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# Addis Ababa University School of Graduate Studies

College of Law and Governance Studies

## **The Role of Mental Health Court in the Protection of Human Rights of Persons with Mental Disability in Ethiopia**

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October 2015

Addis Ababa, Ethiopia

**The Role of Mental Health Court in the  
Protection of Human Rights of Persons with  
Mental Disability in Ethiopia**

By AberashDhugassa

A Thesis Submitted to College of Law and  
Governance Studies in Partial Fulfillment  
for the Requirements of LLM Degree in  
Human Rights

Nov. 2015

## Declaration

I hereby declare that this thesis is my original work; has not been presented for the Degree in any other university and that all material sources used in the thesis have been duly acknowledged.

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## **Acknowledgements**

God Almighty, I came to realize your Living Word that says, “I know that You can do everything, and that no thought can be withheld from you.” Job 42(2) You deserve all the glory and honor for all your limitless provisions!

Those of you, who have contributed in different ways while I have been conducting this research, need to be credited. First and for most I would like to extend my warmest thanks to my advisor AtoYonasBirmeta, without whose invaluable mentorship and critical comment this paper was mere dream.

My next sincere gratitude goes to my husband ZelalemJabessa; his unreserved encouragement and continuous support caused me to successfully conduct this study. My lovely sons LubabasZelalem and HikamZelalem, how wonderful and blessing to have you!

Long live Mom and Dad; you mean a lot to me. You taught me the essence of education. Sisters and brothers thank you for your encouragement. My mother-in-law, may God bless you for your prayer and support.

I would also like to thank Dr. AsnakeLimeneh, psychiatric doctor at Black Lion Specialized Hospital, for his unreserved support. AtoSimenehKiros, LLM coordinator at Addis Ababa University, AtoLeulesilaseLiben, presiding judge of Mental Health Court Bench and secretaries of the bench, you really deserve special gratitude. May God bless you all!

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## **List of Acronyms**

AAUHSCDP—Addis Ababa University Health Science College Department of Psychiatry

ACHPR—African Charter on Human and People’s Rights

AU—Africa Union

BLSH—Black Lion Specialized Hospital

CAT—Convention on Torture Inhuman and Degrading Treatment

CEDAW—Convention on the Elimination of All Forms of Discrimination against Women

CERD—Convention on the Elimination of Racial Discrimination

CPC—Criminal Procedure Code

CRC—Convention on the Right of Child

FDRE—Federal Democratic Republic of Ethiopia

FFFICLD—Federal First Instance Court Lideta Division

ICCPR—International Covenant on Civil and Political Right

ICESCR—International Covenant on Economic Social and Cultural Right

MHC—Mental Health Court

MHCB—Mental Health Court Bench

UDHR—Universal Declaration on Human Rights

UN—United Nation

USA—United States of America

UNSREOPD—United Nations Standard Rule on the Equalization of Opportunities for Persons  
with Disability

DORMRDP—Declaration Outlining the Rights of Mentally Retarded and Disabled Persons

DRDP—Declaration on the Rights of Disabled Persons

WHO—World Health Organization

## Abstract

Mentally disabled persons are entitled to fundamental rights and freedoms that are provided under international, regional and domestic human rights instruments on equal footing with other members of the society. Despite this fact, persons with mental disability are the marginalized and ostracized group of society. As a result there is high probability of human rights violation against this group. Mentally disabled persons may refuse treatment for their problems because the disorder may impair their decision making capacity. Thus, persons with mental disability deserve more attention and protection from state.

In Western Europe and North America there was deinstitutionalization movement in the latter half of 20<sup>th</sup> century as a result of which many mental healthcare institutions were underfunded and the number of mental healthcare was reduced. Consequently, the number of persons with mental disability has increased tremendously. This on the other hand increased the number of mentally disabled persons' involvement in the criminal justice system. Mentally disabled persons were incarcerated for minor offences. They were revolving in the criminal justice system for the reason that criminal justice system focuses on punishment rather than treatment.

To tackle this problem, Mental Health Court which was modeled after drug courts had been established in USA and Canada. Mental Health Court was established with the objective of treating the root cause of criminal behavior rather than punishment. It has been therapeutic jurisprudence which advocates that the justice system should deal with the main cause that makes a person to interact with the criminal justice system. Unlike traditional justice system, Mental Health Court participants are required to undergo treatment if the accused successfully completed the treatment plan s/he would be released from criminal responsibility. Otherwise, s/he would be sent back to traditional system. Mental Health Courts have been expanding rapidly.

In Ethiopia Mental Health Court was established in May 2015. The court was established under Federal First Instance Court Lideta Division in collaboration with Addis Ababa University Health Science College Psychiatry Department. The court has three main objectives. Firstly it determines the fitness of accused to stand trial. Secondly it examines whether accused person is criminally responsible or not while the third objective is diversion of accused to treatment if s/he is found to be mentally disabled.

This research paper evaluates the role of mental health court in the protection of the human rights of persons with mental disability in Ethiopia. In the course of this, the researcher has identified a more relevant case which the Mental Health Court Bench decided to show how the establishment of the court has brought change in the protection of the right to bail, right to health, brotherhood spirit, reintegration of the accused to the society and peace and security of the society.

Key words: *Persons with Mental Disability, Mental Health Court, Therapeutic Jurisprudence, Human Rights*

# Chapter One

## 1.1 Background of the Study

The contemporary human rights movement was launched after the Second World War following the atrocities committed by Nazi Germany.<sup>1</sup> From that time on different declarations, conventions, resolutions, principles and standards were promulgated under the United Nations System. Despite this, the right of persons with disability was for the first time has gained the attention of international community since 1970.<sup>2</sup> Today, there are about 650 million people living with disability while two billion people are taking care of these disabled persons worldwide.<sup>3</sup> Having all these persons with disability, still these groups of persons are discriminated, dehumanized and ostracized in their respective society.<sup>4</sup>

Even though there is no explicit mention of the rights of persons with disability under international bills of human rights, these documents have guaranteed the equal enjoyment of human rights without discrimination under different provisions. The United Nations Charter which is the first international document that has accepted the equal rights and dignity of all human family, for instance, stated in its preamble that the international community is determined to “reaffirm faith in fundamental human rights and in the dignity and worth of the human person”.<sup>5</sup> In addition to this, the Universal Declaration of Human Rights (UDHR) states that “all human beings are born free and equal in dignity and rights.”<sup>6</sup> This provision clearly provides that there should not be discrimination among all human beings in the exercise of all human rights mentioned under the declaration.<sup>7</sup>

After the declaration, two international covenants—International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup> and International Covenant on Economic, Social and Cultural Rights

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<sup>1</sup> UN Office of the High Commissioner for Human Rights and The International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Training Series no.9, (2003) page 634

<sup>2</sup> Owen, F., Griffiths, D., (ed.) Challenges to the Human Rights of People with Intellectual Disabilities, (2009), Page 12

<sup>3</sup> Hand Book for Parliamentarians on the Convention on the Rights of Persons with Disability, From Exclusion to Equality, Realizing the rights of Persons with Disability, No.14-2007, Page 1

<sup>4</sup> Gostin, L. & Gable, L., The Human Rights of Persons with Mental Disability: A Global Perspective on the Application of Human Rights Principles to Mental Health, (2004), page 38

<sup>5</sup> United Nations, Charter 1945

<sup>6</sup> Universal Declaration of Human Rights Preamble, G.A. Res. 217 A, U.N. GAOR, 3d Sess.U.N.Doc. A/311 (1948)

<sup>7</sup> Id, Article 2

<sup>8</sup> International Covenant on Civil and Political Rights, Adopted by United Nations General Assembly Resolution 2200A (XX) Dec. 16, 1966, entered into force Mar. 23, 1976

(ICESCR)<sup>9</sup>—have been adopted by United Nations General Assembly in 1966 and entered into force in 1976. Both covenants have binding effect on state parties. The ICCPR under Articles 2, 3 and 26 ensures the equal enjoyment of civil and political rights as well as all fundamental rights without discrimination on any ground. The same is true with ICESCR Article 2 and 3. Thus, disabled persons reside within the territory of state parties to the covenant can enjoy their civil and political rights as well as economic and social rights without discrimination as per the wording of the covenants.

