examination of the Expert- When the court appoints experts, it also gives them specific instructions regarding the facts to be verified and the report.[67] In the normal course of things, the expert is expected to submit a written report. The report forms part of the record.[68] Once, the expert made his report to the court, he will be examined by the court and the parties after he enters an oath or makes an affirmation.[69]

---

65 Civ. Pro. C., Art 261(3); Crim. Pro. C., Art 136(2) and 142(2).
66 FDRE Const. Art 20(4).
67 See, for example, Civ. Pro. C., Art 136.
68 Civ. Pro. C., Art 133(2).
69 Civ. Pro. C., Art 133(3); Crim. Pro. C., Art 136(2), 142(2).

A testimony is challenged for its logical consistency, veracity and reliability intrinsically, almost exclusively by cross-examination of the witness. The expert report is not documentary evidence but a testimony. It is stated in both procedural codes that the purpose of cross-examination is to show to the court that the testimony given in the examination-in-chief is untrue, contradictory, unreliable, etc.[70] In so far as a given question enables the party or her lawyer to achieve the purpose of the cross-examination, the law does not limit the scope of facts on which such cross-examination may be conducted. In expert testimony, particularly, the cross-examination may focus on four major areas. The first subject for cross-examination is completeness of materials the expert examined for the conclusion she drew. The second subject is reliability of the procedure the expert used in conducting her examination. The third subject is the content and logical rigor of her report, i.e., the possibility of different or contrary conclusions. The fourth subject for cross-examination is relating to the expert herself; she may be cross-examined on her competence, on her professional impartiality, that the report is a product of her expertise, etc.[71]

This manner of impeachment of expert opinion evidence may be more appropriate for court appointed experts because the party may not have the procedural opportunity to counter by other expert opinion evidence.

Such impeachment is possible only if the said expert submitted his report well in advance of his appearance in court for examination.

7.2. Countering the Expert Opinion Evidence Extrinsically

Also, once the proponent presents his expert report and testimony, the opponent may counter the finding and testimony of the expert by producing counter evidence. This counter evidence may be expert opinion evidence, lay witness testimony, or any other evidence the fact admits.

Another Expert Opinion Evidence - where the opponent presents his expert opinion evidence, such expert must be given the same data that was given to

---

70 Civ. Pro. C., Art 263(3); Crim. Pro. C., Art 137(3).

71 Kailey, *supra*, n 3, at 10; J. Grossman, *supra*, n 12, at 15; Godden and Walton, *supra*, n 3, at 278-279; Keane and McKeown, *supra*, n 11, at 535, 540.

the proponent's expert and he must also be given the report of the proponent expert.

As the report forms part of the record, the opponent expert is also examined based on his report and his findings. In fact, he is subject to the same scrutiny the proponent's expert is subjected to. Therefore, his report and his findings need to be given to the proponent expert to make cross-examination by the proponent possible.

The Federal Supreme Court Cassation Bench made a binding decision that expert opinion evidence may be challenged by an expert with better expertise.[72] This approach is not correct at least for four reasons: first, it creates a "battle of experts."[73] The decision will turn on the excellence of the expert in his area of expertise instead of on the facts. Second, the determination of expertise becomes impossible. The parties in selecting experts, they have to find "the best" in town in order to win their case. That would create confusion as to competence of the experts. An expert with five years experience is not as good as the one with ten years experience. However, a retired expert with thirty-five years of expertise is not as good as an expert who is still active with only fifteen years of experience. Third, the decision on the ultimate issue is the power of the court and the assistance of the expert is limited to a particular fact whose competence and credibility is yet to be tested.

Respondent's expert has a better education, experience than that of petitioner's does not mean that respondent's expert is more credible than that of petitioner as suggested by the Cassation Bench. If credibility is determined solely based on the degree of expertise of the experts there is no role for the court in determining the facts at hand. Fourth, if the expert opinion is discredited only by the opinion of an expert with better experience, then there is no room for lay witnesses who personally observed the facts. In fact, this decision of the

---

[72] *Takele Balcha v. Azeb Tsegaye* (Federal Supreme Court Cassation Bench, Cass. File No 47960, 21 December 2010) Vol. 12, at 322.

[73] Godden and Walton, *supra*, n 3, at 264.

Cassation Court contradicts with the decision it passed in *Anbessa City Bus Enterprise*[74] and *Yessu PLC*.[75]

If the witness is qualified as an expert in the field, she examined the material given to her employing preferred and reliable methods or procedures, and stated the conclusions she drew from such examination and based on her expertise, she has done her job and her testimony is admissible. However, if the opponent's expert does the same and reached at a different conclusion, the court evaluated the evidence regarding the reliability of such testimony. As indicated above, the expert opinion evidence is not the only evidence; it is one of the evidences presented by the parties. Therefore, expert opinion evidence must be evaluated in the background of the other evidence and the circumstances of the examination.[76]

Lay witnesses - The findings of the proponent expert may be challenged by producing lay witnesses regarding facts they personally observed. Their testimony may not necessarily be direct on the issue to be addressed by the expert opinion evidence but the court may make its own inference.

