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**THE PLACE OF THE RIGHTS OF PERSONS WITH  
DISABILITIES UNDER THE 1995 FDRE  
CONSTITUTION**

**By: - DAWIT OTICHO ORO**

**January, 2019**

# **THE PLACE OF THE RIGHTS OF PERSONS WITH DISABILITIES UNDER THE FDRE CONSTITUTION**

A Thesis Submitted in Partial Fulfillment of the Degree of Master of Laws (LLM in Human Rights Law) to the School of Law

Addis Ababa University

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## **Dedication**

This dissertation is dedicated to those persons with disability who lacked constitutional protection though they demand and for those persons with disability and their organization who will struggle for the amendment of the FDRE constitution provoked by the dissertation here under.

## **Declaration**

I Dawit Oticho Oro hereby declare that this dissertation is original and has never been presented in any other institution. I also would like to declare that any words or ideas which are taken from other authors have been duly acknowledged through citation.

Again I declare that this dissertation is completed by my own effort and through the support of God who is closer than my breath.

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Long-live! Love you all!

DAWIT OTICHO ORO

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## List of Abbreviations

ACHPR African Charter on Human and Peoples' Rights AU African Union CBR Community Based Rehabilitation CEDAW Convention on the Elimination of Discrimination against Women CRC Convention on the Rights of the Child CRPD United Nation Convention on the Rights of Persons with Disabilities DoFE the Declaration on Freedom of Expression ECtHR European Court of Human Rights Efc European Foundation Center EPRDF Ethiopian Peoples' Revolutionary Democratic Front FDRE Federal Democratic Republic of Ethiopia FRA European Union Agency for Fundamental Rights HPR the House of Peoples Representatives HRC the Human Rights Committee

ICCPR International Covenant on Civil and Political Rights ICERD International Convention on the Elimination of Racial Discrimination IDC International Disability Caucus IDEA Institute of Democracy and Electoral Assistance IFES International Foundation for Electoral Systems JICA Japan International Cooperation Agency MDAC Mental Disability Advocacy Center NGO None Governmental Organization OAU Organization of African Unity PWDs Persons living with Disabilities StRE Standard Rules on the Equalization of Opportunities for Persons with Disability UDHR United Nation Declaration on Human Rights UJD UN United Nation UNECA United Nation Economic Commission for Africa WHO World Health Organization WPA World Program of Action concerning the disabled

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## **Abstract:**

Constitution, which is the fundamental law of the land, is a major instrument for promotion and protection of human rights. Currently, many governments of the world are integrating human right principles in their fundamental law. Basically, three factors: the supremacy of constitution, its amendment procedure and the way constitution is interpreted prompted human right provision to be incorporated in a constitution. An existing constitution of Ethiopia which is ratified in November 1995, is alleged to be a ground breaking document regarding to the inclusion of The general human right provision compared to the previous constitutions. Yet, if we look it in terms of human rights of persons with disability, the FDRE constitution is in era of before 2006 The year 2006 is a crucial year for persons with disability for the reason that the CRPD which was ratified in this year officially shifted the way persons with disability is treated from medical to human right based approach under international law in which Ethiopia is also party to it. Though Ethiopia is party to the CRPD, its basic law (the constitution) doesn't sufficiently reflected the contemporary human rights of persons with disability which is particularly has been developing in the CRPD jurisprudence. For instance, the right to accessibility, reasonable accommodation and an explicit prohibition of discrimination against disability are not properly provided. The concept of reasonable accommodation and accessibility are not completely recognized in this constitution. The nonexistence of human rights of persons with disabilities in the constitution opened a way for legislatures and policy makers to violate human rights of persons with disability and it also prevented persons with disability not to claim when their right is violated

and removed their confidence to exercise the rights prescribed in the constitution as the general citizen.

# CHAPTER ONE

## *1 introduction*

The exact number of the population of those who live with disability is not known precisely. There are estimations nationwide and internationally. One of the estimations is the report of world bank. According to the recent estimation, fifteen percent of the world is suffering from some sort of disability.<sup>1</sup> From this, developing countries take the lion's share. Eighty percent of persons with disabilities live in developing countries.<sup>2</sup>

Coming to our country Ethiopia, there is no exact study on the population of disability. But few international studies indicate that above 17.3 million (17%) people live with some form of disability.<sup>3</sup> Even though they have different forms of disability, the way they experience discrimination from the society makes them similar. Discriminations against disabled person are worldwide problem.<sup>4</sup> Discrimination is not new for disabled community.<sup>5</sup> It goes to the earliest stage of human being. Disability in history was viewed as individual pathology or diseases.<sup>6</sup> Protection of the right of persons with disability under international law is a recent

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<sup>1</sup> Quentin Wodon and Hanna Alasuutari, 'The price of exclusion: Disability and education in Africa' (november 30 2018) <<http://blogs.worldbank.org/education/price-exclusion-disability-and-education-africa>> accessed january 14,2018

<sup>2</sup> Ibid

<sup>3</sup> World Bank and World Health Organization, 'World Report on Disability' (2011) <[https://www.who.int/disabilities/world\\_report/2011/report.pdf](https://www.who.int/disabilities/world_report/2011/report.pdf)> accessed january 14,2019

<sup>4</sup> BRONAGH BYRNE and EITHNE MCLAUGHLIN, 'The Social Model of Disability: Europe and the Majority World ' (2007), 34 *Journal of Social Policy* 175, PP.21.

<sup>5</sup> Roberto Saba, ' Around the globe, people with disabilities face unseen discrimination. We must do better. ' ( February 22, 2017) <<http://theconversation.com/around-the-globe-people-with-disabilities-face-unseen-discrimination-we-must-do-better-70235>> accessed january 14 2019

<sup>6</sup> Lisa Waddington, Mark Priestley and Betul Yalcin, 'Equality of opportunity in employment? Disability Right and Active Labour Market Policies' in Peter Blanck and eilionoir Flynn (eds), *Routledge handbook of disability law and human rights* (2017) PP.72.

phenomenon.<sup>7</sup> Throughout history, individuals with disabilities have been viewed as an individual who require societal protection and invoke sympathy rather than respect.<sup>8</sup> The attitude of the society towards persons with disability is backward attitude.<sup>9</sup> Although disabled persons have full capacity to engage in a certain job, the attitudinal, social, communicational and informational barriers created by the society doesn't allow them to participate in the socioeconomic activities of the country.<sup>10</sup> It is possible for example to see a high level of and indirect and direct discrimination in education, employment sector, health service and even in the political right of persons with disability.<sup>11</sup>

The community of persons with disabilities requires high protection not only in legislation, but also constitutionally. Unless otherwise constitutionally their right is guaranteed, there may be a high level of violation in such kind of vulnerable groups. Furthermore to change and break the backward perception of the society over persons with disabilities, to remove barriers socially constructed and to expand the equal opportunity of persons with disabilities to make them participate in the socioeconomic activities of their life and the country at large, laws have to be framed strictly. Predominantly, constitutions shall integrate the right of persons with disability. In the world, various constitutions have included the right of persons with disability as core principles. One example is our neighbor Kenya. She has involved the right of persons with disabilities in various provisions of the constitution.<sup>12</sup>

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<sup>7</sup> Arlene S Kanter, *The Development of Disability Rights under International Law from Charity to Human Right* (Routledge 2015) PP.25.

<sup>8</sup> nardos feleke, 'the right of persons with disabilities, discrimination or legal protection' (Addis Abeba university 2003)

<sup>9</sup> Lisa Waddington, 'Changing Attitudes to the Rights of People with Disabilities in Europe' in Jeremy Cooper (ed), *law rights and disability* (2000) PP.33.

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> See also the 2010 constitution of Kenya particularly article 24, Sec. 2: Art. 4, 22, 45, 34 and 36, The Constitution of Kenya [Kenya], 27 August 2010, available at: <http://www.refworld.org/docid/4c8508822.html> [accessed 26 April 2018]. Comments, Revised Edition 2010 (current to 2014), published by the National Council for Law Reporting with the Authority of the Attorney General.

Coming to Ethiopia, since the first constitution of 1931, Ethiopia has experienced four constitutions and one transitional charter.<sup>13</sup> Except the 1995 constitution, the remaining constitutions are criticized for their exclusion of disability rights provisions within their articles. In the modern world, one of the major characters for a democratic constitutional government is to insert human right principles under their constitution.<sup>14</sup> The key measure to label whether the government is constitutional or unconstitutional is the value that government gives for the protection of human rights in the constitution.<sup>15</sup> Constitution is the supreme law of the land. Any laws, decision, judgment and any other decisions are null and void when they are contrary to the constitution.<sup>16</sup> This is the main foundation for the author to study the constitutions with that of the human right of persons with disabilities.

The research is organized into 4 chapters. The first chapter of the research deals with the general proposal. The second part of the research looks about the general idea of constitutional rights. Which rights of disabilities are recognized or are recognized as constitutional right. How this constitutional right is incorporated in various constitutions. Why we need to incorporate the right of persons with disabilities in a constitution? Which rights of disabled persons are more important to include in a constitution. What distinguishes constitutional rights from other kinds of rights? Chapter three on other hand focuses on the 1995 FDRE constitution it also investigates the FDRE constitution in light of the rights of persons with disabilities. It spells out which rights of persons with disabilities are recognized in the FDRE constitution, how they are placed, which rights has been given much focus in the constitution. The researcher tried to evaluate the place of the right of persons with disability in the FDRE constitution from the modern thought of disabilities right particularly to which get recognition in CRPD and other state constitution. The non discrimination clause and article 41 (5) of the FDRE constitution will be also take concern. Chapter 4 is a place of recommendation and conclusion.

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<sup>13</sup>Adem Kassie Abebe, 'Human Right under the Ethiopian Constitution: a Descriptive Overview' (2011), Vol. 1 **Mizan Law Review**, P45

<sup>14</sup> Ibid

<sup>15</sup> Lafayette College The Writings of Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia (Writings of)* (2009)

<sup>16</sup> the federal democratic republic of Ethiopia Constitution Fed.Neg.Gaz., Pro. 1/1995, 1995 1, No. 1,

Note: for the purpose of this thesis, disabled persons or persons with disability takes the CRPD definition.

### ***1.1 The statement of problem***

Constitution is the foundation of all laws of the land. Any law, decisions, or any rules which contradict this law is null and no effect. The absence of clearly knowing the constitutional right of persons with disabilities is creating high confusion among the disabled community and other stake holders. The problem created due to the absence of clarity with respect to the place of persons with disabilities in constitution can be summarized as follow:

- It has become impediment for the full enjoyment of the rights by the disabled communities. It means that because disabled persons do not have adequate knowledge which right is constitutionally guaranteed and which is not protected, they are prevented from using their rights with full freedom. But if they have clear knowledge to the right protected by constitution, they will never be troubled to exercise their rights.

The second problem that the absence of clarity over constitutional rights is that it opened the possibility of excessive use of rights. (Abuse of rights) Most of the time every claims disabled person asks is believed to be constitutionally guaranteed. But the reality is not. The cause for this discrepancy is inability of knowing clearly the protected rights under the constitution.

Thirdly, the problem also extends to law and policy makers. It is common to see a number of provisions that disregard the right of persons with disabilities. According to the author, the main instrument that paved the way for law makers and policy designers to ignore the right of persons with disability is that lack of clear understanding to those rights protected under constitution. That means any law maker or policy designer if he has clear understanding about the rights of persons with disabilities protected under the constitution, it can be expected that laws or policies will comply with the constitution. Objective of the research

### ***1.2 The objective of the research***

This research has general and specific objective

The general objective of this research is that by critically examining the FDRE constitution in terms of the modern disability right jurisprudence on one hand and by comparing it from the previous constitution on other hand, to conclude whether the FDRE constitution has given sufficient protection for the right of persons with disability or not.

The specific objective of the research includes:

- Analyzing the specific rights of persons with disability recognized in the FDRE constitution;
- Making a brief comparison of the FDRE constitution in light of the previous constitutions of Ethiopia and other government constitutions;
- Evaluating the FDRE constitution in terms of modern disability right jurisprudence and
- Showing the basic rights and freedoms of persons with disability which are not included in the FDRE constitution.

### ***1.3 Research questions***

The following are the questions which will be answered by this research.

- Does the FDRE constitution incorporate the right of persons with disabilities sufficiently?
- Does the FDRE constitution give better protection for persons with disabilities compared to the previous constitution?
- Is it important to incorporate the right of persons with disabilities specifically in the constitution?

### ***1.4 The significance of the research***

Now days, in this modern world, the role of research in solving an existing problem is unquestionable. Having this idea in mind, this research also by examining the supreme law of the land (constitution), it provides extra knowledge on the existing store of knowledge. Even though the direct beneficial of the outcome of this research are disabled persons, other individuals will also grasp knowledge about the place of right of persons with disability in the history of the Ethiopian constitution in general and the FDRE constitution in particular. On the other hand, stake holder who is working on the issue of persons with disabilities will also be more beneficial

from the outcome of this research because, the research will investigate the rights provided in the constitution. They may use it as training manual for giving awareness about constitution and the right of disabilities. The other advantage of this research outcome goes to other researcher who is interested in constitution and its human right provisions. This is due to the fact that it simplifies and shortens the way to get clear understanding over disability and constitutional rights. The other beneficial of this research outcome is those officials who are responsible to make laws and formulate policies and strategies. It is expected that the outcome of this research will say something over constitution and the right of disabilities. The researcher may come with conclusion that the FDRE constitution doesn't provide due place for persons with disabilities. Then the policy and law makers may be influenced by this outcome and may come to improve the existing laws and policies. Furthermore, student of higher education may also use this paper as a reference to the right of persons with disability and constitution.

### ***1.5 literature review***

Various research works exist in the area of disability rights. Among these works, the author has reviewed the following essential books and researches.

One of these researches is the research of David m. Engelte the focus area of this research is on American children with disabilities. His research title called essay law, culture, and children with disabilities: educational rights and the construction of difference. The author analyzes the education right act of America with that of children with disabilities.<sup>17</sup> The other essential research conducted on disability is the case of the status of persons with disability in Kenya. This research is all about the condition of persons with disability that are living in Kenya. It explores the legal framework of Kenya and how people with disability are being treated by the government.<sup>18</sup> The finding of this research shows that even though legal protections are theoretical exist, but practically disabled communities in Kenya are suffering from high rate of violations of their rights. The monitoring system of Kenya is weak. This researcher doesn't look beyond Kenya. His research is only limited to Kenya. Even he didn't make comparison with the

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<sup>17</sup>david M.enges, *law, culture and children with disability: educational right and the construction of difference* (2010) P.53

<sup>18</sup>state of disabled persons in Kenya 2007 report: <http://www.yorku.ca/drpi/files/KenyaReport07.pdf> , (accessed on July 2007)

condition of Ethiopia. Furthermore, the issue that he seemed to explore by his research is the general status of persons with disability. He used constitution as a one legal framework. Not as subject of research.

The other important research over the world is the research of ANGELO BUHLE DUBE. The title of this research called protection of the rights of persons living with disabilities under the african human rights Systems. The objective of this research is to examine the African union human right system for its protection for persons with disabilities.<sup>19</sup> The Africa union has various human right instruments ratified in different time. But does this convention properly protect the right of persons with disabilities in Africa is the main concern of the author in his partial fulfillment of his research in Pretoria University. The finding of this research is that despite there are rights given for all people without discrimination, still specific convention is important for the realization to the right of persons with disabilities.

The other remarkable research regarding disability and human right is the research of Luke Clements and Janet reads. These authors studied the right to life and human right in its wider sense in selected European countries. The authors employed a socio-legal method of research to explore on the right of disabled persons particularly the right to life. The authors didn't explore the Ethiopian context in one hand it also doesn't relate the right with the constitution.

We have also other scholars who studied the issue of persons with disabilities over the world. These may include: we have many ;publications: (OHCHR (2016) disabilities; from exclusion to equality, realizing the right of persons with disabilities hand book for parliamentarian on the CRPD and its optional protocol], Gerard Quinn and Theresa DeGeneres (2002) human right and disability the current use and future potential UN human right instrument in the context of disability] and [united nation(2010) monitoring on the convention of persons with disabilities, a guide for human right monitors.

