THE BAIL JUSTICE IN ETHIOPIA: CHALLENGES OF ITS ADMINISTRATION

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THE BAIL JUSTICE IN ETHIOPIA: CHALLENGES OF ITS ADMINISTRATION

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Declaration Statement

Here with I, declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Constitutional and Public Law entitled "The Bail Justice in Ethiopia: Challenges of its Administration" is prepared with my own effort. I have made it independently with the close advice and guidance of my advisor.

Kelali Kiros

Signature…….

Date ……...

Certification Statement

Here with I state Kelali Kiros has carried out this research work on the topic entitled "The Bail Justice in Ethiopia: Challenges of its Administration" under my supervision. This work is original in nature and has not been presented for a degree in any university and it is sufficient for submission for the partial fulfillment for the award of LL.M degree in Constitutional and Public Law.

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Signature …….

Date……

Abstract

Bail as an instrument of balancing the tension between individual freedom and security and public interest in securing the accused in court has drawn more attention in the legal atmosphere. The bail justice of Ethiopia unreasonably categorizes offences as bailable and not bailable. The short listed not bailable offences are increasing from time to time and with the promulgation of the new Criminal Code it seems difficult to identify whether granting bail is a principle or an exception under Ethiopian bail practice. However, how far indiscriminately denying bail to a certain group of individuals suspected of committing one of the short listed categories of offences is a solution to problems of bail administration in Ethiopia is debatable. The choice favoring it is adopted in Ethiopia. The study aspires to clarify some of the ideas revolving around this form of bail administration. Moreover, the all rounded challenges this mode of bail administration encumbers on enjoyment of the constitutionally guaranteed fundamental rights, the role of the judiciary, and the prevalence of the rule of law are hoped to be identified with a view to see how best one can utilize it.

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Acronym

ATP- Anti Terrorism Proclamation

CC- The new Criminal Code of FDRE

CCI- Council of Constitutional Inquiry

CJP-Criminal Justice Policy of Ethiopia

CPC- Criminal Procedure Code

CSA- Central Statistical Agency

EPLF- The Eritrean Peoples' Liberation Front

FDRE- The Federal Democratic Republic of Ethiopia

FEACC- Federal Ethics and Anti Corruption Commission
FPC- Federal Police Commission

FSCCD- Federal Supreme Court Cassation Division

HPR- House of Peoples Representative

HF- House of Federation

ICCPR- International Covenant on Civil and Political Rights

ICSCER - International Covenant on Social Cultural and Economic Rights

MJ- Ministry of Justice

PDRE- The Peoples Democratic Republic of Ethiopia

SNNPRS- South Nations, Nationalities and People Regional State

RACSPREP- Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation

RCPC- Revised Criminal Procedure Code (Draft)

TPLF – The Tigray Peoples' Liberation Front

UDHR- Universal Declaration of Human Rights

UN- United Nations Organization

VCP- Vagrancy Control Proclamation

Chapter One: Introduction

1.1. Back Ground

Bail is a vital aspect of every criminal justice system. Any person who is held in custody pending trial suffers the same restrictions on his liberty as one serving a sentence of imprisonment after conviction. By keeping accused persons out of custody until tried, convicted and sentenced, bail protects against the dilution of the presumption of innocence and other guaranteed rights. This is very important for Ethiopia where there are no enough prison centers to host even the convicted persons let alone those pre- trial detainees due to the meager economy of the country.

Experience has shown that people are wrongly arrested, for no one has the ability to identify offenders unerringly. Thus justice requires an impartial court to consider whether the suspicions of the detaining authority carry a high degree of reliability such that pre-trial detention should be ordered. In these proceedings the accused should be heard on the question of his release from custody, for the cost of pre-trial detention is very high. Incarceration violently destroys the prisoner's private life, effectively threatening his job, his family and domestic arrangements. Thus judicial determination of bail serves as a check against arbitrary arrest and protects the rights of the accused by ensuring an independent assessment of the question of pre-trial detention.

This being the precept, the Ethiopian Administration of Bail indiscriminately considers certain category of offences as not bailable at any cost through legislation. As well though there is no common consensus among the practitioners of the legal profession, the Counsel of Constitutional Inquiry, a body of the Federal government which is empowered to decide on preliminary bases to any question of constitutional dispute, rejects a question brought to it for determination of constitutionality of the laws of the country considering certain offences as not bailable without any condition. [1]Based on this notion the CJP of the FDRE 2011 as well as Draft Criminal Procedure Law of Ethiopia which was expected to be promulgated in the recent future and other laws of the country short lists a host of offences as not bailable offences.

[1] Workers of the Commercial Bank of Ethiopia et al Vs Federal Ethics and Anti Corruption Commission, Decided on august 30/1993 E.c , CCI Ruling, *File no. 1/14/95*

The Bail Justice Administration is seriously condemned by the pretrial detainees as well as other stake holders including legal practitioners. The role of the Judiciary in the administration of justice is diminished by the act of the parliament as the court has not been given any room to consider the evidences of the accused in the determination of bail except the application of the white and black letters of the law maker to the case before it. On the other hand the laws demanding the court to deny bail has a negative impact on preserving the balance of the three organs of the government there affecting the prevalence of the principle of separation of powers.

Incarceration has also an adverse effect on the detainees particularly associated with preparation of their defense, right to be presumed innocent until proved guilty, and other financial losses, and find their liberties abridged in various ways through court proceedings intended only to assure their appearance in court.

Thus, the research aspires to assess the extent to which the bail law in Ethiopia serves for the common good.

1.2. Statement of the Problem

As pointed out earlier Administration of Bail Justice in the Ethiopian context faces a number of challenges including, but not limited to, to the enforcement of the right to be presumed innocent until proved guilty.

The Ethiopian laws on the administration of bail justice explicitly deny the grant of bail to individuals suspected of commission of certain category of offences. These laws are assumed to be a problem to the enforcement of some fundamental human rights and other principles and concepts recognized under the FDRE constitution. So having this problem of enforcement of rights one may start to wonder how far the system can be operative to serve a common good. Furthermore, if violation of fundamental rights recognized by the constitution are challenges born out of "Current Administration of Bail Justice" due to the existence of substantial laws absolutely prohibiting the release on bail, then how far is this solution to the problem of securing suspected persons from absconding justice or protecting the steady administration of justice? Is it a source of problem than of solution?

Another challenge the Ethiopian model of Administration of Bail Justice faces is its failure to give due place to the courts in entertaining the right to bail. The bail justice administration by considering certain offences as not bailable has made the courts a mere subservient of the legislature. On the other hand the bail justice fails to use properly and exhaustively other alternate mechanisms to control suspected persons from absconding justice than putting them in jail. This is because; it is explicit that the right of the accused to liberty should not be at stake while there is no necessity of violating it for the common good. By so doing, it compromises standards known to be applicable worldwide. Therefore, it is worth to ask if there is any mechanism of striking a balance between respecting personal liberty of the accused on the one hand and enforcement of the public interest to get delinquents properly punished.

This study will aspire to articulate and examine these and other related challenges to the Ethiopian model of Administration of Bail Justice.

1.3. Objective of the Study

The study is intended as a contribution to the debate on whether the Ethiopian Bail Administration considering certain category of offences as not bailable is acceptable in light of the competing interests of the detainees to the enjoyment of some fundamental rights including freedom of liberty and the right to be presumed innocent until proved guilty and the interest of the state in securing the attendance of the suspect before court of law. In addition the study can help to look over the extent the Ethiopian Bail Administration takes away the role of the court in the administration of Justice and of the prevalence of principle of separation of power and rule of law. The social costs of the present bail justice administration are also to be evaluated as a law should serve a common good. The study therefore aims at finding the major challenges the Ethiopian Administration of Bail Justice poses by forwarding alternative ways of handling these challenges.

1.4. Research Question

General Question

Bail is mechanism of balancing the tension between public interest to security and individual interest to liberty. Thus, how far the practice of classifying offences in to bailable and not bailable which is prevalent in the Ethiopian Bail Justice Administration is a solution to the

existing problems of bail administration in Ethiopia?

Specific Questions

- Whether the bail justice administration conforms to the percepts of the FDRE constitution?
- What is the impact of the bail justice administration on the enjoyment of other fundamental rights recognized under the constitution including the right to liberty, presumption of innocence, and access to justice, if any?
- Whether the role of the judiciary is diminished with the existing bail justice administration?
- What is the implication of the administration of bail justice on the prevalence of the rule of law in Ethiopia?
- Whether the costs associated with the administration of bail justice on the detainee and the prison administration are commendable?

These and other related questions are hoped to be raised and answered based on the analysis of the texts of the constitution and other relevant sources.

1.5. Methodology and Sources of Information

The interpretive nature of this study is grounded in the field of qualitative research since it is basically concerned in identifying key issues as to the challenges in relation to Administration of Bail Justice in Ethiopia. The information used in this thesis is gathered from interviews with concerned officials, books, laws, cases, and periodicals. Moreover, official reports from concerned bodies of the government as well as non governmental institutions and personal observation.

Data collected is continuously interpreted since qualitative research is inherently reflective. The researcher is committed to pondering the impressions, deliberating recollections. Legal as well as socio-legal method will be applied in analyzing the information collected.

1.6. Significance of the Study

The proposed study attempts to clarify some of the key issues revolving around Administration of Bail Justice in Ethiopia. The study will first provide some additional insight into definitions and conceptualizations of Bail and Administration of Bail Justice. Secondly, the findings will

provide a means for examining the feasibility of currently adopted Administration of Bail Justice to achieve its basic objective of protecting the interest of the state and the detainees and the overall administration of Justice of the country. Moreover; the challenge this mode of Administration of Justice encumbers are to be identified with a view to see how best one can utilize it in policy considerations. Additionally, it contributes in the debate concerning the study and in its being a reference for those who are interested in the study of Administration of Bail Justice in general and particularly in the Ethiopian context.

1.7. Ethical Considerations

During data collection which requires permission of individuals or authority, the researcher will take due care to get the permission and to properly preserve and to take appropriate measures to any possible harmful information during the data collection process. The researcher will also guarantee to handle data properly so that it does not fall into the hands of other researchers who might appropriate it for other purposes. Further, in the interpretation of data, the researcher will provide an accurate account of the information and will not use language or words that are biased against persons because of racial or ethnic group.

1.8. Rule of Citation

The Addis Ababa University School of Law rule of citation is pursued throughout the research.

1.9. Organization of the Study

The thesis contains a total of five chapters. The first chapter is an introductory part. The second chapter deals with the definition, purpose, and historical development of the right to bail in Ethiopia. In chapter three, survey of the bail regime is made with an additional review on the CJP of Ethiopia. The place of other fundamental rights in defining the scope of the right to bail is discussed in chapter four. In chapter five a thorough study is made on the impacts of administration of bail justice of Ethiopia. The conclusion and recommendation part provides a holistic overview; it draws together the questions that have been raised and the conclusions that have been reached. It indicates whether the Ethiopian model of administrations of bail justice is an appropriate one to learn from and wind up by providing some recommendations.

Chapter Two

Definition, Purpose, and Historical Development of the Right to Bail in Ethiopia

2.1. Definition of Bail

It is not common to find a definition of bail in the laws of various countries than setting out the competing interests of the state and the suspect's right to personal liberty in the process of releasing him from custody. Thus, the common practice is to set the things that must be considered by the courts in general in the process of releasing a defendant on bail. However, this is not to mean that laws on bail in the process of restating the right and the role of the court in the process of determining the right are not trying to put the general framework from which we can be able to derive a common understanding as to what bail is intended to mean. This is also more reinforced by the efforts of scholars who have got an interest in defining the concerned right.

In this regard a scholar called Ingman defines bail as "a release from custody, pending a criminal trial, of a defendant on balancing of competing interests and on the premise that a specified predetermined amount of money will be paid if he absconds".[2] A person is presumed innocent of a criminal charge until he is proved guilty. This well known principle suggests that no one should ever be kept in detention awaiting trial. Yet it is impossible to release all defendants on bail because of the danger that they might abscond, interfere with witness, or commit further offences.[3]

From the above definition the right to release on bail is not a free gift; it needs the balancing of the competing interests. On the other hand if one of the interests over weighs the other interest, the individual interest to freedom and the interest of the public to get criminals punished and be secured from any further threat of danger, a decision should be made in favor of the one that gets a weight above average. As this definition is based on balancing of competing interests involving the right to bail, it can raise questions like whether there is hierarchy of norms, and the

[2] Terence Ingman, The English Legal Process, 6th ed.(Ashford Colour Press, Gosport, Hampshire,1996), p.109

[3] Ibid

possibility of balancing if the two competing norms are not at equal footing. In this regard for instance the FDRE constitution seems clear on the existence of a hierarchy of norms.[4] There are also other more important rights in the constitution that cannot be violated even during the state of emergency.[5]

On the other hand in the renowned book of Contemporary Restatement of American Law, Corpus Juris Secondum, bail is defined as a verb and as noun in a broad and fashioned manner. Thus, the word bail as a verb means to deliver an arrested person to his sureties on their giving security for his appearance, at the time and place designated, to submit to the jurisdiction and judgment of the court. On the other hand the word bail as it is defined in its noun, and in its strict sense is to mean the person in whose custody the defendant is placed when released from jail, and who acts as a surety for defendant's later appearance in court.[6] In the latter sense, the word is defined to mean the surety or sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated while on the former it is defined as delivering the body of the person to the sureties on the condition that they agree to bring the concerned person before the jurisdiction of the court in the time and place designated in their surety.

Sometimes the term is also reported to be used to refer to the undertaking by the surety, in whose custody defendant is placed, that he will produce defendant in court at a stated time and place.[7] According to this definition bail is referring to the undertaking or the commitment due by the surety for the release of the person in custody.

The overall understanding of bail in the above definitions is in relation to a third party, the surety. The above definitions in this regard are limited in scope on the fact that it does not take in

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[4] Constitution of the Federal Democratic Republic of Ethiopia,1995, Proclamation no 1, Neg. Gaz., Year 1 No 1, Art 13(1) and 105(1)

[5] Ibid, Art 93(4) (c). In these latter cases the rights specified under Article 1, 18, 25, 39(1) (2) of the FDRE constitution cannot be violated on balancing public interest for whatever reason and even in the State of Emergency. Thus, sometimes balancing competing interests might not work due to the special protection accorded to some rights by a constitution and when we try to balance two competing interests it is true that we need first to question whether the competing interests are at the same footing or not in the legal regime of a given country.

[6] 8C.J.S Bailment §79, p.9

[7] Ibid

to account the possibility of release of a person on personal security or on recognizance. In many jurisdictions including Ethiopia a person in custody can be released on bail due to his own guarantee by depositing a certain sum of money to secure his attendance before the jurisdiction of the court in the specified time and place.[8]

Having said this much about how bail is defined in other jurisdictions let us try to define the concept in relation to Ethiopian law. As we have tried to mention above bail is not defined in Ethiopia rather the law prescribes some guidelines which would help us in defining the right to bail. Some of the basic regimes governing the right to bail include the FDRE constitution, CPC, the RACSPREP, the VCP. Irrespective of the fact that the aforementioned laws are governing the right to bail to different category of offences we cannot locate a basic difference with the fundamental concerns of the right to bail among the legal regimes. Thus, while trying to define the right to bail it is enough to take any one of the laws for analysis.

Under the CPC whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person against whom the offence was committed dying.[9] Such release is however possible provided the court believes that the circumstances put under article 67 of the code are fulfilled and further where he has entered in to bail bond, with or without sureties which in the opinion of the court are sufficient to secure his attendance at the court when so required to appear.[10] The right to bail can be exercised provided these requirements are fulfilled cumulatively. The only difference in the VCP and the Anti Corruption Special Procedure and Rules of Evidence Proclamations is that in such cases bail is not allowed when a person is arrested for committing an offence of vagrancy as per the VCP or corruption

[8]Criminal Procedure Code of the Empire of Ethiopia, 1961, Proclamation no 185, Neg. Gaz., Extraordinary Issue, No 1. Under article 63(2) of the Criminal Procedure Code of Ethiopia, a person can be released on bail on signing a bail bond, with or without sureties, which, in the opinion of the Court, is sufficient to secure his attendance at the court when so required to appear. For the same purpose article 64(2) requires an applicant for release on bail to identify the nature of the bail bond he wants to enter among other things. This all shows that an application for release on bail is not necessarily to be made on sureties and a person can apply for bail without sureties calling third party as the case may be. But, the possibility of release of the applicant on personal recognizance (by mere promise to appear before the jurisdiction of the court without depositing a sum of money) is not envisaged within the Code. Thus, poor persons who do not have either a person to secure their presence or money to deposit will not be released on bail creating a problem to the uniform application of the right among poor and rich persons.

[9] Ibid, Art. 63(1)

[10] Ibid, Art. 63(2) and (3)

offence punishable with more than ten years of imprisonment as per the Anti Corruption Special Procedure and Rules of Evidence Proclamation.

Taking this in to account, we can define bail under Ethiopian scenario as follows;

> *Bail is a mechanism of release of a person arrested, after entering into a bail bond, with or without sureties which in the opinion of the Court, is sufficient to secure his attendance when so required to appear, provided the court is of opinion that the circumstances put for release are fulfilled and where the offence with which he is charged does not involve any of the offences considered to be not bailable by the law.*

This being the definition we can notice from the laws there are certain gray areas within the law particularly relating to the question who are the exact bearers of the right to bail which is a very essential thing to define the right concerned. The FDRE constitution seems to use the term in relation to the release of a person "arrested". [11]

The use of the term is not clear in light of the competing interest of the persons accused and those convicted at the first instance and are under way appeal. This is also true in light of the fact that the constitution treats the rights of the 'arrested', 'accused', and 'convicted' persons under different provisions without any express reference on the possibility of application any of the rights guaranteed to one category to the other and vice versa. The FDRE constitution under the title right of arrested persons it provides;

> *Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*[12]

The functional meaning of 'arrested', 'detained', 'accused', and 'convicted' is also considered to be different in many other jurisdictions. For instance the functional meanings of the concepts "arrest" and "detention" are provided by the United Nations Committee on the Study of the

[11] FDRE constitution, Cited at note 4, Art 19(6).

[12] Ibid

Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (United Nations Committee). The Committee has defined "arrest" as:

> *The act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.*[13]

Two elements are central to this definition i.e. the manner in which the arresting authority effects the restraint on personal liberty, and the length of time for which a suspect may be held in custody on the basis of the arrest. However, some argues that arrest need not be accompanied by the physical restraint of the person, whenever a suspect is questioned, apprehended or otherwise detained he may become an 'arrested person'.[14] This requires an objective test to be developed to prevent the law enforcement authorities from circumventing the rights of arrested persons by refusing to 'arrest' a suspect, or by arguing that the 'arrest' does not meet the requirements of the law. If this line of argument towards the understanding of what arrest constitutes is accepted a suspect can demand the right bestowed to arrested persons including bail regardless of the fact that he is not physically restrained from enjoying his personal liberty.

The United Nations Committee has, similarly, defined detention as;

> *the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities.*[15]

The essence of this definition is confinement and deprivation of personal liberty. According to this definition detention comes as a matter of principle after arrest or before arrest. However,

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[13] United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No.8) at 5, U.N. Doc. E/CN.4/826/Rev. I (1964)

[14] Petrus De Villiers, William. Problematic Aspects of the Right to Bail under South African Law: A Comparison with the Canadian law and A Proposal for Reform (LLD Thesis, University of Pretoria, Unpublished, 2000), P.315

[15] United Nations Comment, Cited at note 13

unlike other constitutions the FDRE constitution does not contain specific rights to the persons detained except a general provision under Article 17(2) which states that "...no person may be detained without a charge or conviction against him". Thus, it may be sometimes difficult to locate the exact rights of the detained persons under Ethiopian polity.[16]

Arrest is made in terms of the CPC with or without warrant.[17] As to the time for effecting arrest the CPC seems to indicate that arrest can be made after accusation or before filling a formal accusation. In this regard it provides "Where the accused or the suspect has not been arrested and the offence is such as to justify arrest or where the person summoned under Art. 25 of the code fails to appear, the investigating police officer shall take such steps as are necessary to effect his arrest".

'Accusation' comes when a formal charge is filled by the public prosecutor after proper investigation. The public prosecutor may or may not accuse a person arrested as per the CPC.[18]

This being how the terms 'arrest', 'detention', and 'accusation' are understood under Ethiopian law, it is necessary to question as to whether the rights specified to one category of persons indicated above can be applied to the other and vice versa. This is necessary on the account of the fact that under the Ethiopian constitution the right to bail is categorized under the title which describes with the right of 'arrested persons'.

Still this is to be seen in light of the UDHR, the ICCPR, and the other international instruments adopted by Ethiopia as they are considered to be the basic frame works in interpreting the FDRE constitution. In light of the right to bail the UDHR as well as the ICCPR do not make any distinction to the persons 'arrested', 'detained', 'accused', or 'convicted' rather it prohibits any form of arbitrary arrest, detention or exile. The practice also suggests this basic fact.

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[16] The Criminal Procedure Code of the Empire of Ethiopia guarantees minimum rights to the persons detained including the right to call his advocate and to find sureties under article 60-62 of the code. The South African Constitution treats the right of detained and sentenced persons to be similar. South African Constitution, No 8 of 1996, Art 35 (2)

[17] Criminal Procedure Code, Cited at note 8, Art 49

[18] Ibid, Art 40-48

2.2. The Purpose of Bail

The purpose of bail is to ensure that one is not arbitrarily denied his liberty prior to a fair determination of guilt. The fact that a person is suspected of committing an offence may not mean that he has already committed the particular offence he is suspected of as he is presumed to be innocent. In many cases the final conviction of person suspected of committing a given offence takes a lot of time starting from police investigation to trial before the court of law. Under such conditions it is unfair to detain the person concerned before he is formally convicted. However, circumstances exist in which one should be detained prior to trial, e.g. if the defendant is a danger to the community[19], or is a risk of flight or is necessary to maintain the integrity of the judicial process by preventing the suspect from interference with evidences.[20]

But in most circumstances, people should be released pending trial on bail. The importance of this decision to any defendant is obvious. A released defendant is one who can live with and support his family, maintain his ties to his community, and busy himself with his own defense by searching for witnesses and evidence and by keeping close touch with his lawyer. An imprisoned defendant is subjected to the squalor, idleness, and possible criminalizing effect of jail. He may be confined for something he did not do; some jailed defendants are ultimately acquitted.

Bail serves as a means to strike a balance between the interest of the state and the suspect. The interests of the state includes securing the attendance of the suspect before trial to suffer the punishment thereof if found guilty, to protect the society from dangerous suspects, and to

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[19] Denying bail to a suspect on the mere reason that he may be a danger to the community is a contested assumption. One study suggests that as far as offense seriousness is concerned, the opposite of conventional knowledge is actually the case; persons charged with the more serious criminal offenses were more likely to appear at court than persons charged with offenses of lesser seriousness. Regardless of this fact the U.S court in U.S Vs Salerno decided in favor of the Bail Act of 1984 which considers dangerousness as a factor in bail determination which gives rise to the 2nd generation of bail law in the history of America. Rinat Kitai, "Limits of Preventive Detention," Mc George Law Review, Vol. 40(2009), pp. 908-915

[20] ABA Standard on Pre-trial Release, 3rd edition , p.36

maintain the integrity of the judicial process by preventing the suspect from interfering with the evidences. On the other hand the interest of the suspect to secure his liberty until the court determines his innocence or guilt. To the extent that the state fails to show its legitimate interests are to be endangered by the release of the suspect, bail allows the suspect to be released during the pre-trial period.