In addition to the above instruments, other international human rights instruments have guaranteed the rights of persons with disability such as the Covenant on Elimination of All Forms of Discrimination against Women (CEDAW)<sup>10</sup>, Child Right Convention (CRC)<sup>11</sup>, Convention against Torture and Other Cruel Inhuman and Degrading Treatment (CAT)<sup>12</sup> and International Convention on Elimination of Racial Discrimination (CERD).<sup>13</sup>

Since, 1970s the United Nations have adopted different resolutions, comments and declarations on the rights of persons with mental disability.<sup>14</sup> Among these, the Principles for the Protection of the Rights of Persons with Mental Illness and the Improvement of Mental Healthcare [MI principles] can be mentioned.<sup>15</sup> MI principles are important interpretive guide for international as well as regional human rights instruments concerning the rights of persons with mental disability.<sup>16</sup> Among different instruments adopted by United Nations on the right of persons with mental illness, MI principles are comprehensive and very important.<sup>17</sup> The MI principles incorporate civil, political, economic, social and cultural rights of persons with mental disability.<sup>18</sup> Generally, the MI principles incorporated rights that are found under international bills of human rights by persons with mental disability.<sup>19</sup>

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<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, Adopted by United Nations General Assembly Resolution 2200 A (XXI) Dec. 16, 1966 entered into force Jan. 3, 1976

<sup>10</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by United Nations General Assembly Resolution no. 34/180 Dec. 18, 1979

<sup>11</sup> Convention on the Rights of the Child, Adopted by United Nations General Assembly Resolution 44/25 Nov.20, 1989

<sup>12</sup> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984

<sup>13</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Adopted by General Assembly resolution 2106 A (xx) of 21 December 1965 *opened for signature* Mar. 7, 1966

<sup>14</sup> Gostin, L. & Gable, L., cited above at note 4, Page 37

<sup>15</sup> Ibid

<sup>16</sup> Id, page 38

<sup>17</sup> Ibid

<sup>18</sup> Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Adopted by UN GA Resolution no. 46/119, 17 December 1991 Principle 1(5)

<sup>19</sup> Gostin, L. & Gable, L., cited above at note 4, Page 38

Even though the issue of persons with mental disability came to attention after World War II [mentioned above], the years 1983-1992 in particular is declared by the United Nations to be a “decade for persons with disability.”<sup>20</sup> This caused the promulgation of disability based standards by United Nations such as, Standard Rule on the Equalization of Opportunities for Persons with Disability (UNSREOPD), Declaration Outlining the Rights of Mentally Retarded and Disabled Persons (DORMRDP), and the Declaration on the Rights of Disabled Persons (DRDP). These instruments are very important in the protection of the rights of persons with mental disability because they create baseline for the fair treatment of persons with disability. Moreover progressively they can grow to customary international law by states practice.<sup>21</sup>

Even if, all these international human rights instruments give recognition and protection to the rights of persons with disability persons with disability are still far from reaping the fruit of human rights which others enjoy for granted.<sup>22</sup> In spite of this, there is a need to have a separate international human rights instrument that can address the issue of persons with disability. Due to this reason Convention on the Rights of Persons with Disability (CRPD) was adopted in 2006.<sup>23</sup> The convention hasn't come up with new rights, however; rather it is complementary to the existing human rights documents.<sup>24</sup> It strengthens the obligation of state parties in the enjoyment of fundamental rights and freedoms by persons with disability.<sup>25</sup>

The disability convention identifies persons with disability as those persons who have long-term physical, mental, intellectual or sensory impairments which in their interaction with others cause various barriers hindering their full and effective participation in society on an equal basis with others.<sup>26</sup> The issue of mental and other disabilities is among the disabilities that the convention seeks to bring to attention for better protection. But the focus of this study would be only mental disability.

In addition to international human rights system we have African Charter on Human and Peoples Rights (ACHPR) which was adopted on June 27, 1981. The African charter has got provisions on the equal enjoyment of rights provided under the charter.<sup>27</sup> Persons with mental disability are entitled to exercise the rights that are provided under the charter without discrimination. This

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<sup>20</sup>Gostin, L. & Gable, L., cited above at note 4, Page 38

<sup>21</sup> Ibid

<sup>22</sup>Hand Book, cited above at note 3, Page 4

<sup>23</sup> United Nations Convention on the Rights of Persons with Disabilities, Adopted by General Assembly Resolution 61/106 of 13 December 2006

<sup>24</sup>Gostin, L. & Gable, L., cited above at note , Page 6

<sup>25</sup> Id, Page 5

<sup>26</sup>CRPD, cited above at note 23, article 1

<sup>27</sup> African Charter on Human and Peoples' Rights, June 27,1981 OAU Doc. CAB/LEG/67/3rev. 5, 21 I.L.M. 58, (1982),article 14

shows that the rights of persons with mental disability have got recognition under regional human rights instruments as well.

Lastly, we have Articles on mentally disabled persons under domestic human rights instruments such as the Federal Democratic Republic of Ethiopia Constitution (hereafter FDRE Constitution<sup>28</sup>) Article 25, The Federal Democratic Republic of Ethiopia Criminal Code<sup>29</sup> Article 48, 49, 51, 129-131 and Civil Code<sup>30</sup> Article 339-379. Moreover Ethiopia has ratified different international and regional human rights instruments that we have been discussing previously such as ICCPR, ICESCR, CEDAW, CRC, CAT, CERD, CRPD and ACHPR. As per article 9(4) of FDRE constitution, international covenants ratified by Ethiopia are considered to be part and parcel of the law of the land. Therefore, persons with mental disability have freedom to enjoy those rights which are found under international human rights instruments ratified by Ethiopia.

## **1.2 Statement of the Problem**

Studies have revealed that a number of persons with serious mental disability that are involved in criminal acts are increasing from time to time for nearly half a century.<sup>31</sup> Persons with mental disability end up in criminal justice system for different reasons of societal factors such as, poverty, inadequate housing, trauma, and mental illness itself may cause a person to behave criminally. Because of this, persons with mental disability are over represented in the criminal justice system.<sup>32</sup> Once persons with mental disability are involved in criminal activities their situation goes worse<sup>33</sup>. When they are incarcerated and isolated from the society there is a high risk of homelessness upon discharge; they will experience stigma and discrimination from the society.<sup>34</sup>

Due to the isolation and stigmatization they face in their respective society, persons with mental disability frequently tend to get involved in criminal activity. And there is a high probability of recidivism. A research conducted in USA on prison cells from 1999 revealed that half of the inmates with mental disability are reported for being sentenced three or four times.<sup>35</sup> Because of insufficient treatment during incarceration or in the community, persons with mental disability

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<sup>28</sup> The Federal Democratic Republic of Ethiopia Constitution, Proclamation No. 1/1995

<sup>29</sup> Federal Democratic Republic of Ethiopia Criminal Code Proclamation no. 214/2004

<sup>30</sup> The Ethiopian Civil Code proclamation no. 165/1960

<sup>31</sup> Redlich, A. D., Steadman, H. J., Monahan, J., Robbins, P. C. & Petrila, J. (2006). Patterns of Practice in Mental Health Courts: a National Survey. *Law and Human Behavior*, 30, 347–362.

<sup>32</sup> Center for Addiction and Mental Health, Mental Health and Criminal Justice Policy Framework, October 2013, Page 2

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Council of State Governments Justice Center, Mental Health Court Premier for Practitioners, 2008, page 2

have high probability of cycling in the criminal justice system.<sup>36</sup> Though the purpose of punishment/incarceration is deterrence, this cannot be achieved in the case of mentally disabled persons because mentally ill persons need treatment than punishment.

Owing to this reason, Mental Health Courts (hereafter MHC) are established to treat the root cause of criminal behavior of persons with mental disability. Unlike traditional court system, MHCs have therapeutic goals by increasing adherence to treatment and decreasing participation of mentally disabled persons in the criminal justice system.<sup>37</sup> MHCs are coined after drug courts in USA.<sup>38</sup> They are one among problem solving courts.<sup>39</sup>

In Ethiopia there is neither legislation nor policy that specifically deals with the rights of persons with mental disability.<sup>40</sup> National Mental Health Strategy was adopted by Federal Ministry of Health in 2012.<sup>41</sup> Different researches were conducted at different time by different bodies concerning the number of mentally disabled persons in Ethiopia. These studies showed that mental illness is a fast growing problem in Ethiopia.<sup>42</sup>

On top of that, there is wrong attitude towards mental disability in our country. Most of the time mental disability is associated with spiritual problem or being possessed with evil spirit.<sup>43</sup> Due to this perception the majority of the people having mental illness are not getting professional consultations and clinical help. Instead they are abandoned and left by themselves and most of them end up on street or in prison, while a few are taken to traditional healing places where they get no scientific treatment or the required treatment or care.<sup>44</sup> Moreover mentally disabled persons in Ethiopia suffer from social, economic problems and human rights violations.<sup>45</sup> Stigma and discrimination is the daily life of mentally disabled persons and their Families in Ethiopia.<sup>46</sup>

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<sup>36</sup> Ibid

<sup>37</sup> Binder, R.L., and McNeil, D.E., "Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence", American Journal of Psychiatry, Vol. 164, 1395–1403, (2007), Page 1395

<sup>38</sup> Id Page 1398

<sup>39</sup> Council of State Governments, A Guide to Mental Health Court Design and Implementation, New York, 2005 page 21  
"Problem solving courts are as their name suggests are seeks to unite the justice system with other social service agencies to solve the problems that bring people before court."