In domestic literatures, there are only few researches conducted in relation to constitution and disabilities In Ethiopia. Most of the researches are basically explore on the issue of specific rights of the constitution such as employment, education, election, affirmative action, and the

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<sup>19</sup> Angelo buhleDube, 'Protection of rights of persons living with disabilities under African human right system', (LLM Pretoria University), (' (2007)

right to get adequate housing. These rights actually provided under chapter three of the FDRE constitution. But they are not exclusively given for persons with disabilities. One of this research is the titled called “electoral participation as a fundamental political right of persons with disabilities in Ethiopia; critical examination of the law and the practice” conducted by Shimels Sisay in 2011. According to this researcher finding, persons with disabilities are getting in challenge with respect to the right to election.<sup>20</sup> The right to vote and to be elected is constitutional guaranteed political rights. They are equally applicable irrespective of one’s status. For the better implementation of this article the FDRE government has issued various proclamations, and directives. The author particularly tries to deal with the overall challenges of persons with disabilities at the time of voting. However, article 38 of the constitution has entitled equal protection for all citizen in relation to election, legislation under the constitution that are promulgated for the effective system of election has not addressed the critical issues of persons with disabilities.<sup>21</sup> Therefore, the main focus of the author is to examine the challenge of disabilities at the course of the election. He didn’t examine the essence of the incorporation of a specific provision of disability rights in the constitution. The other relevant domestic research on right of disability is the research of Ato Yohans tezera. In this paper the author seeks to explain whether the absence of strict legal framework regarding to the community of persons with disabilities has made contribution to the increment of the rate of unemployment.<sup>22</sup> We have various legal frameworks to employment and disabilities in our legal system. The researcher in its finding describe that the legal framework of Ethiopia compared to other countries is in its four feet. Even though the right is constitutionally guaranteed under article 41 of the FDRE constitution, everyone irrespective of his status has entitled to engage in any work that has economic benefit. the assumption of equal opportunity to employ in a certain organization is One of this is even though the researcher foundation for his paper is the FDRE constitution as one type of legal framework, but he didn’t scrutinized whether inserting specific provisions of right of persons with disabilities in the constitution has special advantage for the full enjoyment of the

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<sup>20</sup> Shimels Sisay, ‘electoral participation as fundamental political right of persons with disabilities in Ethiopia; critical examination of the law and the practice’ (partial fulfillment, Addis Ababa University 2011)

<sup>21</sup> See the FDRE Constitution, Art. 38, cited above at note 10

<sup>22</sup> Yohannes Teressa, ‘ensuring the right to equal employment opportunity of persons with disabilities: critical examination of the Ethiopian legal framework’ (partial fulfillment, Addis Ababa University June 2012)

right to employment under Ethiopia. But this paper surprisingly emphasizes how much it is essential to include the specific provisions of persons with disabilities in a certain constitution. The paper also compares the place of rights given for women and children with that of disabled persons. We have also other domestic materials over disabilities, which are published and unpublished materials. These may include:

Toward inclusive employment: the conceptual basis and features of pro. 568/2008 on the right of persons with disabilities. By Seyoum Yohans Journal of Ethiopian law V.24.no.1, Dagnachew Bogale employment discrimination on the basis of disability: the current legal regime in Ethiopia and its implementation unpublished, faculty of law AAU 2006, Silashi Zeleke, disability and development the need to develop disability inclusive PASDEM in Ethiopia Addis Ababa University: poverty action network (PANE) 2009,

## ***1.6 Research methodology and Sources of Data***

For successful and effective completion of the research, the author employed the following techniques.

The study employs doctrinal method to analyze the laws and the available literature. Data for the qualitative analysis will be gathered through interview and study of primary documents of organizations working in the area of disability rights.

### **1.7.1 Primary sources**

The primary source of this research is the 1995 FDRE constitution. The research entirely revolves on the analytical investigation of this constitution. Commentaries written on this constitution and disabilities are also the other important doctrinal inputs for the research. Furthermore the author will also try to see the transitional government charter with its provision of human right.

### **1.7.2 Secondary sources**

As a secondary source, the researcher also consulted various commentaries written on the issue of disability and constitution. These sources are very essential tools for analyzing and investigation of the subject matter of the research. Secondary sources of the thesis include:

- The previous constitutions of Ethiopia such as the 1931 constitution, the revised constitution of 1955, the 1987 PDRE constitution
- The minute of the 1994 constitution,;
- Constitutions and basic laws of other governments and
- Disability jurisprudences including the CRPD and its optional protocol, individual complaint through communications, state party report particularly to the committee on the right of persons with disability with its concluding observation and follow up and the general comment particularly on the convention of the right of persons with disabilities

### ***1.8 data interpretation***

This thesis is a textual analysis of the FDRE constitution. The researcher has used a pure analytical interpretation. This is due to the fact that the main sources that are analyzed by this research are literatures. The researcher also tries to analyze the data by comparative approach. That means when investigating the presence of rights of persons with disability in the FDRE constitution, making comparison with the modern jurisprudence of disability right and evaluating in terms of other government constitution the place that this constitution is given for persons with disability and in particular the protection this constitution provided for women and disability is briefly discussed.

## CHAPTER 2

### BASIC RIGHTS OF PERSONS WITH DISABILITY AND THE IMPORTANCE OF INTEGRATING THESE RIGHTS IN A CONSTITUTION

#### ***2.1 Introduction***

As described by Amy Rob et al., constitutions are ideal instruments for formally recognizing and strengthening human rights norms such as equality before the law and extending right to historically marginalized members of the population. Moreover, because constitutions are typically more difficult to amend than legislation, constitutional rights create particularly enduring and meaningful guarantee.”? Rising from this principle, the first section of this chapter deals with the importance of integrating human right provision in a constitution in general and the right of persons with disabilities in particular. Why we need to integrate human right provisions in the constitution? The response to the above question has great significant for clear analysis and conclusion to be made in the subsequent chapters.

This chapter explores the constitution and basic laws of various countries. The ways and methods these constitutions and basic laws recognize the rights of disability are different. Some countries have addressed the issue of disabilities explicitly in their constitutions while other constitutions guaranteed the right of persons with disabilities implicitly.<sup>23</sup> Although there is no clear consensus on which rights shall be constitutional right, however, those rights which serve as foundation for other rights are deemed to be constitutional rights. Nowadays the adoption of the UN convention on the right of persons with disabilities has marked the shift of disability philosophy from medical to human right approach.<sup>24,25</sup> Many countries have become the state

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<sup>23</sup>Amy Raub and others, ‘Constitutional Right of Persons with Disabilities: An Analysis of 193 National Constitution’ (2016), V29 Harv Hum Rts J P203, PP.202

<sup>24</sup> Kanter P.2

<sup>25</sup>Tsitsi Chataika, ‘Book Review as Kanter: The Development of Disability Rights under International Law: From Charity to Human Right’ (2015), Vol3 Africa Disability Rights Year Book

party of this convention.<sup>26</sup> Many countries are amending their constitution in light of the CRPD.<sup>27</sup> The CRPD has also introduced new principles and rights of persons with disabilities.<sup>28</sup> These rights are also very important if they are included in the constitution.<sup>29</sup> This is because they specifically protect and promote the right of persons with disabilities.<sup>30</sup> One of these examples is the principle of reasonable accommodation. The principle of reasonable accommodation, which was first practiced in the US Disability Act, has become a major principle to the full realization and equality of persons with disability.<sup>31</sup> The content and idea of reasonable accommodation will be explored in this chapter.

The other fundamental right of persons with disability which is also recognized in various government constitutions and the CRPD is the right/principle of accessibility. It refers the removal of barriers of disability such as physical, attitudinal, communicational and environmental obstacles which prevent disabled persons not to enjoy rights given for the whole as general.

Antidiscrimination clause and the right to accessibility are also fundamental right of persons with disabilities. The author will discuss them too in this chapter.

Note: The researcher is limited to few but basic rights of persons with disabilities due to the following reasons:

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<sup>26</sup> To see the status of state parties in detail please see at UN website:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=11&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=11&Lang=en)

<sup>27</sup> For example Kenya 2010, Hungary 2012 and Nepal 2015 respectively have amended their constitution to make compatible with the CRPD.

<sup>28</sup> Kanter cited above at note 17, P.2. Kanter puts the principle of reasonable accommodation and accessibility are a new rights introduced for persons with disability which was not seen in the previous human right instruments. however, there is an argument over the right to accessibility whether it is a new right given for persons with disabilities or it is the construction of the right to access which is provided under ICCP to persons with disability. please read for this argument the writing of Anna Lawson (2014) title: "Accessibility Obligations in the un Convention on the Rights of Persons with Disabilities: Nyusti & Takacs V Hungary"

<sup>29</sup> Toolkit on disability for Africa: module 7 legislating for disabilities rights available at <http://www.un.org/esa/socdev/documents/disability/Toolkit/Legislatinfordisabilityrights.pdf> last visited on April 10 2018

<sup>30</sup> IBID

<sup>31</sup> Simon Deakin, 'Disability, Discrimination and Equal Opportunity: a comparative Study of the Employment Right of Disabled Person' (March, 1996), Vol55 Cambridge Law Journal P13, P13

The human right of persons with disabilities entails a number of rights such as political, social, and economic and the whole generation of rights. So discussing and evaluating the FDRE constitution in light of each and every right of disability will take much space and time. Hence, the research discusses only the basic rights of persons with disabilities. Second, the principles and rights selected for analysis are necessary for other rights to be realized and achieved. Thirdly, since the constitution is a fundamental law of the land, it is only a place where the general principles and rights are enshrined.

## *2.2 The importance of incorporating human right provisions in the constitution*

### **2.2.1 The supremacy of the constitution**

The first reason why human right provisions in general and the right of persons with disabilities in particular is important to be included in the constitution is that constitution is the supreme law of the land. It is above any law, practice, decision or any other things.<sup>32</sup> It is null and void for any law or practice that goes against the provision of the constitution.<sup>33</sup>

In Ethiopia, except the first written constitution of 1931, the remaining constitutions including the FDRE constitution has incorporated the supremacy clause of the constitution.<sup>343536</sup> The enabling provision of supremacy of the constitution exists in the constitution itself.<sup>3738</sup> The basic

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<sup>32</sup>Jutta Limbach, 'The Concept of the Supremacy of Constitution' (January, 2001), Vol64 Modern Law Review, P.3

<sup>33</sup> IBID

<sup>34</sup> See article 9 of the FDRE constitution, cited above at note 10

<sup>35</sup> See the PDRE constitution, article 118, ratified on December 1987

<sup>36</sup> The 1955 revised constitution of the empire of Ethiopia, art. 103

<sup>37</sup> See the constitution of Ghana, article 1 reads: This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency, be void, the Constitution of the Republic of Ghana [Ghana], 7 January 1993, available at:

<http://www.refworld.org/docid/3ae6b5850.html> [accessed 27 April 2018] Comments The Constitution was approved at the Referendum held on 28 April 1992 and promulgated by the Constitution of the Fourth Republic of Ghana (Promulgation) Law, 1992. The latest amendment included here is the Constitution of the Republic Of Ghana (Amendment) Act, 1996 which was assented on 16 December 1996.

<sup>38</sup> See article 9 of the FDRE constitution, cited above at note 10

effect of the supremacy of constitution is making other laws, customary practice and decisions null and void when such laws and practices come contrary to the constitution.<sup>39</sup>

The supremacy of constitution is very decisive for guarantying human rights.<sup>40</sup> To have clear understanding how the supremacy of constitution guarantee human right better than any other laws, it is important to argue in light of the two implication of constitutional supremacy.

The first implication is the action of making a certain law or customary practice or judgment void whenever it is against the rights and values of the constitution.

A democratically framed constitution basically consists of inter alia: human right and democratic rights.<sup>41</sup> A human right which is recognized under a certain constitution gets the status of basic law or the integral part of the fundamental law.<sup>42</sup> This integration of human right makes the provision to be above any law, directive, regulation, judgment or any other customary practices.<sup>43</sup> so any decision, law, customary practices or directives are null and void as far as they are contrary to the of the constitutional human right provision.<sup>44</sup>

The other implication of the supremacy of constitution refers the action of making any laws or directive to be compatible with the constitution.<sup>45</sup> This means whenever the legislative or the executive body plans to make a law or to bind a decision all of the government bodies are expected to check whether their decision is compatible with the constitution or not.<sup>46</sup>

### **2.2.2 Interpretation of human rights provisions of the Constitution**

The special way of interpreting constitution is another factor that triggers human right to be incorporated in constitution. The method of interpreting constitution is different from any other ordinary laws. This is due to the fact that constitution is the basic law of the land. The presence of a special provision for interpreting a human right provisions in the

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<sup>39</sup>Leth K. Nasrawin, 'Protecting Human Rights Through Constitutional Adjudication-Jordan As Case Study' (2008),

<sup>40</sup>Colin Harvey, 'Human Right and The Constitution' (May, 2002), Fortnight Publication, P.10

<sup>41</sup> IBID

<sup>42</sup> IBID

<sup>43</sup>David Marrani, 'The Intersection Between Constitution, Human Rights and the Environment: The French Charter for The Environment and the New Ex post Constitutional Control in France'

<sup>44</sup> IBID

<sup>45</sup> IBID

<sup>46</sup> IBID

constitution give an opportunity to be interpreted in light of international law.<sup>47</sup> For countries where the human right jurisprudence is not blossomed, it is very important to incorporate such kind of provisions in a constitution.<sup>48</sup>

One of the Peculiar features of the FDRE constitution is interpreting of human rights provisions. The interpretation procedure for the general provision and the human right provisions is different. That means when courts or any other empowered body require interpreting the constitutional provisions it must interpret in light of international laws to which Ethiopia is party or adopted. Particularly The FDRE Constitution contains a impressive interpretation clause regarding the chapter dealing with human rights and fundamental freedoms.<sup>49</sup> Article 13(2) requires that the bill of rights “shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), International Covenants on Human Rights and international instruments adopted by Ethiopia”.<sup>50</sup>

On other hand, the inclusion of human right provisions in a constitution also makes these provisions to be interpreted by a special body which is authorized by the constitution itself. So the existence of a special body to interpret the constitution is another factor that necessitates human rights provisions to be incorporated in a constitution. Since human rights are an evolving concept and they are about the inherent dignity of a human being, it requires a special expertise and high skill individuals over human right issue and constitutional right.

### **2.2.3 Amendment procedure of constitution**

The other basic nature of constitution is the amendment procedure.<sup>51</sup> Most constitutions have special feature of constitutional amendment procedure.<sup>52</sup> In world basically there are two types of constitutional amendment procedure. The first procedure is the stringent kind of amendment procedure. This kind of procedure allows government to not to easily amend the constitution. So

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<sup>47</sup> IBID

<sup>48</sup> IBID

<sup>49</sup> IBID

<sup>50</sup> read article 13 (2) of the FDRE constitution, cited above at note 10

<sup>51</sup> Beale Cited above at note 1, P34.

<sup>52</sup> IBID

if human right provisions are included in the constitution, since constitution has incorporated a stringent procedure to amend, the possibility of amending constitution is very difficult. So this kind of amendment procedure is very preferable to protect human rights provision which get recognition in the constitution. For human right provision the constitution applies a more stringent procedure while for other kind of procedure it applies a less kind of amendment procedure.<sup>53</sup> In the FDRE constitution under article 103 the constitution stipulates that for amending the chapter 3 provision of the constitution, the 2 third of each regional states assembly and the 2 third of the house federation and the house of representative are mandatory.

### **2.3 The fundamental rights of persons with disabilities**

In this section what the author did is a simple discussion of those rights which are labeled as the fundamental rights under international human right law. So first by exploring the general idea of these rights under international human right law, the author will proceed to make clear the places of this right in the CRPD. Finally the place these rights have been given in domestic nation laws in general and the constitution in particular will be the concern of this section.

#### **2.3.1 The principle of reasonable accommodation**

The principle of reasonable accommodation, which is a recent principle, is a specific right which serves for the protection of persons with disabilities.<sup>54</sup> It was first introduced in the Civil Rights Act of America in 1964.<sup>55</sup> The purpose of this principle was not initially to secure the right of persons with disabilities. Rather it is to facilitate exceptional working conditions in the work place for religious ceremonies.<sup>56</sup> Employers were required to give reasonable accommodations for those employees whose religious ceremony conflict with the rules and regulations of the company.<sup>57</sup> However, in 1992, the American disability act has come with new right approach

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<sup>53</sup> Abebe P.46.