The Federal Supreme Court Cassation Bench made two contradictory decisions on this issue. In *Takele*,[77] Respondent purchased a photo printing machine from Sharp General Trading. While Petitioner was transporting the machine, his vehicle was involved in an accident. The dispute is whether the photo printing machine is damaged and the extent of the damage.

Sharp General Trading is said to have examined the machine and it wrote a report concluding the machine is damaged and the damage is total. Petitioner on his part called witnesses who have heard Sharp General Trading employees

---

74 *Anbessa City Bus Enterprise v. Zenebework Kebede, et. al.,* (Federal Supreme Court Cassation Bench, Cass. File No 43453, 24 November 2009) Vol 12, at 388.

75 *Yessu PLC*, *supra*, n 7.

76 In assessing the expert evidence the court may have regard to, among others, the (a) quality of the reasoning; (b) correctness of the factual presentation and underlying assumptions; (c) scientific validity; (d) soundness of the expert's methodology; (e) quality of the expert's investigation; (f) experts qualifications and reputation; (g) objectivity of the expert; (h) the expert's performance under cross-examination. See in general Evan Bell "Judicial Assessment of Expert Evidence" in *Judicial Studies Institute Journal 2010:2*

77 *Takele, supra*, n 74.

stating that the machine is not damaged. The Somali Regional State High Court decided for Petitioner in this matter and the decision was affirmed by the State Supreme Court. The Federal Supreme Court held, "as can be read from the provisions of Civ. Pro. C., Art 136(1) expert opinion evidence may be discredited by opinion evidence of another expert with better knowledge and skills on the subject." [Translation ours]. It concluded that such evidence cannot be discredited by lay witnesses and entered judgment that the lower courts made a fundamental error of law and reversed the decision.

Few months later, the same Bench in *Yessu PLC*[78] decided otherwise. The dispute is about who caused a damage to a machinery and Petitioner presented expert witnesses and Respondents presented lay witnesses. The Court held, the expert should give his opinion objectively. Where there is no issue of objectivity raised, the court invoked a rule that "in civil context...lay evidence should not be preferred to expert evidence without good reason."[79] Based on this rule the Court upheld the expert opinion.

In *Anbessa City Bus Enterprise*,[80] an earlier decision, the Cassation Bench relegated expert opinion evidence to circumstantial evidence. It held that, "as the expert opinion evidence is based on opinion [rather than personal experience] it is not strong enough to rebut eye witness testimony. Eye witness testimony is direct evidence" and therefore superior to circumstantial evidence.

Despite inconsistencies of the foregoing Cassation Bench decisions, the general tendency appears to be expert testimony may be impeached by lay witnesses if they are convincing.

Court Appointed Experts - The expert is a witness in the strict sense of the term and he needs to meet the procedural requirements of an ordinary witness. First, he must appear in court. It is provided both in the civil[81] and criminal

---

78 *Yessu PLC*, *supra*, n 7

79 This rule is not found in the Ethiopian legal system nor is there such practice developed by the courts. However there is such rule in the English law. Keane and McKeown, *supra*, n 11, at 546.

80 *Anbessa City Bus Enterprise*, *supra,* n 76.

81 Civ. Pro. C., Arts 111, 112, 261.

procedure codes[82] that witnesses appear in court. However, it need not be a physical presence. If the person is outside of the country or in a remote area if coming to court is inconvenient or extremely costly, the court can hear such witness either by a commission in civil matters[83] or via video link both in civil and criminal cases. Second, he must enter an oath or make an affirmation that he will testify the truth.[84] Third, at least in criminal cases, he must be open to cross-examination by the defendant.[85] It is only when all these three procedural requirements are met that a person could properly be referred to as "a witness".

However, where the expert is appointed by the court, the procedure is far less clear and the practice is even worse.

In criminal matters, the issue is whether the expert gave opinion that is adverse to the interests of the defendant. Where the expert gave an opinion that is adverse to the interest of the defendant, the latter has a constitutional right to confront any witness that gives testimony against him. This right includes the personal attendance of the expert in court, entering an oath or making an affirmation to testify the truth and being open to questions that may be put to him by the defendant. This is the same whether the expert is called by the public prosecutor or appointed by the court. Likewise, if the expert is appointed by the defendant, the public prosecutor must have the opportunity to cross-examine the expert witness.

Where it is a civil matter there are two modes of appearances of the expert. If the expert is appointed by the parties, he would appear before the court for cross-examination by the other party.[86] However, if it is a court appointed expert, the attendance of the expert is the discretion of the court.[87] Therefore, impeachment of court appointed expert in civil matters appears to be the discretion of the court.

---

82 Crim. Pro. C., Art 136 for prosecution witnesses and Art 142 for defence witnesses.

83 Civ. Pro. C., Art 125, and 127 ff.

84 Civ. Pro. C., Art 133(3); Crim. Pro. C., Art 136(2), 142(2).

85 The Constitution is broad in its statement of the right to confrontation. Art 20(4) provides that "accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them..." Thus, defendant's right to confrontation of witnesses can never be restricted on any ground.