Regardless of the fact that the purpose of bail is to serve as a means of striking a balance between the interest of the state and the individual suspect to liberty, in Ethiopia there is a practice whereby suspects are prohibited from being admitted to bail where they are suspected of committing any of the offences considered to be not bailable by the legislature.[21] Detaining a person on the mere fact that he is suspected of committing a specified category of offence or an offence which the state considers to be 'serious' without showing that its legitimate interests are to be endangered associated with the release of the suspect compromises the presumption of innocence recognized under the constitution.[22] The seriousness of the offence with which a person is suspected does not tell us with a precise certainty that such suspect is to abscond or commit other offences or temper with the evidences where he is released on bail.

As there is also a chance that persons are wrongly suspected to commit an offence, to be a suspect for committing a given offence does not necessarily mean that such person is guilty of the offence for which he is suspected to commit. Thus, to rule that bail shall not be granted to persons suspected of committing a given type of offence or an offence which is punishable with certain year of imprisonment contradicts the reality. By the same token to detain the suspect on

[21] In our case the Vagrancy Control Proclamation requires the court to deny the right to bail to persons suspected of dangerous vagrancy; the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation under Article 4(1) requires the Court to deny bail to persons suspected of committing an offence corruption punishable with more than ten years of imprisonment; the Criminal Procedure Code requires the Court to deny bail to persons suspected of committing an offence punishable with more than fifteen years of imprisonment under the Criminal Code. Such laws seem not to consider the reality. The best option in this case would have been to leave the issue of determining the right to bail to the courts to be done on a case by case by prescribing circumstances to be considered by it in its bail decision as they are assumed to be accessible to the facts necessary to determine whether bail shall be granted or not.

[22] The seriousness or not of the offence with which a person is suspected to commit may be used to corroborate the likely or not of the suspect to appear at trial after release together with other facts to be considered by the court.

such grounds does not take the reality that there are law abiding citizens which would choose to bear the consequences of their criminal act if found to be guilty by the court.[23]

Accordingly, the denial of bail can be justifiable, where the state has shown that the aforementioned risks are to materialize with the release of the suspect at hand. In other wards for the law that prohibits bail to be justifiable it should be designed with such purposes in mind. The prohibition of bail, though made in accordance with the law, cannot be fair and justified unless the law is based on any of the aforementioned grounds. In this case, the restriction of liberty resulting from the denial of bail made on unjustified ground is an arbitrary arrest.

2.3. Over view of the Origin and Development of Bail in Ethiopia

2.3.1. Pre-Written Constitution

2.3.1.1. The History of Constitution in Ethiopia

To study the right to bail during the pre-written constitution, it is better to be acquainted with the existence of a constitution of either written or unwritten during the early period of Ethiopia. To do this is not without reason, as there are debates on the existence of a constitution before the 1931 constitution on the one hand and on the nature of the constitution, whether of written or unwritten on the other hand.

As well it is better to remind that in spite of Ethiopia's recognition as a polity for three thousand years the current geographical boundary is of recent phenomenon. The polity is rather known for its fluid territorial boarder which is later shaped by the extent of conquest made by the Ethiopian Emperors of the 19th and 20th century. This being how Ethiopia evolved to its present state structure, the existence or not of a written constitution before the 1931 constitution is somehow debatable due to the inexistence of coherent evidence on the matter.

Heinrich Scholler, who carried out a vast research on the Ethiopian constitutional development, believes that the "Ser'ate Mengist" which comes in to force in the 13th c during the reign of Emperor Amade Zion as part of the "Kebre Negest" can be considered as the first written

[23] It is a common practice to see persons who commit certain offences to hand over themselves to the appropriate governmental organ without being apprehended by the police. As well we see persons convicted for an offence to get in to prison for the prevalence of the rule of law.

constitution of Ethiopia. [24] He believes the "Ser'ata Mangest" which contains the description of series of ceremonial activities to the "Fetha Nagast", which contains merely private law, is considered to be the real and the oldest Ethiopian constitution.[25]

On the other hand many other scholars on the area oppose the treatment of "Ser'ata Mengest" by Heinrich Scholler as the first written constitution of Ethiopia. This group of scholars though they do not deny the status of the "Ser'ata Mengest" as a legal document having a constitutional significance, they oppose the view held by other scholars treating it as a written constitution of the time.

Aberra Jembere, who conducted a research on the legal history of Ethiopia, is one of the opponents of the view held by scholars like Heinrich Schollar. Aberra begins his contention by defining what a constitution is all about. A constitution according to him is "a legal instrument that defines and controls the working of the organs of the government and the rights and duties of the individual citizens and thus, a constitution contains a theory of government, a formulation of principles, and an outline of procedures to fulfill those procedures" and seen in light of this measure he concludes the 1931 constitution is the first written constitution of Ethiopia.[26]

The other scholar who held the same view with Aberra is Fasil Nahum. Fasil Nahum, who as well conducted a research on Ethiopian constitutional development, after analyzing the laws that were in force prior to 1931 constitution concludes that though there were ample documentary resources that have a constitutional significance it is hard to equate them with the modern sense of written constitution. [27]Accordingly, he believes the "Kibre Negest", which colorfully wove the legend of the a Solomnic Dynasty and thereby served certain political as well as religious needs

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[24] Scholler, Heinrich. Ethiopian Constitutional and Legal Development, Vol.1 (Dip Digital Print, Witten, Germany, 2005), p.79

[25] Id

[26] Aberra Jembere. Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural laws (Addis Ababa University Printing Press, 1973), p.10

[27] Fasil Nahum. Constitution for a Nation of Nations: The Ethiopian Prospect (The Red sea Press, inc. Asmara, Eritrea, 1997), p.17

of the time; and the "Ser'ate Mangast" of the 13th c which provided certain administrative and protocol directives, served certain specific purposes within the constitutional process.[28]

However, the absence of a written constitution is not as the same time to mean the absence of a constitution at all. Indeed all the above scholars agree that Ethiopia had a sophisticated traditional unwritten constitution. Some of the values of the unwritten constitution was latter incorporated to the 1931 constitution including the ideal of monarchy, an imperial court involving monarchy, church, and nobility, the recognition of Orthodox Christianity as a state religion, the Solomonic Dynasty claim for power and others. [29]

2.3.1.2. The Concept of Bail in the Era of Pre Written Constitution

Among the documentary sources that are believed to have a constitutional significance, the "Ser'ate Mengast" of the 13th c contains a total of twenty one articles of law dealing with the description of ceremonial activities such as the ceremonies attending the king's ascending to the throne and other ceremonial activities during the nomination of administrative and judicial officers, in addition to serving as a handbook of court and state.[30] The other document that is believed to have a constitutional significance is the "Kibre Nagast". This document was used to colorfully wove the legend of a Solomonic dynasty and thereby only served certain political and religious needs of the time.[31] Beyond this there is no mention of the inclusion of any individual rights including the right to bail in this particular constitutional instrument.

In this regard, Heinrich Scholler believes that the " Sir 'ate Mangast" which quite clearly stated the hierarchical power so confronting the individual with the next higher ranking dignitaries cannot be expected to contain human rights granted.[32] Though the scholar states that there were no human rights granted in this particular constitutional instrument, he is not certain on the

[28] Id
[29] Id
[30] Heinrich Scholler, Ethiopian Constitutional and Legal Development, Vol.2 (Dip Digital Print, Witten, Germany, 2005), p.10

[31] Fasil, cited at note 27, p.17
[32] Scholler, cited at note 24, p.13

existence of any other instrument or customary practice that grants a human right including the right to bail during this particular period.[33]

However, in W.Plowden's travel reports from the year 1852-3 it is discovered that in past Ethiopia, after an accusation but before the pleading can commence both parties must give security approved by the "af-a-negus", which will then serve as a security or bail. [34]These bails or securities are answerable for the execution of the sentence whenever it might be, or must suffer it themselves should the principals abscond. [35] This practice which somehow resembles to the current practice of depositing security for release on bail is a common phenomenon in many civil relations in remote parts of the country till date. Though there was this practice, there is no evidence as to whether the practice of releasing a suspect on security during this particular time was granted as a right or as a prerogative of the 'afe-a-negus'. [36]

Prisons were virtually unknown in Ethiopia before the modern era and the outstanding exception was the use of remote natural fortresses (ambas) to keep "politically dangerous" persons in preventive detention.[37] Members of the royal family who were potential rivals for the throne were particularly subject to this form of treatment. However, imprisonment was not generally known in the ordinary criminal process, either as a temporary pre-trial measure or as a penal sanction.[38]Due to the absence of prisons, following the accused's initial physical submission to the legal process, there seem to have been two major types of restraint employed to assure his continued attendance at the proceedings: 'koragna'[39] and conditional release to sureties.[40]

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[33] Id

[34] Hotton, J. Abyssinia and its people (London, Wyman and sons, 1868), p.121 excerpting W.plowden's travel reports from the year 1852-3 cited at Stanley Z. Fisher, Traditional Criminal Procedure in Ethiopia," the American Journal of Comparative law Vol. 19 No. 4 (1971) The word "afe-a-negus" signifies to a court of appeal normally below the 'Yezufan Chilot', a traditional bench whereby the king serves as a fountain of justice. Such court was also recognized in the Administration of Justice Proclamation 1943.

[35]Id

[36] Id

[37] Pollera, n.9, p.101; Messing, n.11, p. 308 cited at Stanley Z. Fisher, Traditional Criminal Procedure in Ethiopia," the American Journal of Comparative law Vol. 19 No. 4 (1971)

[38]Id

[39] "*Koragna*" refers to the practice of physically linking the accused and his accuser by knotting together one corner of each of their cotton togas (*Shammas*); the pair thus joined were under an obligation not to break the

The practice of release on sureties was conducted on presenting a guarantor called 'wahs'[41], who in the judicial procedure answers for the disciplinary conduct of the parties before the judge, for their appearance in court, and for the execution of the civil sentence.[42] However, such release was possible depending on the seriousness of the matter and persons who were suspected for homicide, bandits, persons who were suspected of committing offences of taking the power of the throne by force and similar offences were not eligible for release on presenting guarantors.[43]

As well with the abolishment of the practice of *'koragna'* modern prison started to flourish and persons suspected of committing serious crimes such as homicide were detained until their trial was completed.[44] However, offences like negligent homicide and homicide committed while sanctioning a slave by his master were considered less serious offences and subject to release on a personal surety called *'wahs'*.[45]

2.3.2. Post Written Constitution

Modern state formation in Ethiopia is believed to be initiated by Emperor Tewodros II who reigned starting from February 11, 1855 by collapsing through military force the so called *'Zemene Mesafint'*[46] or the era of the lords. The process begun by subjugating independent local

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knot unless ordered to by a judge. In a variation of the practice, the accused's right wrist was chained to the accuser's left. They had to live together thus until either the case was resolved or the accused produced acceptable sureties for his conditional release. But the accuser had the right to substitute for himself any of his dependent family or retainers to serve as a "walking prison." This practice was put to an end by the progressive young Emperor Lij Iyyasu in 1916. Bahru Zewde, A History of Modern Ethiopia (1855-1991), 2nd ed., (Addis Ababa University Press, Addis Ababa,2002), pp 121-122

[40]Stanley Z. Fisher, "Traditional Criminal Procedure in Ethiopia," the American Journal of Comparative law Vol. 19 No. 4 (1971)., p.725

[41] The use of the term *'wahis'* was not alien to criminal release on sureties, it was also used as a mechanism of post release security especially for those released on pardon. It was also used in civil matters like to secure the performance of contract and other civil obligations. Especially in the dominant Christian High Landers of Ethiopia including Amhara and Tigray the practice of calling a personage to secure performance of contract and other civil commitments is common even currently. Mahtemeselassie, cited at infra note 43, p. 800

[42] Pollera, cited at note 37, p.114

[43] Mahteme Selassie Weldemeskel. *Zikre Neger* (Artistic Printing press, Addis Ababa, Ethiopia,1970), p.95-96

[44] Id

[45] Id

[46] The *'Zemene Mesafint'* is a time where local chiefs called *'Mesafints'* tried to rule their locality by forcing the 'center'. This period was associated with a weak 'central government' of which local chiefs dominated the political space of the time. This period started with the advent of a powerful lord called Ras Michael who was a king maker of the time (1769-1855). Bahru Zewde, Cited at note 39, p.11

chiefs called '*Mesafints*' by military power. This process of modern state formation in Ethiopia continued by the succeeding Emperors including Emperor Yohannes IV and reached at its maturity with the coming in to power of Emperor Minilik II which gave rise to the current image of Ethiopia. During this time many things were introduced to Ethiopia among them of which the introduction of modern European law and institutions is at the forefront. Particularly Emperor Minilik II introduced modern criminal laws and started the appointment of cabinet ministers.

The introduction of modern European laws and institutions to the Ethiopian polity has been continued during the time of Emperor Haileselassie I. This effort of the preceding Emperors to modernize Ethiopia resulted to the coming in to force of the first written constitution of Ethiopia in 1931. After the coming in to force of the first written constitution, Ethiopia witnessed many major changes to its prevailing constitutions, except the 1955 which is considered to be a revision of the 1931 constitution, the other two, the 1987 and 1995 constitutions, are 'totally new constitutions'. There were also many other proposed constitutions from the period 1931-1995 though they did not come to their final stage of ratification due to many reasons.

The 1931 constitution and the rights thereof are considered to be a grant to the people by the emperor. As a proof to this it is better to remind the speeches by Begironed Tekle Hawariat, who was a member of the drafting committee of the 1931 constitution and the then Minister of Finance, delivered in the eve of the coming in to force of the 1931 constitution;[47]

> *'The constitution which comes in to being by the grace of the Emperor put the people of Ethiopia at the stage which would not have been attained after two hundred or three hundred years time frame.' (Translation mine)*

This being the fact as to how Ethiopia came to adopt its first written constitution, the content and merit of the constitutions in regard to protection of human rights and of particularly of the right to bail is to be seen in the subsequent parts. For practical purposes as the transitional charter that came in to force during the coming in to power of the military Derg regime and the EPRDF regimes is not considered as attaining the status of a constitution within the ambit of this study,

[47] Mahtemeselassie, cited at note 43, p. 800

much emphasis is not given in dealing with the status of the right to bail during these particular events in the Ethiopian history.

2.3.2.1. The 1931 Constitution

The 1931 constitution is the first written constitution that came in to force during the modernization effort of Emperor Haileselassie I. The period when this constitution was ratified is marked with repeated efforts of the Italian fascist government to colonize the free land ever not colonized in Africa and the only member of the then League of Nations from the African continent. This time was also a time where slavery was highly criticized as a barbarian tradition that should have been avoided forever and thus, the constitution is considered by some authors as manifestation of the modernization effort of the Ethiopian polity to the community of the world.[48]

As a constitution created at the wake of such threats to the existence of the Ethiopian polity as an independent country, the content and scope of the constitution was not as such remarkable. However, it is not to mean that human rights guarantees were totally overlooked in the constitution. The 1931 constitution was drafted with the involvement of prominent scholars from Europe and particularly from German and Japan and is considered to be modern of its time and has contained basic principles having human rights implications.[49]

Accordingly, chapter three of the constitution which contains a total of 11 provisions out of the whole 55 provisions deals with the rights and duties of the subjects. Among these provisions the constitution provides "No Ethiopian Subject may be arrested, sentenced, or imprisoned except in

[48] Regardless of its effort Ethiopia did not escape the threat of the colonialists. The fascist Italy conquered Ethiopia by force in violation of the League of Nations resolutions in 1935 and the enforcement of the constitution was suspended for the coming five years until the fascist regime was subdued by the Ethiopian patriots with an alliance power from Britain.

[49] It is believed that the Meji constitution of Japan of 1889 has served as a major foreign source of the 1931 constitution and a copy of it has been supplied to the constitutional drafters by the Japanese legation in Addis Ababa. James C.N. Paul and Christopher Calpham. Ethiopian Constitutional Development: A Source Book, Vol.1 (Artistic Printers, Ethiopia, Addis Ababa, 1967)

accordance of the law."[50] The term 'in accordance of the law' is assumed to be a derivation of the due process of law as used by some countries including Japan.[51]

This provision of the constitution was by far the only provision which can have an implication for the protection of the right to bail for the fact that the right to personal liberty is the basic notion which underlies the right to bail in addition to the due process of law which is an integral part of the constitution. Besides this the existence of the right to bail is evident on account of the fact that in practice there were legislations which recognize the right to bail during this time.[52]

2.3.2.2. The Revised Constitution of 1955

The promulgation and placing into force of the Revised Constitution of 1955 was considered as a gift of the 25th anniversary of the coronation of his Imperial Majesty Emperor Haileslassie I to serve as a changing agent so that Ethiopia "may spring forward to yet further progress and development".[53] Although no mention is made within the preamble of the constitution, the 1955 Revised Constitution was promulgated to respond to the new circumstances that emerge with the Federation of Eretria with Ethiopia in 1952 through the 1952 Federation Act.[54]

At the cost of any of the above reasons the Revised Constitution came up with new and improved constitutional provisions than the 1931 constitution. Accordingly, the protections given to human rights got momentum and many other rights that were not recognized by the 1931 constitution came in to picture with the coming in to force of the Revised Constitution including the right to presumption of innocence[55], due process of law[56], right to liberty[57], the right to access to justice[58] and other related rights having legal significance for the protection of the right to bail.

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[50] Article 23, The Constitution of the Empire of Ethiopia, 1931

[51] The 1891 Maji constitution of Japan as a source of the 1931 of the constitution of the Empire of Ethiopia has influenced for the use of the term 'in accordance of the law' than its counterpart the due process of law.

[52] Mahtemeselassie, cited at note 43, p. 821

[53] Bereket Habte Selassie, " Constitutional Development in Ethiopia," Journal of African Law, Vol. 10 No. 2 (1966), p.81

[54] Cf. G. Krzezunovicz, " The Regime of Assembly In Ethiopia," Journal of Ethiopian Studies, (1963), p.79 cited at Bereket Habte Selassie, " Constitutional Development in Ethiopia," Journal of African Law, Vol. 10 No. 2 (1966), p.81

[55] The Revised Imperial Constitution of 1955, Art 53

[56] Ibid, Art 43

[57] Id

[58] Ibid, Art 108 cum 110

The Revised Constitution of the 1955 was reinforced with the massive revision of the old laws and codification of modern laws. In 1961 the CPC which contains many procedural safeguards including the right to bail was promulgated in the Negarit Gazzeta, the official News Paper of laws.[59]

Thus, to conclude the 1955 Revised Constitution came up with important changes especially on the protections accorded to the right to bail. This constitution can be considered as a milestone for the protection of the right to bail to be found in the subsequent codes including the 1961 CPC.

2.3.2.3. The Constitution of the PDRE 1987

During the reign of Emperor Haileslassie I, there were many chaos and disturbances that were motivated from the desire for the respect of human and political rights and abolishing the feudal administration. Though we cannot believe the right to bail has got a full-fledged protection during this particular time on the face of the fact that some offences were considered to be not bailable offences as per the CPC, the main issues of the chaos and disturbances were centered on abolishing the feudal regime.[60]

The last and successful attempt to overthrow the Imperial Administration by force was made by a group of military officials called the Derg in 1974. The coming in to power of the Derg regime remarked another history on the protection of the right to bail in Ethiopia. The Derg regime suspended the Revised Constitution by a proclamation that was promulgated for the

[59] The drafting of this and other codes of this time were made on the need to modernize the laws of Ethiopia so as to serve as change agents for the social, cultural, and economic development of the country. The process of codification of the laws was made by prominent European legal scholars. G. Krzeczunowicz, "The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability," Journal of African Law, Vol. 7, No. 3 (autumn, 1963), p.173. The Criminal Procedure Code which is deemed to be particularly important legislation is still in force with some major revisions especially during the last 20 years with the enactment of revised laws on Terrorism, Anti Corruption, Dangerous Vagrancy, and laws on organized crime which greatly reduced the protections of the right to bail even compared to the 1961 Criminal Procedure Code.

[60] The most serious attempts to overthrow the Emperor were made during the *Kedamay Weyane* rebellion in Tigray and the other a rebellion in Gojjam and many other student demonstrations that were reinforced by the slogan land to the tiller. The Emperor sought the assistance of the Great Britain to crash the various rebellions. Especially the rebellion in Tigray was crashed with the assistance of the Air Force of the Great Britain. Mulugeta Debalikew, *Galahti Segi* (Mega Printing Press, Addis Ababa) 2001, p.51

establishment of the Transitional Military Government Derg that lasted for more than 13 years.[61] The 1974 proclamation which principally did not contain any human rights guarantee including the right to bail stayed in force until the coming in to force of the 1987 PDRE constitution. Due to this the right to bail once gained a constitutional status by the principles and values enshrined in the 1955 Revised Constitution was made subject to no guarantee during the Derge regime for 13 years until the coming in to force of the 1987 PDRE constitution.

During this period various laws that limit the enjoyment of the right to bail were constitutionally recognized. Among the laws which put a limit on the enjoyment of the right to bail includes the prohibition of any admission to bail for cases when a person is charged with an offence that is to be tried under the Court Marshal established as per the 1967 Special Criminal procedure.[62] An additional proclamation was issued in 1974 which bars a right to bail for persons charged with an offence that is to be tried under the Special Criminal Court established as per the 1974 Special Court Establishment Proclamation.[63]

The Derg regime was overthrown by military force in May 1991 by a coalition of political parties called EPRDF. The EPRDF assumed power through a Transitional Period Charter of Ethiopia. The Charter recognized the human and democratic rights enshrined under the UDHR of which the right to bail is an integral part.[64] It stayed in force until the coming in to force of the 1995 FDRE constitution which gives the right to bail a constitutional status in addition to requiring the right to be interpreted in light of the UDHR, the ICCPR and other Covenants adopted by Ethiopia.[65]

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[61] Transitional Military Government establishment Proclamation, 1974, Proclamation no 1, Neg. Gaz., Year 1 No 1, Art 5(a)

[62] Special Criminal Procedure Proclamation,1967, Proclamation no 9, Neg. Gaz., year 34 no 9, Art 9(3)
[63] Special Court Establishment Proclamation,1974, Proclamation no 215, Neg. Gaz., year 41 no 2, Art 17(2)
[64] Transitional Period Charter of Ethiopia, 1991, Proclamation no 1, Neg. Gaz., Year 50 No 1
[65] FDRE Constitution, Cited at 4

Chapter Three

The Right to Bail in the FDRE

3.1. Prelude

Under Ethiopian law a person arrested for committing a certain criminal offence punishable under the law can be released on bail if the offence with which he is suspected does not fall under any of the offences considered to be not bailable. The release on bail can be done either by the investigating officer before a charge is framed or by the court in case the investigating officer fails to release the suspect as per its power.