<sup>40</sup> AyteneWDebebe, The Rights of Persons with Mental Disabilities to Access Mental Health Care and Their Human Rights Conditions in Psychiatric Facilities in Ethiopia, (2013 unpublished AAU Law Library), page 81

<sup>41</sup> Federal Democratic Republic of Ethiopia Ministry of Health, National Mental Health Strategy, (2012/13-2015/16).

<sup>42</sup> [www.mhsethio.org](http://www.mhsethio.org) visited on Oct. 2015;

<sup>43</sup> Ibid ; National Mental Health Strategy, cited above at note 41, page 12

<sup>44</sup> Ibid

<sup>45</sup> National Mental Health Strategy, cited above at note 41 page 12

<sup>46</sup> Ibid

The absence of specific legislation and policy, negative attitude of the society and insufficient psychiatric institutions in Ethiopia are some of the factors up on which persons with mental disability get involved in criminal justice system frequently. Complications related to mentally disabled persons, on the other hand, triggered a need to find out a way to handle this problem better. It is on this ground that the Federal Instance Court Lideta Division established Mental Health Court Bench [hereafter FFICLDMHCB] on 8 May 2015 in collaboration with Addis Ababa University Health Science College Department of Psychiatry [AAUHSCDP].

The court was established to perform three major activities as a referral court<sup>47</sup>. On the basis of the request of other federal courts, this court firstly examines whether the accused person is criminally responsible or not. Secondly it examines if the suspected person is fit to stand trial (fitness to stand trial). Thirdly, accused with mental disability and who commits minor offence will be diverted to treatment plan. The detail of the court activities would farther be discussed in chapter three.

The purpose of this research, therefore, is to investigate the role of MHC in Ethiopia in the protection of human rights of mentally disabled persons. The activities of the MHC in Ethiopia would be assessed on the basis of international and regional instruments in general and domestic human rights instruments that are discussed in the background of this research paper in particular. The research has the following objectives.

## **1.3 Objectives**

### **1.3.1 General Objective**

The general objective of this paper is to evaluate the contribution of MHC in Ethiopia in the protection of human rights of persons with mental disability that are involved in the criminal justice system.

### **1.3.2 Specific Objectives**

The specific objectives of this research paper include;

- To critically analyze the role of MHC in protecting human rights of persons with mental disability;
- To evaluate the activities of MHC in curbing criminal recidivism of mentally disabled persons or the case of revolving door;

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<sup>47</sup> The court was established to handle cases of mentally disabled persons as referred by other Federal Courts. That is the court doesn't have first instance jurisdiction.

- To assess the contribution of the MHC in the treatment of offenders with mental disability;
- To analyze the input of the MHC in bringing behavioral change in the society with regard to the concept of criminal responsibility.

#### **1.4 Research Questions**

This research would answer the following questions:

- Does the establishment of mental health court in Ethiopia has any significance in the protection of rights of persons with mental disability?
- Is there any improvement in the protection of rights of persons with mental disabilities after the establishment of the court system?
- What is the significance of the establishment of the court system in reducing recidivism of persons with mental disabilities?
- What is the positive impact of the establishment of the court towards sustaining peace and security in the community where persons with mental disabilities live?

#### **1.5 Significance of the Study**

This study would have the following significances as a research focusing on human rights of persons with mental disability and MHC in Ethiopia. Firstly, it would be used as a benchmark resource for those persons who are interested to know and research more on the right of persons with mental disability and MHC in Ethiopia. Moreover, the research would give academic support for anyone interested to comprehend about the status of rights of persons with mental disability and MHC in Ethiopia.

As the establishment of MHC in the country is a recent phenomenon this research would examine the shortcomings and strengths of the court. Most importantly, this research would give possible recommendations so that stakeholders will take necessary actions to better improve the services provided by the MHC in Ethiopia.

#### **1.6 Scope of the Study**

The scope of this study would be on the rights of persons with mental disability in Ethiopia. But that doesn't mean all cases of mentally disabled persons would be incorporated in this research. The research would be limited to cases entertained after the establishment of Ethiopian MHC. That is for the fact that Ethiopian MHC is a very young court that started operating half a year

ago, the scope would be limited to those cases seen by this referral court. That means the subject of the study would be cases that have so far been entertained as of May 2015.

## **1.7 Methodology**

This research would thoroughly evaluate the role of mental health court in the protection of human rights of persons with mental disability in Ethiopia descriptive way. The research would employ qualitative research methodology. The theoretical background of rights of persons with mental disability and MHC would be discussed in depth in the following under chapter two and three. In order to strengthen the study, the experiences of other countries in relation to MHC would be examined as well in the literature part. Besides, the researcher also administered unstructured interview to substantiate the information taken from different documents about the establishment of the MHCB in Ethiopia. The analysis of the data gathered would involve the court case decided by the FFICLDMHCB.

### **1.7.1 Method of Analysis**

The case identified as a research data would be analyzed on the basis of Ethiopian legal system whereby regional as well as international fundamental human rights, declarations and conventions could also be other legal grounds by which the case would be analyzed. To better analyze the case logically, it would be important to see the case from different perspective such as the right to health, the right to bail, the right to speedy trial, reintegrating the accused to the society, creating brotherhood spirit between the mentally disabled person and the society and others. As mentioned earlier, the researcher would conduct descriptive approach where both the surface and implied meaning would be shown briefly. That is, the detail of the case and the decision of the court would be described pretty enough while its practical interpretation would be given emphasis based on the legal system put in place.

## **1.8 Limitation**

In the beginning of this study, the intention of the researcher was to focus on more court cases for analyses than picking only one. But in the middle of the study, it was found out that there were only four cases that were related to MHCB out of a total of 50 cases seen since the court was established. Again of the four cases, there was only one case that the researcher identified relevant for the study. That is the case selected for analysis answers basic research questions as a result of which the rest three cases—which were irrelevant for the research—were not incorporated.

## **1.9 Structure of the Study**

The research is divided into five chapters. The first chapter is introduction. It consists of background of the study, statement of the problem, objectives of the study, significance of the study, scope of the study, and methodology. The second chapter deals with rights of persons with mental disability. In this part, mental disability would be defined. The application of international human rights instruments to persons with mental disability would be discussed. Lastly legislations dealing with the rights of mentally disabled persons in Ethiopia would be discussed in detail.

The third chapter is about MHCs and diversion programs. Under this chapter the development, the outcomes, objectives and participants of MHCs will be discussed. In addition, MHC in Ethiopia will be discussed in detail. The fourth chapter deals with the role of MHC in the protection of the human rights of persons with mentally disabled persons in Ethiopia. In this chapter the need of establishing mental health court in Ethiopia would also be discussed. In addition to that a case entertained by the court would be analyzed. The fifth chapter deals with conclusions and recommendations.

## Chapter Two

### 2.1 Rights of Persons with Mental Disability

#### 2.1.1 Introduction

As per a World Bank report, mental disability accounts for 8.1 % of the total disease burden of the world.<sup>48</sup> Despite the growing number of mentally disabled persons they are discriminated and ostracized group of the society.<sup>49</sup> As a result they have been suffering from gross human rights violations. It is a recent history that the issue of mentally disabled persons has got international attention. What intensify mental disability compared to other disabilities is that this disability is related with mental faculty.<sup>50</sup> According to WHO, “There is no health without mental health”.<sup>51</sup> Therefore, the issue of mental health and right of mentally disabled persons needs to be seen critically.

Hence in this chapter the human rights of mentally disabled persons will be discussed. For convenience the chapter is divided into sections. The first section defines mental disability and mentally disabled persons. The second section focuses on the right of mentally disabled persons under international and regional human right instruments while the third section deals with legislations on the rights of persons with mental disability in Ethiopia.

#### 2.2 Mental Disability and Mentally Disabled Persons

Mentally disabled persons have been described by various degrading ways such as moral imbeciles, idiots, feeble minded, defectives, insane, lunatic etc.<sup>52</sup> The names are undignified and humiliating to persons with mental disability.<sup>53</sup> Nowadays these names are replaced by names such as intellectual disability, mental disability, mental illness, mental disorder, psychiatric disability and psychosocial disability etc. The names have their own advantages and disadvantages. Some of the advantages of the term mental illness, for instance, are firstly it is well defined and secondly it could easily be well understood by stakeholders. Coming to its

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<sup>48</sup> Aytenew Debebe, cited above at note 41.