86 Civ. Pro. C., Art 261(1); Crim. Pro. C., Art 136(3).

87 The provisions of Civ. Pro. C., Art 136(2) make reference to the provisions of Art 133.

9. Admissibility and Reliability of Expert Opinion Evidence

The rules on expert opinion evidence are put in place to help the court to make use of the best available knowledge regarding a fact that is scientific, technical or requires otherwise specialised knowledge. In making use of such expertise, the court must have effective control of the expert and understanding of her opinion so that the court disposes of cases based on relevant, admissible and reliable evidence.

In order to show to the expert that the court is in control of the determination of the facts, it must give proper instruction to the expert as to the facts to be disposed and the content and scope of her obligation. This also helps the court to obtain a relevant opinion that is helpful for the determination of the fact in issue. As a matter of fact, the determination of relevancy of the expert opinion to the facts pending before the court does not appear to be complicated. It is only other factors that come into play that confuses the issue of relevancy. Often the court appears to have seen some of the opinions beyond its power. For instance, in *Tilahun*, the court stated that Amanuel Specialised Mental Hospital has the "authority" to decide competence.[88] This suggests several things which obviously are wrong. Also, simply because the report comes from a government institution influences the court's judgment of the evidence.

Once the court determines expert opinion report is relevant to the fact in issue, it must ensure the evidence is admissible, such as, by proper appreciation of the suitability of the fact for expert opinion, that the other party is given the opportunity to cross-examine the expert, particularly in criminal matters, proper assessment of competence of the expert, her presentation of the report and those other factors that otherwise affect admissibility of the expert opinion evidence.

However, as much as suitability of the subject matter for expert opinion evidence extends back to the relevancy of the evidence, competence of the expert and presentation of her report extends to reliability. Where, for instance, two opposing expert opinion evidences are presented by both parties that are relevant and admissible, the determination of which expert opinion is more

---

[88] *Tilahun*, *supra*, n 38

credible depends on several factors. The completeness of the information, reliability of the methodology the expert used, the logical rigor in analysing the facts and the soundness of her reasoning, the degree of the likelihood of the conclusion she drew from the facts, her independence, her appearance before the court and her answers to questions by the parties, such as, making the subject matter simple to understand, her confidence and other demeanour which we appreciate in lay witnesses matter. The court must exclusively focus on the facts and ignore other factors. This further reduces the battle of experts and puts the court on the driving seat.[89]

10. Concluding Remarks

It is discussed in great length that the use of expert opinion evidence is riddled with a multitude of predicaments both in matters of *fact* and *legality*. But few are outstanding.

1. Some of the reports do not address the issues directly and thus, they are not helpful to the court in deciding the issue at hand. For instance, criminal responsibility (insanity) relates to the mental capacity of the accused person whether she understands the nature and consequence of her actions or to control herself according to such understanding. In such determination the relevant time is the time of commission of the alleged criminal actions. Further, defendant is liable to criminal punishment equivalent to her degree of responsibility.

   The psychiatric evaluations presented are all about the condition existent at the time of evaluation of defendant (patient). All of those reports indicate that defendant is either fully responsible or irresponsible. None of the reports state that defendant is partially responsible. *Chala Qeneni*[90] for instance was a suspect for partial responsibility.

   Likewise, autopsy reports are all about internal and external examinations; they do not consider toxic substance and underlying

---

89 Keane and McKeown, *supra*, n 11, at 546.
90 *Chala*, *supra*, n 19.

health issues. The conclusion is therefore drawn from an incomplete examination of the subject matter which is susceptible to error. The report, in fact, states "the main cause of death" of the victim which is not recognized by law rather than "the cause" of death. It is only stating the obvious that those reports are not relevant to the fact in issue and, thus, not admissible.

2. The reports are introduced as documentary evidence of an expert opinion so that the court could act on the basis of the findings of the expert. None of the reports, state the qualifications and expertise of the expert who is said to have conducted the examination; none of those reports state, other than the police technical examination reports, the procedure employed in conducting the examination. They all send a standard one-page formatted paper and one line conclusion usually not even a full-statement, the findings of the said examination. They do not consider all the relevant information to enable us test the reliability of the findings.

3. Many of the cases cited here are criminal matters. Again, many of those expert opinion reports are against criminal defendants with serious consequences. In none of the cases discussed here (both civil and criminal matters) the expert appeared in court to explain the report and to explain the findings of the examination. This nullifies the criminal defendant's constitutional right to cross-examination. Stated otherwise, those reports are not constitutionally admissible.

4. While the state does not have monopoly of expertise, those expert reports, principally in criminal matters, are produced by government institutions. The reports come by a heading paper of the respective institutions with their aura for which the court is giving the weight more than what it deserves. This negatively affects the proper assessment of the expert evidence. Under such circumstances, the findings of the "expert" are hardly challenged by the adverse party because of this dominant practice; it is not even closely looked at by the court.