<sup>54</sup> Janet E. Lord and Rebecca Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in Marcia H. Rioux and others (eds), *Critical Perspectives on Human Rights and Disability Law* (2011) PP273

<sup>55</sup> Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart Publishing 2008) P. 112

<sup>56</sup> IBID

<sup>57</sup> IBID.

recognizing the reasonable accommodation.<sup>58</sup> Later on it has gotten recognition in the CRPD.<sup>59</sup> No any binding instrument was in other UN conventions that try to stipulate the idea of the principle of reasonable accommodation.<sup>60</sup> The CRPD is the first international document to include the principle of reasonable accommodation.<sup>61</sup> According to article 2 (3) of the CRPD, Reasonable accommodation refers to “necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden where needed in a particular case, to insure to persons with disabilities where needed the enjoyment or exercise on an equal bases with others of all human rights and fundamental freedoms”.<sup>62</sup> So reasonable accommodation is an instrument to promote equality and secure anti-discrimination clause. The enjoyment and equal participation of persons with disabilities in all aspects of life is only realized through the use of reasonable accommodation.<sup>63</sup> Reasonable accommodation also can be called as substantive equality.<sup>64</sup> It secures substantive equality in all types of rights including economic, civil, political and other rights.<sup>65</sup> Formal equality model requires all similarly situated people receive the same treatment and for laws and policies to be formulated in a neutral manner.<sup>66</sup> This model ignores human difference. And more importantly, the societal barriers that inhibit rights enjoyment and full participation<sup>67</sup> it gives an identical treatment irrespective of gender and other difference.<sup>68</sup> For example in the space of employment, it provides equal treatment for all kinds of identity with the same treatment approach. By contrast, substantive equality is less concern for identical person.

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<sup>58</sup> IBID

<sup>59</sup>The UN convention on the right of persons with disabilities (CRPD), art. 5 and 2, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly. Publisher, UN General Assembly. Publication Date, 24 January 2007.

<sup>60</sup>Kanter cited above at note 18, P35

<sup>61</sup>Ibid

<sup>62</sup> See The UN convention on the right of persons with disability, (CRPD), article 2, cited above at note 52

<sup>63</sup>Lawson Cited above at note 49, P13

<sup>64</sup>Lord and Brown cited above at note 48, P.276

<sup>65</sup> IBID.

<sup>66</sup> The principle of Equality and Non-discrimination Clause, available at:  
<http://hrlibrary.umn.edu/edumat/hreduseries/TB6/html/CH1.html>

<sup>67</sup> IBID.

<sup>68</sup>Sandra: Fredman, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm ’ in Anna Lawson and Caroline Gooding (ed), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005)

Rather it bothers for the equal access and equal opportunity. So this model requires the positive intervention of government in realizing equal opportunity and access. For instance, it requires resource allocation and other positive measures to ensure the enjoyment of equal opportunity for all persons.<sup>69</sup> So in some circumstances it may require treating disabled persons differently where treating them the same would fail to recognize critical needs, ignore barriers to full inclusion and undermine realization of human rights.<sup>70</sup>

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<sup>69</sup> IBID

<sup>70</sup> IBID.

### 2.3.2 The right/principle of accessibility

Accessibility is a term with no precise definition.<sup>71</sup> In the disability field, the concept of accessible environments is used to describe environments that are approachable, obtainable, or attainable.<sup>72</sup> Often this means that the environment can be altered to enhance the individual's probability to participate in that environment in a way that is meaningful to the individual. Such environments are thus viewed as accessible.<sup>73</sup>

In this sense, issues of access and accessibility are usually not discussed in isolation, but rather in terms of specific environments to which access is desired for persons with disabilities.<sup>74</sup> Examples of environments where accessibility is discussed are communication systems, education, employment, health care, housing, information technology, medical offices, polling places, public transportation, and websites.<sup>75</sup> The right/principle of accessibility mainly refers making information, communication, education, employment and transportation to be accessed by person with disability and enable them to exercise their rights independently and be treated equally with non-disabled persons in effect.<sup>76</sup>

For example, "Braille can make linguistic communication that is usually obtained through sight attainable to persons who are blind, but those persons must know how to use the sense of touch to access Braille."<sup>77</sup> Thus, written communication will not be accessible to persons who are blind if both of these conditions do not meet.<sup>78</sup>

The concept of accessibility has been legally codified in domestic legislations in Section 502 of the Rehabilitation Act of 1973 of America. This created the Access Board.<sup>79</sup> Latter on accessibility as a concept mainstreamed in the subsequent disability related legislations including

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<sup>71</sup>Gary L. Albercht, *Encyclopedia of Disability* (Roulf A. Janke 2006)

<sup>72</sup> IBID

<sup>73</sup> IBID

<sup>74</sup> IBID

<sup>75</sup> read article 9 of the convention on the right of persons with disabilities cited above at note 53

<sup>76</sup> read Para 3 of the general comment 2 on article 9 of the right to accessibility

<sup>77</sup> IBID

<sup>78</sup> *ibid.*

<sup>79</sup> IBID.

the American with disability act<sup>80</sup>The amended constitution of Kenya has also provided a section that deals with the right to accessibility.<sup>81</sup><sup>82</sup>Accordingly the Nepal constitution which amended in 2018 has also included the concept in its basic law.

### 2.3.3 The principle of equality/non-discrimination

The general principle of equality and non-discrimination is a fundamental element of international human rights law.<sup>83</sup> A useful definition of non-discrimination is contained in Article 1(1) of ILO 111, which provides that discrimination includes: ‘Any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation.’<sup>84</sup> “The principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice.”<sup>85</sup> This principle is also reflected in all conventions of the UN.<sup>86</sup> A pioneer exception of the UN convention is CRC.<sup>87</sup> The convention on the right of the child which is also said to be the models of convention in terms of being ratified by the whole UN members except U.S.A, states under article 2 the prohibition of discrimination against disability.<sup>88</sup> <sup>89</sup> Unfortunately, the convention

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<sup>80</sup> Wayne Thomas Oakes, *Perspectives on Disability, Discrimination, Accommodations, and Law: A Comparison of the Canadian and American Experience* (2005)

<sup>81</sup> Kithure Kindiki, ‘Legal Protection of Persons with Disabilities in Kenya: Human Rights Imperatives’ in *Critical Perspectives on Human Rights and Disability Law* (2011) P309

<sup>82</sup> look article 24 of the 2010 Kenya constitution, cited above at note 8

<sup>83</sup> SANDRA FREDMAN, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’ in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe From Theory to Practice* (Hart Publishing 2005) P14

<sup>84</sup> see article 1 of Convention no. 111/1958, ILO convention concerning discrimination in respect of employment and occupation, entered into force 15, June 1960, adopted on 25 June 1958

<sup>85</sup> see the right to equality provided under the human right project CD rom the HTML version, available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>

<sup>86</sup> see for example the following provision: article 1 of the CEDAW, article 3 of the IESCR and ICCPR.

<sup>87</sup> Kanter

<sup>88</sup> Hon. Alastair Nicholson, ‘THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE child and the need for its incorporation into a bill of rights’ (January, 2006), 44 FAMILY COURT REVIEW

too like its predecessor documents, fails to recognize to state unambiguously that children with disabilities are entitled to be treated on equal bases in all aspects of life with children without disabilities.<sup>90</sup>

Compared to other disability laws, the antidiscrimination laws has made tremendous change in UN member states domestic laws up to the 2014.<sup>91</sup> According to research made in 2016, almost 30 percent of the UN member parties have adopted some kind of anti-discrimination law for disabled people.<sup>92</sup> The anti-discrimination laws stated in these state differs in its scope, its entitlement, the definition given for equality and the mechanism of enforcing these rights.<sup>93</sup> Some laws define and clearly prohibit disability-based discrimination;<sup>94</sup> while some constitutions give the construction of what discrimination mean to courts or other quasi-judicial bodies.<sup>95</sup> We should remind that disability discrimination law is truly a recent and new development in social policy around the world.<sup>96</sup> It is an indicator of the paradigm shift from the medical model to the social model of disability.<sup>97</sup> According to degener, “To treat disability as a legally recognized discrimination category implies an acknowledgement that disabled people are people with rights, not problems.”<sup>98</sup> In domestic level antidiscrimination laws are inserted or recognized in various legal contexts.<sup>99</sup> For example antidiscrimination laws are prohibited in criminal laws in Finland,<sup>100</sup> Spain<sup>101</sup> and Australia.<sup>102</sup> Ethiopia also prohibited discrimination against disability at

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<sup>89</sup> if you need to see the status of state party which ratified this convention, please go to [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) Somalia is the last country ratifying this treaty she acceded may 19 2006.

<sup>90</sup>Kantercited above at note 18, P. 234

<sup>91</sup> Theresia Degener, ‘Disability Discrimination Law: A Global Comparative Approach’ in Anna Lawson and Caroline Gooding (ed), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) PP.87

<sup>92</sup>Ibid

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Raub and others cited above at note 17, P. 216-18

<sup>100</sup> see the Finland penal law 39/1989, adopted on 1889, entered into force 1889. this law Sets out the criminal offences. In particular, Chapter 47 (578/1995), deals with employment offences including work safety offences,

the time of employment.<sup>103</sup> Article 11 of the proclamation stipulates discrimination on disability is punishable with fine with 5000 Birr.<sup>104</sup> On other hand governments have also protected anti-discrimination laws in their fundamental laws (constitution).<sup>105</sup> <sup>106</sup>Constitutional rights for persons with disabilities have increased significantly since the CRPD.<sup>107</sup> <sup>108</sup>

### **2.3.4 The right to social and political participation**

Another fundamental right of persons with disability is the right to social and political participation. The right to participate in a society refers to the full participation of every citizen in the whole activities of government undertakings such as policy formulation and national action plans.<sup>109</sup> It extends up to the participation of all citizens in the decision making process which may in return affect his interest and establishing association to defend for his interest.<sup>110</sup>

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working hours offences, work discrimination, violation of the rights of an employee representative, violation of the right to organise, employment agency offences work permit offences, allocation of liability

<sup>101</sup> under the Spain penal code The specific prohibition against discrimination is governed by Article 314. As per this article, it is a criminal offence if an employer, after receiving an administrative order or sanction for serious discrimination in public or private employment, on the grounds, amongst others, of sex, sexual orientation, or disability to fail to restore the situation of equality by remedying the loss.

<sup>102</sup> see article 12A of the Australia disability discrimination act, of 1992, no. 135/1995, compilation no. 33, last compilation date 12 april 2018

<sup>103</sup> Shimelis Ashagre, ‘Appraising Employment Accommodation Rights of Visually Impaired Teacherin Ethiopia: Overview of Selected Cities’ (december 2014), Vol. 8 Mizan Law Review, 406

<sup>104</sup> the employment right of persons with disabilities fed.neg.gaz, 568/2008, 2008 14, No. 20,

<sup>105</sup> Raub and others cited above at note 17, P. 216-18

<sup>106</sup> for example, the 1982 Canadian Charter of Rights and Freedoms, which entered into force in 1982, states as follow: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>107</sup> Raub and others cited above at note 17, P.216-18

<sup>109</sup> Organisation for Economic Co-Operation a, *Evaluating Public Participation in Policy Making* (2005) P.23

<sup>110</sup> read Para3-6 of the general comment no. 25 of the CCPR of human right committee, Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at:

<https://www.refworld.org/docid/453883fc22.html> [accessed 16 December 2018]

Therefore, “the right to vote and stand for election and the freedom of association and assembly are the major expressions of political participation”.<sup>111</sup> It entails the notion that all citizens should be involved in decision-making processes that affect them”.<sup>112</sup>

The freedom to vote and stand for elections is an aggregation of the right and opportunity to vote, the right and opportunity to be elected and the freedom of association, including the right to form and join organizations and associations concerned with political and public affairs.<sup>113 114</sup> The right to vote and election is recognized in many of the UN human right instrument.<sup>115</sup> However, no convention has dared to specifically recognize the interest of persons with disability in the stipulation.<sup>116</sup> Yet the Human right committee in its general comment no. 25 stated that “the right to vote at elections and referenda must be established by law.<sup>117</sup> And it is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements.”<sup>118</sup>

The UN convention on the right of persons with disabilities (CRPD) has come with a large amount of rights for persons with disabilities.<sup>119</sup> According to this convention, the right to political participation for persons with disability typically refers:

- “Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen

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<sup>111</sup> *ibid.*

<sup>112</sup> read the human right project HTML VERSION, available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-participate-in-society>

<sup>113</sup> *ibid.*

<sup>114</sup> JANET E. LORD, MICHAEL ASHLEY STEIN and JANOS FIALA-BUTORA, ‘Facilitating an Equal Right to Vote for Persons with Disabilities ’ (March 2014), VOL. 6 JOURNAL OF HUMAN RIGHT PRACTICE, P6

<sup>115</sup> Laura Bocalandro and others, ‘The Right to Political Participation in International Law’ (April 1992), Vol. 86 (American Society of International Law 13, PP.249

<sup>116</sup> *Kanter* cited above at note 18, P.223

<sup>117</sup> see para 10 of the general comment of 25 of the human right committee, Human Rights Committee (HRC), CCPR General Comment No. 25: cited above at note 101

<sup>118</sup> *IBID*

<sup>119</sup> *Kanter* cited above at note 18,

representatives, including the right and opportunity for persons with disabilities to vote and be elected.”<sup>120</sup>

- “Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use”;<sup>121</sup>
- “Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for

Elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies

Where appropriate”,<sup>122</sup>

- “Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing

Assistance in voting by a person of their own choice”,<sup>123</sup>

- “ Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination

And on an equal basis with others, and encourage their participation in public affairs”.

The right to political participation of persons with disability in nation domestic legal system is recognized in two ways.<sup>124</sup> Few governments recognize this right for all kind of disability<sup>125</sup>

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<sup>120</sup> see article 29 (a) of the CRPD

<sup>121</sup> see article 29 of the CRPD

<sup>122</sup> see article 29 (C) of the CRPD

<sup>123</sup> see article 29 (D) of the CRPD

<sup>124</sup> There are many constitutions that allow the right to political participation for all types of disability. for instance, the following constitutions permit the right to political participation for all types of disability: Kenya, Philins and Germany.

<sup>125</sup> there are also many constitution still deprive of the right to political participation of intellectually disabled persons. for example, the electoral law of Austria retains discrimination clause which disregard the political right of mentally retarded persons. the CRPD committee in its concluding observation given for the initial report of Austria

while many governments disallow it for psychosocial persons.<sup>126</sup> Incorporating the political rights of persons with disability in a constitution is growing fast particularly after the adoption of the CRPD.<sup>127</sup>

### 2.3.5 The right to work

The other fundamental socioeconomic right of persons with disability which has been integrated in almost all constitution is the right to employment.<sup>128</sup> This right has long history rather than other socioeconomic rights.<sup>129</sup> The introduction of the right to employment as one specific right in this world is coincided with the formation of ILO.<sup>130</sup> It goes back to the formation of ILO in 1919.<sup>131</sup> ILO has adopted various conventions in various issues. Like the right to education the right to work also affects many other socioeconomic rights.<sup>132</sup> The right to work is not only about earning income it is also useful for personal development.<sup>133</sup> The right to work, in a broad sense, implies the right to enter employment, and the right not to be deprived of employment unfairly.<sup>134</sup>

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recommended that since Austria had ratified the convention on the right of persons with disability, she must comply with article 29 of the convention which guarantees the political right of all disabilities irrespective of their type..

<sup>126</sup> few countries hav incorporated the political rights of persons with disability in the amended constitution, one example for such step is the 2010 Kenya constitution. anyhow, if you want to read the data how much constitution has incorporated the political rights of persons with disability after the ratification of the CRpd, please read article written by

<sup>127</sup> Raub and others cited above at note 18

<sup>128</sup> Ibid

<sup>129</sup> Arthur O'Reilly, *The right to decent work of persons with disabilities* (2 edn, 2007)

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Waddington, Priestley and Yalcin PP.60

<sup>133</sup> JEAN-FRAN~OIS RAVALJD, 'DISCRIMINATION TOWARDS DISABLED PEOPLE SEEKING EMPLOYMENT' (1991), 83 BEATRICEMADIOT and ISABELLE VILLE National Institute for Health and Medical Research (INSERM)

<sup>134</sup> ibid

As of any socioeconomic rights, this right is also recognized in several international instruments. Several international standards deal with the right to work and many conventions have been drafted on labour rights.<sup>135</sup>

The right to work for persons with disability is a matter of life or death. It is the issue of the right to live. Disabled persons unless they are employed, the security to live in this world will enter to question.<sup>136</sup> The history of the right to work for disabled persons like the general labour related right goes back to ILO convention.<sup>137</sup> One of the earliest laws to address specifically the employment issue of persons with disability is recommendation no. 99 of ILO on vocational rehabilitation.<sup>138</sup> This recommendation refers shelter employment and employment promotion measures.<sup>139</sup> However, the sheltered employment was reserved for those disabled persons who can't fit the ordinary work condition.<sup>140</sup> The 1955 ILO Recommendation is not a right rather it was a rehabilitation mode of protection.<sup>141</sup> After a three decade of development, the ILO came with better vision even though the definition of the convention is rehabilitative approach.<sup>142</sup> The

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<sup>135</sup> Article 23 UDHR Sets out the right to work, the right to equal pay for equal work, and just and favorable remuneration and Article 24 provides that everyone has the right to rest and leisure, reasonable limitations of working hours as well as periodic holidays with pay. Articles 6 and 7 ICESCR develop these rights further with regard to the right to work and its essential corollary, just and favorable conditions of work. Article 11 CEDAW Provides that states shall take all appropriate measures to eliminate discrimination against women in the field of employment and Article 32 CRC sets out work conditions for children in order to protect them from economic exploitation and from work that would interfere with their education, health and development. based approach.