Power of the Investigating Officer

The investigating police officer can only release a suspect in particular circumstances provided by the enabling legislation. In this regard the CPC while specifying the conditions under which the investigating officer can release a suspect on bail bond provides;[66]

> *the investigating police officer may in his discretion release a person accused on his executing a bond with or without sureties that he will appear at such place, on such day and at such time as may be fixed by the police where the offence committed or complained of is not punishable with rigorous imprisonment as a sole or alternative punishment; or where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of.*

Similar power is given to the investigating officer under the Anti Corruption Special Procedure and Rules of Evidence Proclamation. In corruption cases the investigating officer can release the suspect on bail where he is of opinion that it is doubtful that the offence complained of has been committed, or it is doubtful that the arrested person has committed

[66], Criminal Procedure Code of the Empire of Ethiopia, Cited at Note 8, Art 28. However, police bail are considered to be like a 'dog without tooth' due to the fact that the law says nothing as to what should be done to the bond when a suspect fails to appear before the court after securing a bond. In police bail there is no mechanism whereby the bonds man could be held liable under such circumstances and this is considered to be a gap in the implementation of release through bail bond.

the offence, or the offence for which the person arrested is punishable only with simple imprisonment.[67]

Power of the Court

The powers under which the court can release a person suspected of committing a given offence punishable under the law are provided in two separate circumstances. The Court has a power to release on bail an arrested person who is not released by the investigating officer.[68] The Court has also a power to release an accused person as per Article 63 of the CPC and Article 4(1) of the RACSPREP.

According to Article 63 of the CPC the court can release an arrested person on bail after entering in to sufficient bail bond where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying. However, the court can deny an application for bail as per this article where there is a reason to believe that the 'applicant' is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond or the 'applicant', if set at liberty, is likely to commit other offences or the 'applicant' is likely to interfere with witnesses or tamper with the evidence.

As well the Court can release an arrested person charged for committing a corruption offence when the offence with which he is charged is punishable for less than ten years imprisonment.[69] However, the court can deny bail in any corruption cases either to those persons who are not released by the investigating officer or as per its power under article 4(1) where it has a reason to believe that the 'suspect or the accused', if released on bail, is likely to abscond or the 'suspect or the accused', if released on bail, is likely to tamper with evidence or commit other offences.

[67] Art 4(2), Revised Anti Corruption Special Procedure and Rules of Evidence of the Federal Democratic Republic of Ethiopia, 2005, Proclamation no 434, Neg. Gaz., Year 11 No 19
[68] Criminal Procedure Code, Cited at note 8, Art 28, Revised Anti Corruption, Cited at note 63, Art 4(3)
[69] Revised Anti Corruption, Cited at note 67, Art 4(1)

In light of the fact that the court has two options to release an arrested person on bail either through its power given under Article 63 of the CPC and Article 4(1) of the RACSPREP or the power given as per Article 28 of the CPC and Article 4(3) of the RACSPREP, it is better to question to which cases the circumstances set under Article 67 of the CPC are applicable. This issue is of course made clear under the latter proclamation which provides the circumstances set under Article 4(4) of the proclamation are applicable in any cases where the court exercises its power.[70]

However, the CPC seems unclear in this regard. The use of the circumstances provided under Article 67 of the Code is only cited in light of the power of the court as per Article 63. Given the fact that the RACSPREP requires the court to consider the circumstances in exercising its power in every manner, it is doubtful as to whether the same procedure is to be followed by the court in exercising its power under the CPC.

This is also true considering the fact that the power of the court concerning bail other than those provided under Article 63 of the code is to be exercised where it is doubtful that the offence complained of is committed at all or it is doubtful as to whether the offence complained of is committed by the suspect. In this cases it seems unfair to detain a suspect on the assumption that he is unlikely to obey the conditions set in the bail bond or is likely to commit other offences, or is likely to interfere with witness or tamper with evidences while the offence with which he is suspected of is unlikely to be committed or the suspect is unlikely to commit it.

However, the much debated issue relates to the question of what amounts to the 'likely' or 'unlikely' as it is used in article 67 of the CPC. As per this article an application for bail shall not be granted where the applicant is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond; or the applicant, if set at liberty, is likely to commit other offences; or the applicant is likely to interfere with witnesses or tamper with the evidence. The question that relates with this provision is as to how we can know whether the

[70] Article 4(4) of the proclamation provides that "Without prejudice to the provision in sub article 1 of this Article, the court may not allow an application to be released on bail of the accused or the suspect as per sub-article 3 of this article, where the suspect or the accused, if released on bail, is likely to abscond the suspect or the accused, if released on bail, is likely to tamper with evidence or commit other offences."

suspect is likely or unlikely to do or not do the mentioned circumstances in the absence of predictive mechanisms or guide lines in the code or other legislation.

In the case of *Ato Asnake Bekele V Public Prosecutor*[71] the court ruled that it is unlikely that the suspect will appear for trial due to the fact that the suspect has a passport and entry visas to various countries. The question here is whether holding a passport and an entry visa is sufficient cause to decide that the suspect is unlikely to appear for trial. The Sidama High Court and the SNNPRS Supreme Court decided in favor of denying bail on such basis. An appeal to the FSCCD[72], however, changed the ultimate consequence of the case by repealing the decision on the existence of a fundamental error of law. The Cassation Division held that to deny bail on a mere assumption would risk to a consequence which was not intended by the legislature. According to the court's opinion as a right to bail is the principle and denial of bail the exception such cases should be interpreted to favor the right holder than to restrict it.

Regardless of the court's decision such problems can also be associated with the absence of predictive mechanism of preventive detention in the CPC of Ethiopia which is widely used in many courts to determine whether any form of release can satisfactorily protect the community including the weight of the evidence against the accused, family ties, employment, financial resources, character, mental condition, past conduct, length of residence in the community, record of convictions, and record of appearances at court proceedings.[73]

To assure the presence of the suspect released on bail the court can impose injunction orders on his right of movement including an order to restrict the movement of the suspect in a limited region or place; prohibit the suspect from reaching places where he might tamper with evidence; instruct the suspect to report to the relevant authority within a prescribed time; or prohibit the

[71] Ato Asnake Bekele V Public Prosecutor, Federal Supreme Court Cassation Division, Decided on *Ginbot* 15, 2000.
[72] The Cassation Division of the Federal Supreme Court is a court of last resort in case the party to a dispute claims the decision of the lower courts contains a fundamental error of law. The decision of the court made in the presence of 5 judges is final and conclusive and it has a force of precedent to similar future cases arising in any court of the country. Federal Courts Proclamation Re amendment Proclamation, 2005, Proclamation no 454, Neg. Gaz., Year 11 No 42, Art. 2(1)
[73] Charles Patrick Ewing, "Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes," Journal of Law and Human Behavior. Vol. 15 No. 2(1991) P.144

suspect from going abroad.[74] Such order can be made either alternatively or cumulatively as the court deems proper.

A person released on insufficient sureties due to mistake or fraud may be required to find sufficient sureties or be remanded.[75] As well where certain new facts are disclosed which were unknown when bail was granted, the court may on its own motion or on an application order the released person to produce new sureties or be remanded.[76] Article 74 which deals with new facts may be used to detain a suspect released on bail. What is a new fact and the seriousness of the new fact to revoke a bail once granted seems not to be sufficiently described. Sometimes the law puts qualifying words like 'fundamental' in such cases. Though still it is not clear as to what fundamental is to mean due to its subjectivity it can help the courts in entertaining cases.

In the case of *W/ro Liwiza V. Public Prosecutor*[77] a witness was alleged to be intimidated after the release of the suspect by someone unknown which gives rise to the detention of the suspect on account of the existence of a new fact. One of the circumstances that should be fulfilled as per the law for the release of a suspect on bail is the unlikely nature of the suspect to intimidate the witness or tamper evidences. However, in this case the law is clear on the fact when bail can be revoked once granted. For revocation of the right to bail it is necessary that the suspect be proved to intimidate the witness. Otherwise to revoke the bail once granted on the assumption that the suspect might have intimidated the witness can create anomaly.

Failure to appear at the time and place fixed results to issuance of arrest warrant and for the summoning of the guarantors to show the cause why their recognizance's should not be lapsed.[78] The guarantors can apply to the court for their release as guarantors if they are of opinion that the released person is to abscond provided they bring the person before the jurisdiction of the court which released him.[79]

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[74] The Revised Anti Corruption, Cited at note 2, Article 6. However, the possibility of giving such orders in cases other than corruption is not clear with the absence of such laws within the Criminal Procedure Code.
[75] Criminal Procedure, Cited at note 8, Art 73
[76] Ibid, Art 74
[77] *W/ro Liwiza V. Public Prosecutor, Federal Supreme Court Cassation Division, Decided on Hidar 28, 2003.*
[78] Criminal Procedure Code cited at note 8, Art 76
[79] Ibid, Art 77 cum 78

3.2. Classification of Offences in Ethiopia

3.2.1. Bailable Offenses

The CPC provides an arrested person may be released on bail provided he meets the circumstances set under Art. 67 of the same code and where the offence with which he is charged does not carry a death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.[80] A person who is charged with a corruption offence entailing not more than ten years of rigorous imprisonment can also be released on bail under the same conditions set in the CPC.[81]

This being how release on bail is possible there are certain differences among scholars and practitioners involved in the administration of justice especially on the scope of application of Art.63(1) of the criminal procedure. The exact words and phrases of art.63 (1) read as follows;[82]

> *Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.*

While some persons tried to understand it as having two competing meanings[83]others understand this particular provision as having three competing meanings.[84]

The proponents of the first argument hold the view that a person shall not be released on bail as per this particular provision where the offence with which he is charged carries death penalty or rigorous imprisonment for fifteen years or more or where there is a possibility of the victim of

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[80] Criminal Procedure Code, cited at note 8, Art. 63. Under Article 67 an application for bail is not to be allowed bail where he is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond; the applicant, if set at liberty, is likely to commit other offences; the applicant is likely to interfere with witnesses or tamper with the evidence.

[81] The Revised Anti Corruption, cited at note 67, Art. 4(1)

[82] Criminal Procedure Code, Cited at 8, Art.63(1)

[83] *ፍሬ ህይወት ሳሙ ኤል, "ስለ ዋስትና ህግ መሰረታዊ ነጥቦች," ደቡብ የህግ መጽሄት፣ቮልዩም 2, 1995, ገጽ 11*

[84] ታዮ ንጋቱ, "በዋስ የመፈታት መብትና ተፈጻሚነቱ በኢትዮጵያ," ወንበር: የዓለማየሁ ኀይሌ መታሰቢያ ድርጅት ፔሮዲካል, 1ኛ መንፈቅ, ሰኔ 1999፣ ገጽ 39

the offence dying. They believe that the conditions set are to be considered independently rather than cumulatively. "Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying." According to them the use of the word 'where' twice in the English version of this particular provision is intended to give such a meaning.[85]

Thus, anyone whose case falls under any of the conditions identified above should not be released on bail. The proponents of this argument believe that releasing a suspect under the guise of bail who would be sentenced to death or fifteen years or more rigorous imprisonment would mean to give an opportunity for suspects to abscond. However, this argument is challenged on view of the fact that it has a possibility of denying bail to offences that are punishable with fine like negligence homicide.[86]

The proponents of the second argument hold the view that the conditions set under this particular provision are to be considered cumulatively. Accordingly, a person who is charged with an offence which carries a death penalty or an imprisonment for fifteen years or more should be released on bail where the victim of the offence is not dying. On other words the proponents of this view believed that this provision is intended to be applied where the offence with which a person is charged relates to offences of homicide. The fear of the proponents of this view is the fact that if courts are to interpret this particular provision in the way the proponents of the first argument supports no one would be released on bail which will amount against the spirit of the law maker which considers release on bail as the principle.[87]

However, other persons try to give a third meaning to Article 63(1) of the CPC. According to the proponents of the third view a person shall not be released on bail where he is charged with an offence which carries a death penalty or he is charged with an offence which carries fifteen or more than years of imprisonment and where there is a possibility of the person against whom the

[85] Ibid, P. 44
[86] Id
[87] The proponents of this view took as an example the fact that in the Penal Code article 248-270 i.e. roughly 22 articles, there are around 12 offences which are punishable with death penalty.

offence is committed dying. According to this understanding though a particular offence is not a case of homicide bail shall not be allowed where it carries a death penalty.

This third view has got momentum currently in various court decisions. In the case of *Engineer Hailu Shawel et al V. the Public Prosecutor*[88] who was charged with an offence against the constitutional order and many other counts punishable for life imprisonment or death, the right to bail was denied regardless of the fact that the offence with which they were charged does not involve an offence of homicide. The Cassation Division of the Federal Supreme Court has also ruled offences of homicide as not bailable when it is punishable with fifteen years or more and where there is a possibility of the person against whom the offence is committed dying in a recent case involving negligent homicide.[89]

3.2.2. Non-Bailable Offenses

Under Ethiopian law a person can never be released on bail where he is charged with an offence which carries death penalty or rigorous imprisonment for fifteen years or more and where there is a possibility of the person in respect of whom the offence was committed dying[90]; or is charged with a corruption offence which is punishable with more than ten years of imprisonment[91]; or with an offence of dangerous vagrancy[92]. Without prejudice to the provisions of the code relating to release on bail, the court may also order the accused be kept on remand until the trial where he is suspected of committing an offence which is to be tried under preliminary inquiry.[93]

In determining the scope of the above laws, sometimes courts are faced with certain questions due to the existence of gaps on the application and interpretation of the laws. The main source of

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[88] *Engineer Hailu Shawel et al V. the Public Prosecutor,* cited at Wondwossen Demissie. "The Right to Bail in Ethiopia: Respective Role of the Court and the Legislature," Journal of Ethiopian Law, Vol. 23 No 2(2009)

[89] *Amhara Regional State Justice Bureau vs. Ato Temesgen Addis*, Federal Supreme Court Cassation Division, File no.35695, Decided on Sene 21, 2002

[90] Criminal Procedure, Cited at note 8, Art. 63. Some of the offences which are punishable with death penalty or 15 or more rigorous imprisonment according to the New Criminal Code includes offences against the constitutional order, organized crime, human trafficking, tax evasion and many other criminal offences.

[91] Revised Anti Corruption, Cited at note 67, Art. 4(1)

[92] Vagrancy Control Proclamation, 1996, Proclamation no 384, Neg. Gaz. Year 12 No.32

[93] Criminal Procedure, Cited at note 8, Art 93. As per Article 80 the Criminal Procedure Code the offences which are tried on preliminary inquiry include first degree homicide, aggravated robbery, and other offences which are tried in the High Court if the public prosecutor directs.

the problem is specially associated with the nature of the substantive criminal law at large and the lack of use of clear terms during the drafting or approval of the procedural laws. In this regard while analyzing the scope of Article 63 of the CPC one scholar tried to question the consistency of the procedural law with the substantive law for which implementation it was enacted.[94] This come to happen after analyzing the phrase of the CPC which provides "Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more".[95] The problem with this legal provision is the absence of any legal provision within the corresponding Penal Code which is punishable with "fifteen years rigorous imprisonment" as an initial or maximum punishment. Due to this it is ambiguous for what reason fifteen years is chosen as a bench mark for denial of bail.

Similar problem is envisaged in the enforcement of the RACSPREP which provides "An arrested person charged with a corruption offence punishable for more than 10 years may not be released on bail." The problem with this provision is the difficulty of understanding with what "punishable for more than 10 years" is to mean. In the case of *Lalu Seid et al Vs the SNNPRS Ethics and Anti Corruption Commission*[96], two persons were accused of aggravated breach of trust which is punishable with rigorous imprisonment from five to fifteen years imprisonment under Article 676 of the new Criminal Code. The issue before the Court was whether the alleged offence is bailable as per the Anti Corruption Special Procedure and Rules of Evidence which provides an arrested person charged with a corruption offence punishable for more than 10 years may not be released on bail. The lower courts including the SNNPRS Supreme Court Cassation Division decided in favor of releasing the accused on bail since there is a possibility of the accused being punished for five years.

However, the public prosecutor appealed to the FSCCD to deny bail to the concerned persons alleging that the lower courts committed a fundamental error in interpreting the law. The Court in this case decided in favor of detaining the accused and repealed the decisions of the lower

[94] □□ □□□□□□□□□□ 79 □□ □□□□□□
[95] Id
[96] *Lalu Seid et al Vs the S/N/N/P Regional State Ethics and Anti Corruption Commission*, Federal Supreme Court Cassation Division, File no 63344, Decided on Hamle 28, 2003

courts. The main justification of this Court rests on giving effect to the concerned law. The Court believed the main reason why the Proclamation was promulgated was to serve as a check against absconding of suspects of corruption charged with a more serious offence. Thus, to release persons accused of committing a corruption offence which is punishable within the range of five to fifteen years can amount to making the proclamation ineffective as many of the offences of corruption falls under this range. The decision of the FSCCD in effect extends the scope of the not bailable corruption offences which would then have an impact of increasing the remand detainees.

Though we can agree that understanding the proclamation like in the way the lower court have decided would have an impact of making the proclamation mute, it is also possible to think that the legislature might want to repeal the Revised Anti Corruption Special Procedure and Rules of Evidence by introducing the Criminal Code. The ruling of the Federal Supreme Court is a bad precedent over other cases including the CPC. With this ruling it is clear that the scope of the non bailable offences and the number of persons under pretrial detention is to become high as it serves as a precedent to the CPC provision which states "Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more…."[97] As per the ruling of the Federal Supreme Court persons suspected of committing an offence punishable with a maximum of 15 years imprisonment cannot be released on bail.

As well with the enactment of the new Criminal Code the list of suspects who could be denied bail includes to those who are charged with criminal negligence.[98] This is unlike to the old Penal Code of 1957 which did not consider criminal negligence as an offence punishable for 15 years

[97] Criminal Procedure Code, Cited at note 8, Art 63(1). As the Criminal Code was enacted after the coming in to force of the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation it is also possible to assume that the legislature might want to repeal the latter proclamation through the endorsement of the Criminal Code.

[98] Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proclamation no 414, Neg. Gaz. Year 10 No 58, Art 543 of the proclamation considers negligence homicide committed by professionals who have the responsibility of taking care of human life including doctors or drivers punishable with 5 years to fifteen years or to fine from ten thousand to fifteen thousand birr particularly where the criminal has negligently caused the death of two or more persons or where he has deliberately infringed express rules and regulations disregarding that such consequences may follow or even where he has put himself in a state of irresponsibility by taking drugs or alcohol.

or more and in effect bail is allowed to persons suspected of a crime of such a nature as per the CPC. Due to the fact that the CPC of 1961 was enacted with the hope of supplementing the enforcement of the rights provided in the repealed Penal Code of 1957 which by its nature did not consider criminal negligence as a not bailable offence, questions of compatibility of the new Criminal Code with the legislative intent of the then drafters of the 1961 CPC is possibility to happen.

In this regard the decision of the Cassation Division of the Federal Supreme Court is worth looking at in order to have a clear understanding of the way the Cassation Division tries to reconcile the tenets of the CPC with the new Criminal Code which come in to force late a half century of the enactment of the former. The case before the Cassation Division of the Supreme Court involves a driver suspected of commission of negligent homicide as per the new Criminal Code article 543(3).[99] A negligent homicide as per this particular sub article is punishable with imprisonment ranging from five to fifteen years and fine with ten to fifteen thousand birr which is a far stringent punishment than that was supposed to be inflicted for criminal negligence in the old 1957 Penal Code.[100]

The legal elements for the denial of bail under the CPC include rigorous imprisonment for 15 years or more and the possibility of death of the victim which are by far fulfilled on account of the new Criminal Code. However, the contention here is the fact that as to whether the drafters of the 1961 CPC had an intention of denying bail to a person suspected of criminal negligence. This contention came in to picture on the fact that criminal negligence was not punishable to the extent of 15 years rigorous imprisonment on the Penal Code of 1957 for whose enforcement the CPC of 1961 was enacted. On the same token some scholars believe that the policy behind why bail was denied to those persons suspected of homicide was to avoid the possibility of revenge, which was a prevailing culture of the then community and was a source of public instability at the time. Negligence homicide, homicide committed during self defense, or under state of passion were not considered to be within the realm of the policy ground of the then legislature as such circumstances were not expected to result to taking a revenge.[101]In other wards the main

[99] *Amhara Regional State Justice Bureau vs. Ato Temesgen Addis*, Cited above at note 86
[100] Under the penal code of 1957 a homicide due to criminal negligence is punishable to 5 years imprisonment
[101] □□ □□□□ □□□□, □□□□□ 80 □□ □□□□□□, □□ 17

objective of the bail law was to preserve public peace and security that was threatened through the habit of revenge.

This analysis has won the mind and heart of the lower courts including the Amhara Regional State Supreme Court Cassation Division.[102] Based on the courts analysis of the law it has reached at a conclusion that the spirit of the CPC of the 1961 was not to deny bail to those suspects who are charged with criminal negligence rather it was intended to deny bail to those persons who are charged for commission of an offence with a full culpability and intention, accordingly they decided for the release of the suspect on bail.[103] However, this decision was appealed to the FSCCD on the allegation that the decision of the court contains a fundamental error of law and the appellant demanded the cassation court to construe the CPC to deny bail to the particular suspect as the punishment to be due if found guilty reaches fifteen years rigorous imprisonment and the victim has already dead which are the cumulative requirements as per the code.

The Cassation Division of the Federal Supreme Court, after regretting for the absence of a New CPC that fits the circumstances of current Criminal Code, decided in favor of the appellant. Though it did not mentioned in its ruling, the Cassation Division reached on this ruling through textual interpretation. In its decision it indicated that the new Criminal Code should be applied to the conditions set in the CPC without making any reference to the intention of the makers of the CPC whatsoever.

This decision of the Cassation Division can raise a couple of questions as far as it believes the provision of the CPC needs an interpretation. Research indicates that the framers of the CPC intended the particular provision to be applied to those cases when a suspect is charged with an

[102] The cassation Division is a court of last resort when one of the parties believes that the lower court which entertains the matter committed a fundamental error of law. Many of the regional states have their own cassation division within their respective Supreme courts. However, the decisions of the regional Supreme Court Cassation Division is appealable to the Federal Supreme Court though there are some criticism on the legitimacy of such appeal in light of the fact that in a federal structure the states have their own sphere of influence guaranteed by the constitution and to require them to submit state matters is against the precept of the FDRE constitution. The decision of the Federal Supreme Court Cassation Division made on the presence of not less than five judges is final and is considered as a precedent.

[103] The Amhara Regional State Supreme Court reached this conclusion on account of the fact that criminal negligence was punishable with an imprisonment below the range used to deny bail under the 1961 criminal procedure and this was deliberately made to exclude those suspects charged with a criminal negligence from any possible restriction of their liberty.

intentional offence.[104] The ruling of the Cassation Division extended the scope of the applicability of the particular provision than that was intended at its making to the extent of denying bail to those persons suspected of committing an offence due to negligence.

In the absence of a corresponding new CPC, the reason why the legislature has enacted a law which prescribes a much higher penalty to criminal negligence than it was believed sufficient in the older Penal Code should have been analyzed in light of its consequence on the enjoyment of the right to bail. Otherwise to rule on the right to bail only by looking at the text of the CPC which was enacted to achieve a purpose that might not relate with the purpose the new Criminal Code was intended to achieve can result to restraining the right to bail of the accused. To the extent that there is inconsistency between the CPC and the new Criminal Code the ultimate solution would be to require the legislature to enact a procedural law that fits the circumstances of the new Criminal Code and decide in favor of the right claimants until the enactment of such law.

In the case of *Ato Seid Yimer Vs Amhara Regional State Anti Corruption Commission* [105]the accused was charged with three counts of a corruption offence of which as per the applicable criminal law of the time release on bail was not possible for such an offence. With the coming in to force of the new Criminal Code such offences were made punishable with not more than ten years of rigorous imprisonment. The legal issue here is as to whether the principle of non retroactivity of criminal law is applicable for the purpose of granting the right to bail.[106] The Public Prosecutor opposed the granting of bail to the accused on the principle of non retroactivity of criminal law contending that the principle is applicable only at the time of sentence than at the trial stage.