5. This in clear terms means, in criminal matters by admitting irrelevant, inadmissible and unreliable evidence, the state is "punishing" its ill and poor.

Now after having read this article, one would then ask whether this topic deserves such a research article. The researchers are not attempting to give an academic cover to a practice which pretty much likes the practice of witchcraft from the point of the criminal defendant who is required to enter his defence or who gets convicted based on so-called expert evidence while there is literally nothing he knows about the expert, the examination process and never had a chance to cross-examine such witness. Having appreciated the depth and breadth of problem relating to the use of all forms of expert opinion evidence, it is only an attempt to show the extent of such failings in the manners of use of expert opinion evidence and the immense nature of the measure it requires to be taken to give it semblance of fairness.

In order to make better use of the expertise of our experts and to make decisions based on relevant, admissible and reliable evidence, there are only few steps the court needs to take. The court must first determine the subject matter, because it is scientific, technical or require otherwise expertise is suitable for expert opinion evidence; second, the person selected as expert must possess relevant and appropriate expertise. The expert must then prepare a report to the court and the parties. The report must include competence of the expert, completeness of the material given to her for examination, the methods or procedures available in the profession and the one she chose to employ, her findings and the degree of certainty of her conclusions.

Once the report is submitted to the court and both parties have the chance to review it, such expert must appear in court in person to explain her findings and answer questions from the parties. She must enter an oath or make an affirmation to testify the truth.

Daniel B. Gebreamanuel. 2015. *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework.* The Hague: Eleven Publishing, p. xxv & 301.

Muradu A. Srur[*]

An indication of Ethiopia`s current approach to land policy appears a convenient starting point for this book review. The approach to land may be termed as people`s ownership of land. It is primarily embodied in the FDRE Constitution (the Constitution). The following are some of its fundamentals. The approach disaggregates land rights into ownership and use rights.[1] While land ownership is exclusively vested in the people and is inalienable, Ethiopian peasants and herders are given use rights for a living without payment, immunity against eviction, full ownership over the fruits of their land and the right to demand commensurate advance compensation for their property on the land upon expropriation.[2] The policy pledges farmers and pastoralists the right to receive fair prices for their products.[3] Implied is social justice through the possibility of land redistribution to meet new demands from the land poor and the landless.[4] Also envisaged is land for investors with payment with a clear proviso that doing so must not trump priority rights of small rural producers.[5] The Constitution further empowers the Government as a trustee ''to hold land on behalf of the People and to deploy [it] for their common benefit and development''.[6] It envisions local and plural land administrations with ''direct [popular] democratic participation'' and implies a bottom up approach to agricultural development.[7]

The people`s ownership of land has been interrogated by various forces. Their thoughts fall under three broad perspectives: full privatization, revisionist and associative ownership. The full privatization perspective prescribes for full private ownership of land for poverty reduction, respect for human rights, stimulation of agricultural productivity and local industries and for environmental protection. It argues that too little inequality in land endowments in rural Ethiopia is the main source of the country`s predicaments. The perspective draws inspiration from liberalism that views private property to encompass the right to exclusive possession, use and disposition of a resource on individual autonomy and efficiency grounds.

---

[*] Assistant Professor, AAU, School of Law

[1] The Constitution, Article 40.

[2] *Ibid.*

[3] *Id.*, Article 41 (8)

[4] *Id.*, (Article 40 (4 &5)

[5] *Id.*, (Article 40 (6)

[6] *Id.*, (Article 89 (5)

[7] *Id.*, Article 8 (3) *cum* Article 52 (2) & Article 55 (2).

The revisionist view states that full private ownership of land is not necessarily a panacea for the ills of the country's land relations. It rather argues that land tenure security can emanate from a prudent implementation of the people`s ownership of land as embodied in the Constitution if its implementation allows use rights with detailed, clear and comprehensive land laws and if there exists unrestricted land use rights transferability and an effective means of checking undue administrative discretion in land administration. The associative ownership view claims that land ownership shall be vested in a village and that each member of a village community and outsiders including the government shall be given use rights including regulated tradability on the basis of the decision of each village representatives.

The current book is about restrictions over transfer of land rights in Ethiopia and their pernicious far-reaching effects. It subscribes to both the full privatization and the revisionist approaches. Yet, it gravitates more towards the latter perhaps in the short-run. I believe the book is the most trenchant articulation of the revisionist approach and critique of people's ownership of land. Telling lines can be quoted from it. The first is its bedrock assumption which reads: "well-articulated and defined property rights which foster transferability of rights over land leads to sustained growth and development in Ethiopia" (p. xxi). The second passage runs,

> …long-term lease provides access to land to the most active and the capital holder thereby boosting agricultural production in the nation in its diversified way. In turn, this system almost immediately brings about the credit facilities or may facilitate credit access. … Therefore, overall development can be tried out in this way, and over time the country must *go to the freehold system, which completely leaves land to the force of the market thereby unleashing the potential in land for development* (p. 26) (Emphasis supplied).