<sup>136</sup> Lisa Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion' in Anna Lawson and Caroline Gooding (ed), *Disability Rights in Europe: From Theory to Practice* (2005) PP.107

<sup>137</sup> Waddington, Priestley and Yalcin cited above at note 126, P.77

<sup>138</sup> recommendation 99/1955 of ILO. if you want to read more about the history of the right to employment of persons with disability, please read the book titled "the right to decent work of persons with disabilities" which is written by Arthur O'Reilly. this book puts the chronological development of the right to employment of persons with disability.

<sup>139</sup> Waddington, Priestley and Yalcin cited above at note 126, P.74

<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> see the human right project CD, cited above at note 81

convention and the recommendation were found on principle of Equal opportunity.<sup>143</sup> It says that policies shall be based on the principle of equal opportunity between disabled workers and workers generally.<sup>144</sup> Equal opportunity and treatment for disabled men and women shall be respected.<sup>145</sup> The European Social Charter is also another law that addresses the issue of disabled persons at employment.<sup>146</sup> By the same token the charter emphasized the shelter employment which requires a special place to which disabled may work in a segregated place.<sup>147</sup> However, in the revise ESC, shelter employment is made exception for state parties to be obliged.<sup>148</sup> After 1990, understanding about disability and employment is changed to equal opportunity and integration of disabled persons in active and open labour market.<sup>149</sup> The standard of UN equal opportunity for disabled persons and the UN convention on the right of persons with disability are two instruments which witnessed the shift of disability and employment thinking to the more right based approach.<sup>150</sup>

The UN convention on the right of persons with disability (CRPD) in its article 27 states that among other things:

- “State party to Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and

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<sup>143</sup> O'Reilly P.20

<sup>144</sup> Ibid

<sup>145</sup> ILO convention no. 182/1982

<sup>146</sup> Olivier De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights' in Anna Lawson and Caroline Gooding (ed), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) PP.35

<sup>147</sup> Ibid

<sup>148</sup> Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion' cited above at note 130, P.112

<sup>149</sup> Waddington, Priestley and Yalcin cited above at note 126, P.74

<sup>150</sup> Andrew Byrner and others, *From Exclusion to Equality realizing the Right of Persons with Disabilities handbook for Parliamentarian On the Convention On the right of Persons with Disabilities and Its Optional Protocol United Nation* (2 edn, Secretariat for the convention on the Right of Persons with Disabilities United Nation Department of Economic and Social Affairs (DESA) 2007) P.24

employment, continuance of employment, career advancement and safe and healthy working conditions”;<sup>151</sup>

- “Protect the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances”;
- “Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others”;
- “Promote employment opportunities and career advancement for persons with disabilities in the labor market, as well as assistance in finding, obtaining, maintaining and returning to employment”;<sup>152</sup>
- “Employ persons with disabilities in the public sector and Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmers, incentives and other measures, as well Ensure that reasonable accommodation is provided to persons with disabilities in the workplace” and<sup>153</sup>
- “Promote the acquisition by persons with disabilities of work experience in the open labour market”.<sup>154</sup>

Many countries have incorporated disability employment laws in their legal system.<sup>155</sup> ADA of USA,<sup>156</sup> DDA of England<sup>157</sup> and Australia disability employment act<sup>158</sup> are

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<sup>151</sup> see article 27 1 (A) of the CRPD

<sup>152</sup> see article 27 (C and D) of the CPRD

<sup>153</sup> see article 27 1 (G, H and I) of the CRPD

<sup>154</sup> read article 27 1 (J)of the CRPD

<sup>155</sup> Degener cited above at note 85, P90

<sup>156</sup> the American disability act (ADA) of 1990

<sup>157</sup> the england disability discrimination act (EDDA) of 1995

<sup>158</sup> the Australia disability discrimination act (ADDA) of 1995

comprehensive and huge documents addressing disability and employment in their context.<sup>159</sup>

Regarding to constitutions, many governments protected the right to employment of persons with disabilities by inserting formal equality or using antidiscrimination law which prohibits discrimination on ground of disability.<sup>160</sup> Some governments use an explicit provision to secure the rights of disabled persons in employment.<sup>161</sup>

### **2.3.6 The right to health**

The right to health is one of the second generation human right lists which are in the first time appeared in the UDHR. It requires the government active and positive intervention to realize this right.<sup>162</sup> Compared to the first generation of rights which require immediate reaction, this right normally demand financial expenditure and resource allocation's<sup>163</sup> the right to health is also mention in almost all core human right instruments of the UN convention.<sup>164</sup> The right to health basically encompasses such as the right to food, shelter, clothing and other necessary things which are relevant to live as a human being.<sup>165</sup> Except in ICCPR, the right to health is defined in every section of the core instruments of the UN convention.<sup>166</sup> From these provisions, the provision used under ICESCR serves as a good standard for the right to health.<sup>167</sup>

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<sup>159</sup> Raub and others cited above at note 17, P.223-224

<sup>160</sup> Ibid

<sup>161</sup> Venezuela's constitution, for example, under article 81 guarantees the right to work to persons with disabilities by stipulating the following:

“Any person with disability or special needs has the right to the full and autonomous exercise of his or her abilities. The State guarantees them respect for their human dignity, equality of opportunity and satisfactory working conditions, and shall promote their training, education and access to employment appropriate to their condition, in accordance with law”.

<sup>162</sup> Kanter 214 cited above at note 18, P.213-215

<sup>163</sup> Ibid

<sup>164</sup> John Tobin, *the right to health in international law* (oxford university press 2012) P.16

<sup>165</sup> Ibid

<sup>166</sup> see article 17 of the CRC: "

<sup>167</sup> Kanter cited above at note 18, P.213-215

The right to health is also enshrined under the CRPD.<sup>168</sup>

The right to health exceptionally for persons with disability means mainly the entitlement extends:

- “The need to expand health and rehabilitation services for people with disabilities, particularly in rural area”:<sup>169</sup>
- “Insure insurance companies and private organization not to discriminate against persons with disability”;
- “Increase budgetary resources and making accessible health care institution including hospitals for persons with disabilities;
- insure all mental health care services to be with the free and informed consent of individual concerned and extending up to an action of repealing any laws which permit involuntary treatment and confinement as well as authorization of third parties such as guardian and other families of disabled individual to decide in place of him and change it to supported decision making.

The right to health addressing the issue of disability is obtaining national action in various governments particularly after the adoption of the CRPD.<sup>170</sup> For example Argentina has taken a legislative measure after the recommendation of the committee of CRPD.<sup>171</sup>

Constitutional measures also have been taken in a few countries to address the interest of persons with disabilities, in the right to health which has more connection with having and to lead dignified life in effect.<sup>172</sup>

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<sup>168</sup> Ibid

<sup>169</sup> see article 25 (1) of the CRPD, cited above at note 52

<sup>170</sup> Raub and others cited above at note 17, P.220-22

<sup>171</sup> please read the section on the principal area of concern and recommendation of the concluding observation of the committee on the convention right of persons with disability on the initial report of Argentina, held on september 2012, at its 8th session, available at:

<sup>172</sup> Kate Harrison, ‘Disability and Mental Health Law’ in *law, rights and disability* (2000) PP.193

### 2.3.7 The right to education

The right to education, which is a precondition for the realization of other socioeconomic rights, is very necessary for the promotion of human rights.<sup>173</sup> This is because many socioeconomic rights depend at least to the minimum attainment of education level.<sup>174</sup> Take for example, the right to work is realized only if the right to education is sustained. The same is true for scientific progress.<sup>175</sup> Few civil and political rights are also can only be enjoyed by the minimum requirement of getting education level.<sup>176</sup> For this, freedom of information, the right to vote and the right to access public service can be taken as good manifestation.<sup>177</sup> Education serves as huge instrument to escape from poverty particularly for women and disability.<sup>178</sup> It empowers them to take part in the whole social political and economic activities of the society.<sup>179</sup>

International instruments such as the UDHR in its article 26,<sup>180</sup> ICESCR under article 13 and 14,<sup>181</sup> CRC with in article 28 and 29,<sup>182</sup> article 10 and 11 of the CEDAW,<sup>183</sup> article 5 of the

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<sup>173</sup>see the human right education project, CD Rom prepared by the University of peace, under the substantive human right, on the right to education.

<sup>174</sup>IBID.

<sup>175</sup> ibid.

<sup>176</sup>IBID.

<sup>177</sup> Felicity and and Armstrong Len Barton, *Disability Human Right and Education: Cross Cultural Perspective* (Professor Len Barton ed, 1999) P.6

<sup>178</sup> Ibid

<sup>179</sup> Payel Rai Chowdhury, 'THE RIGHT TO INCLUSIVE EDUCATION OF PERSONS WITH DISABILITIES: THE POLICY AND PRACTICE IMPLICATIONS' (2012), Vol. 12 ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW, P.7

<sup>180</sup>the UDHR states: Article 26

"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

<sup>181</sup>Article ICESCR under article 13 states that "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms."

<sup>182</sup> CRC article on its part stipulates that Article 28 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

CERD<sup>184</sup> and article 30 of CMDW<sup>185</sup> have given recognition for the right to education. Other international documents such as the convention on the status of the refugee and regional instruments too have incorporated the right to education in its provision.<sup>186</sup>

Coming to the right of persons with disability, the CRC is the first UN human right instrument to touch roughly education and disability.<sup>187</sup> However, this instrument doesn't guarantee education as a right holder for children with disability. Rather it aspires state party to progressively realize this right.<sup>188 189</sup> Nevertheless, CRC is a precursor for the CRPD.<sup>190</sup> The CRPD is the first UN

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- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - (d) Make educational and vocational information and guidance available and accessible to all children;
  - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates."

<sup>183</sup>CEDAW states the following: Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women."

<sup>184</sup>ICERD under article 5 declares:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (v) The right to education and training

<sup>185</sup>CMw ALSO PROVIDES THE RIGHT TO EDUCATION IN ARTICLE 30:

"Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned.

Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment."

<sup>186</sup>CONVENTION ON THE STATUS OF REFUGEE

<sup>187</sup> Chowdhury P.6

<sup>188</sup> Raub and others cited above at note 17, P.203

instrument to use education as a right for persons with disability. As the author explained earlier in this section, the right to education is a fundamental right for all society. However, its importance is doubled when we come to individuals with disability. Because the right to education for persons with disability is the main gate to be FREE FROM third party dependency and to be self-dependent, insuring education play a crucial role to this end. According to a recent study conducted by World Bank, disabled persons much suffer with poverty compared to non-disabled persons. According to This study, lack of education opportunity for persons with disability at the level of elementary and high school contributed to these phenomena. It seems that depending on these phenomena that the CPRD has taken much focus on poverty and education starting from the preamble of the convention.<sup>191</sup>

Article 24<sup>192</sup> of the CRPD states that the right to education for persons with disability refers:

- Removals of an institutionalized system of disability based education and replace it with an inclusive and integrative approach of education;
- Overturning discrimination against disability in times of education;
- To insure reasonable accommodation in education and make the environment accessible for individual with disability so as to enjoy their right to education

Nations are taking measures to combat discrimination based education which permits disabled persons to be learned in segregated institutions. For example, Zimbabwe after a great struggle for

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<sup>189</sup> Article 23 of the CRC says the following: (3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

<sup>190</sup> Kanter P.6.

<sup>191</sup>pleas see the preamble of the CRPD particularly M and T

<sup>192</sup>CRPD Article 24 says the following: the right to Education 1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning

justice to disabled persons, in 1992 has adopted national disability act which can be cited as one starting point in the Zimbabwe legal system to recognize the question of disabled persons over institutionalized system of education and a bitter discrimination exclusion of disabled persons on education.<sup>193</sup>

On the other hand, Even though little is done to address the need of disabled children in mainstream sector or to provide for access children excluded from any sort of educational provision, The Trinidad and Tobago government has endeavored to recognize the establishment of special need education since the educational act of 1968.<sup>194</sup>

Furthermore, constitutional recognition of the right to education is also taking place particularly after the adoption of the CRPD.<sup>195</sup> For example, the constitution of Bolivia guarantees that: "The State shall promote and guarantee the continuing education of children and adolescents with disabilities. Under the same structure, principles and values of the educational system and shall establish a special organization and development curriculum."<sup>196</sup> Thailand includes measures to support education for all children with disabilities, stating that: "The indigent, the disabled, persons of infirmity or persons suffering a state of difficulty shall be accorded the right under paragraph one and entitled to such support from the state as to enable them to receive education comparable to that received by other persons."<sup>197</sup>

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<sup>193</sup>Robert Chimedza and Susan Peters, ' Disabled people's quest for social justice in Zimbabwe' in Len Barton and Felicity Armstrong (eds), *DISABILITY, HUMAN RIGHTS AND EDUCATION: Cross-cultural perspectives* (1999) PP.7

<sup>194</sup>Ann Cheryl Namssoo and Derrick Armstrong, 'Human rights and the struggle for inclusive education in Trinidad and Tobago' in *DISABILITY, HUMAN RIGHTS AND EDUCATION: Cross-cultural perspectives* (1999) PP.24

<sup>195</sup>Raub and others P.220

<sup>196</sup>Ibid

<sup>197</sup>Ibid

## CHAPTER THREE

### **THE RIGHT OF PERSONS WITH DISABILITY IN THE ETHIOPIAN CONSTITUTION IN GENERAL AND THE FDRE CONSTITUTION IN PARTICULAR**

This chapter discusses a general overview of the right of persons with disability in the previous constitutions of Ethiopia and it investigates the place of the right of persons with disabilities whether it is sufficiently included in the FDRE constitution or not.

#### ***3.1 A glance overview of the previous constitutions with respect to the human right in general and right of persons with disability in particular***

Until now, Ethiopia has witnessed four constitutions. These constitutions are the 1931 constitution, the 1955 revised constitution, the 1987 constitution and the 1995 constitution.<sup>198</sup> Though these constitutions vary on the degree they devote their place for a human right, more or less all of the constitutions were entailed a human right provision. In this chapter the author will try to simply highlight the previous constitution the place they give for the right of persons with disability.

##### **3.1.1 The 1931 constitution**

The 1931 constitution, which is the first written constitution in Ethiopia history, has marked the beginning of a uniform and a written legal document.<sup>199</sup> In the first written constitution of Ethiopia, history shows that human rights were not included as such.<sup>200</sup> the constitution, rather than endowing rights for its subject, imposes duties on citizen.<sup>201</sup> In this constitution, a few rights were cited in the chapter three of the constitution.<sup>202</sup> Yet the constitution missed basic and

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<sup>198</sup> Abebe P.41.

<sup>199</sup> Bereket Habte Selassie, 'Constitutional Development in Ethiopia' (june 1966), JOURNAL of African law

<sup>200</sup> Abebe P.41

<sup>201</sup> tsegaye regasa, 'MAKING LEGAL SENSE OF HUMAN RIGHTS: The Judicial Role in Protecting Human Rights in Ethiopia' (September 2009), Vol. 3 Mizan Law Review, PP.287

<sup>202</sup> Selassie P.42

fundamental rights which stem from the sole fact of being a human.<sup>203</sup> For instance, equality before the law/antidiscrimination clause was not inserted in the constitution.<sup>204</sup> Likewise the right to life which is the base of other rights was not enshrined by this constitution.<sup>205</sup>

Concerning to the right of persons with disabilities, we can't find a specific provision that deals with disability in any of the sections of the constitution.<sup>206</sup> In general, the constitution had no relevance in light of disability. However, disabled persons can enjoy those rights provided in the constitution as one subject of the emperor.