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[104] □□ □□□□ □□□□, □□□□□ 80 □□ □□□□□□, □□ 17. The drafters of the Criminal Procedure Code while enacting the particular provision were persuaded by the fact that the Penal Code of the time did not contain a provision which penalizes a negligence offence to the minimum limit put to deny bail in the code. The intention of the drafters was believed to be manifested by including a provision which sets the minimum possible range of imprisonment far beyond the maximum penalty set in the Penal Code of the time for any negligence offence.

[105] *Ato Sied Yimer Vs Amhara Regional State Anti Corruption Commission*, Federal Supreme Court Cassation Division, File no 34077, Decided on *Megabit* 9, 2000

[106]Constitution of the Federal Democratic Republic of Ethiopia, Cited at note 4, Article 22 (2). The principle of non retroactivity of criminal law provides a law promulgated subsequent to the commission of the offence to be applied if it is advantageous to the accused or convicted person.

The Cassation Division in its ruling held the view that criminal law should be interpreted in favor of the right bearer and believed that to detain an accused on account of a repealed law would amount to ruling against the spirit and intention of the legislature. Detaining an accused on a repealed law who would later be punished for less than ten years of imprisonment if found guilty has nothing to attain in light of the interest the legislature wants to achieve.

3.3. Review of the Parliamentary Concerns on the Right to Bail

It is a fact that a government wishes to enact a given law when there is an existing controversy which the government wants to settle or it is believed a controversy is to come in to being in the near future and it is found necessary for public benefit that a law be enacted to govern such relationship in advance. Due to this reason when the legislature enacts a law it tries to list down the rationales behind the law and tries to convince the public on the fact that the enactment of the concerned law does not violate any other competing constitutional rights and the public interest.

Based on this premise the enactment of the laws dealing with the right to bail in Ethiopia has passed various stages of law making. The deliberations made during this process has great importance in identifying the forces that give rise to the enactment of such laws which will later help us in our discussion on the justifiability of the given rationales in light of other legitimate constitutional concerns and public interest at large. Accordingly, I have consulted the deliberations gathered from public opinion and the deliberations of the HPR made during the enactment of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation and the Dangerous VCP.

The deliberations of the public opinion on the revision of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation emphasis on the draw backs of the earlier proclamation that excludes any admission to bail to those persons suspected of committing the crime of corruption.[107] They found that the fact that bail was not allowed for persons suspected of corruption has become a peril to the investigation process of the crime of corruption for two reasons which served as a reason for the amendment of the proclamation.[108]On the one hand

[107] The Revised Anti Corruption, Cited at note 63, Art. 51(2)

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since corruption is not bailable and as the suspect once accused in such cases has no chance of release on bail, it necessitated the public prosecution to collect sufficient evidence before arrest and accusation is made. To do this was believed to create its own problem especially due to the fact that many of the persons suspected of corruption are public officials and in the process of collecting the evidences they tried to conceal the evidences in their office from the reach of the public prosecutor which then served as a means to escape prosecution.[109] On the other hand filing accusation on insufficient evidences as an alternative to the above was also found problematic as the matter is to fall within the supervision of the court and there is a possibility that the court may release the suspect on the failure of the prosecution to prove its case beyond reasonable doubt on account of speedy trial.[110] Therefore, it is found that to have a law which grants the right to bail to those persons suspected of corruption which entails ten years or less imprisonment is the best mechanism to compromise the problems to meet the interests of the government in fighting the crime of corruption.[111]

When we come up to the legislative back ground of the VCP, it is proved that researches conducted by the FPC shows an increase of the rate of crime committed by dangerous vagrants and the basic reason for this is found to be the absence of well suited procedural laws to fit the gravity and nature of the offence of dangerous vagrancy.[112] This increment in an alarming rate of the offence is especially true associated with the existing law which provides the possibility of bail for suspects of dangerous vagrancy and to respond to the current problem of dangerous vagrancy it is hoped that having a law which denies bail to any person suspected of committing an offence of dangerous vagrancy is instrumental.[113]

To have such a law is also considered not to pose any problem with the right to personal liberty. It is also found that prescribing certain offences as not bailable is common in other developed countries of the world including many states of the U.S.A. To substantiate their allegation the

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[109] Id
[110] Id
[111] Ibid, p.3
[112] □□□□ □□□□□□ □□□□□□ □□□□□ □□□ □□ □□□□□ □□□□□ 2□□ □□□□ □□□□□ □□□ □□ 4□ □□□ □□□ □□□ □□□□ □□□□ □□□□ □□ □□□□□ □□□□ □□□□□□□□□ 3□1993 □.□□ □□ 9_12
[113]Ibid, p. 9_12

drafters cited the case of United States Vs Salerno[114] as an example of a case where denial of bail is similarly possible exactly in the same way that is made in case of the Dangerous Vagrancy in Ethiopia. The other justification they raise is the earlier law which provided the possibility for bail for suspects committing an offence of dangerous vagrancy created a problem as those suspects released on that basis found to commit other offence after their release including intimidating potential witnesses. Thus, having a law which absolutely denies bail to any person suspected of committing dangerous vagrancy is also found to be appropriate to protect the potential witnesses from any fear of being intimidated by the suspect.[115]

3.4. Review of the Constitutional Concerns on the Right to Bail

As we can understand from the legislative history of the laws which prohibit bail the main concerns of the law maker are heavily relied on protecting the general public. The possibility of balancing public interest with individual interest is not given due concern during the making of the laws with the exception of simply raising the issue. Thus, the main reasons which lead the HPR to enact the laws can be summarized easily in the following manner.

The first reason is that the legislature believed that having a law which bans the right to bail has a major importance especially in ensuring the suspects to stand at trial and to incapacitate them from committing further offences including concealing evidences and intimidating witnesses. As a second reason the legislature believed that to have a law which prohibits any admission to bail helps to control such crimes. Moreover, the legislature tried to consult the experience of other countries of the world including those which are believed to upheld constitutionalism like U.S.A.[116]

This being the main reasons that forced the legislature to enact the law which denies any admission to bail let us now look at the rationality of such concerns of the legislature in light of the constitutional principles provided in the FDRE and other pertinent international instruments adopted by Ethiopia.

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[114] U.S Supreme Court, United States v. Salerno, 481 U.S. 739 (1987) 481 U.S. 739 available at **http://laws.findlaw.com/us/481/739.html**

[115] □□□□ □□□□□□ □□□□□□ □□□□□ □□□ □□ □□□□□□□□□□□ 112 □□□□□□, □□□ 13

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The first concern of the HPR relates to the fact that having a law which bans the right to bail has a major importance especially in ensuring the suspects to stand at trial and to incapacitate them from commission of further offences including concealing evidences and intimidating witnesses.

The HPR while decided to enact a law which bans the right to bail in the case at hand it considered the gravity of the crime of corruption and the misapplication of the law by courts as a justification.[117]It is to be recalled that there is an existing mechanism whereby a suspect admitted to bail can be denied bail when the court has decided that if such a person is released there is a possibility that he may commit further offences, or intimidate witness or temper with evidences, or will not comply with the conditions set in the bail bond.[118]Thus, it is implied that the law which totally bans an admission to bail is enacted as a response to the distrust of the judiciary by the parliament in properly implementing this condition.

Although it is true that denial of bail offers reasonable guarantee that suspects once arrested will not flee and commit further offences, the question that should be raised here is that whether the action of the legislature is proper in light of the competing interest of the suspects to personal liberty and as to whether the legislature has the mandate to enact such type of laws as per the FDRE constitution?

As far as the first question is concerned the total ban of the right to bail is against the personal liberty of the suspects. Here the reason why the innocent suspects are to suffer jail is not on their own fault rather on the alleged fault of the court in properly applying the law in screening the suspects entitled to bail as per the conditions set in the law. The main reason why we deny bail absolutely to the suspects is not because the legislature believed such persons are a threat to the society or possibly to abscond rather the reason is the failure of the courts to properly apply the law. Thus, as the action of the legislature does not relate with the personal behavior of the particular suspects and rather with the fault of the courts, if any the remedy seems to overlook the real causes of the problem.

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[118] Criminal Procedure Code, Cited at note 8, Art 67

The other question that is raised is as to whether it is within the sphere of competence of the legislature to enact a law which prohibits any admission to bail? The FDRE constitution provides the HPR will have the power of law making in all matters falling under the federal jurisdiction.[119]Similarly the constitution provides judicial power both at Federal and State level, are vested within the judiciary.[120]Thus, the constitution has apportioned the sphere of competence of the legislature and the courts.

Based on this law the courts must be clearly independent of the legislature, acting as servants of the constitutional order as a whole rather than merely as instruments of a majority of elected members of the legislative assembly. It is ultimately for the courts to determine cases before them in accordance with the principle of equality and with due regard for the other essential constituents of the rule of law. This is also an appropriate mechanism of reconciliation between the sovereignty of the parliament, as the supreme law maker, and the legal sovereignty of the courts, as the final arbiters of the law in particular cases.[121]

The fact that the legislature is interfering within the sphere of influence of the courts as a final arbiter of cases can be understood from the constitution which provides;[122]

> *Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

This constitutional provision tries to set the sphere of influence of the legislature in the one hand and the courts on the other hand. This law gives a power to the legislature to enact a law which contains the "circumstances" that the court should consider in denying or granting the right to bail. On the other hand it is clear from the constitution that it is the court and not the legislature which "may deny bail".

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[119] FDRE Constitution, Cited at note 4, Art.55(1)
[120] Ibid, Art. 79(1)
[121]MJC Vile, Constitutionalism and the Separation of Powers, 2nd ed. (Indianapolis, Liberty Fund, 1998),p.60

[122] FDRE Constitution, Cited at note 4, Art 19(6)

Here the question is as to which organ is denying the right to bail, for instance, when a law is enacted that requires the courts to deny bail when "a person is suspected with a corruption offence which entails ten years or more rigorous imprisonment" or is suspected to commit an offence of "dangerous vagrancy" or else? It is clear that here the courts are serving as mere servants of the legislature and they are not exercising any judicial power. The law by itself is not a law rather a decision of the legislature that is to be expressed within the mouth of the judge. Here the legislature is exceeding its power and involved itself in adjudicating matters of which the courts are empowered to do so. The role of the legislature as per the constitution is to prescribe the "circumstances" on which the courts should rely in deciding on the question of granting bail or not.

In this regard a question was raised before the CCI to determine the constitutionality of the Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation which prescribes a person suspected of committing an offence of corruption which entails ten or more year of rigorous imprisonment shall not be granted the right to bail.[123] The CCI decides to the affirmative and it provided that the legislature in its power of prescribing "circumstance" it can either set the particular conditions that should be considered by courts in deciding to grant bail like as it is provided under article 67 of the Criminal Procedure, which they call it 'factual circumstance' or it may list down the type of crime or the range of the sentence that one is to serve provided he/she is found guilty like as it is set under the VCP and the Anti Corruption Proclamation Special Procedure and Rules of Evidence (amendment) proclamation respectively, what they call it a 'legal circumstance'.[124]

However, the decision of the CCI seems not to consider the requirements of the rule of law and the principle of separation of power which are the core values of the FDRE constitution, let alone the way this particular provision is framed. The rule of law dictates that laws to be enacted by the legislature be in general terms and must not embody a judgment concerning the appropriate treatment of a specific individual.[125]A bail law which requires a court to deny

[123] CCI Ruling, Cited at note 1
[124] Id
[125]Peter, Gerangelos, The Separation of law and Legislative Interference in Judicial Process: Constitutional Principles and Limitations (Hart Publishing, Port Land, USA, 2009), p.287

bail when a person is suspected of committing an offence of corruption which entails a penalty of ten years or more or with an offence of dangerous vagrancy is too specific and embodies a judgment concerning the appropriate treatment of a specific individual concerned.

From the basic structure of the above particular constitutional provision and the overall values accepted by the constitution there are certain implications we can draw to consider that the 'circumstance' indicated is a 'factual circumstance' as opposed to 'legal circumstance'. The basic structure of Art 19(6), the fact that it gives a role to both the court and the legislature indicates that both have a sphere of influence on the question whether or not to grant bail. Had it been the circumstance under this particular provision intended to refer a 'legal circumstance' there would have been no reference to the courts as the courts has anything to do here.

The role played by the courts in determining as to whether the particular offence with which the accused is suspected to commit really falls within the range of a not bailable offence or whether the public prosecutor has sufficient reason to suspect for a corruption offence, cannot be considered as a role played by courts pursuant to this particular provision as is claimed to be by the CCI. This latter role is a general role of the courts played from their role to enforce the constitutionally guaranteed rights. It is after the Public Prosecutor shows that it has sufficient reason to suspect a person for that particular offence that the right to bail comes in to picture. This is true in light of the fact that in Ethiopia the CPC under Article 49 and 51 requires that arrest to be made when there is a reasonable suspicion and the public prosecutor is required to institute proceedings as per article 40 and 41 whenever he is of opinion that there are sufficient grounds for prosecuting the accused and he is required to refuse to institute a charge if he is of opinion that there is not sufficient evidence to justify a conviction.

Ato Wondwossen also shares this argument. According to him the argument that the role of the court is to assure the existence of a prima face case on behalf of the public prosecutor does not look justifiable as the right to bail is in principle to come following establishing prima face case to accuse for the particular offence and there is no point in making the suspect's release

conditional as there is no need to conduct trial unless the public prosecutor establishes the existence of a prima face case.[126]

The second reason that forced the legislature to enact such a law is that it believed that to have a law which prohibits any admission to bail helps to control such crimes. This reason leads to look in to the models of criminal justice. Currently there are two competing models of criminal justice, the due process and the crime control model.[127]

The proponents of the crime control model believes that once a person is charged for commission of a certain offence he is no more innocent from that time on wards as the police and the prosecution has accurate screening procedures to file the charge against such a person.[128] It is simply because the criminal justice system cannot duly convict and punish at this stage in the process is an insufficient reason to release the defendant. He is likely to abscond from the jurisdiction or commit further crimes against society if he is released. In addition they believe jail time at this stage serves an educative function, reminding the defendant that "crime does not pay" and to acknowledge their wrong doing while providing a taste of the final disposition.[129]

The proponents of the due process model to criminal justice in contrast adhere to the strongest presumption of innocence. According to them, the accused is not a criminal; it is only a conviction pursuant to the highest standard of proof that can brand him guilty, until that verdict the defendant remains innocent in the eyes of the law. In the abstract, pretrial confinement flies in the face of this fundamental presumption and considers pragmatically incarceration founded upon a guilt-based presumption to be a self-fulfilling prophesy.[130] Moreover, the due process model tries to substantiate its argument by showing the draw backs of the crime control model. Incarceration may result to miscarriage of justice by forcing the defendant to accept an undeserved conviction because he lacks the means and will to fight the charges to the bitter end

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[126] Wondwossen Demissie. "The Right to Bail in Ethiopia: Respective Role of the Court and the Legislature," Journal of Ethiopian Law, Vol. 23 No 2(2009), p.23
[127]Erik G. Luna, "the Models of Criminal Procedure," Buffalo Criminal Law Review Vol. 389 No 2 (1999),p.390
[128] Ibid, p. 409
[129] Herbert L. Packer, "Two Models of the Criminal Process," 113 U. Pa. L. Rev.Vol.1 No 5 (1964), p.39
[130] Luna, Erik G, Cited at note 127, p. 410

in addition to receiving de facto punishment well in advance of a final verdict through the loss of his employment and reputation in the community.[131]

It is true that in Ethiopia the law requires that arrest to be made on a court warrant or on a reasonable suspicion[132] and the public prosecutor is required to institute proceedings whenever he is of opinion that there are sufficient grounds for prosecuting the accused and he can refuse to institute a charge if he is of opinion that there is no sufficient evidence to justify a conviction.[133]But there are also chances where the public prosecutor is required to institute a charge in doubtful cases where he is ordered by the Advocate General.[134]

It is also a common phenomenon that persons are charged wrongly and a lot of persons are found innocent each year and the conviction rate in Ethiopia is said to be 36%.[135]Thus, the crime control model starts from a false premise and cannot help in the fair administration of justice.

On the other hand when we see the due process model it respects the right of the suspects to be presumed innocence until they are found guilty by the trier of fact. This is also true in light of the broad understanding of the presumption of innocence prevailing in the FDRE constitution as well as the international covenants ratified by Ethiopia which are part and parcel of the Ethiopian law as well as the norms to be considered while interpreting the constitution. The fact that the Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation and the Dangerous Vagrancy Proclamation are issued to control such crimes as the cost of suspects not yet found guilty is contrary to the underlining principles of the FDRE constitution.

The other supplementary reason that the legislature puts as a justification for the legality of having a law which totally prohibits any possibility of admission to bail is the existence of similar laws in other countries which are believed to be democratic including in the U.S.A. Though it is important to see experiences of countries which are assumed to have developed a

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[131] Ibid
[132] Criminal Procedure, Cited at note 8, Art 49 and 51
[133] Ibid, Art. 40 and 42
[134] Ibid, Art.41
[135] Fortune Newsletter, Vol. 12 No 587 accessed from www.aigaforum.com/.search?query=democracy&hits *on 31, 8, 2011*

good record of human rights protection in order to enact a given law, it is fallacious to justify the constitutionality of a given law solely on that basis.

This being the preliminary critic to the allegations of the HPR the other thing that should be emphasized is that it is incorrect to say that there is an experience in the U.S.A polity to have laws which absolutely ban the right to bail in a criminal trial in Ethiopia. The case of U.S Vs Salerno is put as an instance where by a ban on the right to bail is found justifiable by the Supreme Court of America within the minutes of the HPR. Unless this is taken as lack of appreciation of facts of the case this cannot be taken as an example to the case before the HPR.

The case of US Vs Salerno is a typical case which settled the issue of whether The Bail Reform Act of 1984 (Act) which requires courts to detain prior to trial arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community" is constitutional in light of the due process concerns of the 5th Amendment of the American Constitution.[136] In this case as well as in any other Federal or State Constitution within the American polity there is no law which totally bans an admission to bail a priori rather the US Supreme Court in Hunt Vs Roth decided such practice to be against the substantive due process.[137]

3.5. The Right to Bail and CJP of Ethiopia

3.5.1. The CJP on Hierarchy of Constitutional Norms

Every government that comes to power comes up with its own version of CJP that is crafted to meet the objectives it wants to achieve in relation to that specific area of interest. The policies a given government follows in relation to a specific area is different for a variety of circumstances including the priority given in relation to the subject and the ideological differences on the social, cultural, and economic, and political matters in relation to the subject among other things. Due to this many countries have their own peculiar policies on criminal justice. Moreover, the political parties in a given country may follow different policies in relation to the same area of interest

[136] United States v Salerno, Cited at note 114
[137] Hunt v. Roth, 648 F.2d 1148 (1981)

like criminal justice though it may not be necessary to have a different policy in every respect of the social life. During election among the many factors the electorate considers, the policy a given party follows in relation to a specific area of interest has a paramount importance to casting its vote. Thus, the parties to a greatest extent try to craft a policy that best suits the interest of the public at large taking in to account the situation at hand and after conducting a thorough study.

In our country the CJP followed by the ruling party EPRDF and some of the opposition parties has a remarkable difference though many of the opposition parties do not have a policy at all let alone CJP.[138] The difference is also debated by the members of parliament in relation with the enactment of the Revised Anti Corruption Special Procedure and Rules of Evidence which denies bail for suspects accused of committing corruption punishable with more than ten years of imprisonment.[139] The fact that public interest is to prevail over individual interest is also envisaged in the CPC(draft) which contains a provision which states that a suspect or an accused can be denied the right to bail when the court believes that the release of such person negatively affects public interest.[140]

Some relate the difference between the political parties on their CJP comes largely with the difference they hold on the status of group and individual rights as they are recognized under the FDRE constitution. While the ruling party EPRDF believes there is a hierarchy between the group and individual rights by asserting that group rights are higher in hierarchy than their counter part individual right, the opposition parties reflected an idea which supports the inexistence of any hierarchy between such rights and any policy relating to the group and

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[138] Mersie Kidan, Liberal Democracy Vs Revolutionary Democracy, p.4 accessed from www.aigaforum.com/.search?query=democracy&hits last visited on 31, 8, 2011. This difference is shown to be manifested in many instances including during election campaigns, day to day running of their business, and in the law making process. In this regard while the ruling party is inclined to give a priority to protecting the interest of the public at large as represented by the Nation, Nationality and people, the other opposition parties notably the CUD has another policy which emphasis on balancing the interest of the public and the individual freedoms.

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[140] FDRE Criminal Procedure Code (Draft) , Art 124(4)

individual rights must be made on balancing the two rights. Thus, any CJP of the ruling party is targeted to protecting group right than the individual rights. Accordingly, the issue is as to whether there is a hierarchy of norms within the FDRE constitution and as to whether the hierarchy within the constitution is between group and individual rights.

When we come to our question though it is true that there is hierarchy of norms within the FDRE constitution[141], it is doubtful as to whether there is any hierarchy between the individual and group rights in the constitution. As we can see from the CJP of the FDRE government a clear hierarchy is placed in the protection of the individual and group rights.[142] However, other persons including those that work within the criminal justice system attach this with the place given to the Nation, Nationalities and Peoples under the FDRE constitution, as holders of the sovereign power.[143] According to them the constitution by considering the Nation, Nationality and people as holders of the sovereign power puts them at the apex of the holder of all rights and privileges provided within the constitution.

However, this seems to be an erroneous understanding of the other pillars of the constitution including the constitutional principle for the respect for human and democratic rights. The FDRE constitution beyond guaranteeing human and democratic rights, it considers them to be equally fundamental principles of the constitution under chapter two of the constitution.[144] The constitution considers the human rights and freedoms as emanating from the nature of mankind and inviolable and inalienable. Moreover, to respect human and democratic rights is a fundamental principle of the constitution. Thus, as the constitution considers respect for human and democratic rights as equally fundamental principle of the constitution as sovereignty of the

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[141] The existence of hierarchy of norms can be understood from the fact that the FDRE constitution puts an extraordinary protection to certain rights including protections during the time of emergency and very strict amendment procedures. For instance in this case the amendment procedure for the rights provided in chapter three of the constitution, Art 104 and 105 is stricter than the amendment procedure followed to the remaining provisions of the constitution. As the same time the rights provided under Art 1, 18, 25, 39(1,2) of the constitution cannot be suspended even at the state of emergency as per Art 93(4)(c) of the FDRE constitution.

[142] There is a continuing debate on the existence of any hierarchy in the protection and promotion of human rights from the perspective of interdependence and indivisibility of human rights. Tom Farer, "the Hierarchy of Human Rights," American University International Law Review, Vol. 8 Issue 1 Article 10 (1992)

[143] FDRE Constitution, Cited at note 4, Art 8, An Interview with Ato Wondu, Head of Legal Reform Core Process, and Ministry of Justice also indicated this fact.

[144] Ibid, Art 10

Nation, Nationality and people there is no possibility that the group rights can be privileged over the individual rights.