The lines suggest removal of restrictions imposed on land use right transfers and the attendant overall benefits. The quote also advises evolution towards complete land marketization over time. Beyond and above the preceding passages, the characterization of the theme of the book as falling within the rubric of the revisionist paradigm (and its vision for long term complete land privatization) become evident from the reading of its preface and seven chapters.

The preface sets the book`s research agenda, focusing on core issues facing Ethiopia`s extant land law. The catalogue includes legal restrictions on transferability of land use rights, tenure insecurity attendant to land redistribution, lax expropriation regime and lack of fixed term for land use rights. The book argues that the consequences of these problems are avoidance of permanent investment, land fragmentation and environmental degradation and overall massive poverty that leads to human rights violations. Subsequent chapters develop these themes.

The first chapter provides historical development of land tenure regimes since the imperial time. During the Imperial period, the northern population was shackled by the *rist* system that prevented land transfers and led to incessant land litigation and land fragmentation (perhaps meant land miniaturization). In the period, the southern population suffered injustice in the hands of exploitative tenancy and evictions. During the Derg period, even

if the social injustice attendant to feudal land relations were addressed, frequent land redistributions and other imprudent agricultural policies including the grain quota system produced equality of poverty, land fragmentation and environmental degradation. In the current system, the economic and social justice of land has been dwarfed by political manipulations even if "The deadlock appears ostensibly clash in principles, namely, the principle of fairness and the principles of efficiency" (p. 22).

The second chapter considers existing federal and regional legislative land frameworks. This chapter argues that the Federal Government has a mandate to enact framework land legislation. This federal land law should be evaluated in light of human rights, self-governance, plurality, sustainable development, poverty elimination and environmental stewardship. The chapter, after assessing the federal and regional land laws in light of these constitutional standards, finds,

> Fostering equality and abating the imperial era, discriminatory land-accessing rights is still the guiding motive that shapes the spirit of the land laws in Ethiopia…The rural land laws grant free access to all citizens as along as one wants to live on agriculture, yet this fact has created land fragmentation, land degradation, and forest depletion and resulted in an ever-increasing land shortage as the population inflates. The same fact exposed the environment, caused forest clearing in search of extra arable land and subsequent soil erosion. Besides, subsistence agriculture and the fragile environment coupled with frequent rain failure exacerbated poverty condition in the rural mass. The rural land law also immensely restricted transfer of land use rights in many aspects; for instance, transfer via renting, sharecropping, gift, and inheritance has been severely curtailed. The restriction on transfer of use rights tied the rural mass to the subsistence land and further restricted freedom of movement in search of alternative livelihood elsewhere since use right is a condition on effective residence (p.75).

The third chapter treats informal land deals especially in cash crop and urban, peri-urban areas where land has high economic value. The chapter reveals that various disguised forms of informal land transactions which are clearly contrary to the spirit and letter of the country`s land law. The book envisages three possible factors contribute to the prevalence of informal land alienations. The first reason is "the restrictions and prohibitions prescribed in the statute law..." (p. 145). The second is "… the incompetence on the part of the government to put the law in action" (p. 145). The third factor seems to be economic desperation. There are losers and winners in the process. The book says small "farmers are always at the losing end" (118). It adds that "illegal transfer of land rights is boosting productivity" even if "the beneficiaries are not legal landholders" (p. 143). Courts in the Southern Region including the regional Supreme Court gives sanctity to informal land transfers in favor of economic elites invoking a wrong and twisted application of non-eviction principle embodied in the Constitution. Land administration institutions are also depicted as culprits in this illegal enterprise; they offer a cover to and facilitate informal land transactions. Ineffectiveness, corruption and land speculation explain official behaviors in relation to informal land deals.

The chapter further documents that the state engages in land transfers for large-scale farms in favor of investors in a way that infringes human rights, undermines collective self-

governance, raises environmental concerns and aggravates conflicts. Subjecting land use rights to free market by eliminating the restrictions on transfer of land rights is counseled to combat the ills land deals, informal or mega-land transfers.

The fourth chapter is in search for global land policy standards. It is also about evaluation of Ethiopia`s various land laws. By considering UN, EU and AU guidelines regarding land, the chapter argues that there is lack of a comprehensive land policy, one-size-fits-all approach, lack of taking and pastoral people distinct view about land into account It suggests reforming the country`s land taking the soft land standards of these international institutions which set forth "standards of land reform policy, which are directed at bringing about poverty alleviation, social and economic growth, social justice, equality, and environmental protection" (p. 176).

The fifth chapter considers compliance of land laws of Ethiopia with human rights enshrined in the Constitution and international human rights instruments. It finds that the land law in place violates aspects of human rights that include the right to adequate standard of living, the right to food, the right to work and freedom of movement. It also finds that land rights of some social groups are infringed. This means women`s land rights are not respected due to defective implementation and discriminatory customary practices. Land access right of the youth is not respected either. And the right to land of indigenous people`s is being violated because of absence of responsible land allocation to large-scale agricultural investors.