Hence, this Constitution was nothing less or more than a mere confirmation of the powers and prerogatives of the Emperor, which he would, in any have exercised.<sup>207</sup>

### **3.1.2 The 1955 revised constitution**

The 1955 revised constitution, like the 1931 constitution defined and distributed powers, rights and obligations within the country; notably, between the Emperor who had the most self-sufficient source of political authority, and the rest of branches of government (which enjoyed derivative powers, either from the Crown and the people or from both).

Even though the constitution is escorted with an internal claw back clause and general limitation,<sup>208</sup> Compared to the 1931 constitution, this Constitution incorporated the basic tenets of fundamental human and political rights from the United Nation Universal Declaration of Human Right to which Ethiopia was then a signatory, though it did not matter much for it was a

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<sup>203</sup> Ibid

<sup>204</sup> look the chapter 3 provisions of this constitution

<sup>205</sup> ibid.

<sup>206</sup> Seyoum Yohannes Tesfaye, 'Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/ 2008 on the Employment of Persons with Disabilities' (2010), Vol. 24 JOURNAL OF ETHIOPIAN law, P.88

<sup>207</sup> regasa PP.290

<sup>208</sup> among the rights stipulated under the 1955 revised constitution, have claw back clause. in addition to this, general limitation clause is also provided under article 65 in which we read: ARTICLE 65

"Respect for the rights and freedom of others and the requirements of public order and the general welfare shall alone justify any limitations upon the rights guaranteed in the foregoing articles of the present chapter"

mere declaration, no a Convention.<sup>209</sup> The right to life which was not provided in 1931 constitution had been recognized in this constitution. Accordingly the equality clause and nondiscrimination clause are also vested in the constitution.<sup>210</sup> However, the nondiscrimination clause is narrowly constructed in the constitution. First it doesn't list out protected groups in which discrimination is prohibited. Second the nondiscrimination clause applies only for the civil rights enshrined in the constitution. It excluded socioeconomic and political rights which are to some extent inserted in the constitution.<sup>211</sup> The significance of this constitution for disabled persons is the same as its predecessor document.

### **3.1.3 The 1987 PDRE constitution**

The PDRE constitution contained a number of basic and fundamental freedom and rights. Chapter 7 of the constitution lists out the basic and fundamental rights and freedoms of citizens. Compared to the previous constitutions, this constitution had given much place for socioeconomic related rights. Regarding to disability issue, three provisions of the constitution has connection with disability.

First, The PDRE constitution is the first constitution to use at least as a term the word “disable” in the Ethiopian constitutional history. Article 22 of this constitution states: The “state and society shall provide special care for those disabled in the course of defending the sovereignty and territorial integrity of Ethiopia and safeguarding the revolution as well as the families of the martyrs.” In This provision, at least apparently, we find two visible weaknesses. The first one is the provision is only dedicated to protect a particular groups of disability namely a war victims of disability. Secondly the provision defines disability as charity based model. This provision does not invite the disabled persons to the enjoyment of rights and freedoms enshrined in the constitution. Rather, it strengthens the possibility of being supported by the state and the society.

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<sup>209</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999)

<sup>210</sup>see article 37 and 38 of the 1955 revised constitution of Ethiopia here under: ARTICLE 37

No one shall be denied the equal protection of the laws.

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#### ARTICLE 38

There shall be no discrimination among Ethiopian subjects with respect to the enjoyment of all civil rights.

<sup>211</sup> see article 47 of the 1955 revised constitution of Ethiopia, cited above at note 54

The second provision which may have relation with disability is article 35. At least as formal equality, by extending the phrase “other status” this provision protects disabled persons as same as non-disabled persons.<sup>212</sup> The equality clause of the PDRE constitution varies from the 1955 revised constitution for the fact that it had improved the weaknesses which was noticeable in the earlier constitution.

The third provision that has connection with disability is article 50. This provision openly excluded intellectually disabled persons from the right to elect and be elected, which must be given for the sole fact of being the citizen of Ethiopia.<sup>213</sup><sup>214</sup> Notwithstanding the positive and negative steps the constitution provided, however, like the previous constitutions, in this PDRE constitution also we can't find a section of disabilities which guarantee the specific interests of disabled persons.

### **3.1.4 The 1995 FDRE constitution**

The 1995 Constitution differs from the previous constitution in relation to recognition of human rights. Amazingly, the constitution has devoted its 1 third of its section for human right provisions which is not ever seen in the previous constitution. It has also incorporated a large amount of rights which were not observable in the previous constitution.<sup>215</sup> Among these rights, self-determination can be taken as good example. This constitution also differs from the

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<sup>212</sup> Tesfaye P.98

<sup>213</sup> please read art. 50 of The Constitution of Peoples' Democratic Republic of Ethiopia Neg.Gaz., Pro. 1/1987, 1987 47, No. 1,

this article uses the term "insane" for explaining those persons who are mentally disabled persons. the above term is a derogatory and an outdated term. this term was used in the ancient time. now it is replaced by intellectually disabled persons. the CRPD committee in its subsequent concluding observation has recommended state parties to remove such derogatory words and replace it with psychosocial or intellectually disabled persons in light of human right model. Ethiopia too, had recommended to change derogatory terms which are inserted in particular in the civil code and family code. you can read more the conclusion observation given for Algeria, Tunisia, Uganda, and also Ethiopia by visiting

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)

<sup>214</sup> the right to elect and to be elected is defined as a democratic right to which only it is given the citizen of a given country. many countries including Ethiopia give this right for their own nationality.

<sup>215</sup> Abebe PP.42

previous constitution in terms of expanding the special protection for vulnerable groups such as women and children.<sup>216</sup>

The FDRE constitution has many peculiar features in relation to human right as Adem Kassie discussed it. One of these peculiar features of the constitution is recognizing the whole generation of rights in a single document.<sup>217</sup> Civil and political rights (traditionally called first generation rights) are set particularly from article 15 up to 38.<sup>218</sup> While article 39 stipulates the right to self-determination up to secession, the right to development (art. 42) and the right to clean healthy environment (article 43) represent the so-called third generation or solidarity rights. Likewise, article 40 and the following provision specify mostly categories of socioeconomic rights.

Starting from recognizing the supremacy of The constitution, by introducing a new stringent amendment procedure for amending the human right section of the constitution and by providing a segment which requires judicial bodies and other organs while interpreting the human right provision to be in light of international bill of rights to which Ethiopia has adopted or ratified, the constitution has become the shield and armor of human rights.

Though the FDRE constitution is too gold compared to the previous constitutions in terms of human right entitlement, it is not escaped from criticism. One of the shortcomings of the FDRE constitution as most scholars including Adem Kassie observed is the absence of the right to life in a non-derogable rights provided under article 93 of the constitution. Indeed, it is unbelievable and confusing to remove the right to life from non-derogable right lists as Ethiopia is the state party of ICCPR which declares the non-derogability of the right to life enshrined under article 5 of the convention. Ethiopia has also neither put a reservation nor a statement of declaration on ICCPR.

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<sup>216</sup> regasa P.293

<sup>217</sup> Abebe PP.41

<sup>218</sup> Ibid

## ***3.2 The place of the right of persons with disabilities under the FDRE constitution***

In the previous sections the author briefly tried to discuss the place of right of persons with disabilities in the preceding constitutions. And also the author tried to see a general overview of the human right provision of the 1995 FDRE constitution. Now this section and the followings will discuss the presence of the right of persons with disabilities in the FDRE constitution. A brief comparison is also made with other constitution so as to have a general knowledge and appreciate the FDRE constitution in light of other constitutions.

General speaking, in the FDRE constitution, like as of Nigeria constitution there is no a specific provision that dedicated for the right of persons with disabilities.<sup>219</sup> The only provision that used the term of disabled persons is article 41 (5).<sup>220</sup> However, article 25 of the constitution may have an indirect relevance to the right of persons with disabilities.<sup>221</sup> Other basic rights such as the right to accessibility, the principle of reasonable accommodation, the right to live in community and the right to decision making are not guaranteed as one specific right of disability in the FDRE Constitution. The researcher will try to see all the above rights and principles one by one in the following subsections.

### **3.2.1 Article 41 (5) of the FDRE constitution**

Before going to deal with article 41 (5) of the constitution, the writer do want to discuss models of disability. Basically there are four models of disability. These are individual/medical approach, morality approach minority group right and social/right based approach.<sup>222</sup>

The medical approach is an approach mostly which was accepted before 1993.<sup>223</sup> This model defines or understands disability as functional impairment.<sup>224</sup> In this model, Disabled persons are

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<sup>219</sup>IBRAHIM IMAM, 'rights of people with disabilities in nigeria: attitude and commitment ' (2016), P4

<sup>220</sup> read article 41 (5) of the FDRE constitution.

<sup>221</sup> see article 25 of the FDRE constitution.

<sup>222</sup>Mahari Redae, Employment and Labor Law, Teaching Material prepared under the sponsorship of the justice and legal system research institute, (unpublished, 2009), P62

<sup>223</sup> IBID

discouraged to take part in social undertakings.<sup>225</sup> This discipline characterizes disability solely as a biomedical condition, a genetic condition, a disease category, or a personal deficit.<sup>226</sup> It viewed as needy who require the treatment of the society and believed that due to their disability they can't be engage in any economic activities.<sup>227</sup> That means they think that the functional limitation of disabled person will not allow them to participate in the socioeconomic activities of the country.<sup>228</sup> So this theory requests the state to create a separate institution so as to rehabilitate them.<sup>229</sup> The reaction that this model has towards disabled persons is as much as possible to cure them from their personal deficiency.<sup>230</sup> However, if it is not attainable the model requires putting disabled persons in a segregated place and makes them to safe zone.<sup>231</sup>

Minority group right: the minority group right emerged to challenge the traditional dominance of the functional limitation paradigm.<sup>232</sup> The main theme of this model is that these opponents argue as disable person is under minority as black and Spanish people.<sup>233</sup> minority group activists believe that discrimination and oppression come This model basically was dominant in America.<sup>234</sup> The main cause for the rise of minority group right activists seems the decision of America Supreme Court which decided in one case determining that disability cannot be among protected groups in the equality clause of the 14<sup>th</sup> amendment.<sup>235</sup> According to this decision,

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<sup>224</sup> Marcia H. Rioux and Fraser Valentine, 'Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy' in Dianne Pothier and Richard Devlin (eds), *critical disability theory* (2006) PP.47

<sup>225</sup> Ibid

<sup>226</sup> Ibid

<sup>227</sup> Arlene S. Kantar, The Development of Disability Right under International Law: from Charity to Human Right, (2015), P4-7

<sup>228</sup> Bricher and Gillian, 'Disabled People, Health Professionals and the Social Model of Disability: Can there be a research relationship?' (august 2000), 15 *Disability & Society*

<sup>229</sup> See page 21 of SUPRA 5

<sup>230</sup> Bricher and Gillian cited above at note 222, P.35

<sup>231</sup> Ibid

<sup>232</sup> Harlan Hahn, 'the politics of physical differences: disability and discrimination' (1988), Vol. 44 *Journal of Social Issue* P40, P40

<sup>233</sup> Ibid

<sup>234</sup> ibid

<sup>235</sup> Elizabeth Barnes, *The minority body : a theory of disability* (2016) PP.12

disabled persons are not viewed susceptible to discrimination in which the equality clause is based to protect.<sup>236</sup>

The social model: the social model refers to the day to day life interaction of persons with disability in the society that they have. Social model proponents argue that the thing which hinders someone who is disabled persons is not due to his medical deficiency, rather socially constructed things. These may include: the negative attitude the society has against persons with disabilities, inaccessible communication and information technology, inaccessible infrastructures and services prevent these persons not to participate in whole matter they may concern.<sup>237</sup> It argues for the integration of disabled persons in the community.<sup>238</sup> It accepts the active participation of disabled person in the whole social, political, cultural and economic activities of the state.<sup>239</sup> The approach has gained acceptance particularly after 1970's.<sup>240</sup>

The human right model: Most people use social and human right model interchangeably. However this two concepts have clear differences. A human right model refers or views disabled persons in terms of recognizing them before the law.<sup>241</sup> It is bringing the social factors which hinder individual with disability into a codified human right legislation.<sup>242</sup> The social model, as it is described before views disability from the social interaction. However, human right model is beyond that. Indeed some scholar argue that social model also struggle for right. Buts a recent disability study shows that social model is limited to the social interaction of disability.<sup>243</sup> For example, in the human right model approach, the absence of impairment is not the issue for the fact that human right is given for the sole fact of being a human.<sup>244</sup> The United Nation treaty

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<sup>236</sup> Ibid

<sup>237</sup> See page 25 SUPRA10

<sup>238</sup> See page 35 SUPRA 10

<sup>239</sup> Kanter PP.2

<sup>240</sup> Alberch G. Davis, encyclopedia of disability, (volume I, 2009), P56

<sup>241</sup> Theresia Degener, 'A HUMAN RIGHTS MODEL' in Eilionóir Flynn (ed), *ROUTLEDGE HANDBOOK OF DISABILITY law AND HUMAN RIGHTS* (2017) PP.50

<sup>242</sup> Ibid

<sup>243</sup> Valentina Della Fina, Rachele Cera and Giuseppe Palmisano, *the united nations convention of the right of persons with disabilities a commentary* (Springer International Publishing 2017) PP.33.

<sup>244</sup> Ibid

CRPD is the first binding international document recognizing the right of persons with disabilities in terms of right/social based approach.<sup>245</sup>

The position of article 41 (5) in light of theories of models of disability

In the FDRE constitution, the only place that uses the term disability is article 41 (5).<sup>246</sup> The other left provisions do not use or direct implication with disabled persons. But we can cite article 25 of the FDRE constitution to argue as it may have implication with regard to disabled person.<sup>247</sup> This provision is the nondiscrimination clause. And says: everyone is equal before the law irrespective of sex, religion, political opinion and other status. They add disability among other status so as to claim that nondiscrimination clause also has relationship with disability.<sup>248</sup> Just the author will come on this issue latter in this research.

Fundamentally, models of disability revolve in two basic issues of disability. The first one is the way disabled persons are viewed. The second is how governments or the society react or respond for the demand of disabled persons. So in this section what the author do is to evaluate article 41 (5) of the FDRE constitution in light of the models as it had been highlighted near before.

Article 41 (5) says “The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guard.”<sup>249</sup>

First is actually a right? Is it an entitlement in which disabled person can request it for enforcement? This question may request for the philosophical conception of right. But here in this paper it is not as such important to enter into philosophical conception of this provision. The

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<sup>245</sup> Kanter PP.10

<sup>246</sup> see article 41 (5) of the FDRE constitution.

<sup>247</sup>the federal democratic republic of Ethiopia Constitution

<sup>248</sup>*Wesen Alemu Et al. V. Amara Judicial Training Center Et al.*, file no. 019/08, (The House of Federation), (october 2, 2017

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<sup>249</sup>the federal democratic republic of Ethiopia Constitution

author will try to address in other paper this issue. For now it is better to limit myself with the models of disability.

Here, three things must be taken into focus. These are: the word “with in available means”,<sup>250</sup> “rehabilitation and assistance” and to which disability is categorized (the aged, and to children who are left without parents or guard).<sup>251</sup>

When we see article 41 (5) independently, it fails to recognize disabled persons as a right holder. This provision is a clear manifestation of the policy implication of the government in relation to disabled persons. First it is only a state obligation second the purpose of this resource allocation is not for the removal of environmental and attitudinal barriers. It is aimed at providing rehabilitation service for disabled community.

As most Ethiopian disability right scholars including Amare,<sup>252</sup>Shimeles<sup>253</sup> and Belayneh<sup>254</sup> agree, and the author also shares is that the constitution view disabled persons not as social or right based approach rather it recognizes in terms of medical approach. To evaluate whether it followed the medical approach or not the writer have to see critically what the contents of this provision indicate. The objective of this provision is to provide rehabilitation and assistance. Then what do we mean by rehabilitation? According to the Encyclopedia of special need education, the term rehabilitation refers to any process, procedure, or program that enables a disabled individual to function at a more independent and personally satisfying level.<sup>255</sup> This functioning should include all aspects—physical, mental, emotional, social, educational, and vocational—of the individual’s life.<sup>256</sup> So from the definition itself we can deduce that the

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<sup>250</sup>Amare Sisay, ‘TOWARDS ENSURING ACCESSIBILITY RIGHT TO THE BUILT ENVIRONMENT FOR PERSONS WITH DISABILITIES IN ETHIOPIA: THE CASE OF ADDIS ABABA ’ (a partial fulfillment, Ethiopian Civil Service University 2012)

<sup>251</sup>Ashagre PP.408

<sup>252</sup>Sisay

<sup>253</sup>Ashagre P.408.