<sup>49</sup> Funk, M., and Drew, N., (ed) et.al, Mental Health Legislation and Human Rights, WHO (2003), Page 9

<sup>50</sup> Ibid

<sup>51</sup> National Mental Health Strategy, cited above at note 41, page 3

<sup>52</sup> ACHPR, *Purohit and Moore Vs The Gambia* (2003) AHRLR 96 (2003), Communication 241/2001 ; Civil code, cited above at note 30, article 339-379

<sup>53</sup> Owen, F., Griffiths, D., Tarulli D., and Murphy, J. “Historical and Theoretical Foundations of the Rights of Persons with Intellectual Disabilities: Setting the Stage,” Owen, F., Griffiths, D., (ed.) Challenges to the Human Rights of People with Intellectual Disabilities, (2009), page 23

disadvantage, it fortifies the medical model.<sup>54</sup> On the other hand names such as mental disorder and mental incapacity are said to be narrow in scope. That is, they don't represent all persons that should have been included in the set. Defining mental disability is, therefore, a daunting task as it is not a unitary condition but a group of disorders with some commonalities.<sup>55</sup>

Among the names aforementioned mental disability covers broad in nature. The term mental disability is not synonym with mental disorder. Mental disorder is narrow in scope and included under mental disability.<sup>56</sup> Using the term mental disability is advantageous in a sense that the term disability refers directly to persons' immediate perception towards the environment and others. Moreover professionals outside the health sector understand the term mental disability easily.<sup>57</sup> It is based on this assumption that the term mental disability is preferably used in this research than other terms. Mental disability includes two sets of conditions: psychosocial and intellectual disability. The UN has defined a person with mental disability as s/he who, in the course of his/her disability, is unable to care for his/her own person or affairs and requires care, treatment or control for his/her own protection or that of others or of the community.<sup>58</sup>

### **2.3 The Rights of Mentally Disabled Persons**

Human rights are those rights recognized as inherent in each and every one of us by virtue of our common humanity and innate dignity as human beings. They are the rights that must be respected if we are each to fulfill our potential as human beings. They are not luxuries—they are the basic and minimum necessities for living together in human society.<sup>59</sup>

The founding principle of human rights is that it is applicable to all human family for the mere fact that a person is born human. It is a right that is guaranteed to all human being without discrimination. Some scholars argue that the issue of rights of mentally disabled persons is only the concern of domestic governments not of international society, but this attitude is wrong because domestic governments are under obligation to set their laws and policies in accordance with binding international human rights obligations.<sup>60</sup>

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<sup>54</sup>Bertolote, J., (ed), World Health Organization Resource Book on Mental Health, Human Rights and Legislation,(2005), Page 24

<sup>55</sup> Id, Page 24

<sup>56</sup> Ibid

<sup>57</sup> Id page 23

<sup>58</sup> Erica, I., Rapporteur, Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill Health or Suffering From Mental Disorder, U.N. doc. E/CN.4/Sub.2/1983/17, Para43

<sup>59</sup>Owen, F., Griffiths, D., Tarulli, D., and Murphy, J., Historical and Theoretical Foundations of the Rights of Persons with Intellectual Disabilities: Setting the Stage; Owen, F., Griffiths, D.,(ed.) Challenges to the Human Rights of People with Intellectual Disabilities, (2009), Page 24

<sup>60</sup> Funk, M., and Drew, N., (ed) et.al, Cited above at note 49, Page 8

Like any person with disability persons with mental disability have been experiencing discrimination based on ableism.<sup>61</sup> Ableism refers to the view that people with disabilities are inferior and therefore not entitled to the rights assumed to be accessible to others.<sup>62</sup>Based on this understanding persons with mental disability have been discriminated and marginalized. Violation of rights of persons with mental disability is not because of lack of legislative provisions; there are over 180 United Nations Human Rights Instruments that are related with the rights of persons with mental disability.<sup>63</sup> But the irony is that there is still violation of the rights of persons with mental disability.<sup>64</sup> Mentally disabled persons are most often burdened with invisible disability whereby they are unable to speak for themselves and historically relegated to closed institutions.<sup>65</sup> Thus the issue of the rights of persons with mental disabilities is very important and the protection of these rights is a burning agenda.

## **2.4 International Human Rights Instruments on the Right of Persons with Mental Disabilities**

In the generation of contemporary human rights movement International Bill of Human Rights has played significant role.<sup>66</sup> Among the International Bill of Human Rights Universal Declaration of Human Rights is the first born. The declaration states that all persons are free and equal in dignity and rights.<sup>67</sup>So persons with mental disabilities have equal rights and dignity with others. The right to equality is a milestone for the enjoyment of other fundamental rights and freedoms.

Historically disability was perceived to be a medical problem to be solved only by medical policy.<sup>68</sup> Moreover the issue of disability was seen as the issue of economic and social right

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<sup>61</sup>Owen, F., Griffiths, D., Tarulli, D., and Murphy, J., Cited above at note 59, Page 35

<sup>62</sup>Ibid

<sup>63</sup>Lecomte, J., & Mercier, C., 'The Emergence of the Human Rights of Persons with Intellectual Disabilities in International Law: The Cases of the Montreal Declaration on Intellectual Disabilities and the United Nations Convention on the Rights of Persons with Disabilities', Owen, F., Griffiths, D.,(ed.) Challenges to the Human Rights of People with Intellectual Disabilities, (2009), page 43

<sup>64</sup>Ibid

<sup>65</sup>Ibid

<sup>66</sup>International Bill of Human Rights refers to Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights.

<sup>67</sup>UDHR Article 1 cited above at note 5

<sup>68</sup>Degener, T., 'Disability and freedom: The International Covenant on Civil and Political Rights (ICCPR)', Quinn, G., and Degener, T., The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability, (2002), Page 54 ; Lecomte, J., & Mercier, C., 'The Emergence of the Human Rights of Persons with Intellectual Disabilities in International Law: The Cases of the Montreal Declaration on Intellectual Disabilities and the United Nations Convention on the Rights of Persons with Disabilities', Owen, F., Griffiths, D.,(ed.) Challenges to the Human Rights of People with Intellectual Disabilities, (2009), page 44 ;European Union Agency For Fundamental Rights, Legal capacity of persons with intellectual disabilities and persons with mental health problems, (2013) page 14

rather than civil and political rights.<sup>69</sup> It is based on this historical concept that disability was considered not as human rights agenda like race and gender.<sup>70</sup> Nowadays this idea is reversed and disability is being considered as human rights issue.<sup>71</sup>

ICCPR was recognized in 1966 for the protection of civil and political rights. At the time of its adoption the covenant didn't take into account the case of persons with mental disability expressly. But the issue of mentally disabled persons is covered under the covenant impliedly.<sup>72</sup> This is because, firstly, this covenant is a universal human rights instrument unlike CEDAW and CRC which are specifically targeted to some group of the population.<sup>73</sup> Secondly the preamble of the covenant states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".<sup>74</sup> This sentence incorporates all human families including persons with disability.<sup>75</sup>

Article 2, 3 and 26 of the covenant deal with the right to equality; these articles are non-discrimination clauses of the covenant. Article 2 deals with the equal enjoyment of rights that are provided under the covenant. But the scope of article 26 is wider and encompasses equality in the enjoyment of all rights that are not covered under the covenant. Both articles do not make specific reference to equality of persons with disability but the ground of discrimination are illustrative and ends with the phrase 'other status' which includes those persons with disability.<sup>76</sup> Thus persons with mental disability have the right to equal enjoyment of civil and political rights that are provided under the covenant as well as other fundamental rights and freedoms that are not incorporated in the covenant.<sup>77</sup>

The rights that are provided under ICCPR protect individuals from government action that infringe on their liberty, privacy, freedom of expression and association; persons with mental disability frequently raise these provisions and benefited from it.<sup>78</sup> Under ICCPR there is a committee mandated to oversee the implementation of covenant rights by state parties. This committee has not yet issued General Comment specifically on the rights of persons with mental

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<sup>69</sup>Degener, T., Cited above at note 68

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Id Page 53

<sup>76</sup> Id Page 54

<sup>77</sup> Ibid

<sup>78</sup> Ibid

disability.<sup>79</sup> General comment no.18 is on the right to equality; in this comment the right to be free from discrimination on the ground of disability is covered.<sup>80</sup>

ICESCR deals with economic, social and cultural rights. The covenant has nondiscrimination clause on article 2 and 3. Article 2(2) states that state parties to the covenant have the responsibility to respect, protect and fulfill all the rights provided under the covenant without any discrimination.<sup>81</sup> Similar to ICCPR this covenant does not make specific reference to persons with disability rather the list is illustrative and ends with the phrase 'other status'. This phrase includes persons with mental disability too. Thus it is possible to conclude that persons with mental disability have the right to enjoy all economic, social and cultural rights that are provided under ICESCR on equal footing with others. In addition, Article 3 deals with equality between men and women in the enjoyment of rights that are provided under the covenant.