3.5.2. The Right to Bail under the CJP of Ethiopia

One of the areas the CJP of Ethiopia concerns is the right to bail. The right to bail is discussed in many areas of the CJP having its own positive and negative implications on the enjoyment of the right. Though the right to bail is one of the fundamental human rights of arrested persons recognized under the FDRE constitution[145], the CJP seems to place innumerable burdens on its enjoyment. The Policy together with the laws promulgated on the basis of the Policy has placed many problems on the enjoyment of the right itself and the accompanying benefits like full access to justice among other things.

Among the benefits the CJP gives to the persons subject to bail includes its concern on the speedy disposal of cases involving persons under custody due to denial of bail.[146] The protection in this regard ranges to the extent of putting a special time frame for the start and completion of investigation and court hearing. In addition the policy frame work provides for the possibility of laying administrative penalty on public prosecutors for ethical misconduct if they fail to accomplish the prosecution process of the concerned persons on the given time frame.[147]

This is even more reinforced in the draft new CPC by providing time frame for the start and completion of a given case and also revised the consequence of delay to amount to the release of the concerned accused which is more related to the merit of the case in addition to the possibility of penalizing the public prosecutor on ethical considerations.[148] Many other policy frame works are provided that relate to the treatment of persons not released on bail for various reasons including providing separate place where such suspects are to be detained and other mechanisms of release like release by entering in to an obligation for suspects of bailable offences in case they fail to provide sufficient guarantee for their conditional release due to financial or other constraints.[149]

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[145]Ibid, Art 19(6)
[146] FDRE Criminal Justice Policy 2011, Section 3.6 cum 3.16.1
[147] Ibid, Section 3.7
[148] The time line for speedy case dispatch is also included in the draft Criminal Procedure Code of 2011
[149]Criminal Justice Policy, Cited at note 146, section 3.16.1(d) and 3.16.1(e)

However, the CJP has also come up with its another version of story that could have a serious implication on the possibility of release on bail and the overall possibility of acquittal of those persons not admitted to bail for various reasons. The list of offenses which are to be considered as not bailable has shown an increment in the CJP coupled with additional circumstances and pre conditions for release on bail. The investigation and data gathering techniques of the police has also shown an increment which would in effect result to empowering the police to an extent of further jeopardize the principle of equality of arms of the prosecution and the defendants. Coupled with this the CJP has provided the possibility of shifting the burden of proof to the defendants when the offences concerned relates to terrorism, corruption, offences against the constitution and the constitutional order, or offences committed by organized groups which would have a negative implication on the constitutionally guaranteed right of presumption of innocence of the defendant.[150]

Accordingly, a person suspected of committing terrorism, corruption, genocide, rape, sexual harassment of minors, offenses committed by organized groups, offenses against the constitution and constitutional order, and an offence which entails fifteen years or more rigorous imprisonment will not be released on bail. [151] Moreover, the court can deny bail where the public prosecutor shows that the concerned suspect has no good record of his past criminal records and the release of the suspect could affect 'any public interest' in addition to those circumstances put under article 67 of the CPC.[152] Moreover, persons released on bail can be required to report regularly to a certain governmental body, to stay out of reach of certain places, not to move from any specified place, to stop from doing or practicing something, or to stay out of the reach of the victim and witnesses.[153]

Besides, the police are empowered to use extra ordinary investigation and data gathering techniques like hacking private communication devices with or without a court order,

[150] Ibid, Section 4.4
[151] Ibid, Section 3.21.3
[152] Ibid, Section 3.21.1
[153] Ibid, Section 3.21.2

investigating as undercover agent, and using other necessary electronic devices among other things.[154]

Many of these powers are already included in the new laws of the Anti Terrorism Proclamation, RACSPREP, the new Criminal Code, and other areas of law. The remaining policy priorities of the ruling party concerning bail are believed to come in due course with the promulgation of the new CPC which is scheduled to come as a law in the near future.[155]

What can be understood from the CJP frame work is that the number of suspects to stay at custody pending their case is to increase gradually. With the increase of the techniques of investigation and data gathering of the police coupled with the possibility of shifting the burden of proof to the defendant the chance of acquittal of such persons is hardly possible with the fact that such persons are behind bars and do not have enough freedom to locate and organize their evidence necessary for their acquittal. This all summed the right to bail under the current CJP is extremely circumvented.

[154] Ibid, Section 3.17 cum 3.17.2

[155] The final version of the new Criminal Procedure Code is already approved by the Council of Ministers this year and many of the policy priorities I mentioned are included in this law. The ruling government as a government with a dominant seat in the parliament with a seat of 99.6% coupled with the party centralization policy it follows, it is a fact that this draft is definitely to be a law in the near future with its burdens and benefits.

Chapter Four

The Role of Other Fundamental Rights in Defining the Scope of the Right to Bail

The FDRE constitution assigns the power of constitutional adjudication to the upper house of the legislature, the HF, which is composed of representatives of the Nations, Nationalities, and Peoples of Ethiopia.[156]The House while adjudicating a constitutional issue is assisted by a technical committee called the CCI, composed of legal professionals and members of the House.[157]The role of the CCI predominantly is deciding on constitutional disputes brought before it and then prescreens cases eligible for constitutional adjudication though in both cases the decision of the Council is not final due to the fact that its decision is appealable or has only recommendatory value.[158]

In this demanding task of constitutional interpretation the CCI as well as the HF have given their verdict on various constitutional disputes including the right to bail. To create a uniform interpretation of constitutional disputes throughout the cases the CCI as well as the HF are empowered to develop their own principles of constitutional interpretation.[159] It is also made obvious that when the matter brought before the institutions empowered to interpret the constitution is relating to fundamental rights and freedoms enshrined in the constitution, such matters shall be interpreted in a manner conforming to the principles of the UDHR, international covenants on human rights and other international instruments adopted by Ethiopia.[160]

The CCI as an institution empowered to assist in the interpretation of the constitution is required to consider the principles of the UDHR, international covenants on human rights and

[156] The house is composed of one member of each Nation, Nationality and People plus one additional member for each one million of the population of the Nation, Nationality and People. The House Currently constitutes 121 members which are expected to be 137 in the next house http://www.hofethiopia.gov.et

[157]According to art.82(2) of the FDRE Constitution The CCI consists 11 members eight of them are legal professionals and the other 3 members of the house of either legal professionals or non legal professionals

[158] Constitution of the Federal Democratic Republic of Ethiopia, Cited at note 4 , Art.84

[159] CCI Proclamation, 2001, Proclamation no. 250, Neg. Gaz., Year 7 No. 40, Art. 20(1)

[160] FDRE Constitution, cited at note 4, Art. 13(2)

international instruments adopted by Ethiopia, as principles of interpretation of the constitutional provisions involving the human rights and freedoms recognized in the FDRE constitution.[161]

The right to bail is recognized under Article 19(6) of the FDRE constitution in a manner that can bring issues of interpretation to its scope. While some say that the legislature can limit the scope of the right by listing some offences as not bailable, others disagree with this proposition and claims that the role of the legislature is to prescribe the 'factual circumstances' that should be considered by courts in entertaining disputes involving the right to bail.[162]

The dispute concerning this point of difference was litigated before the courts especially in relation to the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation which require courts to deny bail for persons suspected of committing corruption offences punishable with more than ten years of imprisonment. The case was brought before the CCI to determine its constitutionality which finally was decided in favor of those who consider the proclamation as constitutional. The decision of the CCI on this issue basically comes by interpreting Article 19(6) which provides that;

> *Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

Though the CCI uses other constitutional provisions to define the scope of the right to bail, the material part of the constitutional provision that is used to reach at a decision by the CCI is the word which states "…in exceptional circumstances prescribed by law…".The CCI in its ruling defines 'exceptional circumstances' to mean either 'legal circumstance' or 'factual circumstance' and considers within the constitutional mandate of the legislature to enact laws which denies bail or prescribe factual circumstances which the courts must follow in deciding any claim concerning the right to bail. The decision of the CCI seems to say that the alpha and omega of the source of conflict concerning the scope of the right to bail boils down to

[161] CCI Proclamation, Cited at note 159, Art 20(2)
[162] CCI Ruling, Cited at note 1

interpreting the word 'circumstance' as it is stipulated under Article 19(6) of the FDRE constitution.[163]

The decision of the CCI apart from failing to define the right to bail in a manner that respects the principle of interpretation in case of exceptions which provides exceptions to be interpreted strictly respecting the ultimate enjoyment of the right by the right holder which is also widely used principle of interpretation in many court decisions in Ethiopia[164], it seems also not to consider the role of other fundamental rights recognized under the constitution and other international instruments adopted by Ethiopia to define the right to bail.[165]

Thus, the next section makes a survey of the role of the right to liberty, the right to the presumption of innocence, the right to access to justice, and last but not least the due process of law in defining the scope of the right to bail in Ethiopia. This is made in terms of showing the impact of the CCI ruling, which up held the existence of laws which deny bail to certain category of offences, on the enjoyment of the right to liberty, the right to presumption of innocence, the right to access to justice, and the due process of law. The analysis in effect is hoped to help increase our understanding of the scope of the right to bail from the perspective of the aforementioned rights as well.

As we will see in the following section the right to bail is defined in terms of the aforementioned rights in many human rights instruments of which Ethiopia is a party including in the UDHR and the ICCPR. Though I found it to be insufficient treatment, the CCI has also tried to make a reference to some of the aforementioned rights including the right to liberty, the presumption of innocence, and the right to access to justice while defining the right to bail as it is recognized under article 19(6) of the FDRE constitution.

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[163] CCI Ruling, Cited at note 1, p.7, Para. 2

[164] Ato Seid Yimer Vs Amhara Regional State Anti Corruption Commission, Federal Supreme Court Cassation Division, File no. 34077, Decided on Hamle 21, 2002. In this case the court said courts should follow principles of interpretation that entrench the ultimate enjoyment of the right holder in cases while they interpenetrate provisinon which are an exception to a general rule.

[165] The precedents of the HoF also shows that fundamental rights and freedoms are defined in a way that gives effect to the constitutional provision which requires fundamental rights recognized under the constitution to be defined in a manner that confirms with the UDHR and other human right instruments adopted by Ethiopia. For instance in the case of Benshangul Gumuz Regional State Election Case and the Silte Case of involving the right of self determination the HoF opted to widely use other fundamental rights in defining the rights contested.

4.1. The Right to Personal Liberty

Evolution of the Right as a Check against the Exercise of Arbitrary Power

Right to personal liberty is amongst oldest and fundamental rights treated in relation to the right to bail. Due to the fact that the denial of bail has an immediate consequence of taking the personal liberty of the suspect concerned, the role of this right in defining the scope of the right to bail is paramount. The right to personal liberty in its defining role of the right to bail requires government authorities not to detain a person unless there is justifiable ground to do so. As we are going to see the right to liberty prohibits any form of arbitrary detention including through an unjustified bail practice.

Though there was no authoritative definition to the scope of the right to personal liberty in the past, many thinkers has tried to show its scope in relation to the fair share of the government to limit the enjoyment of the right concerned. Scholars that evolve during the Renaissance like John Locke considers the right to liberty as part and parcel of the right to property.[166] They believed that any unjustified encroachment with the right to liberty on submitting the right to public deliberation means to contradict with the basic reason human beings come out of state of nature and purported to establish a government through their mutual consent and understanding. John Locke attached particular significance to the right to liberty and believed that "the great and chief end of men's uniting in to common-wealth's, and putting themselves under a government, is the preservation of their property".[167]

Montesquieu asserted that equating democracy with liberty is an error in which "the power of the people has been confounded with their liberty", though, he believes that liberty is not the right to do whatever one pleases, for then everyone would be under constant threat owing to other doing the same.[168] He believed as each of us has liberty only if all are restrained from doing harm to

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[166]Brain Z.Tamanaha, On the Rule of Law: History, Politics, and Theory (Cambridge University Press, New York, 2004) , p.50

[167] John Lock, Second Treatise of Government, p.66, Cited at Brain Z.Tamanaha, On the Rule of Law: History, Politics, and Theory (Cambridge University Press, New York, 2004), p.50 Here the term 'property' is to include the right to liberty as we have mentioned it above at note 1.

[168] Baron de Montesquieu, Sprit of laws, J. V. Pritchard (ed.), Vol. 1 (London, Bell and Sons), 1914, p.161 Cited at Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press, New York, 2004), p.52

others, the law should create a scope of secure action within which individuals may do as they please.[169] But there was a question like how much of human life should be assigned to individuality, and how much to society? Or what is the rightful limit to the sovereignty of the individual over himself? Where does the authority of the society begin?

John Staurt Mill, a thinker who has devoted his life researching on the right to liberty, while responding for the above question provides, as soon as any part of a person‘s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open for discussion.[170] But, he believes, there is no room for entertaining any such question when a person’s conduct affects the interests of no person besides himself, or need not affect them unless they like (all persons concerned being of full age, and the ordinary amount of understanding) though such conceptions can raise a couple of questions under the current scenario.[171]

The right to personal liberty has a special place in the hearts and minds of persons throughout history, and laws and court decisions that has an impact of limiting the right to liberty including pretrial detention are expected to balance between the reasons for arrest or detention and the right to liberty and to be guided in fact by the balance between the rights of individual offenders and the rights of victims and the concern of society for public safety and crime prevention and the role of the right to personal liberty in defining the scope of the right to bail is treated in relation to this fact. [172]

The Right to Personal Liberty under Ethiopian Scenario

The right to personal liberty is guaranteed under the FDRE constitution in a way that is similar with the widely accepted international instruments like the ICCPR, UDHR, and African Convention on Human and Peoples Rights. As a recent in its history it is believed that the FDRE constitution has taken a lesson from its earlier counter parts in formulating the provisions of the constitution in this manner.

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[169] Id

[170] John Staurt Mill, On Liberty (the Floating Press, 2009) , p.128

[171] Id

[172] United States v. Salerno, Cited at 114

Under the FDRE constitution the right to personal liberty is treated in two independent provisions as follows;[173]

Article 14 of the FDRE constitution provides;

> *Everyone has the inviolable and inalienable right to life, the security of a person and liberty.*

On the other hand Article 17 provides;

> *1. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> *2. No person may be subjected to arbitrary arrest and no person may be detained without a charge or conviction against him.*

It seems that there is inconsistency between the Amharic and the English version of the constitution. The first inconsistency relates to the scope of protection of the right concerned. In this sense while the Amharic version of the constitution provides that the right to liberty can be deprived when the procedures established by the law provides so, the English provision on the other hand requires a higher standard by providing the need for the existence of laws that sets the grounds for deprivation of personal liberty in addition to the procedures established by law.[174] Thus, while the English version provides procedural and substantive safeguards for the right to liberty the Amharic version only provides for the procedural safeguards. The other serious flaw between the Amharic and the English

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[173] Constitution of the Federal Democratic Republic of Ethiopia,1995, Proclamation no 1, Neg. Gaz., Year 1 No 1 ,Article 14 and 17. The treatment of the right to liberty in two independent provisions of the constitution can show the weight given to the right concerned. But unlike the other rights provided under the constitution, there is no an explicit right to personal liberty rather it emphasized on how the right to personal liberty can be deprived on justifiable grounds. However, there is no question as to whether the right to personal liberty is guaranteed under the FDRE constitution due to the fact that article 14 guarantees a general right to personal liberty and the constitution requires under Article 13(2) the fundamental rights and freedoms specified under the constitution to be interpreted in a manner conforming to the UDHR, international covenants and international instruments adopted by Ethiopia Moreover, the UDHR as well as the ICCPR and other international instruments which provide the right to personal liberty explicitly are made an integral part of the law of Ethiopia as per Article 9(4) of the Constitution.

[174] FDRE Constitution, Cited at note 8

version comes when the word 'arbitrary' in the English version is translated to mean against the procedure established by law in effect the Amharic version considers deprivation which are 'arbitrary' and deprivations which are against 'the procedure established by law' as synonymous.[175]

The inconsistency shown above may have a serious implication on the scope of protection accorded to the right to liberty and the implementation of the UDHR and other international treaties ratified by Ethiopia including the ICCPR due to the fact that the protection accorded to the right to liberty in the UDHR as well as the ICCPR is similar to the English version than the Amharic one. For the fact that the Amharic version of the FDRE constitution has a final authority over the English Version[176], it is necessary to reconcile the gaps between the FDRE constitution and the UDHR and the ICCPR for the sake of effective protection against any form of pretrial detention.

In this regard while trying to reconcile the gaps it is better to look in to the section of the FDRE constitution which provides that the scope of application and interpretation of the fundamental rights and freedoms shall be made in consonant to the principles of the UDHR, international covenants on human rights and the international instruments adopted by Ethiopia.[177] As Ethiopia is a country which adopts the UDHR, the ICCPR and other international instruments on human rights and fundamental freedoms the terms of the constitution are to be understood in a way that conforms to those instruments. The fact that the constitution provides that the fundamental rights and freedoms be construed in a way that conform to the instruments is understood to mean that the country has decided to give domestic law force to the instruments concerned.[178]This line of understanding is also accepted in other countries having similar provisions.[179]

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[175] Ibid, Article 17(2) "□□□□□ □□ '□□□ □□□□□□□ □□□□ □□' □□□ □ □□ □□□□□□□ □□□ □□□□□□□ □□□□ □□□□□□"

[176] Ibid, Article 106

[177] Id

[178] Michael Van Alstine, "The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law," Maryland Journal of International law, Vol. 24 No. 63(2009) , p. 70

[179] The Spanish Constitution 1978, section 10(2) provides that "the provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human

Though we can reconcile the inconsistencies above through the instrumentality of the constitution itself there is still difference on the issue as to whether the word 'arbitrary' in these instruments is introducing a qualification of lawfulness as it is used under the Amharic version of the FDRE constitution or it is imposing a higher international standard up on the content of the domestic laws which has also a meaningful advantage to determine the scope of the right to bail in Ethiopia.[180]

In this regard while the proponents of the narrow interpretation believe that an arrest or detention is 'arbitrary' if it is unlawful, that is, not in accordance with procedure as laid down by law. The proponents of the wide interpretation suggest on the other hand that an arrest or detention is 'arbitrary' if it is unlawful or unjust, that is, under the provisions of a law that do not accord with the principles of justice. Arrest or detention is 'arbitrary' if under a law the purpose of which is incompatible with respect for the right to liberty and security of person.[181]

According to the narrow interpretation of the word 'arbitrary' simply means "unlawful," then the prohibition in Articles 9 of the UDHR and 9(1) of the ICCPR would not apply to any lawful governmental action, regardless of how oppressive the action, if it conformed with domestic law.[182] Such an approach would essentially allow each state, through its own domestic law, to determine the scope of an individual's right to freedom from arrest or detention including the right to be released on bail. Thus, deprivation of personal liberty even as a result of despotic, tyrannical, objectively unreasonable legislation would therefore be acceptable.

Given the effect of the narrow interpretation of 'arbitrary' for preventive detention, it is contended that the wide interpretation of 'arbitrary' is more persuasive. Thus, the broader

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Rights" ; The Constitution of the Republic of Yemen 1994, Article 5 also provides "The state shall abide by the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the League of Arab States, and the generally accepted norms of international law".

[180] Laurent Marcoux, "Protection from Arbitrary Arrest and Detention under International Law," Boston College International and Comparative Law Review, Vol. 5(1982) , p.349

[181] Id

[182] Ibid, p. 35

interpretation suggests the word 'arbitrary' should not just require a deprivation of liberty to be 'in accordance with procedures as established by law', but also imposes an additional higher requirement. The word 'arbitrary' is concerned with the actual content of laws, not just compliance with procedures in accordance with law.[183]

This broad interpretation is also upheld by the Human Rights Committee in Van Alphen v The Netherlands; while resorting to give meaning to word 'arbitrary' in Article 9(1) of the ICCPR. In this case the applicant was detained from 5 December 1983 to 9 February 1984 (a period of over nine weeks) without criminal charge or trial. The Committee confirmed that;

> *'Arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.*[184]

The Human Rights Committee has also reached at a similar conclusion in the case of A v Australia where it held:

> *The Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but interpreted more broadly to include such elements as inappropriateness and injustice.*[185]

At its twelfth session, the Commission on Human Rights mandated the United Nations Economic and Social Council to conduct a study into the phrase 'arbitrary arrest and detention'. In defining the terms of the study, suggestion was made that the word 'arbitrary' should be understood to mean arrest and detention either on grounds or in accordance with procedures other than those

[183] Id
[184] Van Alphen v The Netherlands, Communication No. 305/88, UN Doc. CCPR/C/39/D/305/1988
[185] A v Australia, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997)

established by law or under the provisions of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person.[186]

In light of the above definition, the fact that the legislature enacted various laws which deny the right to bail to particular offences is questionable. The impartiality, legality, and predictability of such laws should be analyzed in light of the safeguards of the right to liberty against any form of 'arbitrary arrest'. The drafters of the Vagrancy Control Proclamation tried to look at the constitutionality of the law which denies bail for persons suspected of committing the offence of dangerous vagrancy though the analysis was unsatisfactory.

The drafters of the VCP held a view that the existence of law or established procedure that allows arrest or detention does not by itself make the arrest or detention lawful as the law by itself can be found arbitrary in its purpose.[187] While explaining this fact, a person who participated in the public discussions for the enactment of the VCP which contains a provision for the total ban of the right to bail if suspected a dangerous vagrant affirms that the existence of laws and procedures for the arrest or detention of person is not enough to justify the arbitrariness or not of the action taken as the law and procedure concerned can be arbitrary by itself.[188] Regardless of this fact the legislature beyond raising the issue failed to see the contents of the VCP through the test of 'arbitrariness'.

At the same token the CCI has also tried to use the test of arbitrariness to the issue of the constitutionality of the RACSPREP which denies bail to persons suspected of committing corruption punishable with more than ten years of imprisonment. It said that the mere existence of law which prohibits bail cannot make the arrest lawful unless the law is fair and appropriate in the measurement of justice. However, finally it side steeped the issue[189] of whether the law

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[186] Claire Macken, Preventive Detention and the Right of Personal Liberty and Security under the ICCPR, 1966, (2005) 26 Adelaide Law Review, p. 40

[187] CCI Ruling, Cited at note 153

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[189] The ruling of the CCI on whether the Revised Anti Corruption Special Procedure and Rule of Evidence Proclamation is arbitrary or not would have been material to rule on the issue of whether the constitutional provision which provides bail not to be allowed "…in exceptional circumstances…." is to mean a factual or legal circumstance. However, in the absence of any decision on the arbitrariness or not of the law which prohibits any admission to bail it would be difficult to get the position of the CCI on this issue. Had the CCI tried to define the

which prohibits bail is arbitrary or not and changed the issue to determining the meaning of the word 'exceptional circumstance' as is used by Article 19(6) of the FDRE constitution than making a verdict on point of the arbitrariness or not of the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation.[190]

4.2. The Right to Presumption of Innocence

Introduction

The emergence of presumption of innocence is associated with the faithful acceptance of human beings as a law abiding and righteous mind as opposed to the negative conception of human kind. That the doctrine is based upon the well recognized fact, which courts judicially notice, that men generally obey the rules of criminal law, and upon the impossibility of obtaining and the consequent injustice of requiring affirmative proof from the prosecutor that he has done so in the particular case. [191]

The other thing supporting presumption of innocence is the fact that one can be accused of a crime without being a criminal and an elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment. This is already embraced in one of the oldest written codes of laws, the Babylonian Code of Hammurabi 1792-1750 B.C.[192]

The strong presumption in favor of pretrial release is ,therefore, believed to be tied in a philosophical if not a technical sense, to the presumption of innocence.[193] Thus, the use of the

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right to bail in this regard by resorting to the test of arbitrariness it would have been possible to determine on the meaning of 'circumstances' as it is stated in the constitution. Otherwise, defining what 'circumstances' is to mean without reaching at a mutually agreed position on whether the law is arbitrary or not makes the decision of the CCI incomplete.