<sup>254</sup>belayneh admasu, ‘the legal protection of persons with disability in Ethiopia’ (2013), vol. 3 Bahirdar Law Journal, P.230

<sup>255</sup> Cecil R. Reynolds Elaine, Fletcher-Janzen JOHN WILEY and SONS, *encyclopedia of special need education* (third edn, 2007)

<sup>256</sup>

purpose of rehabilitation seems to restore disabled person to their normal situation by medical treatment. Therefore, the state obligation at this juncture is to protect such individuals from the ill effects and limitations of disability and to provide them with minimal assistance.<sup>257</sup> In practice, this translates into paternalistic decision making, politics, programs, and services, including, for instance, institutional living, segregated education, and sheltered workshops.<sup>258</sup>

This is clearer when we see other sections of this provision. The other is assistance. Assistance is more related to charity. This is also an old view of person with disabilities. So the author argue that this article is not a right based provision rather it is an old model of disability which requires treatment by physician and a matter of charity.<sup>259</sup> The other problem of this article is the term “with in available means”. This term denotes the progressive realization of rights of disabled persons. However, there are many issues of disability which doesn’t require resource allocation.<sup>260</sup> For example, if we take legislative measures to combat discrimination, it demands only the determination of the government not its resource.<sup>261</sup> Accordingly, making reasonable adjustment for individual with disability in time of employment is also an immediate obligation of states. The allocation of resources for persons with disability is dependent upon the economical capacity of the state. However, the subject of disability is not wholly at the mercy of state. Or there are a number of rights which does not require the allocation of resources.

### **3.2.2 Article 25 the right to be free from discrimination**

Antidiscrimination clauses may insert in a certain constitution into three ways.<sup>262</sup> First the constitution may include disability in the general antidiscrimination clause mostly quoted as principle of equality or free from discrimination.<sup>263</sup> Secondly, a certain constitution may also recognize the non-discrimination clause by specifically incorporating the rights of persons with

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<sup>257</sup> Waddington, Priestley and Yalcin

<sup>258</sup> Degener

<sup>259</sup> Sisay P52

<sup>260</sup> read the concluding observation of CRPD committee given for the initial report of Austria

<sup>261</sup> *ibid.*

<sup>262</sup> Raub and others PP.218

<sup>263</sup> *Ibid*

disability.<sup>264</sup> Thirdly the constitution may also incorporate an affirmative action clause which in effect believed to remove discrimination against disability.<sup>265</sup> So the author will evaluate the FDRE constitution whether it has incorporated antidiscrimination clause or not in terms of the above explanation.

The general anti-discrimination clause of the FDRE constitution exists in article 25 under human right provision. It reads: “Right to Equality “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status”.<sup>266</sup> This article is the heart of the constitution. Because it proclaims that everyone is equal before the law.<sup>267</sup> Excluding this provision from the constitution will make other remaining human right provisions meaningless or senseless.<sup>268</sup>

Yet what we can notice from the above reading of the provision is that disability is not listed explicitly as one prohibited ground of discrimination as of other social groups such as: sex and political opinion.<sup>269</sup> We have chiefly two arguments on whether disability could be included as one prohibited ground in the antidiscrimination clause of the FDRE constitution or not. The first argument comes from Shimeles Ashagre in his article, He argues that disability is not only explicitly listed but also it is not recognized impliedly.<sup>270</sup><sup>271</sup> Belayneh on other side contends that “other status” refers those groups which are not listed in the antidiscrimination clause.<sup>272</sup> He reiterates his argument by alleging that lists of the constitution is not restrictive rather it is

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<sup>264</sup> Ibid cited above at note 17

<sup>265</sup> Ibid

<sup>266</sup> article 25 of the FDRE constitution.

<sup>267</sup> Takele Soboka, ‘Interplay of the Equality Clause and Affirmative Action Measures under the Ethiopian Constitution The Benishangul Case and Beyond’

<sup>268</sup> Anna Lawson and Caroline Gooding, ‘Open for All? Disability Discrimination Laws in Europe Relating to Goods and Services’ in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe from Theory to practice* (Hart Publishing 2005) P.14

<sup>269</sup> Ashagre

<sup>270</sup> IBID

<sup>271</sup> Ashagre P.408

<sup>272</sup> admasu

exhaustive.<sup>273</sup> Before discussing the arguments, the author believes that it is preferable to search the intention of the drafting committee of the FDRE constitution. This is because the drafting committees of the FDRE constitution may in some circumstance believe that discriminating on that ground is fair and just. In exceptional manner, the drafter of the constitution may exclude discrimination grounds from anti-discrimination clause intentionally. For instance, in case of birth, the constitutions of most countries exclude prohibition of discrimination against birth in their political right entitlement. The justification for removing birth from antidiscrimination clause seems to exclude foreigners from holding political office. As one Ugandan delegate in the drafting process of the 1992 constitution argued, “If discrimination on ground of birth is prohibited, a foreigner may ask for political power such as to become a president of Uganda.”<sup>274</sup>

The same seems true in Ethiopia context. So for effective conclusion and understanding, the writer carefully examines and makes comparison with the two provisions which deal with prohibition of discrimination against protected groups. In the FDRE constitution, in addition to article 25, the other provision that has direct relationship with antidiscrimination clause is obtained in the section of democratic rights under article 38.<sup>275</sup>

Article 38 reads: The Right to Vote and to be Elected Every Ethiopian national, without any discrimination based on color, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights”. When we carefully investigate article 38 of the constitution, we find the absence of birth as one ground of discrimination though it is clearly injected in article 25 of the constitution.

Article 38 of the FDRE constitution is designed carefully. According to this article, an Ethiopian national whose birth is not of Ethiopia, for example in London may be treated unfairly concerning to the right to elect and to be elected. There is a circumstance in which An Ethiopian nationality may be obtained while the birth place of that individual is outside Ethiopia. This can be for example through naturalization as the constitution itself provides and proclamation no.

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<sup>273</sup>Ibid

<sup>274</sup>Jamil DDmamulira Mujizi, ‘Article The Drafting History of The Provision on The Right to Freedom From Discrimination in The Ugandan Constitution with a Focus on The Ground of Sex, Disability and Sexual Orientation ’ (2012), vol.12 International Journal of Discrimination and the Law

<sup>275</sup> see article 38 of the FDRE constitution.

378/2003 stipulated. Hence the author argues that when a clear and intentional exclusion of a certain group from the nondiscrimination is inferred, other status may not include that ground since it is omitted from antidiscrimination clause. Protecting this ground may be against the will of the drafters of the constitution. Therefore, whenever a new category of social group requesting free of discrimination faced, courts must look the target of drafters of the constitution. Hence the author believes that the interpretation on “other status” comes if and only the constitutional drafting committee is not clearly discussed it at all.

Coming to disability issue, as we can see from the minute of the constitution, the drafting committee did not make disability as one issue in article 25 and 38 respectively.<sup>276</sup> So the issue of disabilities whether it is covered by “other status” or not will be the discretion of courts. Hence, the argument held by Belayneh seems impossible particularly in times of clear objection raised in the drafting process. Moreover, the argument of Belayneh will be more complex when a group of individual claim for prohibition of discrimination against sexual orientation is proposed. Does an individual can claim overtly that he is discriminated based on sexual orientation alleging the “other status” phrase protects his right? That is impossible for the fact that homosexual is strictly forbidden act resulting in a criminal sanction.<sup>277</sup>

Yet, courts, when they came across with issues like to be protected under the discrimination clause, they must look an existing policy and legislative frameworks which in turn shows the clear position of the government in relation to the fact in issue.

On other hand, the argument of Shimeles also seems impracticable. The main foundation his argument based is the fact that since disability was present at the time when the FDRE constitution was ratified, and the catching-phrase “other status” denotes to the future new discovered groups which were not existed or recognized at the time of the ratification, the disability group may not be inferred from the “other status “enshrined in the FDRE constitution.<sup>278</sup>

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<sup>276</sup> The Constitutional Assembly, *Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution*, vol 4 (Unpublished 1994)

<sup>277</sup> the FDRE criminal lawneg.fed., 414/2004, 2004 10, No., please read article 629-33 of this reference.

<sup>278</sup> Ashagre P.408

But what the author considers is that the existence of disability as discrimination in the time of the ratification of the FDRE constitution signifies the possibility of disability as one ground of discrimination being covered by the catching-phrase “other status” stipulated under article 25 of the FDRE constitution. What we have to understand is that even if there were grounds of discrimination when a certain discrimination law is drafting, it may not be easy to list down all grounds of protected groups. If it was so, the phrase of “other status” might not be necessitated. Or the FDRE constitution would take the approach of a restrictive kind of discrimination clause. In addition to this, as it is explained near before in this section, the side of the government in relation to disability which can be deduced from policy and legal document should matter to decide whether disability is held in the protected groups of the antidiscrimination clause covered by the FDRE constitution. Indeed, the absence of an explicit prohibition of discrimination against disability has its own impact. First it will be open for interpretation as Shimeles and other scholars are arguing.<sup>279</sup> As much as possible, anti-discrimination laws must be clear and easily understandable.<sup>280</sup> Otherwise, it will invite courts to interpret as they understood. For instance: In one Kenyan case, the High Court dismissed a claim for discrimination on the ground of disability because the non-discrimination clause of the Kenyan Bill of Rights did not expressly include disability as a prohibited ground.<sup>281</sup> The court's reasoning was that while the statutory law prohibited discrimination on the basis of disability,<sup>282</sup> the prohibition could not be constitutionally enforced as disability was not expressly listed in the Bill of Rights.<sup>283</sup> On the other hand, the absence of explicit prohibition of discrimination against persons with disability will also invite law making bodies to easily go against the rights of persons with disability.<sup>284</sup> Nevertheless, in Ethiopia, the jurisprudence shows article 25 of the FDRE constitution prohibits discrimination on ground of disability. The House of Federation, in the case of *Wesen Alemu et al. V. Amara Judicial Training et al.*, found that individual with visual impairment has been

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<sup>279</sup> Degener P.92.

<sup>280</sup> Sandra Fredman, *Discrimination Law* (2 edn, Oxford University Press 2011)

<sup>281</sup> Likando Kalaluka, ‘towards an effective litigation strategy of disability rights: the zambian experience’ (2013), Vol.1 Africa Disability Rights Year Book, P.166

<sup>282</sup> the 2003 Persons with Disabilities Act of Kenya

<sup>283</sup> The Constitution of Kenya

<sup>284</sup> in this regard, please read 3.2.4 of this thesis below.

discriminated by ground of disability which is prohibited by article 25 of the FDRE constitution.<sup>285</sup>

To make it clear here, the writer is not arguing claiming that incorporating disability in a protected group under the FDRE constitution is not necessary. The importance of inserting of disability in the protected group of the FDRE constitution is not a point which can be getting into compromise. The author complains the drafters of the constitution for the failure of the constitution with regard to disability, while preceding legal documents like pro. 101/1994 was present though it is restricted to employment discrimination of disabled persons.<sup>286</sup>

Therefore, Howsoever the jurisprudence may be, since equality and the right to be from discrimination are an interpretative tool for all the other principles and rights enshrined in the constitution<sup>287</sup> and The principles/rights of equality and non-discrimination are a cornerstone of the constitutional rights protection guaranteed by the Constitution,<sup>288</sup> disability must explicitly be listed out as one ground of discrimination.<sup>289</sup> Moreover, for countries like Ethiopia where human right in general and the right of disability in particular is young and yet being developed, a weak kind of antidiscrimination clause becomes fruitless in effect. A strong equality clause and which does not give broad discretion for courts to interpret is preferable since human right provisions are somewhat flexible in their nature.<sup>290</sup>

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<sup>285</sup> See WesenAlemu Et al. V. Amara Judicial Training Center et al. cited above at note

<sup>286</sup> please read pro. 101/1994 of Ethiopia

<sup>287</sup> See general comment no. 6 of the committee of the crpd, on equality and non-discrimination, adopted on the 19 session of febraury 14-9 March 2018, Para5

<sup>288</sup> ibid. Para4

<sup>289</sup> as it is possible to notice from the subsequent principal area of concerns and recommendation forwarded by the committee to the state parties initial report, incorporating an explicit antidiscrimination clause of disability is the firm stand of the committee on CRPD. you can for example view concluding observations given for Algeria and Bulgaria, available at:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)

<sup>290</sup> the author do want to emphasize in the phrase human rights are flexible by their nature" is to signify that human rights are not static. they can be changed through time. for example after the first human right document (UDHR in 1948), world recognized a dozen of human right instruments

In contrast to the FDRE constitution, few constitutions have prohibited discrimination based on disability explicitly. To cite few of them:

In article 11 of the Rwandan constitution, it provides that all Rwandans are born and remain free and equal in rights and duties.<sup>291</sup> Discrimination on the basis of physical or mental disability or any other form of discrimination is prohibited and punishable by law.<sup>292</sup> Canada is also among few countries prohibiting discrimination on ground of disability.<sup>293</sup><sup>294</sup>

The other place of a constitution in which antidiscrimination clause may be stated is in a specific section which is dedicated only for the right of persons with disabilities.<sup>295</sup> In the FDRE constitution, we can't find any section which is placed for the right of persons with disabilities. However, among various vulnerable groups, the Constitution situated the right of women in an independent section.<sup>296</sup> <sup>297</sup>As the researcher tried to understand from the minute of the constitution, two factors have necessitated the incorporation of gender issue in the FDRE constitution.<sup>298</sup> The first one is the experience women faced in the past history. The other is to include the specific interest of women rights.<sup>299</sup>

Regarding to the first factor, the FDRE constitution gives double protection for women concerning prohibition of discrimination. Though the way the article stated is different from article 25 of the FDRE constitution, for example, the authors observes no difference between

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<sup>291</sup> see article 11 of The Rwanda Constitution, Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 [], 4 June 2003, available at: <https://www.refworld.org/docid/46c5b1f52.html> [accessed 28 December 2018]

<sup>292</sup> IBID.

<sup>293</sup>Ravi A. Malhotra, 'Justice as Fairness in Accommodating Workers with Disabilities and Critical Theory: The Limitations of a Rawlsian Framework for Empowering People with Disabilities in Canada' in Richard Devlin and Dianne Pothier (eds), *Critical Disability theory* (2006) P72

<sup>294</sup>Oakes P.88

<sup>295</sup> Raub and others P.230

<sup>296</sup> article 35 of the FDRE constitution.

<sup>297</sup>the federal democratic republic of Ethiopia Constitution

<sup>298</sup> Minute of the constitution

<sup>299</sup> The Constitutional Assembly, *Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution*, vol 3 (Unpublished 1994)

Article 35 (1) articles 25 to on gender based discrimination. The preamble of the FDRE constitution also emphasizes the prohibition of discrimination against women. These three repetitions of prohibition of discrimination against women in a constitution is mainly required probably to give focus and give a constitutional recognition and protection for women whom were treated unequally in the past legal documents. Though Disabled persons also share the same kind of legal exclusion in the past history, discrimination against disability is not explicitly provided in any part of the FDRE constitution. Disabled persons were being excluded from legal documents. For example, in the 1987 PDRE constitution, psychosocial persons were undoubtedly denied their right to right and to be elected which is the proud of citizenship.<sup>300</sup> On other hand the civil code under article 359 states that the court shall appoint a guardian for psychosocial persons who are deemed to be incapable to exercise his juridical act.<sup>301</sup> The law doesn't require the consent of the alleged disabled persons. It simply forces the mentally disabled persons to be under the guardianship.<sup>302</sup> This kind of concept called as paternalistic attitude is currently an outdated concept.<sup>303</sup> It is replaced by supportive decision. So this law violates the basic idea of human right which stems from equal respect and dignity.<sup>304</sup> So what the author does want to signify here is to show that like of women, disabled persons also experienced the same kind of denial of rights and interests in the past and even in the current legal documents.

Secondly, the drafting committee of the constitution intended to recognize the specific rights of women which are only exercise by their feminist. Take for example sub article 4 of article 35. It reads: "maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family."<sup>305</sup> This provision directly concerns only women. It is not sound or possible to apply for the male persons. The same is true the issue of disability. There are a number of rights which is only applicable to disabled

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<sup>300</sup> see article 49 of the PDRE constitution.

<sup>301</sup> see the Civil Code of Ethiopia, Pro. 165/1960, from article 339-378

<sup>302</sup> *ibid.*

<sup>303</sup> Kanter P.235.