Moreover ICESCR has General Comment on application of economic social and cultural right to persons with mental and physical disability.<sup>82</sup> Even if General Comments do not have binding effect they are useful interpretive instrument of the rights that are provided under the covenant.<sup>83</sup>

Under International Bill of rights there is no provision that explicitly mention disability but by implied reading of different provisions of the bills we can say that rights that are provided under the bills as well as other fundamental rights and freedoms are equally applicable to persons with mental disability without discrimination. Thus these groups of persons are entitled to be protected against the violation of their rights.

## **2.5 Other International Human Right Instruments on the Right of Persons with Mental Disabilities**

Persons with mental disabilities may receive additional human rights protection from four other human rights treaties. These are CAT, CRC, CEDAW and CERD. In some instances these conventions give better protection to persons with mental disabilities than ICCPR and

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<sup>79</sup>Ibid

<sup>80</sup>Human Rights Committee, General Comment no. 18, adopted at 37<sup>th</sup> session, Nov.1989

<sup>81</sup>Bruce, A., Quinn, G.,& Kenna, P., 'Disability and Social Justice: The International Covenant on Economic, Social and Cultural Rights', cited above at note 55 Page 79

<sup>82</sup>Committee on Economic, Social and Cultural Rights, General comment no.5, 11<sup>th</sup> Session 1994

<sup>83</sup>Funk, M., and Drew, N., Cited above at note 49, page 11

ICESCR.<sup>84</sup> In addition the conventions have binding effect on signatories besides they have committee which oversees the implementation of the convention by state parties.<sup>85</sup>

There are specific provisions in the right of children with mental disability under CRC; Article 23 recognizes that children with mental or physical disabilities have the right to enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate the child's active participation in the community. Article 25 recognizes the right to periodic review of treatment provided to children who are placed in institutions for the care, protection or treatment of physical or mental health. Article 27 recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 32 recognizes the right of children to be protected from performing any work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental spiritual, moral or social development.

The CAT convention is important tool in the protection of the rights of persons with mental disability. The convention protects persons with mental disabilities from torture inhuman and degrading treatment. In addition protection is also made under CEDAW and CERD to persons with mental disabilities.

## **2.6 Principles, Rules and Declarations on Mental Disability under the UN System**

The conventions that are promulgated under the UN system do not make specific reference to persons with disabilities and specifically to mental disabilities.<sup>86</sup> Hence it is necessary to have detailed provisions on the protection of the right of persons with mental disabilities. It was based on this assumption that many principles and standards were adopted under the UN system.<sup>87</sup> Principles, standards, and declarations are soft laws that do not have binding effect.<sup>88</sup> Soft laws are adopted with the intention of inciting states to incorporate not the text but the intention of their text in their domestic law.<sup>89</sup> These declarations and principles that are adopted by UN have played very significant role in putting forward the agenda of human rights and disability.<sup>90</sup>

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<sup>84</sup>Gostin, L. & Gable, L., cited above at note 4 page 35

<sup>85</sup>Id page 36

<sup>86</sup>Id page 36

<sup>87</sup>Ibid

<sup>88</sup>Owen, F., Griffiths, D., Tarulli D., and Murphy, J., cited above at note 53, Page 46

<sup>89</sup> Id page 45

<sup>90</sup> Id page 46

The UN General assembly adopted its first nonbinding instrument almost 40 years ago. The UN Declaration on the Rights of Mentally Retarded Persons was adopted in 1971. This declaration has played a very important role in giving some much needed visibility to persons with mental disabilities. After twenty years the UN General Assembly adopted the MI Principles, which called for drastic changes in the institutional care of persons with mental disabilities. After two years another important rule was adopted; the United Nations Standard Rule on the Equalization of Opportunities for People with Disabilities. The Standard Rules were, by far the most important and comprehensive international instrument guaranteeing the rights of people with disabilities until the UN Convention on Persons with Disabilities was adopted.<sup>91</sup> From the three let us see MI principle in detail.

### **2.6.1 UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare [MI Principles]**

MI principles were adopted by the General Assembly in 1991. These principles are applied to persons with mental disability whether they are in psychiatric institution or outside the institution. And they are applicable to persons who are admitted to mental health facility irrespective of their mental health condition in other words whether they have mental disorder or not.<sup>92</sup> MI principles consist of the most direct human right in the context of mental illness to date issued by UN.<sup>93</sup> International monitoring bodies have used MI principles as an authoritative interpretation of international conventions such as ICESCR on mental health.<sup>94</sup>

The MI principles are a framework for the development of mental health legislations of different countries such as Austria, Hungary, Mexico and Portugal; these countries have incorporated MI Principles in their domestic legislations in whole or in part.<sup>95</sup> The principle begins by enunciating fundamental rights and freedoms such as respect for inherent dignity, protection from exploitation, physical or other abuse, nondiscrimination and the right to exercise all rights that are found under International Bill of Human Rights.<sup>96</sup>

The MI Principles recognize the inherent difficulties of protecting human rights in Institutions by noting that care should, when possible, be administered in the community. The duty to treat patients in the least restrictive environment and to maintain and improve

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<sup>91</sup> Id page 47

<sup>92</sup> Aytenew Debebe, cited above at note 40, page 15

<sup>93</sup> Gostin, L. & Gable, L., cited above at note 4, page 38

<sup>94</sup> Aytenew Debebe, cited above at note 39, Page 15

<sup>95</sup> Ibid

<sup>96</sup> Gostin, L. & Gable, L., cited above at note 4, page 38

their autonomy reinforces this preference for community care. Therefore MI principle has influenced the legislations of different countries on the right of persons with mental disability.

## **2.6.2 UN Convention on the Right of Persons with Disabilities (CRPD)**

It is the most recent and extensive human right instrument that specifically recognizes the right of persons with disability. It is designed to providing international standard for persons with disability that will be binding on any country that commits to it. The convention covered from specific right to equal recognition of persons with disabilities up to obligation of states to protect and promote full enjoyment of fundamental rights and freedoms of persons with disabilities without discrimination with others.<sup>97</sup>

The purpose of the convention is outlined under article 1 of the convention; thus the purpose is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>98</sup> The convention does not define disability explicitly the preamble of the convention mentioned that disability is an evolving concept this acknowledged that society and concept within the society are not static.<sup>99</sup> The convention has laid the definition of disability as “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>100</sup> Having this as its definition there are principles of the convention these are:

- Respect for the inherent dignity, autonomy, including the freedom to make one’s own decisions, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;

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<sup>97</sup>Gostin, L. & Gable, L., cited above at note 4, Page 15

<sup>98</sup> CRPD, cited above at note 23, Article 1

<sup>99</sup>Gostin, L. & Gable, L., cited above at note 4, Page 15

<sup>100</sup> CRPD, cited above at note 23, Article 1

- Equality between men and women; and
- Respect for the evolving capacities of children with disabilities and for the right of children with disabilities to preserve their identities.<sup>101</sup>

These general principles serve as guidance to states actors and others in interpreting the provisions of the convention.<sup>102</sup>

The convention has covered civil and political right some of these rights are the right to life, the right to recognition as person everywhere, their right to be free from torture inhuman and degrading treatment, right to respect for physical and mental integrity, freedom of expression and opinion right to liberty and security of person etc.<sup>103</sup> In addition social, economic and cultural rights are also covered under the covenant. Some of these rights are right to education, right to health, right to work; right to adequate standard of life etc.<sup>104</sup> The convention also addresses the specific rights of groups such as women and children.<sup>105</sup> States are expected to ensure enjoyment of these rights by persons with disabilities on equal footing with others.

## **2.7 Right of Persons with Mental Disabilities under Regional Human Right System**

Even if there are general consensus on the idea that human rights are universal regional systems have created additional fora for the protection and promotion of human rights often through more direct means.<sup>106</sup> Courts and commissions at the regional level have granted individuals the ability to redress human rights grievances that have not been dealt with appropriately at the domestic level or to challenge domestic policies and practices that violate human rights norms.<sup>107</sup> Hence, in addition to international human rights instruments having regional human rights instrument is very important. Regional human rights instrument deals with the right of persons with mental disability. These regional instruments include African Charter on Human and Peoples Right (Banjul Charter), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and American Convention on Human Rights. From these regional instruments African Charter on Human and Peoples Right will be discussed in detail because Ethiopia is signatory of neither the European nor the American convention.