The sixth chapter relates to whether land laws are compatible with environmental protection ethos. National policy and legal norms as well as international environmental protection principles are considered. Though the share of climate change is conceded, the land laws in place are held responsible for colossal environmental problems particularly in highland Ethiopia. These are land degradation, soil erosion, deforestation, and freshwater depletion, loss of bio-diversity and wildlife loss. The element of land policy indicted is the social equity thesis, i.e., a pledge for redistributive land reform. Institutional framework for land governance weaknesses are also indicated as sharing the blame: institutional overlapping of power, incompetence, corruption, immense unchecked executive power over land matters and lack of "effective teeth to bite" (p. 243). The solutions offered to resolve environmental crises especially in highland Ethiopia are: encouraging transfer of land rights "accompanied by alternative economic activities" and "steady and rapid growth in urbanization which diffuses population pressure from the land" (p. 246). The last chapter essentially brings together the conclusions and suggestions made in relation to each chapter. It emphasizes lack of a specially designed comprehensive land policy and elaborates on the idea of a universal fixed-term land lease hinted in the preface.

Going through the chapters reveal two matters worth discussing: the book`s market-based approach entailed by its revisionist stance and issues it misses out. The former should be dealt with first. The thrust of the book is that various restrictions imposed on social and market transfers of land rights should be removed to make land rights subject to market forces. This would help Ethiopia avoid the pernicious consequences of the restrictions and enable it to reap the benefits thereof. In focusing on the market, the book seems to neglect the harmful effects of market-led approach to land reform. Empirical evidence shows that

land privatization supported by titling does not automatically lead to tenure security. To the contrary, as happened in Kenya, the program of land privatization through the tool of land registration can lead to insecure tenure for the poor through exposure to elite capture.[8] As the book rightly suggests, massive chronic poverty brings about desperation. That in turn becomes a significant factor forcing small landholders to engage in informal land deals, resulting in loss of a livelihood as well as cultural asset. The factor driving people into alienation of their only asset would not vanish into the thin air at the moment land use rights are liberalized. It is not uncommon for even supporters of the market paradigm to concede the existence of a degree of coercion under the veneer of free consent. They accept the principle of freedom of choice but question "whether every instance of market choice is truly voluntary… market relations can be considered free only when the background conditions under which we buy and sell are fair, only when no one is coerced by dire economic necessity".[9]

And land privatization does not necessarily lead to more investment in land nor does land privatization always increase transfer of land to more efficient users or create more demand for bank credits or decrease land disputes. The assumed effects of land titling are contingent on a number of extra-tenure factors. The available evidence, both in Africa and elsewhere, shows that there is no inherent positive connection between land privatization and productivity.[10] Besides, as the land tenure history of Ethiopia shows, there could be tenure insecurity in the context of private ownership of land while people could enjoy tenure security even in the context of people`s ownership of land.[11]

---

[8] Janine Ubink *et al* (eds) (2009), *Legalising Land Rights in Africa, Asia and Latin America: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America* (Leiden University Press).

[9] Michael Sandel (2012), *What Money Cannot Buy: The Moral Limits of Markets: Penguin Book* p. 96.

[10] Michael Trebilcock & Paul-Erik Veel (2008-2009), ''Property Rights and Development: The Contingent Case for Formalization'', *U. Pa. J. Int'l L.*, vol. 30; for the critique of Hernando De Soto`s prescription, see Celestine Nyamu Musembi (2007), ''De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights'', *Third World Quarterly*, 28:8 and Jan Michiel Otto (2009), ''Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando De Soto'', *Hague Journal on the Rule of Law*, 1:1.

[11] In pre-1975 land tenure system, for example, there was wide-spread tenure insecurity in both private land ownership and communal ownership areas. And in this period, legally speaking even the landlords were insecure vis-à-vis the Emperor for the latter could confiscate their lands at his pleasure. In this regard, it is said ''…the imperial state had what was called the right of 'eminent domain' which meant that a private owner could be dispossessed at any time by the order of the Emperor. Thus, private owners had less security here than in the capitalist countries.'' Dessalegn Rahmato (2003), Land Tenure in Ethiopia: From the Imperial Period to the Present, A Brief Description'' (hereafter Land Tenure), in *Topics in Contemporary Topics in Contemporary Political Development in Ethiopia* Tafesse Olika *et al* (eds.) Department of Political Science, Addis Ababa University) p. 86. Moreover, during the Derg period, initially, the peasants were secure in their land possessions and the fruits thereof; only later policy changes made their land possession insecure. Thus, it is unsound to

More broadly, land privatization does not automatically help an agrarian society transform socially and structurally through the instrumentality of agricultural development. At best the path may contribute to economic growth of a country by furthering the security of property of the few through the expropriation of the property of marginalized groups, which happens through ''the reallocation of [property] into the hands of more politically powerful constituencies with access to the knowledge and capital necessary for efficient investment.''[12] In other words, ''severe property insecurity for some groups often exists alongside very secure property rights for others. …property rights can simultaneously be strong and secure for some groups and weak and insecure for other groups.''[13]

Turning to the gaps, the book has not examined the extent to which the course and direction of land policy and law has been actually influenced by global institutions. Are global forces determining the content of the country`s land law or are they having no influence over it? The issue merits an independent investigation. Notwithstanding this, the book has mentioned lifting restrictions on transferability of land use rights as the preference of international institutions. It has also discussed their support in the rural land certification project underway. It fittingly points out the utility of international standards regarding land to evaluate an existing land law of a country as well as to reform it. These are welcome attempts to drive a message home: a country`s land policy is not merely an internal matter as international forces have a role to play in its shaping.