<sup>304</sup> please if you want to read more about substitutive decision making and supportive decision making: read the Kanter book. further more, you can also read the thesis of Mohamed Hamza Marishet concerning to Ethiopian laws in light of the CRPD, in the title called "legal capacity in Ethiopia" made in 2017 Wolaita Sodo University.

<sup>305</sup> please se article 35 (4) of the FDRE constitution.

persons. These may include: the right to accessibility and principle of reasonable accommodation.<sup>306</sup> The transcribing of printed materials into Braille may not be relevant for nondisabled persons.<sup>307</sup> However, making accessible the printed material into readable manner serves as basic instrument for visually impaired persons to meaningfully exercise his rights.<sup>308</sup> So the need to have a specific provision in a constitution regarding to disability derive from the robust correlation created between disability on one hand and an achieving principle of disability which help for meaningful exercise of disability right on other hand.<sup>309</sup>

The other way of incorporating antidiscrimination clause in a constitution is through affirmative action.<sup>310</sup> Affirmative action is a positive obligation which is rendered to redress the disadvantaged groups in the past history.<sup>311</sup> The constitution has endowed positive measures for 2 groups. These are women<sup>312</sup> and minority nationalities and people.<sup>313</sup> As we can see from the minute of the constitution, one of the basic grounds to consider the right of women in light of affirmative action is to redress the cultural, social, economic and legal exclusion and inferiority created in the past.<sup>314</sup> Regarding to the minority nationalities and people the drafting committee has also stated that these nations were not equally beneficial of their resource.<sup>315</sup>

Affirmative action is a question of justice for the disabled community of Ethiopia. Disabled persons were not beneficial of their country resource as of non-disabled society. Basically the convincing point for the necessity of affirmative action for disabled persons can be deduced from the section the author explained near earlier in this section.

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<sup>306</sup> Kanter PP.10

<sup>307</sup> see para9 of the general comment no. 2 of the CRPD on article 9.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Raub and others PP.220

<sup>311</sup> J. Edward Kellough., *Understanding Affirmative Action Politics, Discrimination, and the Search for Justice* (2007) PP.11

<sup>312</sup> see article 35 of the FDRE constitution.

<sup>313</sup> see Art. 36 of the FDRE constitution.

<sup>314</sup> Assembly

<sup>315</sup> Ibid

### 3.2.3 The right to accessibility

The right to accessibility, which enshrined basically in the convention on the right of persons with disability, basically refers to the removal of barriers of disability.<sup>316</sup> These barriers are: physical, informational, attitudinal and institutional.<sup>317</sup> The right to accessibility is a crosscutting right like the right to equality and free from discrimination.

In the FDRE constitution, we can't find a specific provision that guarantees the right to accessibility. Accessibility is the most important and essential right for the realization of other rights of persons with disability including the right to be free from discrimination.<sup>318</sup> Without the right to accessibility, none of the rights can be insured or guarantee.<sup>319</sup> Even the general right provision of the FDRE constitution will only be insured by the incorporation of the right to accessibility. Ensuring full access to the physical environment, transportation, information and communication, and services open to the public is indeed a vital precondition for the effective enjoyment of many rights covered by the constitution.

Say for instance under the FDRE constitution, in article 29 (2), everyone has entitled to “the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.”<sup>320</sup> For persons with disabilities to exercise this right (the right to access information and freedom of expression” equally with other nondisabled persons, it necessitates information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities”.<sup>321</sup> Furthermore, it requires facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities.<sup>322</sup> In this regard, the committee on the right of persons with disability, in the communication of Mr. “F” V. Austria, observed that

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<sup>316</sup> please read article 9 of the CRPD.

<sup>317</sup> general comment no. 3 of the CRPD committee on article 9, adopted on the 11 session held from march 30-april 14 OF 2014 Para2

<sup>318</sup> read para 1-10 of the general comment no. 2 of the CRPD committee.

<sup>319</sup> *ibid.*

<sup>320</sup> read article 21 in conjunction with article 9 of the CRPD.

<sup>321</sup> read para 4 and 7 of the general comment no 2 of the CRPD committee.

<sup>322</sup> see the general comment 2 on article 9.

the Non installation digital audio system which enables visually impaired persons to access to information which is visually available to passengers on the stop of tram is denial of the right to access to information and communication technologies and to facilities and services open to the public on an equal bases with others.<sup>323</sup>

Accordingly, pursuant to article 32 of the FDRE constitution, “Any Ethiopian or foreign national lawfully in Ethiopia entitled to within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes.”<sup>324</sup> That means in normal understanding, this rights pronounce the freedom of going from place to another place. However in the context of disability, the right to movement implies beyond the normal understanding. That means access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement.<sup>325</sup> For example visually impaired persons like any other persons have a right to movement in the constitution. The poor infrastructure and road accessibility hinders this individual not to freely travel from one place to another place. The CRPD committee in case of Mr. X V. Argentina viewed the nonexistence of elevators and an architectural barrier in prison house tantamount as the violation of the right to liberty and the right to accessibility for the author mobility.<sup>326</sup> Such barriers prevent an individual with disability not to enjoy the rights prescribed for the general citizen. Hence, so as to make persons with disability equally exercise their rights in the constitution like any nondisabled persons is only realized by incorporating the right to accessibility which in effect will remove barriers and create opportunity.

On the other hand, The social objective of the government as stated in article 90 of the constitution, which obliges government to access health and education for all Ethiopians as the resource of the country permit is only insured for persons with disabilities whenever accessible transport to schools, accessible school buildings, and accessible information and communication, which are open for public is guaranteed. Otherwise, Persons with disabilities would not have the

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<sup>323</sup> read Para.8.7 of the *Mr. "F" V. Austria*, communication no. 21/2014, (committee on the right of persons with disabilities), (August 21, 2015)

<sup>324</sup> see article 32 of the FDRE constitution.

<sup>325</sup> see the general comment on article 9, Para1.

<sup>326</sup> *Mr. "X" V Argentina*, Communication no. 08/2012, (Committee on the Rights of Persons with Disabilities), (11 April 2014)

opportunity to exercise their right to education and the right to health. In fact, according to article 90 of the FDRE constitution, the government has the obligation to access infrastructures such as road, health, water, and education.<sup>327</sup> Expanding these social infrastructures does not satisfy the ultimate need of disabled persons. The obligation to access and the right to accessibility are different concepts. The obligation to access is the possibility of expanding infrastructures for the whole society particularly to the rural area.<sup>328</sup> The right to accessibility refers to the process in which it is explained as removal of informational, attitudinal and environmental barriers and creating equal opportunity for persons with disabilities by which as a result can exercise the general rights vested for the whole citizen in meaningful manner.<sup>329</sup>

The obligation to access most of the time requires time, skilled man power, and economy.<sup>330</sup> However, even though the right to accessibility in few circumstances requires positive intervention from government, most of things can be accessible for disabled persons easily and with low coast.<sup>331</sup> From time to time the government of Ethiopia is increasing the coverage distance of road infrastructures. However the road construction is condemned for its poor standard of construction and exclusion of disabled persons. It is common to see open leaved halls and stand by poles here and there in the edge and to the midst of the asphalt in which much movement of disabled individuals undertake.

On other hand, the FDRE constitution must also govern the horizontal relationship of persons with disability and the private sector. Since the major source of bias and discrimination against persons with disability is the private sector and the society at large, the government must clearly put a provision that forces private sectors to make accessible their services for persons with disability for those who are one part of the society. The committee on the right of persons with disability noted in Zsolt and others V. Hungary, lack of accessible devices of ATM for visually impaired persons in bank service tantamount the violation of the right to accessibility

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<sup>327</sup> look for article 90 of the FDRE constitution.

<sup>328</sup> read para 1-15 of the general comment no. 2 of the CRPD committee

<sup>329</sup> *ibid.*

<sup>330</sup> *ibid.*

<sup>331</sup> *ibid.*

and equality before the law.<sup>332</sup>

The importance of the right to accessibility in the FDRE constitution is more visible due to the inherent relationship of discrimination and accessibility.<sup>333</sup> Since accessibility is a precondition for persons with disabilities to live independently, as provided for in article 19 of the Convention,<sup>334</sup> and to participate fully and equally in society, denial of access to the physical environment, transportation, information and communication, and services open to the general public should be viewed in the context of discrimination.<sup>335</sup> Failure to ensure accessibility for the disabled constitutes a violation of equal treatment enshrined in article 25 of the FDRE constitution. Accessibility constitutes direct discrimination, since it means that persons with disabilities are treated less favorably in accessing services when compared to persons without disabilities.<sup>336</sup>

Right to accessibility is now enshrined in various government constitutions. For instance, in the government of Kenya, the constitution imposes a mandatory requirement for deaf and blind citizens of Kenya to have an access of any material into Braille and sign language.<sup>337</sup>

### **3.24 The right to political participation**

The other fundamental right of persons with disability which is being recognized in various constitutions is the right to political participation.<sup>338</sup> The right to political participation is an umbrella term in which it normally includes various rights in it. Among these, the right to vote, the right to hold office, or get seat in parliament and the right to be a member of a certain political party and the right to establish a political organization<sup>339</sup>. Few researches show that disabled persons in Ethiopia were excluded from enjoying these basic democratic rights which

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<sup>332</sup> *Zsolt Bujdosó and others V. Hungary*, (Committee on the Rights of Persons with Disabilities), (9 September 2013)

<sup>333</sup> *ibid.*

<sup>334</sup> read article 19 of the CRPD.

<sup>335</sup> see the general comment on article 9, , Para6.

<sup>336</sup> The the committee on the convention on the right of persons with disabilities in communication no. 1/2013, considered that Hungary case

<sup>337</sup> the 2010 constitution of Kenya.

<sup>338</sup> Raub and others PP.221.

<sup>339</sup> Sisay P.85.

are endowed for the sole fact of being a citizen of Ethiopia.<sup>340</sup> For example, in the 1987 PDRE constitution, psychosocial persons were prohibited to take part in political rights participation.<sup>341</sup> In addition to this, even though a formal entitlement of these rights was recognized in the previous remaining constitution, disabled persons were not practically seen participating in their democratic rights.

The right of political participation for persons with disabilities is presumed to be expressed when constitution's guarantee the right to join political parties, the right to form political parties, the right to vote and the right to associate for political purposes expressively. The right to political participation under the FDRE constitution is stipulated at the center of democratic rights in article 38.<sup>342</sup> This provision normally doesn't explicitly mention disability as one ground of the protected groups. Or discrimination against disability at the time of political participation is not expressively provided.<sup>343</sup> Unfortunately, the absence of an explicit discrimination against disability in the constitution resulted in the transgression of the right to vote of persons with disabilities particularly psychosocial disabled persons in the electoral law of Ethiopia which is amended two times after the adoption of the FDRE constitution.<sup>344</sup> If for example we see pro. 532/2007 which is promulgated to amend the election law prohibited intellectually disabled persons from registering to election. This promulgation is undoubtedly a violation of article 29 of the CRPD which is guaranteed irrespective of disability type. Furthermore, the author considers that the act of the proclamation is against the fundamental law of the land in which under article 38 it guaranteed the right to vote for all types of disabilities implicitly. It is true because as the author did it before on provision of article 25 of the FDRE constitution discussed elsewhere, here also by expanding the catching phrase of "other status", we can conclude that disability is defined as protected groups under article 38 of the FDRE constitution.<sup>345</sup>

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<sup>340</sup> Ibid

<sup>341</sup> see article 49 of the PDRE constitution.

<sup>342</sup> read article 38 of the FDRE constitution.

<sup>343</sup> Sisay P.77.

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<sup>345</sup> in this regard, shimeles Sisay agree with this idea. please read the thesis made by shimeles sisay on page 77:

Sisay

Yet, this formal recognition of political participation for disabled persons is meaningless unless it creates equal opportunity for disabled persons to their right to political participation.

The FDRE constitution has no a specific entitlement designed for persons with disabilities in relation to political participation. However the constitution recognized these rights for the general citizen in its dispersed provisions even though disabled persons are not the direct beneficial of these rights. For persons with disabilities to be direct beneficial of these rights, the environment must be designed accordingly. The government must facilitate accessible environment and communication to the full enjoyment of these rights and remove barriers which hinder these individuals from exercising these entitlements as of their colleagues. For example at the time of vote, unless the polling stations are accessible for physically disabled persons or unless the secret ballot is prepared for visually impaired voters inclusively, it will be meaningless or valueless for persons with disabilities.<sup>346</sup> Some researchers found that even though disabled persons desire to take part in the voting campaign, the absence of accessible environment and communication has discouraged them not to exercise their democratic rights.<sup>347</sup> Article 38 (2) reads: this provision announces the method of voting procedure. It follows a secret ballot vote procedure.

The right to participate in political participation also interconnected with the right to decision making. In a democratic society, the main theme of democracy is that power is gained only through the people and the elected officials are deemed to be for the people.<sup>348</sup> That means these officials are assigned in par lama for the interest of the people to whom they are elected which is also shown in the FDRE constitution.<sup>349</sup> According to article 54 of the constitution, the main requirement to represent the members of the legislative is based on the amount of the people.<sup>350</sup> Elected officials are expected to protect the interest of their people to whom they are represented. According to article 55 of the FDRE constitution, the highest political power of the federal

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<sup>346</sup> LORD, STEIN and FIALA-BUTORA

<sup>347</sup> Ashagre P.408.

<sup>348</sup> Peter Emerson (auth.), *Defining Democracy: Voting Procedures in Decision-Making, Elections and Governance* (2012)

<sup>349</sup> see article 54 of the FDRE constitution.

<sup>350</sup> read article 54 of the FDRE constitution, cited above at note 10

government is vested upon the HPR.<sup>351</sup> This power may include the power to make laws, the power to evaluate the executive body and so on. Disabled persons may be covered by the people as a general. However, the possibility of securing the rights and interests of disabled person is very exceptional. The main possibility why the interests of disabled persons are undermined is due to the fact that the interests of disabled person are special or different from the other community. In a parliament, an official represented from the general population may demand for the road construction coverage, while in meantime an official who is represented from persons with disability demand for the possibility of making accessible the road construction for disabled persons. This is the reason why in UN ratification process the role of disabled persons was decisive. “No one is about us” which is the motto of the UN CRPD drafting process.<sup>352</sup>

Globally, almost 67 percent of the constitution has recognized the right to vote for persons with disabilities.<sup>353</sup> For example, the constitutions of Kenya, the Philippines,<sup>354</sup> Uganda, and Zimbabwe contain provisions inclusive of all types of disabilities.

### **3.2.5 The right to work**

The other fundamental right which requires constitutional recognition is the right to work. Article 27 of the CRPD instructs states to "recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities."<sup>355</sup> Individuals' right to work was considered to be granted if the constitution states expressively that persons with disabilities have the right to be employed, the right to labor, the right to secure a means of livelihood, or similar terminology.<sup>356</sup> The constitution may also give protection for persons with disabilities by putting a general or specific prohibition against discrimination in employment. In

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<sup>351</sup> read article 55 of the FDRE constitution, cited above at note 10

<sup>352</sup> Kanter P.13

<sup>353</sup> Raub and others P.224.

<sup>354</sup> read the 1987 constitution of Philipins

<sup>355</sup> read article 27 of the CRPD, cited above at note 53

<sup>356</sup> Raub and others P.223.

the FDRE constitution, we can't find any provision which specifically prohibit discrimination against disabled persons in times of employment. However, we can conclude from constitutional interpretation of the House of Federation in *Wesen Alemu Et al. V. Amara Judicial Training Center Et al.* as the general equality clause stipulated in article 25 of the FDRE constitution can be applied for persons with disability even in times of employment.

In the FDRE constitution, The provision which has slight connection with respect to employment is article 41 (5) which is placed under the category of socioeconomic rights. The author observes This provision as it is the clear manifestation of the FDRE constitution with respect to employment for persons with disability. The incorporation of disabled persons in article 41 (5) in aggregation of which unproductive groups show the intention of the Constitution that disabled persons need rehabilitation not engagement of employment.<sup>357</sup>

In the draft process of the FDRE constitution, under the discussion of article 42 on issue of the right to labor, one participant raised the issue of disabled persons as they are being discriminated in employment market in particular equal pay with non-disabled persons in employment and requested for the insertion of a strong article which prohibits discrimination against disability at the time of employment.<sup>358</sup> However, his opinion is not included in the constitution.

Yet the constitution has provided a general entitlement of labor rights such as the right to choose one's own occupation, the right to engage in any economic activities. Even though disabled person can enjoy these rights as one citizen of Ethiopia, however, to exercise these rights meaningfully, disabled persons demand additional protection specifically desired to keep the interest of these persons.