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<sup>101</sup> Id Article 3

<sup>102</sup> Gostin, L. & Gable, L., cited above at note 4, Page 15

<sup>103</sup> CRPD, cited above at note 23, Article 5,10, 11, 12, 13, 14, 15, 16,17, 18, 19, 20, 21, 22, &29

<sup>104</sup> Id Article 23, 24, 25, 26, 27, 28 & 30

<sup>105</sup> Id Article 6 & 7 respectively.

<sup>106</sup> Hand Book for Parliamentarians, cited above at note 3, Page 47

<sup>107</sup> Ibid

### 2.7.1 African Charter on Human and People's Right (Banjul Charter) (1981)

The ACHPR is binding regional human right instrument adopted by OAU in the year 1981. The charter incorporates civil, political, economic, social and cultural rights. The African charter has its own distinctive features. Firstly, the charter does not have derogation clause.<sup>108</sup> Secondly, the charter provides not only rights but respective duties of individuals<sup>109</sup> lastly the charter provides for community rights.<sup>110</sup> Having these distinctive features, the charter recognizes equality before the law and equal protection of law in the enjoyment of rights provided under the charter without discrimination under article 3.<sup>111</sup> In addition special attention is given to the aged and disabled under article 18 of the charter. Article 18(4) states that “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs”. This provision recognizes that special protection and care should be made to persons with disabilities.<sup>112</sup>

The charter is supervised by African Commission on Human and People's Right.<sup>113</sup> The Commission has the mandate to investigate violations of human rights in the Charter and collect state reports detailing compliance with the charter.<sup>114</sup> The commission issues recommendations in response to communications but the enforcement of substantive remedies based up on the commission's determinations has been problematic.<sup>115</sup> With regard to Mental disability there was a famous case that was brought before the commission. The case is between *Purohit and Moore v the Gambia*, the commission has made the following statement:

61. The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African

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<sup>108</sup>NegaEwnetu and AdmasuAlemayhu, *African Human Rights Law Teaching Material*, (2009), Page 28

<sup>109</sup> African Commission on Human and Peoples' Right and Center for Human Rights University of Pretoria, *A Guide to the African Human Rights System*, (2011), Page 11

<sup>110</sup> Ibid

<sup>111</sup> ACHPR, cited above at note 27, Article 3

<sup>112</sup> Id Article 18(4)

<sup>113</sup> Id Article 30

<sup>114</sup> Ibid

<sup>115</sup> Gostin, L. & Gable, L., cited above at note 4, page 47

Charter in accordance with the well-established principle that all human beings are born free and equal in dignity and rights.<sup>116</sup>

The position of the commission on the right of persons with mental disability is very significant in the protection of the right of persons with mental disabilities. The commission strongly insisted that the right of persons with mental disability has to be protected by allstate parties to the African Charter based on the principle that all human beings are born free and equal in dignity and rights.

The African Court on Human and People's Right was established by the Assembly of Head of States and Government of OAU.<sup>117</sup> Unlike the Commission the court has the authority to issue binding and enforceable decision in cases brought before it.<sup>118</sup>

## **2.8 Legislations on Persons with Mental Disability in Ethiopia**

### **2.8.1 Mental Health Legislations in General**

Mental health legislations are very important instrument in the protection of civil, political, economic, social and cultural right of persons with mental disabilities.<sup>119</sup> Mental health legislation is important to persons with mental disability because they are vulnerable groups of the society.<sup>120</sup> They are vulnerable because of two reasons. Firstly mental disability can affect the way a person think and behave and it can affect decision making ability.<sup>121</sup> Secondly they face stigma, discrimination and marginalization.<sup>122</sup> People with mental disabilities live the harshest way of life in most societies as a result of economic marginalization.<sup>123</sup>

Mental health legislations are important tools to combat this suffering of persons with mental disability. Mental health legislations focus on care and treatment of persons with mental disability.<sup>124</sup> Mental health legislations are not limited to the provision of institution- based health service. It also provides for legal frame work addressing critical mental health issues such as access to care, the provision of care of high quality, rehabilitation and aftercare, the full

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<sup>116</sup>Purohit and Moore Vs The Gambia, cited above at note 52

<sup>117</sup>Luis Gabriel Franceschi, The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective, 2014, Page 164

<sup>118</sup>Ibid

<sup>119</sup>Funk, M., and Drew, N., (ed) et.al, cited above at note 49, Page 10

<sup>120</sup>Ibid

<sup>121</sup>Ibid

<sup>122</sup>Ibid

<sup>123</sup>Ibid

<sup>124</sup>Ibid

integration of people with mental disorders into communities, the prevention of mental disorders and the promotion of mental health in different sectors of society.<sup>125</sup>

Different approaches are used by countries in the adoption of mental health legislations. That is consolidated mental health legislation approach and dispersed approach.<sup>126</sup> In Consolidated approach all important issues concerning persons with mental disability will be covered under single mental health legislation.<sup>127</sup> Consolidated approach is easy to enact and amend without a - need to amend other laws. Moreover in the process of drafting consolidated legislation it create good opportunity to raise public awareness about mental disability and educate the legislator and the public about discrimination, stigma and human right issues.<sup>128</sup> On the other hand consolidate approach is criticized for segregating the issue of mental disability. It has the power of reinforcing discrimination and stigma against persons with mental disability.<sup>129</sup>

In dispersed approach there is no separate mental health legislation mental health issues are inserted into different relevant laws. Dispersed mental health legislations have the advantage of avoiding stigma and discrimination of persons with mental disability.<sup>130</sup> In addition they create good opportunity for better protection of right of mentally disabled persons because the law exists in the law which benefits the wider public.<sup>131</sup> The main disadvantage of dispersed mental health legislation is that they are unable to cover all matters that are relevant to persons with mental disability.<sup>132</sup> Moreover, more legislative time is necessary because of the need for multiple amendments to existing laws.<sup>133</sup>

From the two legislations it is difficult to say this one is better than the other because both have their own advantages and disadvantages. Combined approach is preferable; inserting mental health issues in other relevant laws complimented by mental health legislation is very important in the protection of human rights of persons with mental disability.<sup>134</sup>

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<sup>125</sup> Ibid

<sup>126</sup> Id page 2

<sup>127</sup> Id page 11

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> Ibid

## **2.8.2 Legislations on Persons with Mental Disability in Ethiopia**

As discussed under chapter one Ethiopia does not have separate mental health legislation as well as mental health policy.<sup>135</sup> It is a recent history that Ethiopia has adopted the first National Mental Health Strategy in the year 2012.<sup>136</sup> Before the adoption of the strategy Ethiopia has scattered laws that deal with mentally disabled persons; such as FDRE constitution, Criminal Code, Civil Code and Criminal Procedure Code and a Proclamation. From the approaches we have discussed above Ethiopia follows dispersed approach for the fact that the laws concerning persons with mental disability is scattered in different laws. The main disadvantage of dispersed approach is its difficulty in ensuring coverage of all legislative matters of relevance to persons with mental disorders and that it takes the time of the legislator in case where amendment is needed. In the following section the issue of mentally disabled persons under FDRE constitution, Criminal code, CPC, Civil Code and a proclamation will be discussed.

### **2.8.2.1 Right of Persons with Mental Disability under FDRE Constitution**

Under FDRE Constitution one third of its provisions are fundamental rights and freedoms. The constitution's founding principle states that human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable.<sup>137</sup> Moreover article 25 of the constitution provides that every person is equal before the law and entitled to equal protection of the law. Accordingly no discrimination based on race, sex, ethnic background, color or other status. Under this constitutional provision there is no specific reference to discrimination based on disability but the term 'other status' includes disability. Hence persons with mental disability are equal with any other person and entitled to equal protection of the law.

In addition, Article 41(5) provides that "the state shall within available means allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children without parents or guardian". As per this provision the state is bounded to give special attention to mentally disabled persons within the available resource. The state is under obligation to rehabilitate and assist mentally disabled persons.

Furthermore, the constitution provides for the status of international human rights instruments ratified by Ethiopia. Accordingly, Article 9(4) provides that international agreements ratified by

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<sup>135</sup> AyteneWDebebe, cited above at note 40, Page 81

<sup>136</sup> National Mental Health Strategy, cited above at note 41

<sup>137</sup> FDRE Constitution, cited above at note 28 Article 10

Ethiopia are an integral part of the law of the land. As per wording of this article international agreements ratified by Ethiopia are considered as part of the law of the land. Moreover Article 13(2) of the constitution provides that fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of UDHR and international instruments adopted by Ethiopia.