[190] CCI Ruling, Cited at note 1

[191] Rinat Kitai, "Limits of Preventive Detention," Mc George Law Review, Vol. 40 (2009) , p.921

[192] Allen H. Godbey, "The Place of the Code of Hammurabi," 15 the Monist (1905). "It is a fundamental principle of the code of Hammurabi that the presumption is always in favor of the innocence of the accused: the burden of proof is thrown upon the accuser . . . . Not merely is the burden of proof upon the accuser, but in all primitive society [sic] the entire burden of accusation or indictment falls upon him. In this respect the legal procedure of Babylonia seems to have been that of all early nations."

[193] ABA Standard on Pre-trial Release, Cited at note 20, p.36

right of presumption of innocence as a tool of interpreting the scope of the right to bail is immense. However, the interpretive role of this constitutional right is held to be different in countries of the civil law and common law legal systems associated with its origin and development as we will see in the following section.

The Right to Presumption of Innocence and Pretrial Release: The Nexus

Though the right to presumption of innocence has a great role in defining the scope of the right to bail, the interaction of bail law with the presumption of innocence raises a number of complex and interlocking questions in the legal systems of the world. Surprisingly, in common law jurisdictions the possibility of conflict between the presumption of innocence and pretrial detention has not been seen as problematic by a majority of judges with the exception of the Irish Supreme Court which has taken a somewhat absolutist position on this issue, viewing the presumption of innocence as almost totally prohibiting any provision for pretrial detention.[194] There is also another major difference between the common law and civil law countries on the understanding of the meaning and scope of the presumption of innocence.[195]

A number of courts have also reached different conclusions on the question of whether pretrial detention even prima facie violates the presumption of innocence. The various conclusions on the question of whether pretrial detention violates the presumption of innocence arise because of a number of different views that can be taken as to the nature of the presumption itself. First, there is a divergence of opinion as to when the principle of the presumption of innocence comes into play; does it apply at the pretrial stage or merely at the trial? The legitimate purposes which may be served by the bail/pretrial release system will to a large extent depend on which view is taken on this first question. Second, there is a difference of opinion as to what the presumption of innocence prohibits; does it prohibit punishment in any circumstances other than following upon a criminal conviction; or, alternatively, does it prohibit any restriction of the accused's liberty premised on the view that he is guilty of the offence charged, even if such restriction on liberty

[194] Francois Quintard Morenas, The Presumption of innocence in the French and Anglo American Legal Traditions," The American Journal of Comparative Law, Vol. 58 (2010) , p.109

[195] Id

does not constitute punishment? If the former view is to prevail, it raises the question of distinguishing between punitive and non-punitive liberty depriving measures.

Bearing the above differences in mind, we can identify three distinct approaches to the question of whether pretrial detention prima facie infringes the presumption of innocence. The views taken in explaining the relation of the presumption of innocence and pretrial release are the narrow view, the intermediate, and the broad view.[196]

The narrowest view of presumption of innocence suggests that it is a rule applying merely at the criminal trial in order to ensure that a conviction will not be reached unless the accused's guilt has been proved beyond reasonable doubt and no objection can be made to pretrial detention on this basis.[197] On this view, it follows that the presumption of innocence is of no relevance at the pre-trial stage and there is no reason why various policies, including the prevention of crime, cannot be pursued at this stage of the criminal process.[198]

Though few studies have attempted to trace the development of the presumption of innocence as a doctrine in both common law and civil law legal traditions this narrow understanding of presumption of innocence is followed by the courts of the countries in the former legal traditions.[199] In Continental legal tradition including French the concept of presumption of innocence is thought in a great detail as having two distinct functions, namely a rule of proof and a shield against punishment before conviction, however, in the counter parts across the Atlantic the concept is understood briefly as amounting to little no more than an evidentiary doctrine with no application before trial.[200]

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[196] Sometimes Scholars disregard the intermediate view as a third view though it has a very important place in the legal system of some countries for explaining the relation of the presumption of innocence and pretrial release possibilities.

[197] P.J. Schewikkard, "the Presumption of Innocence: What it is?" S. Afr. J. Crim. Just Vol.11 (1998), p.396

[198] Id

[199] Morenas, Cited at note 194,p.109

[200] Joseph L.lesteer, ." Presumed Innocent Feared Dangerous: the Eighth Amendment's Right to Bail," Northern Kentucky Law Review. General Law Issue, Vol. 32 no 1(2005) p. 8-11), larry laudan, The presumption of innocence: Material or Probatory," Cambridge University Press (2005) p.334, and Francois Quintard morenas, "The Presumption of innocence in the French and Anglo American Legal Traditions," The American Journal of Comparative Law, Vol. 58(2010) , p.109

This approach is also understandable in light of the narrow meaning that the Supreme Court of America has granted to the presumption of innocence in Bell v. Wolfish, as "a doctrine that allocates the burden of proof in criminal trials", although this approach is highly criticized by many practitioners as well as the academicians as an unjustified narrowing down of the concept.[201] However, in the view of the Court, the presumption is not an omnibus claim of the innocence of every one charged with a crime. The presumption of innocence, the majority wrote, "is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial."[202]

The Louisiana Supreme Court put the same argument in blunter terms:[203]

> *The presumption of innocence is a guide to the judge. If it were absolute and operative at every stage of a prosecution, the defendant could never be jailed until conviction. It does not prevent arrest. There is little relationship between the right to bail and the presumption of innocence. The presumption of innocence is operative and protects against conviction, not against arrest.*

However, a series of critics by scholars alleges that the presumption of innocence should be accorded a broad meaning as a symbol of the proper attitude of the state towards the individual claiming that the presumption of innocence contributes to alleviating the sense of humiliation, rejection, and alienation that the individual may suffer when the state treats him as if he or she were guilty.[204]

The broadest view of the presumption of innocence asserts that presumption of innocence is a perspective which informs the entire criminal process from the commencement of proceedings to sentence and that the accused should in all respects be treated as innocent by the system until

[201] Bell V. Wolfish, 441 U.S. 520, 533 (1979)
[202] Larry Laudan, cite at note 200
[203] State Vs Green,275So.2d184,186(La.1973)
[204] Kitai, Cited at note 191, p.908

found otherwise by a jury after a trial or upon his own plea of guilty.[205] Thus, based on this broader conception of presumption of innocent suspects has the right not to be treated as criminals before conviction including the right to pretrial release.

However, this view does not consider restrictions to prevent pretrial absconding or interference with witnesses or evidence as offending the presumption of innocence because their purpose is to ensure that the judicial process will be carried out unhampered and these restrictions are in no way premised on the view that the accused is guilty; in contrast, a deprivation of liberty in order to prevent the accused from committing further offences or other reasons not rationally related with the condition of the suspect violates the presumption of innocence because it is premised on the view that the accused is guilty.[206]

A third possible view on the relationship between the presumption of innocence and bail law is the intermediate view. This view accepts that the presumption has application at the pretrial stage, but says that it only has application to the extent of prohibiting punitive deprivations of liberty. This approach necessitates an investigation into whether the measure in question is a punishment, or whether it simply regulates the liberty right of the individual for legitimate reasons, in the same way as, for example, the State may deprive the mentally ill of their liberty in certain circumstances, for reasons which are not punitive.[207] This is in contrast to the broadest view described above which draws a distinction not between punishment and regulation, but between measures which deprive an accused of liberty on the assumption that he is guilty of the criminal offence charged and those which do not; the former can only be legitimate if imposed after criminal conviction.[208]

However, the decision of the court in United States vs. Salerno which tries to classify detention as punitive and regulatory is highly criticized as a fallacy of the "definitional stop" argument in

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[205] Id

[206] Laudan, cited at note 200, p.336

[207] This view is accepted by the Supreme Court of America in a recent decision, United States v. Salerno, Cited at note 114

[208] Laudan, cited at note 200, p.336

defense of utilitarianism.[209] When the retributivist says that an exclusive interest in utility would justify punishing the innocent, the utilitarian replies: "But that would not be punishment at all, since punishment is by definition something imposed on a person for a crime he has committed!" This is not a very persuasive argument.[210] The court's aim is not to label imprisonment of the innocent as something other than punishment; we want to determine whether and why it is wrong, otherwise, the Court would sidestep the issue by calling it "regulation" as it is done in this case; we can't make imprisoning the innocent acceptable just by calling it regulation.[211]

This being how the concept of presumption of innocence is understood, various institutions which work on human rights concerns have taken the broadest view as an acceptable view to fully entrench the fundamental rights of individuals. Accordingly, the Human Rights Committee of the UN understood the concept as incorporated under Art 14(2) of the ICCPR broadly. In its general comment 13, it held;[212]

> *….by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of the trial.*

Similarly, the African Commission on Human Rights and the Inter-American Commission on Human Rights have interpreted the presumption broadly to include pre trial criminal process.[213]

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[209] Michael Louis Corrado, "Punishment and the Wild Beast of Prey: The Problem of Preventive Detention," Journal of Criminal Law& Criminology, Vol. 86 No. 3 (1996) , p.781

[210] Id

[211] Id

[212] General Comment of the Human Rights Committee of the UN adopted in its 21st session 13 may 1984, available at http;//www.unhchr.ch/tbs/doc.nsf, visited on 23 April 2011.

[213] Robert P Barnidge Jr, "The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the Right to an Impartial Hearing on Detention and Trial within a Reasonable time and the Presumption of Innocence," Afr. Hum. Rts. L. J, Vol. 4(2004), PP. 117-119.

The Right to Presumption of Innocence and Pretrial Release under Ethiopian Law

The right to presumption of innocence as a fundamental right of human beings is recognized by the FDRE constitution. The constitution provides that "During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves".[214] Beyond this many other provisions are incorporated in the constitution as a reflection of the concept including the right of arrested persons to remain silent[215] and their right not to be compelled to testify against themselves.[216]

Regardless of the fact that the right to presumption of innocence is recognized under the constitution a question can be raised on the meaning and scope of the presumption. The confusion come with the incorporation of the right under the title dealing with the right of "accused persons" as per the constitution as well as the wording of the provision itself restating "during proceeding" which may give diverse connotations. Is "During proceeding" to mean during the court proceeding or during the criminal proceeding including the treatments to be afforded in police station or any place outside the court room?

If our understanding of the term "during proceeding" refers to the former understanding, it means the presumption of innocence is to have a value only as an element of proof which is a narrow conception of presumption of innocence which is enforced particularly in many countries following the common law legal system. However, if we understand the term as showing the whole criminal proceeding till conviction, the presumption of innocence will have a value beyond an evidentiary purpose as a shield against any punishment prior to conviction including denial of bail which is a wider conception of the presumption which is also predominantly up held in the civil law legal system associated with the adversarial nature of the proceeding.

This being the point of difference there are other implications that can be taken from the constitution in support of the acceptance of a wider conception in the FDRE constitution. The constitution requires the fundamental rights and freedoms to be interpreted in a manner conforming to the principles of the UDHR, ICCPR and other international human rights covenants and instruments adopted by Ethiopia. The African Commission on Human and

[214] FDRE Constitution, Ccited at note 4, Art 20(3)
[215] Ibid, Art 19 (2)
[216] Ibid, Art 19(6)

Peoples' Rights as well as the Human Rights Committee of the UN understood the concept as incorporated under Art 14(2) of the ICCPR broadly in its general comment 13 to serve as a safeguard of the rights of the suspected and accused individuals from any punitive measures and treatments that compromise legal innocence before conviction including arbitrary denial of the right to bail in addition to its evidentiary role in the criminal process requiring the prosecution to adduce evidence to show the guilt of the accused beyond reasonable doubt.

4.3. The Right to Access to Justice

The FDRE constitution provides that "Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power." The use of the word 'justiciable matter' under this constitutional provision indicates the existence of rights which are not justiciable. The word 'Justiciability' is used to refer to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur and implies access to mechanisms that guarantee recognized rights.[217] Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties.[218] The existence of a legal remedy understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim are a defining features of a fully fledged right. [219]

When we see the justiciability of rights in light of the above definition there are two competing ideas which are evolving especially starting from the coming in to being of the two UN human rights conventions, namely the ICCPR and the ICSCER in 1942. Member countries to the UN are especially reluctant to accept the justiciable nature of the latter on account of the fact that the rights in such a convention demands resource and economic strength of countries unlike the

[217] Courts and the Legal Enforcement of Economic, Social and Cultural rights: Comparative Experiences of Justiciability, International Commission of Jurists, Geneva, 2008, p.6

[218] An extended judicial protection of rights may include other forms of adjudication – such as litigation brought by non-victims on behalf of victims, or on behalf of the public interest, but the absence of any role for victims seriously hampers the idea that they are true right-holders.

[219] Mixed Claims of German-American Commission, Decision in the Lusitania Cases, November 1, 1923, Recueil des sentences Arbitrates, Volume VII, P. 32, at 35. For a general panorama about the right to a remedy, see International Commission of Jurists, The Right to a Remedy and to Reparation for Gross Human Rights Violations. Practitioners Guide N° 2 (Geneva: International Commission of Jurists, 2006: available in English, French and Spanish.

rights stipulated in the former convention.[220] During the debates at the seventh session of the United Nations Commission on Human Rights for instance, India strongly favored the drafting of two covenants, emphasizing that economic, social and cultural rights differed from civil and political rights "in as much as the former were not justiciable".[221] It is believed that the main reason for the existence of two conventions on essentially similar human rights is the fact that those rights stipulated in the ICCPR are by their nature simple to fulfill without demanding states economic strength relative to those rights stipulated on the ICSCER and with the result that states can provide a mechanism of enforcement through courts.[222]

When we see this in the context of our country in addition to the fact that Ethiopia is a signatory country to the ICCPR, the FDRE constitution provides every person has the right to bring any justiciable matter before the court of law for the determination of his rights and privileges. [223] The question of justiciability of the right to bail in light of the existence of certain laws which prohibits any possibility for pretrial release was raised before the CCI.[224] The issue that was raised before the CCI is as to whether the RACSPREP which provides for the denial of the right to bail for persons suspected of corruption offences which carries more than 10 years of imprisonment is constitutional or not.

While entertaining this issue the CCI incidentally touched the relation of the right to bail with the right to access justice provided under Article 37 of the FDRE constitution. The question raised here was that whether the existence of a law which prohibits any admission to bail affects the justiciable nature of the right to bail. The CCI ruled that the existence of a law which prohibits any admission to bail do not violate the justiciable nature of the right to bail. The reason it provide is that making the corruption offences punishable with more than ten years of imprisonment not bailable do not mean the courts are absolutely denied of entertaining questions

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[220] The Role of the Courts in Protecting Economic, Social and Cultural Rights, p.690 accessed from www.omct.org/escr/documents/2004/05/d6138/ *on May 15, 2011*
[221] Id
[222] Id
[223] FDRE Constitution, Cited at note 4, Art 37
[224] Federal Ethics and Anti Corruption Commission Vs workers of commercial bank of Ethiopia (Criminal File no 7366, Federal Supreme Court, November 5, 2011(unpublished), Cited at Wondwossen Demissie. "The Right to Bail in Ethiopia: Respective Role of the Court and the Legislature," Journal of Ethiopian Law, Vol. 23 No 2(2009)

relating to the right to bail. After all, the CCI ruled, it is the courts that decide whether or not there is adequate reason to suspect and arrest someone in connection with the corruption offence and whether or not the facts alleged by the prosecutor constitute corruption.

We can agree that the court has a power to weigh the evidence of the public prosecutor to see whether or not there is adequate reason to suspect and arrest someone in connection with corruption offence and we can also agree that the court has a power to weigh whether or not the facts alleged by the public prosecutor constitute corruption, however, as to whether exercising such power really amounts to making the right to bail justiciable is questionable.

The facts alleged by the CCI are debated before the Courts and the Courts has already ruled that they do not have a power to weigh the evidence and facts alleged by the public prosecutor for the purpose of prosecution on the matter or for the purpose of release on bail. The only prerogative of the courts in any criminal cases is to hear based on the allegation of the public prosecutor and dispense the matter accordingly.

The issue as to whether the court has the power to rule on the existence of material facts that give raise to corruption was debated in the case of FEACC V Workers of Ethiopian Commercial Bank et al.[225]In this case the Public Prosecutor charged 12 suspects for a corruption offence. The defense lawyers for the 11th and 12th suspects raised a preliminary objection alleging that the material facts with which their clients are charged do not constitute an offence of corruption and since the facts do not indicate the commission of corruption, they pledged the court not to apply the corruption proclamation and to allow the release of the suspects on bail. However, in response the court ruled that since the prosecutor has alleged that the acts committed by each accused person, including the 11th and 12th persons, constitute or related to the offence of corruption, it will not go in to verifying the validity of the allegation to determine whether or not the facts constitute corruption and denied bail accordingly.

The other power of which the CCI considers the courts have in relation to the right to bail is related to the power to decide on the existence of adequate reason to suspect and arrest someone in connection with the corruption offence. In the case of Public Prosecutor V Engineer Hailu

[225] Id

Shawel et al[226] the suspects were accused with an offence which carries a punishment of life imprisonment or death. The accused requested the court to consider whether the evidence produced by the public prosecutor is enough to show a prima facie case against them to warrant the denial of bail under Article 63 of the CPC. Some of the persons accused pleaded the court to check the existence of a prima facie case than deny bail only by referring to the provisions of the Criminal Code. The Public Prosecutor on its turn pleaded the court not to involve in such exercise as Article 63 of the CPC does not give such power to the court. The Court after looking in to the argument of the parties ruled in favor of the Public Prosecutor and restrained itself in involving on the task of checking the existence of a prima facie case.

From the above cases we can understand that the court has already restrained itself both from exercising its power to weigh the evidence of the public prosecutor to see whether or not there is adequate reason to suspect and arrest someone in connection with corruption offence and its power to weigh whether or not the facts alleged by the public prosecutor constitute corruption.[227]

Assuming the courts are exercising such powers it is still doubtful that the right to bail is justiciable in this cases as the courts has no power to rule on issues of bail which it believes there is enough evidence and reasons to accuse the suspects. To the extent that suspects accused of a corruption offence punishable with more than ten years of imprisonment on the existence of enough evidence and reasons has no right to claim the right to bail for any reason before the court of law, it is difficult to believe that right to bail is justiciable as per the constitution.

In this regard it is better to mention the case of *W/ro Wulta V. Oromia Regional State Anti Corruption Commission*[228] who was charged with a corruption offence punishable with more than ten years of imprisonment. The suspect while serving pretrial detention found to be caught with cancer which can only be cured abroad according to the report of the Board of the Medical Directors. Due to this fact the suspect claimed the court to release her on bail regardless of the

[226] Public Prosecutor V Engineer Hailu Shawel et al, Cited at Wondwossen Demissie. "The Right to Bail in Ethiopia: Respective Role of the Court and the Legislature," Journal of Ethiopian Law, Vol. 23 No 2(2009)

[227] Ato Wondwossen in his Article has tried to show that the courts have the power to weigh the evidences of the public prosecutor as well as to look in to the reasons for arrest of the suspect. Wondwossen Demissie. "The Right to Bail in Ethiopia: Respective Role of the Court and the Legislature," Journal of Ethiopian Law, Vol. 23 No 2(2009)

[228] W/ro Wulta V. Oromia Regional State Anti Corruption Commission, Federal Supreme Court Cassation Division, file no.86407, Unpublished, Decided on Hamle 14, 2003

fact that the offence with which she was accused is punishable with ten years of imprisonment and thus not bailable as per the corruption proclamation.

The issue that was raised before the court was as to whether the right to bail is justiciable in case the suspect is accused of committing an offence of corruption punishable with more than ten years of imprisonment. Irrespective of the fact that the suspect is suffering from cancer the court ruled that it has no power to entertain the matter and grant the right to bail in such cases and ordered the suspect to follow her medical cases under the supervision of a police officer according to the rule and procedures of the prison administration. The ruling of the court shows that courts has no power to decide on the right to bail in case the offence for which the suspect is accused involves a corruption offence punishable with more than ten years of imprisonment which would in turn make the right to bail not fully justiciable.

The FDRE constitution provides that accused persons have the right "…. to adduce or to have evidence produced in their own defense, and to obtain the attendance and examination of witnesses on their behalf before the court."[229] However, the full enjoyment of this right is qualified on the existence of favorable conditions for the persons under pretrial detention and on the abolishment of any possible restraints that comes against the enjoyment of the right. The fact that a person is in detention due to absence of access to bail is one of the reasons that can be a hindrance for the full enjoyment of the right mentioned above.

Researches on the area indicate that the difference between being released prior to trial and being incarcerated often is the difference between an acquittal and a conviction. A freed defendant is able to better defend himself against the government and he can better assist his attorney in gathering evidence and securing witnesses so that the government's burden to convict remains high. Pretrial detention severely limits a defendant's ability to defend his case simply because his ability to contact the world is necessarily restricted. [230]

On the other hand the constitution guarantees the persons accused the right to "… to adduce or to have evidence produced in their own defense, and to obtain the attendance of and an examination

[229] FDRE Constitution, cited at note 4, Art 20(4)
[230] Joseph L. Lester, cited at note 200, p. 689

of witnesses on their behalf before the court". To fully exercise this basic right it is an elementary understanding that such persons should have guaranteed their liberty. Otherwise, it would be difficult to assume that the accused persons are participating equally in the collection of evidence necessary to impeach the evidences of their adversary, the public prosecutor.

Studies indicated that persons in custody during trial are more likely to be convicted than those released on bail awaiting trial.[231] This shows that there is direct relationship between defending one's while in custody due to absence of bail and the right to access to justice. A similar conclusion is also reached by the US Supreme Court in the case Roth v Hunt farming that the traditional right to freedom before conviction permits the unhampered preparation of a defense.[232]

4.4. The Right to Due Process of Law

Its Scope and Legacy

The concept of due process has a long history associated with the right to bail. The Magna Carta, Article 39, has a provision of which scholars has considered it as a forerunner of due process of law. It reads as;

> *"No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land."* [233]

When we come to the case of Ethiopia the concept of due process has come in to full picture through the Federal Act uniting Eritrea to Ethiopia in 1952 and the Public Rights proclamation of 1953 before it was officially incorporated to the 1955 revised constitution of the Empire of Ethiopia though similar provisions were found to exist in the 1931 Constitution as well.[234] The Eritrean Constitution of 1952 contained the concept of due process and it provides that no one

[231] Id
[232] *Hunt v. Roth*, 648 F.2d 1148 (1981)
[233] Magna Carta, I Statutes of the realm 6-7 (1810)
[234] James C.N. Paul and Christopher Calpham, Ethiopian Constitutional Development: A Source Book, Vol.1 (Artistic Printers, Ethiopia, Addis Ababa), 1967

can be deprived of the right to own and dispose of property 'without due process of law'.[235] This right has got a momentum in the 1955 constitution of the Empire of Ethiopia and the right to due process was crafted to be considered in other areas of rights than in entertaining the right to property. In this regard the constitution provides "No one within the Empire may be deprived of life, liberty or property without due process of law".[236]

This being how the concept of due process of law come in to existence in to the Ethiopian polity, the FDRE constitution of 1995 which provides, *"No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law."*[237],is considered to be unclear on the fact of whether due process is recognized due to the fact that the term "due process" is missing from the vocabulary of the constitution and it is replaced by other words which we are not clear as to whether the drafters of the constitution are referring to due process while incorporating words like this in the above constitutional provision.