Basically two particular issues of disabled persons must be included in the FDRE constitution to insure the right to employment as their non-disabled fellows.

The first one is reasonable accommodation while the other is affirmative action or special measures.

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<sup>357</sup> Ashagre P.41

<sup>358</sup> Assembly discussing under article 42 and article 41 (5) of the draft constitution.

The principle of reasonable accommodation as I tried to explain earlier, it is an instrument which facilitates equal opportunity for persons with disabilities in order to exercise their jobs with full effort and capacity.<sup>359</sup> Reasonable accommodation normally refers the adjustment or accommodation of In the FDRE constitution, we can't find any provision which deals with reasonable accommodation. Without "reasonable accommodation", protecting the interests and rights of persons with disability in open labor market is unthinkable. This is the reason why the committee on the right of persons with disability repeatedly recommended state parties to incorporate an explicit provision that approves the absence of reasonable accommodation be categorized as direct discrimination into their legislation particularly in their fundamental law.<sup>360</sup> The FDRE constitution, which was ratified in 1995, also doesn't have a provision that confirm as the denial of reasonable accommodation corresponds to direct discrimination. In fact, pro. 568/2010 has a an explicit article which prohibit discrimination against disability. The proclamation in article 5 (3) reads:<sup>361</sup> "when a disabled person is not in a position to exercise his equal right of employment opportunity as a result of absence of a reasonable accommodation, such an act shall be regarded as discrimination".<sup>362</sup> Yet, this doesn't satisfy the ultimate need of persons with disability. Basically, that is due to the following two major factors.

On the first hand, the scope of the proclamation is too narrow which can only be applied for employment right of persons with disability. Nonetheless, reasonable accommodation is beyond that. It is not restricted to employment arena alone. It is also important instrument to create equal opportunity for persons with disabilities in other issues such as education and health care service.<sup>363</sup>

Secondly, since Pro. 568/2008 is a law that is promulgated by the HPR, it is open for interpretation and simple amendment procedure. On other word, this law may wittingly or

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<sup>359</sup> Lawson PP.45

<sup>360</sup> in this regard, the committee on the right of persons with disabilities in almost all state parties recommended to include an explicit prohibition of discrimination against persons with disability. however, the committee was silent concerning to Ethiopia regarding to its constitution which is still under medical model definition. the committee didn't also recommended to insert an explicit prohibition of discrimination against disability which is not present in the FDRE constitution. read the concluding observation of Ethiopia for its first initial report held on 2016. you can also read other countries concluding observation. like Algeria, Austria, Hungary.

<sup>361</sup> read art. 5 (3) of the employment right of persons with disabilities

<sup>362</sup> Ibid

<sup>363</sup> Emanuelle Bribosia and Isabelle Rorive, 'Reasonable Accommodation beyond Disability in Europe' ([http://ec.europa.eu/justice/discrimination/files/reasonable\\_accommodation\\_beyond\\_disability\\_in\\_europe\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_beyond_disability_in_europe_en.pdf)) accessed November 10

unwittingly be repealed by subsequent enactment of the HPR. however, if there is an explicit regulation of reasonable accommodation in FDRE constitution, such skeptical issues will not be get into mind. That is due to the fact that constitution within its entirety is the fundamental law of the land. It is also convincing to integrate reasonable accommodation in FDRE constitution for the reason that it is a decisive, crucial and fundamental principle for the realization of equal opportunity for persons with disability to exercise their rights of education, health care access and other socioeconomic and civil rights.

The other is a special measure. It is aimed at rectifying the past unjust discrimination. targeted at disabled persons from labor market and extend the possibility of these individuals to fully and meaningfully participate in the economic activities such as creating job opportunities and enable them to compete in the labor market with fair and healthy competition. Because disabled persons were historically marginalized groups like women, special measures at the time of employment are mandatory. The special measures may be giving incentives, tax exemption, and so on.

Researches made by various scholars show that disabled persons are being discriminated from job opportunities particularly from private sectors.<sup>364</sup> As the finding of this researcher, the reason behind the discrimination is poor attitude towards disabled persons.<sup>365</sup> The attitude may include: believing as disabled persons are not fruitful and thinking as disabled persons are very costly because they need extra resources and assistance.<sup>366</sup> To remove this bias and discrimination on employment, meaningful measures must be taken from the government. Among these measures the constitution takes the first place. The constitution must protect the interest of disabled persons by the same reason of other vulnerable groups such as women and children. Because the convincing reason to secure the interest of women in particular is also true for persons with disabilities. So article 41 (7) shall be redrafted hence as to expand the obligation of the government to take a special measure while trying to create job opportunity for unemployed citizen particularly for disabled persons.<sup>367</sup>

Better than the FDRE constitution, some constitutions include prohibitions against

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<sup>364</sup> Teresa P.79.

<sup>365</sup> Ibid

<sup>366</sup> Ibid

<sup>367</sup> see article 41 (7) of the FDRE constitution, cited above at note 10

discrimination of persons with disabilities in a certain aspect of work. For instance, Malawi's constitution stipulates that: "Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race."<sup>368</sup>

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<sup>368</sup> read article 31 of the 1994 constitution of Malawi.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATION

#### *4.1 finding and conclusion*

At the first hand, The FDRE constitution, compared to the previous constitutions particularly from the 1955 and 1931 constitution is better for the reason that the FDRE constitution used at least the term disabled persons in the constitution. Compared to the 1987 constitution, although both of the Constitutions inserted the term disabled persons in the constitution, they both viewed disabled persons from medical approach not as a human right holder. However, the FDRE constitution is more realistic for the fact that the FDRE constitution doesn't apparently prohibit at least disabled persons from the recognized rights of the constitution endowed for the general citizen. However, The PDRE constitution prevents psychosocial persons from the participation of the political rights. On other side, contrary to the PDRE constitution, the FDRE constitution incorporated an interpretive clause in its article 13. This provision has much benefit for the right of persons with disability also. Because courts when they face human right violations over disabled persons they can interpret the violated section of the constitution in terms of international conventions and other instruments Ethiopia adopted.

On other hand compared to other government's constitution, the FDRE constitution remains much to incorporate. Other government constitution, at least in their non-discrimination clause, they give protection by providing an explicit anti-discrimination clause. Many governments particularly after the adoption of the CRPD are shifting their definition over disabled persons to more participatory and human right based approach. However, the FDRE constitution defines disabled persons not in terms of human right model as the modern jurisprudence of persons with disability demand rather as charity seeker/medical model.

Likewise, the FDRE constitution missed basic substantial rights of disabled persons in its provision. These may include the principle of accessibility, reasonable accommodation, universal design and an explicit provision of anti-discrimination clause.

Compared to women, while the FDRE constitution redundantly gave constitutional protection for the women beginning from the preamble to the chapter dealing with policies and the objective of government, rights of persons with disability is not expressively documented as a right holder. The constitution also specifically protected women right while the right of persons with disability is not specifically recognized.

In general, the FDRE constitution doesn't sufficiently incorporate rights of persons with disability. Under the FDRE constitution, gender is the most serious kind of discrimination while disability is much lesser concern. Even minority nationalities have well protection than disabled persons. In the FDRE constitution, persons with disability have no real protection. As a result of this, disabled persons in Ethiopia are subject to judicial interpretation with respect to constitutional protection. Therefore, in order to secure constitutional protection under the FDRE constitution, persons with disability must either have been considered a person under the general provision or a member of one of the other specifically mentioned groups. In either cases the specific needs people with disability were not taken into account in this constitution. In addition to this, the constitution does not recognize the unique situation of people with disabilities who need special support and accommodation.

Furthermore, the nonexistence of rights of persons with disability in the fundamental law of the land (FDRE constitution), created lacquona to subsequent legislations like pro. 532/2007 of the election amendment law to violate basic rights of persons with disabilities. Likewise, it made to continue getting into force an outlawed legislation such as the Civil code which is recommended to be amended in light of the CRPD held at the initial report of Ethiopia for the CRPD committee.

## ***4.2 Recommendation***

- amending the FDRE constitution: the first and durable solution which should be recommended is the amendment of the constitution. The amendment shall aim at incorporating the specific rights and interests of persons with disabilities. The constitution specifically shall enumerate lists of rights of persons with disabilities which enable them to enjoy all the rights prescribed in the Constitution and shall not be discriminated against on the basis of disability. Specific provisions on rights of persons with disabilities, if embodied into the Bill of Rights, it would clear the

ambiguity in article 25 of the nondiscrimination clause. This is helpful as the Constitution is the supreme law of the land and would thus logically make unconstitutional any discriminatory provisions in other statutes or policy documents. So amending of the FDRE constitution which existed for the last 27 Years in force is the first measure Ethiopia has to take. Constitution is not a bible which may not amend until the generation passes. In fact, there are some scholars who suggest that few provisions of the FDRE constitution wittingly or unwittingly, is amended practically.<sup>369</sup> For instance the constitution, which stipulates the national census bureau to undertake a decade of population report, is eroded by the national census agency. Now a day, the national population census is undertaking beyond 10 years which is against the FDRE constitution. On other hand, Zelalem in his article argues that article 98 of the FDRE constitution had been amended two times within twenty years.<sup>370</sup> According to Zelalem, the FDRE constitution has been amended twice. So now the remaining thing is amending the constitution explicitly. Indeed, following the great and deep reform conducted in ruling party (EPRDF), a little step has been observing to amend the FDRE constitution. In THE speech delivered by his Excellency Prime minster Aby Ahmed (DR) speaking to those Diaspora community met in Washington noted this incident. The measure of the government may entail go up to amending the constitution particularly the section of the constitution which deal with election procedure and system. Ethiopia will not be the first country to amend the constitution for the purpose and advantage of disabled persons. If for instance we see Zambia, she amended its constitution section which proclaims nondiscrimination clause. But when the constitution will be amending care has to be taken:

First a specific provision which is only dedicated for persons with disability should be inserted. This section for instance looks like,

Article----- the right of persons with disability

All disabled persons may have the following right in this constitution:

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<sup>369</sup>Zelalem Eshetu Degifie, 'UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ETHIOPIA: THE PRACTICE UNDER VEIL AND DEVOID OF A WATCH DOG ' Africa Disability Right Year Book

<sup>370</sup>Ibid

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Secondly, insuring the right of persons with disability as a specific provision by itself is not enough. The constitution should mainstream the rights, freedoms and interest of disabled persons in the whole section of the constitution if any.

For instance, in the section which puts the working language of the Federal Government, it must incorporate the sign language as basic means of communication and giving effective efforts to translate those words into Braille users. For this approach Kenya and Austria are good example. If we see article 7 of the 2010 Kenya Constitution, it puts the working language of Kenya and in the same provision it recognized the sign language as a language and Braille as one method of communication.<sup>371</sup> Actually one of the natures of accessibility is mainstreaming the interests of disabled persons in all sectors including the constitution.

Thirdly, the antidiscrimination clause should contain disability as one ground in the lists of the protected groups. So in the coming amended constitution, it is expected to list out explicitly the term disability in the prohibited grounds of discrimination. As a result, the formal equality principle may looks like as follow:

Article--- discrimination is prohibited

1 everyone is equal before the law irrespective of sex, political opinion, religion, birth, disability or in any other status.

The last but not the least thing which must be taken into consideration in the whole amendment process is the involvement of individual with disability and disability person's organizations. They must play a major role from the initiation of the amendment up to the final draft of the constitution. In the amendment process, they must have an active, free and meaningful participation for the fact that the absence of persons with disability may affect their interest at the end. No one is about them to whom only the pain is felt.

- Applying the general provision of the FDRE constitution and interpretative clause of article 13 of the FDRE constitution: This and the subsequent recommendations serve for

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<sup>371</sup>see art. 7 of the Constitution of Kenya, cited above at note 6

filling gap up to the final amendment process of the FDRE constitution. One mechanism to fill a gap for the absence of constitutional right of persons with disability is applying article 13 of the constitution perfectly for the full effect of the general human and democratic rights enshrined in the FDRE constitution. Almost all jurisprudences or substantive or procedural rights of disabled persons are developed by international

Conventions. The rights and freedoms the author dealt with in this thesis are all available in international human right documents. For example in the convention on the right of persons with disability (CRPD), the whole things discussed earlier present in this instrument too. The series of its general comments prepared by the CRPD committee is also good sources for the interpretation of violation of constitutional right of persons with disability. The documents are which Ethiopia has ratified and being bound with. So when courts or any other concerned body tries to apply the general rights of the constitution, they must examine it in light of international instrument to which Ethiopia is party. Yet the practice shows that even courts do not attach claims of plaintiff in terms of violation of human rights. For example in one case of Gebreteklay Versus Ethiopia Railway Corporation et al., the high court didn't substantiated the claim of Gebreteklay in light of violation of constitutional guaranteed right.<sup>372</sup> However Gebreteklay hailemariam practically was denied of his constitutional right which is the right to liberty freely move from one place to another place. On other word, this mechanism helps persons with disability to exercise their constitutional rights meaningful which is given as one part of the general citizen not as a specific group.

- Putting the convention on the right of persons with disability in effect: As it is known, Ethiopia has ratified the CRPD on 2010 by proclamation 676/2010.<sup>373</sup> According to article 3 of the proclamation, the whole obligation to make in effect this convention is imposed up on the ministry of labour and social affair. Although I couldn't find researches how far the ministry gone for the full effect of the convention, as far as the author's knowledge concern, the ministry has not yet taken meaningful measure towards

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<sup>372</sup> *Gebreteklay hailemariam tiruneh v. Ethiopian Railway Corporation Et al.*, File no. 171101, (Federal High Court Lideta Civil bench), (February 07, 2018),

<sup>373</sup> the Convention on the Rights of Persons with Disability Ratification Proclamation No . 676/2010 Fed.Neg., Pro. 676/2010, June, 2010 16th, No. 32,

enforcing the convention. Yet, the human right commission has gone one step by translating the English version of the convention in to Amharic language and into braille sign. However, still much is expected from Ethiopia. Particularly bringing violated rights of the convention to courts must be accustomed with in persons with disabilities as of the individual complaint submitted to international human right courts. Likewise, Judges also must be aware of the convention and decide accordingly in light of the disability jurisprudence. Furthermore, notwithstanding the academics debate over the hierarchical place of treaties in light of constitution, persons with disabilities may be benefited much from this mechanism for the fact that the convention requires the compatibility of national laws including the constitution in accordance with all substantive and procedural rights enumerated in the convention.

- The third recommendation which I have is that Ethiopia requires a comprehensive legal document. Adopting a comprehensive disability right document may also fill the gap created by the FDRE constitution. A comprehensive document must be governing principle in the whole issue of people with disability. Having a comprehensive disability law has two advantages. In the first hand it is helpful to serve as a minimum standard of disability rights and as umbrella for all rights to be aggregated in a single document. This document may consist of a holistic right of persons with disability. Secondly, having a comprehensive document may help to promote, protect and insure the right of persons with disability. This collection of rights may in turn help disabled persons to easily know their rights along with duties. In this respect Ethiopia may learn much from the comprehensive disability act of Peru. This gap filling method is more convincing if it is supported with a provision that shows the relationship of this comprehensive disability law document with other laws even which come in future. For instance if that comprehensive document promulgated as follow: “any laws, directive or customs which contravenes this laws which were practiced before the coming effect of this law and any laws, directives or customs which contravene those rights covered by this law even which come in the future will be void and meaningless with respect to the rights covered by this law”.

- Using subsidiary disability laws effectively: the other mechanism up to amendment is using disability laws of the Federal government. For example concerning to free from discrimination, although the application of the law is only for specific right of employment, Ethiopia has antidiscrimination law. Proclamation no. 568/2003 provides that the denial of reasonable accommodation by employees tantamount discrimination. In article 11, the law extends criminalizing those persons organization which participated in discriminating an applicant of disabled persons. Ethiopia does not have a comprehensive antidiscrimination law as Australia, Canada, Hong Kong, Malta, the Philippines, the UK and the US. On other hand, regarding to education, the higher education proclamation no. 650/2009<sup>374</sup> may also be cited as one other law which integrated the issue of disability in its provision. Furthermore, adopting other legislations targeted on the rights of persons with disability may also be additional solution until the constitution is amended.

Zelalem Eshetu Degifie, "Unconstitutional Constitutional Amendments in Ethiopia: The Practice under Veil and Devoid of a Watch Dog ", AFRICA DISABILITY RIGHT YEAR BOOK,

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<sup>374</sup> Higher Education Proclamation No. 650/2009Fed.Neg., 2009 15th, No. 64,

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<sup>375</sup> Kanter P.24.