Ethiopia has ratified different human right instruments at different times. These are: ICCPR,<sup>138</sup> ICESCR,<sup>139</sup> CERD,<sup>140</sup> CEDAW,<sup>141</sup> CRC,<sup>142</sup> CAT<sup>143</sup> and CRPD<sup>144</sup>. Since these international human right instruments are ratified by Ethiopia as per the wording of article 9(4) they are integral part of the law of the land. Therefore the provisions of the instruments are applicable in Ethiopia. Furthermore, fundamental rights and freedoms that are situated under chapter three of the constitution shall be interpreted in accordance with spirit of these international human rights instruments.

### **2.8.2.2 Mental Disability under FDRE Criminal Code**

Criminal legislations in many countries determine the criminal responsibility of accused person. A person can be held criminally liable if three elements are satisfied that is legal, mental and material element.<sup>145</sup> If one of these elements is not satisfied there is no criminal liability. From these elements mental element is the ability of the person to appreciate the consequence of an act. If the mental faculty of the person is impaired because of mental disorder at the time of commission of the crime and such disorder is sufficient enough to render the person partially or totally incapable of satisfying the mental faculty then in such case the accused is not responsible due to mental disability.<sup>146</sup> If the person is not responsible because of mental disability then he/she will be sent to mental health facility for treatment or released into community. This decision depends up on domestic legislations of countries.<sup>147</sup>

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<sup>138</sup> Ethiopia has ratified ICCPR in the year 1993 but neither Optional Protocol I nor Optional Protocol II is ratified.

<sup>139</sup> In the year 1993 Ethiopia has ratified ICESCR

<sup>140</sup> Ethiopia has become the member of CERD in 1976 but did not make the declaration under article 14 that provides for individual complaint mechanism.

<sup>141</sup> Ethiopia has ratified CEDAW in 1981.

<sup>142</sup> Ethiopia has ratified CRC in 1991.

<sup>143</sup> CAT was ratified by Ethiopia in 1994 by Ethiopia.

<sup>144</sup> CRPD was ratified by Ethiopia in the year 2010.

<sup>145</sup> Criminal Code, cited above at note 29 Article 23(2)

<sup>146</sup> Bertolote, J., (ed), cited above at note 54, page 77

<sup>147</sup> Ibid

Defining responsibility has been a difficult task because it includes different extra-legal issues.<sup>148</sup> Philosophers, lawyers and physicians have done their best to determine criteria for responsibility that could have been utilized across all disciplines.<sup>149</sup> The efforts that were made to have uniform definition of responsibility were unsuccessful.<sup>150</sup> As a result of this, focus was made on the signs and symptoms that prohibit a person from being regarded as responsible for his acts. Many of these signs and symptoms were adopted from famous common law cases that involved the defense of insanity. There are different cases that aimed at determining criminal responsibility.<sup>151</sup>

One among these cases that are used to determine the degree and kind of criminal responsibility was *Mc'Naughten's* case on right and wrong test.<sup>152</sup> In this case Daniel *Mc'Naughten's* was possessed by the idea that Sir Robert Peel wants to destroy libertarian Englishman by creating Metropolitan police in London.<sup>153</sup> Being possessed with this idea he hunted Sir Robert Peel to kill but mistakenly he shot and killed his secretary.<sup>154</sup> At the end *Mc'Naughten* was released from the charge of murder on the defense of insanity. Based on the controversy aroused in the House of Lord in determination of insanity the House of Lords has clarified the defense as follows:

Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was suffering under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong.<sup>155</sup>

In Ethiopia criminal responsibility is covered under article 48 of the criminal code. According to Article 48(1) a person can be held criminally liable if and only if he/she is responsible.<sup>156</sup> Article 48(2) provides that a person is not responsible for his acts under the law when, owing to age,

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<sup>148</sup>Nirmala, G.K., &AmhaMekonnen, (2009), Criminal law (II) Teaching Material, Unpublished, Page 6

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> [https://www.law.cornell.edu/wex/insanity\\_defense](https://www.law.cornell.edu/wex/insanity_defense), accessed on Oct. 2015

<sup>153</sup> Ibid

<sup>154</sup> Ibid

<sup>155</sup> Id Page 9

<sup>156</sup> Criminal code, cited above at note 29 Article 48 (1)

illness, abnormal delay in his development, deterioration of his mental faculties, one of the causes specified under Article 49 sub article 1 or any other similar biological cause, he was incapable at the time of his act, of understanding the nature or consequences of his act, or of regulating his conduct according to such understanding.<sup>157</sup>

In addition there is Article 49 of the criminal code on partial/limited responsibility.<sup>158</sup> A person is said to be partially responsible if he/she is in a condition of partially understanding the nature and consequence of his act and incapable of regulating his conduct in accordance with such understanding because of the causes specified under article 48(2) or derangement or an abnormal or deficient condition or any other similar biological cause at the time of commission of the crime.<sup>159</sup> In such case the person shall be partially liable to the punishment specified for the committed crime. The court shall determine sentence in accordance with Article 180.<sup>160</sup> Moreover the court may order appropriate measure in decisions that is responsibility and irresponsibility in accordance with Article 129-133 of the criminal code.<sup>161</sup>

After the decision of not criminally responsible due to mental disability if the person is found to be dangerous to public safety and order as well as persons living with him the court shall order the confinement of the person in appropriate institution.<sup>162</sup> If the confined person is in need of treatment he shall be treated in the same institution or transferred to other institution for treatment.<sup>163</sup> When the person is suffering from mental disease the court shall order the treatment of the person in appropriate institution.<sup>164</sup> If the court is satisfied that the person is not dangerous it shall order the treatment of the person as an outpatient.<sup>165</sup> The court shall appoint a medical expert or other competent authority who is in discharge of controlling and supervising the criminal.<sup>166</sup> This decision of the court is revocable if the result does not produce positive effect.<sup>167</sup>

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<sup>157</sup> Id Article 48(2)

<sup>158</sup> Id Article 49(1)

<sup>159</sup> Ibid

<sup>160</sup> Ibid

<sup>161</sup> Id Article 49(2)

<sup>162</sup> Id Article 130 (1)

<sup>163</sup> Id Article 130(2)

<sup>164</sup> Ibid

<sup>165</sup> Id 131(2)

<sup>166</sup> Ibid

<sup>167</sup> Ibid

The duration of the decision for treatment and confinement will be for indefinite period of time but the court shall renew the decision every two years.<sup>168</sup> But if the reason for the measure has disappeared and this is proved by expert opinion then the court shall order the release of the person.<sup>169</sup> Even if the reason for the measure is partially disappeared the court shall order conditional release of the person.<sup>170</sup> The court shall order the release of the person under supervision by selected protector for one year.<sup>171</sup> The decision of the release will be final if the person go through the probation period successfully.<sup>172</sup> The decision of the court is revocable at any time if the person is found to be dangerous to public safety.<sup>173</sup>

In the case of persons with partial responsibility based on the circumstances of the case the court shall order the temporary confinement or treatment of the person after having suspended the sentence.<sup>174</sup> Up on the completion of the measure it is the discretion of the court to decide on the enforcement of the penalty or release the criminal.<sup>175</sup> In giving this decision the court shall take in to account the gravity of the crime committed the antecedent and the character of the criminal, the effect of the internment or treatment had upon his condition and the likelihood of his permanent recovery.<sup>176</sup>

### **2.8.2.3 Mental Disability under Criminal Procedure Code of Ethiopia**

Under the CPC justice sets in motion after complaint/ accusation is made to the police.<sup>177</sup> After that the police start investigation.<sup>178</sup> After investigation is completed by the police, the case will be forwarded to the office of public prosecutor.<sup>179</sup> The public prosecutor shall institute charge wherever he is of opinion that there are sufficient grounds for prosecuting the accused.<sup>180</sup> The public prosecutor can refuse to institute charge only on grounds listed under article 42(1) (a-d) of CPC. On no other grounds the public prosecutor can refuse to institute charge.<sup>181</sup>

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<sup>168</sup> Id Article 132(1)

<sup>169</sup> Ibid

<sup>170</sup> Id Article 132(2)

<sup>171</sup> Ibid

<sup>172</sup> Ibid

<sup>173</sup> Id Article 132

<sup>174</sup> Id Article 133(1)

<sup>175</sup> Id Article 133(2)

<sup>176</sup> Ibid

<sup>177</sup> Criminal Procedure Code of Ethiopia, 1961, Article 11, Proc.no185, Neg. Gaz. year, no. 1

<sup>178</sup> Id Article 22

<sup>179</sup> Id Article 37

<sup>180</sup> Id Article 40

<sup>181</sup> Id article 42(3)

Having this provision in mind another proclamation was adopted by the House of People's Representatives.<sup>182</sup> Article 16(1) (5) of the proclamation states that the Ministry of Justice shall have the power to undertake or order the conduct of investigation where it believes that a crime the adjudication of which falls under the jurisdiction of the federal courts has been committed; direct and supervise the process of the investigation; allow plea bargain; up on the existence of good cause, *decide on the discontinuance of an investigation or the carrying out of additional investigation*. [Emphasis added] Based on this provision the public prosecutor is mandated to discontinue investigation when there is good cause. The case where there is sufficient evidence that can show that the accused person was irresponsible at the time of commission of the crime is good cause, which enables the public prosecutor to discontinue the charge against persons with mental disability.