The question as to whether the term 'in accordance with the law' and 'on the ground as are established by law' has the same meaning with the old concept of 'due process' of law has entertained divergent views. James C.N. Paul, in his study on Ethiopian constitutional development, while commenting the ill translation of the concept of due process from English to Amharic version of the 1955 constitution provided that "due process" is not an equivalent concept with the term "in accordance with the law". [238]

On the other hand the Magna Carta which is believed to be the first legal instrument to incorporate the concept of due process seems to use other words and phrases that have a similar connotation than the word "due process" itself.[239] Similar expressions are also used under the

[235] Art 22(c), The Eritrean Constitution as Ratified 11th September, 1952
[236] Revised Constitution of the Empire of Ethiopia, 1955, Neg. Gaz., Year 1 No1 , Art 43

[237]FDRE Constitution, Cited at note 4, Art 17(1)
[238]James C.N. Paul and Christopher Calpham, Cited at note 234, p.90
[239] Magna Carta, Cited at note 233

ICCPR and many other modern constitutions including the Canadian Charter of Rights and Freedoms 1982, the Constitution of Japan, and the French Constitution among other things.[240]

In this regard the absence of the term from the vocublary of the constitution may not mean that this principle do not have any bearing in Ethiopia. Though the principle is not found within the text of the constitution there are some evidences which show the term is expressed in another way. In this case the fact that the term used in the FDRE constitution is a modification of due process of law can be understood on account of the strict usage of the term to life, liberty, and property.[241]The history of the concept of due process shows us that it is used particularly to these fundamental rights as opposed to other rights.[242]

By the same token, in the history of Ethiopian constitutionalism the concept of due process is not a new concept. We have had a strong link with the concept starting from the 1955 Revised Constitution.[243] Thus, taking the historical root of the concept it is not wrong to conclude that the concept of due process is within the heart and mind of the Ethiopian people regardless of its absence in the vocabulary of the 1995 FDRE constitution.

Lastly, the constitution provides the fundamental rights and freedoms incorporated in the constitution to be interpreted in accordance with the international instruments adopted by Ethiopia and the principles of the UDHR.[244] Due process of law as a concept recognized by those instruments could be used as a tool of intrpretation of the fundamental rights enshrined in the constitution. Thus, in light of the above accounts no question can be raised as to whether the protections of due process of law are incorporated in the 1995 FDRE constitution.

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[240]Article 7 of The Canadian Charter of rights and freedoms 1984 provides "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As well the ICCPR Article 9(1) provides "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[241] The FDRE constitution has embodied in its provisions the notion of due process of law Art.14-17 cum 40 as modified by the term 'except in accordance with procedure established by law', to those historically very important rights of life, liberty, and property.

[242] A strict look at the Magna Carta indicates the strict usage of the concept of due process to life, liberty, and property than other rights.

[243] *Hunt v. Roth*, 648 F.2d 1148 (1981),

[244] Michael Van Alstine, "The Universal Declaration and Developments in the Enforcement of International Human Rights in Domestic Law," Maryland Journal of International law, Vol. 24 No. 63(2009), p. 70

Ato Anmut, who worked his senior thesis, entitled "the Principle of Due Process as it is enshrined under the Constitution of the FDRE" also, tries to trace the root of this expression to the Japanese counterpart.[245] He concludes in his senior thesis that the expression provided in the FDRE constitution seems to be the modification of the due process of law and replica of Article 31 of the Japanese Constitution.[246]

This being how due process is understood under the Ethiopian constitution, there is an additional provision which reinforces the substantive due process under article 25 which provides that "…the law shall guarantee to all persons equal and effective protection…"[247], which we are going to discuss shortly here after.

The Substantive Due Process of Law and the Scope of Legislative Power

The importance of due process of law in its defining role to the scope of the right to bail is to be manifested in terms of its benefit in delimiting the law making power of the government. Accordingly, the substantive due process as one aspect of the concept of due process requires that governmental action must serve a public purpose, or promote the public interest, rather than benefiting or burdening a discrete segment of the population. It also believes that those sorts of acts might fall outside the scope of delegated legislative power. [248]

The substantive due process bases its existence on the purposes for which men enter into society and the nature and terms of the social compact. The people as the foundation of the legislative

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[245] Anmut Lakew, The Principle of Due Process of Law as enshrined in the Constitution of the FDRE (1994), (Unpublished Senior thesis: Faculty of Law, Addis Ababa University, 1995), p.48

[246] The Japanese constitution 1947 under Article 31 provides "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." Though the Japanese Constitution contains terms similar to the Ethiopian counterpart I am not convinced to the fact that the term is a replica of the Japanese Constitution in the face of the fact that there were other countries incorporating similar terms in their constitution and it is hardly possible to make a logical link to that fact. Article 7 of The Canadian Charter of Rights and Freedoms 1984 provide "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As well the ICCPR under Article 9(1) provides "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[247] FDRE Constitution, Cited above at note 4, Art 25

[248] Kermit Roosevelt III, "Forget the Fundamentals: Fixing Substantive Due Process," Journal of Constitutional Law Vol. 8 No.5 (2006), p.986-987

power within the social compact decides what the proper objects of it are. The substantive due process relates to regulating the things that the people forming a government would simply not want that government to do, and they would not delegate it the necessary power.[249] It abducts legislative powers which are by all reason and justice for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. For instance in this manner substantive due process condemns punishing citizens for innocent acts, or taking property from A and giving it to B for the mere fact that such actions do not serve a public purpose, or promote the public interest, rather than benefiting or burdening a discrete segment of the population.[250]

Due process of law in its defining role on the scope of the right to bail questions the well established notion that bail does not apply for certain serious offences to be reevaluated in light of substantive due process concerns. The proportionality and necessity of the law that deny bail to certain category of offences to be evaluated through the spectrum of substantive due process in order to be sure as to whether the law in this regard serves a public purpose, or promote the public interest, rather than benefiting or burdening a discrete segment of the population.

If the legislature's power to enact a law is limited by the due process concerns the protections given to more severe charges ought to apply to less severe charges as well, the converse should also be true.[251]Due process does not grant more protection to a defendant charged with a less serious crime than it does to a defendant charged with a more serious crime. In fact, the more severe the charge, the more the protection needs.[252]

Substantive due process requires that an objective measure to be taken in assessing the right of persons to liberty. In relation to this substantive due process requires two questions to be raised to objectively determine any claim for the right to bail, i.e.[253]

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[249] Id
[250] Id
[251] Joseph L. Lester, Cited at note 200, p.30-31
[252] Id
[253] J. Michael Norwood and Larry S. Novins, "The Constitutionality of Pretrial Detention in New Mexico without Bail," New Mexico Law review, Vol.12 (1996), p.697

1. What are the legitimate state interests which justify the grant or denial of bail to certain individuals, or individuals charged with certain offences?
2. How do the bail provisions relate to those state interests?

Arguably the legitimate purposes in denying pretrial release includes protection of court process, protection of society from dangerous defendants, and assurance of the defendant's presence at trial.[254] The rational relationship of the bail provisions to these purposes must be carefully analyzed to determine its acceptability in terms of the substantive due process. The substantive due process requires that the right to bail can be abridged only by the government's showing a compelling need to do so.[255]

Even after showing the existence of a compelling state interest, to meet those purposes the substantive due process also requires the state to employ the least restrictive means to protect its interest, otherwise, the restriction of the right to liberty on the guise of denial of bail would be arbitrary and unacceptable.[256]

The substantive due process seems not to be used as a safeguard in the legislative proposals as well as the decisions of the CCI regardless of the fact that it is recognized under the FDRE constitution and it has a great role to play serving as a check against legislative privilege. The fact that the CCI did not consider the safeguards of substantive due process in its decision on the constitutionality of the RACSPREP which denies bail to persons suspected of committing corruption punishable with more than ten years of imprisonment creates a gap in appreciating on the existence or not of other appropriate and proportional measures to protect the public interest concerning bail than detention of persons suspected of committing one of the offences considered to be not bailable. Due process of law as a recognized concept under the FDRE constitution, the consequences of this serious flaw on the legitimate interest of the pretrial detainees cannot be underestimated on account of the enormous role the principle can play in delimiting the scope of protection accorded to the right to bail.

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[254] The ABA standard on pretrial release provides that the two purposes providing due process for the accused and maintaining the integrity of the judicial process by assuring the defendant's attendance at court proceedings have historically been recognized as integral to decision-making regarding release or detention. ABA standard on pretrial release, 3rd ed., p.37
[255] Norwood, Cited at note 253, p. 700-705
[256] Id

Beyond looking on whether the 'exceptional circumstances' provided under the constitution is referring to 'factual circumstance' or 'legal circumstance' the CCI should have considered the proportionality and appropriateness of denying bail to persons suspected of committing corruption punishable with more than ten years of imprisonment with the public and individual interests of the suspects. Is detaining the suspects at pretrial stage the only appropriate and proportional measure to protect the interest of the public concerning the suspects? Is it impossible to resort to other measures that could strike a balance between the interest of the public and the interest of the suspects? These are some of the issues that should have been debated to rule on the constitutionality of the aforementioned proclamation in a manner that can up held the due process recognized under the constitution.

It is not true to say that a given law is constitutional because the legislature has a power to enact such law. Irrespective of the fact that the legislature has a power to enact the law concerned, the power of the legislature is subject to scrutiny of the due process of law which requires the legislature to opt the measures which could decrease the costs on the suspects, to the extent it attains the same result. As we have repeatedly said the right to bail involves the interest of the suspect to security and personal liberty before guilt is established and the public interest to stop any possible absconding of suspects, intimidating witness or tempering with evidences, and to protect the public from dangerous suspects. To the extent the aforementioned interests of the public are protected there is no reason to detain the suspect because he is suspected of committing one of the offences considered to be not bailable. Thus, the pretrial detention in this case is not appropriate and proportionate to the interest sought to be protected.

Chapter Five

The Impacts of the Administration of Bail Justice

5.1. Introduction

The Bail Administration of Ethiopia is considered to be highly pro detention with around 100 (one hundred) types of offences punishable under the new Criminal Code held to be not bailable. In other words, this is roughly 25% of the total types of offences recognized by the new Criminal Code.[257] Persons suspected of committing offences of one of the remaining types of offences which are also considered to be bailable offences can be released on bail provided they fulfill the stringent circumstances provided under the law for their release.

This fact is unlike what the FDRE constitution provides. The constitution provides persons suspected of committing an offence have the right to be released on bail unless there are exceptional circumstances which supports that the suspect should not be released on bail. It is difficult to believe when 25% of the total type of offences recognized under the Criminal Code are held as not bailable, is to fall under the 'exceptional circumstance' requirement of the Constitution. In addition to the fact that an 'exception' has its own limits and to be applied in a very restricted manner, the way the legislature lists the type of offences as not bailable goes to the extent of encroaching up on the power given to the judiciary under the constitution.

The practice of administration of bail justice in Ethiopia as we have seen in the preceding chapters violates the basic tenets of the right to liberty, the presumption of innocence, the right to access to justice, and due process of law which are recognized by the FDRE constitution. This is

[257] The new Criminal Code of the FDRE contains a total of 865 provisions. Among them the first 237 provisions deals with general principles while the remaining provisions deals with the specific as well as with some other general principles applicable to certain offences. Over all around 400 types offences are recognized under the code. Among them around 100 types of offences are punishable with not less than fifteen years imprisonment or death which is to mean bail is not allowed in such cases as per the Criminal Procedure Code or the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation. When we compute this in percent it is to mean the not bailable offences are around 25% of the total type offence recognized under the Criminal Code.

to mean that the prevalence of the rule of law which is recognized as a basic pillar of any democratic society including the FDRE constitution is at stake due to the bail practice.

Moreover, the administration of bail justice in Ethiopia has violated other basic pillars of the constitution including the doctrine of separation of power when it empowers the legislature to have the power to enact a law which considers certain short listed offences as not bailable which would in effect made the judiciary a subservient of the legislature. This practice automatically results to the accumulation of power of law making and adjudication in the hand of one organ, the legislature thereby affecting the power sharing mechanism established by the constitution.

The impact of the practice of bail justice administration of Ethiopia is not limited to the above discussed challenges. It has also negative implications on the prison administration of the country. Due to the current bail justice administration the country is to lose a huge amount of money to finance the pre-trial detainees which would not have been a risk of flight or danger to the community had there been a mechanism of judicial determination of bail than indiscriminately putting them in jail on the mere fact that they are suspected of committing an offence considered to be not bailable. This practice is against using cost effective criminal justice administration mechanisms including pre-trial release which would serve a very important role particularly in minimizing the cost of financing the detainees with the meager economic resources of the country.

The bail justice administration of Ethiopia does not also seem to consider the possible adverse consequences of pre-trial detention on the accused personal and family life. Pre trial detention has many adverse impacts on the accused as well as his families which the bail justice of Ethiopia seems to underestimate or else miscalculate.

5.2. Impacts on the Accused Personal and Family life

5.2.1. Impacts of Pre-trial Detention on the Detainee

The impact of pretrial detention on the accused is multifaceted ranging from incapacitating him from collecting necessary evidence to properly defend his case to impacts relating to post release social stigma, loss of job opportunity, economic loss to family, contamination to infectious

disease like TB and HIV/AIDS etc. Moreover, the accused suffers from exposure to criminals particularly due to the fact that convicted criminals and suspects are detained under the same cell under the Ethiopian scenario.

A person once suspected to commit one of the offences categorized as not bailable is to mean that he is behind bars regardless of a serious threat to his life due to his bad health condition. The courts can not release him on bail to take care of his life, to get any medical examination, and to get the care of his families. This is regardless of the fact that the courts are certain that this man is not a flight risk or in a position to tamper with evidences or to commit other offences. In this case it is not clear why such persons are to remain behind bars.

In the case of *W/ro Wulta Vs Oromia Regional State Anti Corruption Commission*,[258] the suspect was charged for committing corruption as per Article 407(2) of the new Criminal Code which is punishable with seven to fifteen years of imprisonment. The suspect while serving a pretrial detention was found to develop cancer of which the Medical Board decided that the suspect can only be cured if she is treated abroad. Meanwhile the suspect requested to be released on bail to the court in spite of the fact that she is certain that bail is not allowed for the offence of which she is charged. The material fact of her allegation reads that the Revised Anti Corruption Special Procedure and Rules of Evidence which denies bail for persons charged with corruption offence is unconstitutional as it means to contradict with the right to life if such law has an effect of extending pretrial detention to suspects under serious threat to their life. Thus she pleaded the court to release her on bail as she needs the medical care as it is approved by the Medical Board. In other wards she is looking for an exceptional treatment under the bail law.

Regardless of the fact that the court is aware of the state of health of the suspect, it denies bail and up held the pretrial detention. In this case the court did not look in to the issue as to whether there is a room to consider for pretrial release to persons under a serious threat to their life under the constitution as well as the Revised Anti Corruption Special Procedure and Rules of Evidence. This shows that the bail law which denies bail to persons suspected of committing offences punishable for more than ten years of imprisonment does not consider its effect on like suspects.

[258] *W/ro Wulta Vs Oromia Regional State Anti Corruption Commission, Cited at note 128*

In this case it is obvious form the decision of the Medical Board that the suspect needs the immediate supervision of her family and medical care. Under such conditions it seems illogical to put the suspect under pretrial detention.

The interim detention of a suspect in order to secure his attendance before the court of law or for any other purpose has also various negative impacts of which we could not be compensated after a formal acquittal. A person who is charged of committing of an offence of the type categorized as a not bailable offence loss many fundamental rights once and for ever regardless of the fact that he is found not guilty at the end of the day.

By the same token the fact that a person is held in custody during criminal investigation may mean his job security is endangered.[259]Though we do not have comprehensive statistical information on how many of the persons detained on remand were employed it is not difficult to guess that at least such persons would have contributed something to sustain themselves. A report from the Anti Corruption Commission also indicated that more than 96% of the persons under detention including those in remand are in the age group between 20-55 years which shows that many of the detainees are the productive force of the country.[260]

5.2.2. Impacts of Pre-trial Detention on the Family of the Detainee

Family is a fundamental unit of the society, the continuity and existence of the state is based on the existence and continuity of the family. On the assumption of this basic truth family has got a constitutional recognition in many countries. The FDRE constitution in this regard provides that "The family is the natural and fundamental unit of society and is entitled to protection by society and the State".[261] The constitution as well gives due recognition to the rights of the children as members of the family "to know and be cared for by his or her parents" and the right to "life".[262]

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[259]Labour Proclamation of the Federal Democratic Republic of Ethiopia, 2003, Proclamation no 377, Neg. Gaz., Year 10 No 12, Art 24(5) and 27(j)

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[261] Constitution of the Federal Democratic Republic of Ethiopia,1995, Proclamation no 1, Neg. Gaz., Year 1 No 1, Art 34(3)

[262] Ibid, Art 36

This constitutional provision has provided two fold duties on the state, one to play a role for the continuity of the family as a fundamental unit of the society and the other to provide laws and policies which would realize that the rights of the children to know and be cared by their parents. When we see the reality it is questionable as to whether we are having laws and policies that protect the family when we enact a law which considers not less than ¼ of the offences recognized by the criminal law of the country as not bailable with additional restrictions on the remaining types of offences.

In Ethiopia though no comprehensive and systematic research is made as to how many of the pretrial detainees are family leaders, the reports of the CSA indicates that more than 90% of the total detainees are male detainees who were the back bone of the family and the working force of the country. [263] A report from the Anti Corruption Commission also indicated that 63% of the total numbers of suspects in the year 2009/10 are married with a total of 161 children under their control and supervision.[264]

Interviews made with some detainees also indicated that many of them are family leaders and their family is in serious threat of being disintegrated due to lack of money to cover the costs of maintenance and education and other social predicament. This is also exacerbated by the increase in the number of remands which would likely increase the number of the time the family would stay without a support before acquittal and detention of the suspect. A report from the Anti Corruption Commission indicates that the average remand time is estimated to be 182 days while the longest remand time is 518 days.[265] In some cases there is a chance of being acquitted after serving such a prolonged remand time.[266]

The increase of the rate of acquittal indicates that the law which considers certain 'serious offences' as not bailable is based on a wrong assumption and we are detaining on pretrial innocent suspects which do not have any risk of flight or possibility of tempering with evidences.

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[263] FDRE, Statistical Abstract, Central Statistical Agency, 2011

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[265] Statistical Abstract, cited at 263, p. 113

[266] For instance in corruption cases the rate of acquittal in the year 2009/10 is estimated to 35.5% which is by far to be considered as a significant amount. □□□□□ □□□□□□□□ □□ □□□_□□□ □□□□ □□□ □□□□□ □□□□□□□□ □□□□ □□□□□ 260 □□□□□□ □□ 43 □□ 50

The all rounded problems accruing on the family and children of like pretrial detainees is an outcome of a wrong policy of bail prevailing in Ethiopia. This is true in light of the fact that it is possible to have a bail law which could shield suspects which do not have any risk of absconding or tempering with evidences from any form of pretrial detention.

The bail law which considers certain offences as not bailable at any cost does not take in to accounts its adverse effects on the family and the children. Due to this the family of the pretrial detainee including those who have a potential of being acquitted after a prolonged trial process is at a serious danger on account of the fact that many of the detainees are family leaders who has a shared responsibility to maintain their children. This consequence is to happen while we can still have a bail law which could minimize such risks by allowing the suspects to be released on bail through a subjective and systematic analysis of the cases of the concerned suspects for admission to bail.

5.3. Impacts on the Prison Administration

The bail justice administration of Ethiopia has also other challenges relating to the prison administration by exacerbating prison overcrowding and taking a significant amount of disbursement for up keeping and feeding the prisoners. Letting suspects out of prison through the mechanism of bail has a very important role in ameliorating the costs of prison administration which is very difficult to meet especially for countries like Ethiopia. Many reports from international human rights institutions indicated that there is a serious insufficiency of prison facilities in many of the prisons. In this case a U.S Human Rights Country Report indicated that the country which has three federal prisons, 117 regional prisons, and many unofficial prisons, the prison and pre-trial detention center conditions remained harsh and life threatening.[267]

One of the serious challenges of prison administration in Ethiopia is prison overcrowding. The total number of prisoner in the regional and federal prisons in 2006/07 was 80, 246 which increased to 112,325 in the year 2009/10.[268] Among this the total number of pre-trial detainee in the year 2009/10 was 15, 723 which is to mean by far more than 14% of the total detainees in

[267] U.S Human Rights Country Report, Ethiopian Assessment Report, 2008 accessed from http://www.state.gov/g/drl/rls/hrrpt/2010/af/154346.htm on June 11, on May 13, 2011

[268] FDRE, Statistical Abstract, Central Statistical Agency, Cited at note, 2006/7 and 2009/10

regional and federal prison institutions are pre-trail detainees.[269] This number is equivalent to the total number of employees working in the regional and federal establishments which was estimated to be 148,817 in the year 2008/9.[270]

The prison population rate per 100,000 of the national population was estimated to be 99 in the year 2009/10.[271] On the other hand the prison population rate of Ethiopia is reported to be one of the highest in Eastern Africa.[272]

The number of pre-trial as well as other detainees is increasing from time to time at a steady rate which is to mean an additional cost for maintaining and up keeping of the detainees is to be expected from the meager resources of the prison administration. In this regard the total number of pre-trial detainees in the year 2008/9 is recorded to be 14,769 which have shown an increment in the year 2009/10 to 15,723 which is an increment by around 6.5 % per year.[273] Such an increment also demands a parallel increment of resources which is so far found to be impossible due to scarce budget allocation.

The country spent around 484,890,701.14 birr to maintain 112,325 prisoners in the year 2009/10.[274]This amount of money is too much when compared to the amount of money spent to maintain the detainees some five years earlier which was set at 149,553,489.12 birr.[275] The amount of money spent per one detainee in the year 2009/10 is 4316.85 birr. This cost does not include the money spent to hire police officers to secure their attendance before a court of law. An additional economic cost is to be expected as the detainees are no more at freedom to involve in any gainful activities due to the detention.

On top of that, regardless of the fact that the country is spending a huge amount of money to maintain the prisoners, Ethiopian prisons are remarked to be harsh and life threatening. Prisoners often had less than 22 square feet of sleeping space in a room that could contain up to 200

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[269] Id
[270] Id
[271] International Center for Prison Studies accessed from http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=19 on April 23, 2011

[272] Id
[273] Statistical Abstract, Cited at note 264
[274] FDRE, Central Statistical Agency, Statistical Abstract, 2009/10
[275] FDRE, Central Statistical Agency, Statistical Abstract, 2004/05

persons, and sleeping in rotations was not uncommon in regional prisons. In all prisons which were visited, during the night some 70-150 persons were squeezed together in rooms of about 200 m² floor space. Bedding is of very poor quality most people have to lie on old, filthy rags, if any. No beds, mattresses or blankets were to be seen in many of the prisons.[276]

It is under such very bad conditions that we have many laws that deny bail to persons suspected of committing vagrancy, or committing an offence punishable with more than fifteen years of imprisonment under the new Criminal Code, or with a corruption offence punishable with more than ten years of imprisonment. Based on the current prison conditions the enactment of the bail law seems not to consider the prevailing sate of the prison institutions in addition to the constitutional issues we have tried to discuss. Thus, the bail law which allows pre-trial detention categorically to persons suspected of committing offences punishable with a given period of imprisonment does not have a solid basis in light of the current condition of our prison centers. The condition of prisons also shows by denying bail categorically we are putting the tax payers to shoulder a responsibility which they do not have the capacity.