The question of people`s resistance is not also dealt with. It is trite to say people are not a sitting duck. They respond to unfavorable laws and policies. When past regimes implemented harmful land policies, people in the country resorted to different forms of resistance. They continue to do so when they see unjust measures regarding their landholdings. Thus, the following questions are bound to arise: what are the forms and nature of people`s resistance to aspects of land laws and policies deemed unjust? To what degree grassroots resistance succeeded in the past? To what extent these people's reactions are backed by national and transnational civil society and with what efficacy? These point warrant investigation.

---

say that private ownership of land invariably delivers tenure security as it is also incorrect to argue that the opposite is true with regard to a system of public ownership of land; that is, land privatization does not equal land tenure security; as use rights within the context of public ownership of land per se does not lead to insecure land tenure.

See Yigremew Adal (2004), ''Some Queries about the Debate on Land Tenure in Ethiopia'', Institute of Development Research, Addis Ababa University, p. 5, for the argument that seen in light of past and current experiences both in the country and elsewhere in Africa, it is untenable to hold that unrestricted ownership over land would in itself give meaningful security to peasants. What is critical in is the way a land tenure arrangement is put in place and implemented. Yigremew also says ''…the argument that either formal legal policy of individualized land rights or state paternalism will guarantee peasants' access to and use of land is not strong...''

[12] Terra Lawson-Remer (2012), ''Property Insecurity'', *Brook. J. Int'l L.*, vol. 38, p. 147.

[13] *Id.*, 149.

Furthermore, the book implies the need to find out ways to deal with customs that are founded upon inalienable land rights, customary tenures that do not permit land commercialization. One cannot rather presume that customary land tenure practices permit market transfer of land rights. This is another issue that requires exploration. In this regard, the work should be appreciated for arguing for the case of plural land laws and policies. Plurality, as mentioned in the book, stems from agro-ecological diversity and diverse modes of life. Plurality pervades the country. Plurality in land matters exist both in the North and the South; in cities and rural areas. This a good stride.

Finally, the question of how a land tenure system replete with insecurity has triggered economic growth requires exploration. The official claim is that the secret of Ethiopia`s high rate of economic growth for the last ten years lies in secure rural land regime that has led to a significant increase in agricultural productivity and production. Also mentioned as contributory factor are massive re-greening and sustainable land management projects. If these claims are not considered properly, it would raise the issue of whether there is a correlation between land privatization and productivity and hence national economic growth. This is a theme worth considering, too.

In fairness, given what can reasonably be included in a book of its size and the range of grounds already covered, such lacunas should however be taken as a source of inspiration for future research. The book`s impressive achievements go beyond indicating research issues. It is organized coherently and composed lucidly. Its socio-legal methodology enables readers to easily relate land laws to societal realities. It covers cutting-edge primary literature as well as normative and policy documents. It rightly sees the land question as a complex cross-cutting matter. It is comprehensive in its attempt to transcend the often rural-urban land artificial dichotomy by treating both rural and urban land issues and by implicitly demonstrating their interconnectedness. One could not agree more with the book`s proposal for empirically grounded especially formulated land policy for Ethiopia. The book should serve as a respectable source for teachers, researchers, practitioners and policymakers grappling with issues of land policy and law in contemporary Ethiopia.

Captain Husssein vs. The Public Prosecutor of the Somali National Regional State / Federal Supreme Court Cassation Division File No. 37050 (Case Report)

Translated by *Tsehai Wada*[*]

Federal Supreme Court Cassation Division File No. 37050
Tahsas 30, 2001 E. C.
Justices:
AbdulKadir Mohammed
Hirut Melesse
Tsegaye Asmamaw
Almaw Wolle and
Ali Mohammed
Petitioner – Captain Husssein Ali – Defense Attorney – Medhin Mehari – present in court.
Respondent – The Prosecutor of Somali Region – No one appeared.
We have rendered the following judgment after examining the file:
Judgment –