Had there been a bail law which could subjectively look in to the personal conditions and characteristics of suspects for the purpose of release or pre-trial detention we would have reduced the number of the pre-trial detainees which would also help to improve the prison centers. As there is a chance of suspects wrongly to be accused it is possible to guess that some of the pre-trial detainees are not a risk of flight or in a position to temper evidence or to commit further offences. The bail law which denies any admission to bail to certain category of suspects is based on a wrong assumption that such suspects are a risk of absconding or tempering with evidences.

5.4. Impacts on the Role of the Judiciary

5.4.1. Some Preliminary Remarks

A characteristic feature of government is the possession of a monopoly in the legitimate exercise of coercive power. Such a monopoly is required both because citizens need protection from each other, and because citizens desire the provision of certain public goods that, acting individually,

[276] U.S Human Rights Country Report, Cited at note 267

they will not provide in an adequate quantities. A major problem for citizens, however, is that the assignment of coercive power renders them vulnerable to exploitation by their political agents. Accordingly, a major constitutional question is how to design institutions that limit such exploitation.[277]

Separation of power is one piece of institutional fabric that enjoys almost universal support in this context. The classic formulation of the doctrine of separation of powers is that there are three distinct functions of government the legislative, executive, and the judiciary which should be discharged by the three separate agencies i.e. the legislature, the executive, and the judiciary respectively and that no individual should be a member of more than one of them.[278]

In Ethiopia although it is nowhere explicitly enunciated in the text, the FDRE constitution accords tacit recognition to the principle of separation of powers stating that "the federal government and the states shall have legislative, executive, and judicial powers".[279]However, with the establishment of a parliamentary form of government it is common to see persons who staff the executive and the legislature to be the same which is by far a characteristic feature of that form of government. But, the welding of executive and legislative power is thought to be dangerous for the protection and promotion of human rights unless there is a viable organ that can serve as a check against any abuse. In this regard Montesquieu emphasized that;

> *When the legislature and executive powers are united in the same person, or the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the*

[277] Geoffery Bernnan and Alan Hamlin. A Revisionist View of the Separation of Powers, p.346 in The Rule of Law and the Separation of Power, Richard Bellamy (ed.) (Ashgate Publishing Company, USA, Burlington), 2005, p.346

[278] Barendt, Eric. Separation of Powers and Constitutional Government, Richard Bellamy (ed.) (Ashgate Publishing Company, USA, Burlington, 2005),p.277. The role of the judiciary in this respect begins from the doctrine of separation of power. However, the doctrine itself as well as the role of the judiciary in a given system of government has changed through time as the social structure and the interest of the society changes. In this regard the classic understanding of the separation of powers as outlined above has become out dated though the principle do not. Unlike the classic separation of power in parliamentary system of government there is a fusion of the legislature and the executive, in USA the president has the power of law making, as well in other countries like Great Britain the House of Lords which is deemed to be the Upper house of the legislature has a function of adjudicating cases, and many other changes are made to the classic separation of power today.

[279] FDRE Constitution, Cited at note 4, Art. 50(2)

same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.[280]

In relation to the judicial branch, the constitution affirms its independence by stating that "judicial powers both at federal and state levels are vested in the courts".[281] It also declares "courts of any level shall be free from any interference or influence of any governmental body …"[282], and this idea is more reinforced when it is stated that "judges shall exercise their functions in full independence and shall be directed by the law"[283].

The House of People's Representative is the highest authority of the federal government as the State Council is for the state government.[284] The House as a highest authority of the federal government needs to be checked in the exercise of its power to protect the people from any possible infringement in the enjoyment of their rights as stipulated in the constitution which is supreme to the House itself. We cannot say here that the House will not violate the rights of the people.[285]

The function of the legislature had an inherent tendency to encroach on others. The main reason as Madison points out is that the legislature powers were at once more extensive, and less susceptible of precise limits than the other two, which to some degree were necessarily guided by its decisions.[286] Thus, he figured out that the main issue confronting modern constitutions was not absolute monarchies but tyrannous legislative majorities.[287] Sometimes legislatures were no longer simply promulgating general rules but settling disputes, so that most important acts of the legislature were so many judicial determinations.[288]

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[280] The spirit of laws, Book XI, s.6 Cited in Rule of Law and Separation of Power, Richard Blamey (ed.), (Ashgate Publishing Company, USA, Burlington, 2005), p.601
[281] FDRE Constitution, Cited at note 4, Art 79(1)
[282] Ibid, Art 79(2)
[283] Ibid, Art 79(3)
[284] Ibid, Art 50(3)
[285] Bruce Ackerman, The New Separation of Powers, Richard Blamey (ed.), (Ashgate Publishing Company, USA, Burlington, 2005) p.437. Montesquieu who has placed a high emphasis on the rule of law perceived that the greater danger to it is the legislature than any other organ of the government.
[286] Federalist no 48
[287] Federalist no 10
[288] Id

5.4.2. The Fair Share of the Judiciary in the Enforcement of the Right to Bail

The fundamental question that was raised before the CCI concerning the constitutionality of the Revised Anti Corruption Special Procedure and Rules of Evidence[289] was as to whether the law which describes some corruption offences punishable with more than ten years of imprisonment as not bailable is constitutional. This issue is related with the respective role of the court and the legislature particularly whether the legislature while enacting such laws is involving itself in the task of judging. The applicants believed that the power exercised by the legislature in our case to determine which offence should be bailable is a fundamental violation of the principle of separation of power and ousted the courts from doing their fundamental task of judging.

In other wards the applicants believed that the constitutional provision while providing that "in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person" is not requiring the legislature to enact laws that gives no room to the courts to determine on whether bail shall be granted or not depending on the characteristics of the person arrested. The legislature while enacting such laws is in effect involving itself in the task of determining which person should be granted bail which would have been left to the courts.

The applicants believed that the role of the legislature as per the above constitutional provision would have been prescribing conditions that the court should consider in entertaining bail cases than enacting laws that require the court to deny bail for a specified type of crimes. The legislature while enacting such laws is encroaching to the power given to the courts.

The CCI believed that making corruption offences punishable with more than ten years of imprisonment not bailable do not mean that the courts are ousted from entertaining cases involving the right to bail as per the constitution. The CCI ruled that as it is the courts that decide whether or not there is adequate reason to suspect and arrest someone in connection with the corruption offence and whether or not the facts alleged by the prosecutor constitute corruption, we cannot say the legislature is ousting the courts from their fundamental task of judging.

[289] CCI Ruling, Cited at note 1

The CCI ruling seems to over look the fact that it is when after the public prosecutor shows that there is sufficient reason to suspect and arrest some in connection with the offence that can make an arrest and then comes the issue of release on bail. It is also after the proper investigation and trial that the court decides whether there are sufficient facts to constitute the alleged corruption. Thus, the above alleged powers of the court are strictly speaking not related with the fair share of the courts in entertaining issues of bail as the CCI claim.

On other wards the question as to whether the courts are getting a fair share as per the constitution vis a vis the power of the legislature is over looked here. But, I believe that when the legislature enacts a law which requires the courts to deny bail when a person is suspected of a corruption offence punishable with more than ten years of imprisonment it gives no power to the court than making them as it's subservient. The only thing the court can do is to deny bail when a person is suspected of committing corruption punishable with more than ten years of imprisonment. Thus, under such conditions it is hardly possible to believe the courts are exercising a fair share of their power.

The decision of the CCI in this regard has a potential effect of serving against the percepts of representative democracy adopted by the constitution. As per the representative democracy when a law is enacted to deny bail for a specified category of suspects without any possibility for determination by the court it is to mean that these cases were decided by the disputants themselves, thereby undermining the main tenet of separation of power that no one should be a judge in his own case.[290] This also results to a clear risk that the public good is disregarded in the conflict of rival parties, and that measures too often decided, not according to the rules of justice and the rights of the minor party but by the superior force of an interested and over bearing majority.[291]

To empower the court to decide on issues of the right to bail serves as check to protect the constitutional provisions from being merely considered as an auxiliary to some other law enacted by the legislature.[292] On the other hand to rule the legislature as having a power to enact a law on

[290] Bruce Ackerman, Cited at note 285, p. 44
[291] Ibid, p. 41-42
[292] Caleb Foote, "The Coming Constitutional Crisis in Bail," U. Pa. L. Rev. Vol. 113 No. 2 (1965), p.19

a basic human right in the cases like Revised Anti Corruption Special Procedure and Rules of Evidence requires one to believe that the legislature has the power to restrict the right to bail at will, or even render some fundamental rights entirely moot by enacting legislation denying such right at most which is not desired in democratic societies.[293]

5.5. Impacts on the Rule of Law

5.5.1. A Glimpse on the Scope of Rule of Law

The rule of law as a phrase was started to be widely used since 17th c though the concept was used earlier in history starting from the time of Aristotle who believes that "law should govern".[294] The classic meaning of the rule of law as it was understood by A.V. Dicey constitutes three basic attributes including;[295]

1. No one can be punished or made to suffer except for a breach of law proved in an ordinary court,

2. No one is above the law and everyone is equal before the law regardless of social, economic, or political status,

3. The rule of law includes the results of judicial decisions determining the rights of private persons.

This classic definition of rule of law, however, is believed to be insufficient by many scholars and international organizations who are working on the rule of law. With the emergence of looking at a rule of law as having a formal and substantive conceptions some scholars consider the definition given by Dicey only to constitute as a formal definition of rule of law.[296]The formal conceptions of the rule of law address the manner in which the law was promulgated including the fact that as to whether the law was promulgated by a properly authorized person in

[293] Ibid
[294] Aristotle, Politics 3.6, Cited at Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, Richard Bellamy (ed.) (Ashgate Publishing Company, USA, Burlington, 2005) p.100
[295] Dicey, Albert, An Introduction to the Study of the Law of the Constitution (1885)
[296] Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, Richard Bellamy (ed.) (Ashgate Publishing Company, USA, Burlington, 2005) p.100

a properly authorized manner and the temporal dimension of the enacted norm including its prospective and retrospective application.[297]

On the other hand the substantive conception of rule of law goes to the extent of questioning the validity of the law at hand.[298] According to the proponents of the substantive rule of law a particular law enacted following the formal procedures of the law making process do not make the law valid as per the precepts of rule of law if on its face value the law is against the dignity of the human kind. Thus, according to the proponents of the substantive rule of law any law which gave an authority powers to order citizens about in whatever manner it deems necessary to achieve a particular purpose would infringe the rule of law though it would make such action perfectly legal.[299]

Accordingly, the proponents of substantive conception of the rule of law believes that if a rule of law is to prevail it is not enough that the law fulfill its formal requirement rather the law should not make the private citizen an instrument of governmental policy but must be free within the known rules to pursue his own ends undisturbed by unpredictable interference of authority.[300] To express it shortly the substantive conception of the rule of law advocates that "the known general laws which tell the private citizen in which circumstances and in what manner the government will use coercion have to him much the same significance as the known laws of nature; and need restrict his freedom no more than his knowledge of the natural effects of his action."[301]

Understanding the rule of law in this way, the Ethiopian bail law which denies any admission to bail to certain category of suspects is to be questioned in light of its formal sufficiency including its temporal effect and the legitimacy of the organ which issued it, and its substantive sufficiency in light of its object as to whether such law is made to serve as an instrument of governmental policy without due regard to the rights of the suspects.

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[297] Ibid, p. 95
[298] Ibid
[299] F.A. Hayek, Freedom and the Rule of Law, Richard Bellamy (ed.) (Ashgate Publishing Company, USA, Burlington, 2005), p.147
[300] Ibid, p.149
[301] Id

On the other hand various international organizations including the UN, the International Commission of Jurists, the International Bar Association, and many others institutions have defined the rule of law. The definitions given by such organizations have an outstanding deference both from the classic definition given by Dicey and the definitions given by other scholars. To look at the deference it would be enough to see the definition given by the UN in the one hand and the International Bar Association on the other hand.

The UN Secretary-General has considered the rule of law as an agenda item since 1992 and has shown a renowned interest since 2006. As per the definition of the UN Secretary General Rule of law is considered as;

> *a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*[302]

The understanding of the rule of law by the UN emphasis on governmental and public accountability to the laws of the land, consistency of laws with international human rights norms and standards, fairness in the application of the law, separation of power and avoidance of arbitrariness among other things. This definition is considered to encompass both the formal and substantive conception of the rule of law discussed above. When the definition advocates for the accountability to the laws and publicity of the laws it is referring to the formal element of the rule of law. On the other hand issues like consistency of laws to international human rights norms and standards and the avoidance of arbitrariness are more related to the substantive aspect of the rule of law.

[302] Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004)

The resolution of the International Bar Association passed on 2005 has inclined to define the rule of law as including many other things which were not treated under the definition given by the UN as follows;

> *An independent and impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.*[303]

The rule of law as it is understood here by the International Bar Association has come up with its own different version of definition unlike to the above definition given by the UN body. According to this definition the rule of law requires the existence of an independent and impartial judiciary, the prevalence of the presumption of innocence, the existence of laws which has a rational and proportionate approach to punishment of whatever nature, abolition of arbitrary arrests, and protection of confidential information communicated by clients among other things.

This being how the rule of law is understood by different scholars and institutions, it is better to question as to which version of the definition is acceptable in the interpretation of the FDRE constitution which will later help us in looking at the bail law in light of this principle. It is obvious that the FDRE constitution under article 13(2) provides that the relevant provisions of the fundamental rights and freedoms of the constitution be interpreted in accordance to the UDHR, the international covenants and other human right instruments adopted by Ethiopia.

[303] Resolution of the Council of the International Bar Association of October 8, 2009, on the Commentary on Rule of Law Resolution (2005)

5.5.2. The Rule of Law and the Bail Regime of Ethiopia

The precept of rule of law unlike the definition given in the classical period has already shifted to a higher norm consisting formal and substantive aspects. The understanding of the rule of law as having a meaning more than a 'rule by law' is however a recent phenomenon. The rule of law as a basic norm in the Ethiopian polity is incorporated in the FDRE constitution. The constitution in its preamble provides that the Nation, Nationality and Peoples of Ethiopia are committed to "build a political community founded on the rule of law".[304] Moreover, the precept of the rule of law as it is understood by the UN as well as other scholars is also entrenched within the main provisions of the constitution.

In this regard, among the many elements the rule of law is believed to encompass by the UN Secretary General the principle of accountability[305], supremacy of law[306], separation of power[307], prohibition of any form of arbitrariness[308], the need for the consistency of laws with international human rights norms and standards[309] are included in the main provisions of the constitution. Moreover, other precepts of the rule of law which are recognized by the UN like the presumption of innocence[310] and independent and impartial judiciary[311] are recognized by the constitution.

However, when we see at a lower level, the subordinate criminal laws shows a trend contrary to what the rule of law is advocating. When we have a law which provides for not less than 25% of the offences recognized by the new Criminal Code to be labeled indiscriminately as not bailable offences, many of the precepts of the rule of law are endangered. A bail law such as the above jeopardizes function of the judiciary as the court do not have a role as what to be done in protecting the fundamental rights of the individuals suspected of one of the concerned offences. In other words the bail law is making the judiciary a subservient of the legislature which is prohibited by the rule of law.

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[304] Constitution, Cited at note 4, Preamble, Para 2
[305] Ibid, Art 12
[306] Ibid, Art 9
[307] Ibid, Art 50(2)
[308] Ibid, Art 17(2)
[309] Ibid, Art 13(2)
[310] Ibid, Art 20(3)
[311] Ibid, Art 78 cum 79

The other major limb of the rule of law which requires that laws to be enacted by the legislature to meet the international human rights norms and standards which is also up held by the constitution is also made ineffective when we are having a law which categorizes certain offences as not bailable. We have seen in the above chapters that the right to bail has a direct link to the right to personal liberty, the presumption of innocence, the right to access to justice, and the right to due process of law which are recognized both by the FDRE constitution and other international instruments adopted by Ethiopia including the UDHR. The bail law which is currently in force has a major incompatibility with the international human rights norms and standards which would in effect mean that the rule of law is endangered.

The entertainment of cases involving bail by the HF as assisted by the CCI has impacted on the rule of law. The rule of law requires the existence of an independent and impartial judiciary to entertain cases of violations of rights brought by individuals. However, the HF which is not yet independent institution is made to be an arbiter of any constitutional disputes including the right to bail. This is a clear danger to the prevalence of the rule of law as the HF which is not institutionally made independent is to favor one party over the other in the application of the law of the land. Thus, the practice of ousting the judiciary which is by far recognized as an independent institution under the constitution from the task of handling issues of fundamental human rights like the right to bail is a big dismal to the prevalence of the rule of law.

Conclusion and Recommendation

Conclusion

The practice of classifying offences in to bailable and not bailable which is prevalent in the administration of Ethiopian bail justice has created challenges. The challenges of this mode of classifying offences for the purpose of bail on the administration of bail justice of Ethiopia are multifaceted.

To begin with there is a major incompatibility of the subordinate legislations governing the right to bail with the constitution. The legislature at various times has enacted laws that made the right to bail mute by legislation without any possibility of judicial determination against the percepts of the constitution. The acts of the legislature has a potential effect of implying the fact that the right to bail, unlike to what the constitution provides, can be made subject to the legislatures blessing. To the extent that the legislature has a free hand to decide whether a given offence is bailable or not our fate to be released on bail is going to depend on the free will of the legislature. As far as there is no limit on the legislative power of the law making organ it is difficult to believe that the right to bail has got constitutional recognition in Ethiopia.

The other challenge of the bail administration of Ethiopia is that the legislature while enacting laws which made certain offences not bailable it is engaging itself in the task of adjudicating cases. The judiciary in Ethiopia becomes a mere subservient of the legislature when the legislature in advance by legislation considers some offences as not bailable. The role of the Judiciary in the administration of bail justice is limited to the application of the white and black letters of the law maker to the case before it than determining the right to bail on its merit which would have an impact of creating a weak judiciary that cannot stand for the respect of fundamental rights and freedoms of suspects against the percepts of the constitution.

Moreover, the administration of bail justice on the semblance of introducing not bailable offences has made other fundamental rights of the suspect mute. A suspect who is denied the right to bail indiscriminately because he is suspected to commit one of the offences considered to

be not bailable cannot enjoy his right to liberty, presumption of innocence, and access to justice. Allowing the legislature to enact laws that would restrict the right to bail to specified category of offences has also a practical challenge from ensuring the substantive due process of law. As the constitution is a compact document the provisions within it are expected to be understood intelligibly. When we define the right to bail it is necessary that it be defined in a way that could give effect to the other rights within the constitution as each right has the same constitutional recognition.

The reasons why the not bailable offences are introduced under the Ethiopian bail justice administration are related to keeping suspects from absconding and from committing further offences or to help the steady administration of justice in the country. But it is difficult to believe such objectives would not be achieved through other alternative mechanisms than detaining the suspects on the face of the fact that we have many experiences in our history including the practice of releasing suspects on 'wahis'. The only problem of resorting to the latter alternative is allegedly unsuccessful due to the weakness of the government mainly the judiciary in screening out the suspect eligible for release which gives rise to the enactment the laws which deny the right to bail to persons suspected of certain offences.

Apart from eroding the fundamental rights of the suspects, the bail justice administration also has implications on economic and social aspects which the legislature seems to miscalculate or side step. The cost of pretrial detention is very high which violently destroy the prisoner's private life, effectively threatening his job, his family and domestic arrangements. As well the avoidable costs the public bears to up keep and maintain such productive suspects also seem unjustified while many poor teenagers are leaving in streets and dying out of hunger and many other social services are not fulfilled. The public is paying taxes so that the government can spend it reasonably to serve public benefit. With the above challenges to the bail justice administration, we cannot see such practices will serve public benefit.

It is possible to have a viable administration of bail justice that can accommodate both the interests of the public to get the suspects punished if found guilty and the interest of the suspect to get his fundamental rights respected until he is found guilty through the ordinary criminal justice process. However, this aim can be achieved so long as we firmly believe that there is a

chance of suspects being charged wrongly and that they could be found innocent at the end of the criminal justice process. The only interest of the government in bail is to secure the attendance of the suspect at trial and to secure the public or witness and evidences from unjustified interference by the suspect after the interim release on bail. To the extent bail is based on this core values there should not be any hindrance on the personal liberty of the suspect to the extent this core values are not infringed by the release of the suspect concerned.

As far as we believe that there is a chance of suspects being prosecuted wrongly, it is unwise to believe that any person suspected of one of the offences which are shortlisted by the law as not bailable are certainly to obstruct the normal process of the criminal justice. Therefore, the practice of classifying offences as bailable and not bailable which is prevalent in the Ethiopian bail justice administration is based on a wrong assumption and is based at the cost of those law abiding and innocent suspects. And the only way to solve this dilemma is to have a bail justice administration based on a subjective and sound criterion that could support the merit of individual cases than to classify offences as bailable and not bailable. To the extent we channel our administration of bail justice to merit based subjective determination of the suspects right to bail all rounded challenges of the system of bail justice of Ethiopia is facing will surmount.

Recommendation

The challenges of the administration of bail justice of Ethiopia are all-around, as a way out to such challenges and to create a sound system of bail justice I recommend the following;

- The all rounded challenges of the bail justice administration of Ethiopia to a large extent are attributable to the existence of laws and policies which are based solely on the protection of societal interest without any room for the protection of the personal interest of the suspects to liberty before guilt is established. Thus, the laws and Policies concerning bail which are currently in force shall be revised in a way that could strike a balance the conflicting interests of the public and the suspects concerning release on bail.

- Laws and Policies on bail shall tend to make the right to bail subject to judicial determination as denial of bail by the legislature would amount an anomaly with the principle of representative democracy. The HPR as an organ that represents the collective interest of the public it is obvious that it cannot serve as a proper forum to decide as to which offences is bailable or not among other things.

- As the right to bail cannot be understood by merely relying on interpreting a single provision of the constitution, organs involved in the interpretation of the constitution including the CCI shall also take regard to other fundamental rights recognized under the constitution and other international instruments adopted by Ethiopia to define the scope and breadth of the right to bail.

- Advocating for pretrial release can also have some inevitable risks such as dangerous suspects are released wrongly. Thus, the laws and policies on bail shall adopt

mechanisms to minimize such risks like requiring suspects released on bail to report to a given organ regularly, not to reach some place without a permission of a responsible organ, or creating community ties to look over such suspects and an increased inter governmental cooperation agreements for deportation of absconding suspects.

- Some of the root causes why detention is preferred over release on bail under the Ethiopian bail justice administration are attributable to the weakness of the government mechanism mainly the judiciary in release options. Thus, as means to alleviate such gaps judges shall be provided with some awareness creation trainings and skills on release options of the suspects.

- Ethiopia has customary practice of handling suspects including release on 'wahis'. The predictive mechanism of such release cannot be underestimated as it is deep rooted within the community. Thus, having laws and policies that participates community leaders on issues involving release on bail can minimize the alleged increase of absconding and commission of further offences after release as such persons have sufficient knowledge of the personal traits of each suspect brought before the court.

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