The Respondent was charged under Art. 543(1) of the Criminal Code for killing an individual named Yusuf Mohammed Sellim, on Nehasse 26, 1998 with a pistol that he was carrying with him at the relevant time. [At the Jigjiga Zone High Court], The Petitioner requested for an appointment of a defense counsel, [but it appears that the request was denied] and then the court went on reading the contents of the charge brought against him. The court then asked the Petitioner whether he has understood the contents of the charge to which he responded in the affirmative, but contended that he did not commit the crime as stated in the charge. The court then adjourned the session and ordered the appearance of the defense counsel in the next session during which the testimonies of prosecution witnesses will be heard. Nonetheless, neither the prosecution witnesses nor the defense counsel of the petitioner appeared in court. The court adjourned the session for another day. But on this day, the prosecution witnesses appeared in court and the Petitioner's defense counsel failed to appear, for he had an overlapping assignment at another court at the

---

[*] Associate Professor, AAU, School of Law (tsehaywada@yahoo.com or tsehaiwada@gmial.com)

relevant time. The petitioner requested for an adjournment for the next day, but the Prosecution objected the request on the ground that it will [unnecessarily] delay the trial. The court then ruled that it will no more tolerate the disappearance/absence of the defense counsel [and that it has noted that the parties have agreed on this] and then went on to hear the testimonies of the witnesses in the absence of the defense counsel or a replacement. It then ordered the Petitioner to submit his defense for, the prosecution has proved beyond any reasonable doubt, the fact that the petitioner has actually committed the crime. It then ordered the appearance of additional prosecution witnesses and recorded that the petitioner has waived his right to submit his defense evidence [enter upon his defense]. The court then convicted the petitioner and sentenced him to death. The Regional Supreme Court to which the petitioner submitted his appeal against the above decision fully confirmed the lower court's decision.

This appeal is lodged against these decisions. The Petitioner submitted that the courts have committed an error of law in that they have denied him his right to be represented by a defense counsel. He further contended that the prosecution has not proved the fact that he has actually committed the alleged crime; his right to submit defense evidence was denied in haste (i.e., without giving him sufficient time to prepare his defense); the submission of additional prosecution witnesses was conducted in disregard of the procedure; the article under which he was charged was not relevant to the case at bar and the sentence passed on him is equally irrelevant. He then prayed for the reversal of the lower courts' decisions.

The Cassation Division noted that there is an issue of question of law that needs to be entertained by it. It then ordered both parties to submit their arguments in writing to which they complied and rendered the following judgment.

It first framed the issue 'whether it will be proper to entertain a case and pass a decision on an unrepresented accused who is charged with a serious crime?'

It is noted from the files of the lower courts that: the petitioner pleaded in the absence of a an appointed defense counsel; prosecution witnesses as well as the defense counsel did not appear during the next session; and again during the next session the defense counsel could not appear and that the petitioner requested for an adjournment, but this was denied and the court heard the testimony of prosecution witnesses.

In principle, it can be noted from the structure and contents of those provisions that deal with the rights of those arrested and accused of a crime under the FDRE constitution that these rights have to be implemented automatically as circumstances allow. It is clearly provided under Art. 13(1) of the Constitution that, "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter [i.e. Chapter Three, Fundamental Rights and Freedoms]. It should, therefore, be understood that the duty to respect the constitutional rights of those who are arrested or accused and that they are respected by others falls on the shoulder of courts. It is when judges working for the criminal justice administration discharge their obligations that the society respects [observes] the justness of the process and accept the outcome without reservation. It is believed that the societal view towards the legitimacy and respect of the legal system will decrease if the system fails to discharge its duties to respect and observe that the rights of those whose rights are recognized under the constitution. It is, therefore, a must that those rights enshrined in the constitution are respected [by all].

One of the rights that are enshrined in the constitution is an arrestee or accused's right to be represented by a defense counsel throughout the criminal justice process [from the beginning to the end]. Art. 20(5) of the constitution provides that "Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense". It can be understood from the spirit of the provision that sufficient time should be given to an accused so that he can be represented by a defense counsel of his choice and that s/he should be told in court that s/he has such a right.

Not only these, it should also be proved that an accused is represented by a competent defense counsel. All these are the duties of courts [Ensuring that all these rights are realized is the court's duty]. It is not, therefore, that difficult to note that the right to defense counsel is a major constitutional right.

In the case at bar, we have noted from the arguments of the parties in this court that the petitioner's constitutional rights to be represented by a counsel of choice, at all stages as well as his right to be granted sufficient time to prepare his defense were denied (violated). Accordingly, it is found out that a judgment of conviction and sentencing rendered in violation of the petitioner's

constitutional rights is found to be a major error of law and therefore, reversible. Accordingly, we have rendered the following judgements:

Judgment

1. The judgments of Jigjiga Zone High Court in File No. 001/99 on 01/02/1998 that convicted and sentenced the petitioner and that of the Supreme Court of Somali Region that confirmed the lower court's judgment are hereby reversed (quashed) per Art. 195(2)(b)(1) of the Criminal Procedure Code and let it be written.
2. We have ordered that the petitioner's right to be represented by by a counsel of his choice should be respected.
3. We have remanded the case to the Jigjiga Zone High Court, so that the case should be seen (entertained) by judges other than those who handled it in the past (previously) so that a judgment shall be passed by respecting the petitioner's right to be represented by a counsel of his choice.
4. The file is closed and returned to the archive. …