On the other hand if the issue of mental disability was not raised during investigation the accused person can rise at first hearing as preliminary objection based on article 130 (2)(g). The court shall take the objection and ask the public prosecutor if s/he has any statement to make as to the objection.<sup>183</sup> The court shall decide on the objection if it can be settled by reference to law or the facts on which the objection is made are not disputable by the public prosecutor.<sup>184</sup> When decision cannot be made forthwith because of lack of evidence the court shall order that the necessary evidence be submitted without delay.<sup>185</sup> The court shall give decision up on the submission of the necessary evidence.<sup>186</sup>

#### **2.8.2.4 Mental Disability under 1960 Civil Code**

Under our civil code on capacity of physical persons all persons are presumed to be capable of entering in to juridical acts.<sup>187</sup> But this presumption can be rebutted if evidence to the contrary is produced by the party alleging incapacity.<sup>188</sup> Hence in our civil code there are grounds of incapacity; minority, notorious insanity, apparent infirmity, judicial interdiction and legal interdiction. The main purpose of incapacity is protecting these groups of persons from others who want to take advantage of their inexperience and their inferior judgment.<sup>189</sup> Persons with

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<sup>182</sup> Definition of Powers and Duties of the Executive Organ of the Federal Democratic Republic Ethiopia, 2010, Art. 15(5), Proc. No. 691, Fed. Neg. Gaz. Year 17 no.1

<sup>183</sup> Criminal Procedure Code, cited above at note 177, Article 131(1)

<sup>184</sup> Id 131(2)

<sup>185</sup> Id Article 131(3)

<sup>186</sup> Id article 131(4)

<sup>187</sup> Civil Code, cited above at note 30, Article 196(1)

<sup>188</sup> Id Article 196(2)

<sup>189</sup> Elias N. Stebek, Ethiopian Law of Persons: Notes and Materials (2007), Page 144

mental disability are protected by our civil code as judicially interdicted person<sup>190</sup> and notoriously insane person.<sup>191</sup> Judicial interdiction is the best way of protecting the interest of persons with mental disability than through notorious insanity because the latter is difficult to prove.

### **2.8.2.5 Mental Disability under Proclamation on the Right to Employment of Persons with Disability Proclamation No. 568/ 2008<sup>192</sup>**

Proclamation on the right of employment of persons with disability is designed to protect the right of persons with disability by providing for reservation of vacancies for disabled persons.<sup>193</sup> It has the objective of changing the attitude of the society towards disabled persons as incapable of performing jobs based on merit and failed to guarantee their right to reasonable accommodation and provide for proper protection.<sup>194</sup> Moreover the proclamation lays down simple procedural rule that enable persons with disability to prove before any judicial organ discriminations encountered in employment.<sup>195</sup> Thus this proclamation is a very important instrument in the protection of the right of disabled persons to equal employment opportunity.

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<sup>190</sup>Civil Code, cited above at note 30, Article 351-379

<sup>191</sup> Id Article 339-350

<sup>192</sup>Right to Employment of Persons with Disability Proclamation (2008) Proc.no.568, Fed. Neg. Gaz. 14<sup>th</sup> Year no.20

<sup>193</sup>Id Preamble Para 2

<sup>194</sup>Id Preamble Para 3

<sup>195</sup>Ibid

## Chapter Three

### 3. Mental Health Court and Diversion Programs

#### 3.1 Introduction

In USA studies revealed that since recent times the number of mentally disabled persons in the criminal justice system has increased at a rate in excess of ten percent per year over the past dozen years.<sup>196</sup> As a result of the increasing number of mentally ill offenders, prisons have become de facto mental health center in many countries.<sup>197</sup> In fact, prison cells are not appropriate places for persons with mental disabilities because the criminal justice system focuses on deterrence and punishment than treatment and care.<sup>198</sup> This chapter deals with the problem that causes the establishment of MHC in different nations, objectives, basic features, participants, activities and outcomes of MHC in different countries in general and in Ethiopia in particular.

#### 3.2 Development of Mental Health Court

In Western Europe and North America, there was a deinstitutionalization<sup>199</sup> movement in the latter half of the twentieth century.<sup>200</sup> The purpose of deinstitutionalization was to give greater autonomy for adults that are affected by serious mental illness. In the contrary, this movement did not change the quality of life of these individuals; rather it would result in marginalization, homelessness, unemployment and engagement in criminal activities.<sup>201</sup> As a result of deinstitutionalization movement, many mental healthcare institutions were underfunded and availability of mental healthcare services became scarce and even difficult to access.<sup>202</sup> However, the fact that the number of mental healthcare institutions decreased did not lessen the number of persons that needs the treatment. The increased number of persons with mental disability in the society resulted in involvement of the group in to criminal justice system.<sup>203</sup> Due to this, in USA,

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<sup>196</sup> Schneider, R., "Mental Health Court and Diversion Program", Bloom H. & Schneider R. (ed) Law and Mental Disorder: A Comprehensive and Practical Approach (2013), page 155

<sup>197</sup> Ibid

<sup>198</sup> Ibid

<sup>199</sup> Releasing mentally disabled persons to the community than confining them within psychiatric institution so that the disabled will get community based treatments.

<sup>200</sup> Schneider, R., cited above at note 196, page 155; Cosden M., Ellenset al, J.K., Evaluation of a Mental Health Treatment Court With Assertive Community Treatment, Journal of Behavioral Science and Law, (2003) Vol. 21: pages 415–427

<sup>201</sup> Ibid

<sup>202</sup> Schneider, R., "Mental health Courts and Diversion Programs: A Global Survey: International Journal of Law and Psychiatry Vol.33 (2010) page 201

<sup>203</sup> Reich, W.A., Picard – Fritsche, S., et al, Predictors of Program Compliance and Re- arrest in Brooklyn Mental Health Court, (2014), page 2

the prevalence of inmates with serious mental illness in jail ranges from 7-16 %.<sup>204</sup> It rates four times in men and eight times in women than found in the general population.<sup>205</sup> Other study indicates that half of the inmates with mental illness were reported for three or more prior offences.<sup>206</sup> In addition, in 1999 the Los Angeles county jail and New York Ricker Island jail were reported to accommodate more mentally ill persons than the largest psychiatrist institution in USA.<sup>207</sup>

It is this predicament that caused the establishment of MHC in US. The main agenda of MHCs was to curb the root cause of criminality.<sup>208</sup> MHC was established with the assumption that, treatment of participants of crime reduces number of crimes and benefits the individual and the community in general.<sup>209</sup> The idea of MHCs is derived from problem solving courts. Problem solving courts include drug courts, community courts, domestic violence courts, reentry courts and prostitution courts. These courts have been established with the purpose of addressing the underlying cause that leads to involvement in the criminal justice system.<sup>210</sup>

The first MHC in US established in Broward country Florida in 1997. The court was founded by the work of Mental Health Task Force that was established in 1994.<sup>211</sup> In Canada as well the idea of MHC came into picture in 1994 in Toronto.<sup>212</sup> Since then the number of MHCs has been increasing from time to time in Canada.<sup>213</sup> Likewise, the idea of MHC has been expanded in different jurisdictions in US since the first court was established. That is, in US alone there were 250 MHCs in 2009.<sup>214</sup> These courts would offer treatment than punishment.<sup>215</sup> The philosophy of these courts was derived from the principle of therapeutic jurisprudence.<sup>216</sup> The principle of therapeutic jurisprudence advocates that the justice system should deal with the main cause that makes a person to interact with the criminal system.<sup>217</sup> Sometimes the problem of mentally accused persons can be solved by treatment rather than criminal penalties. It is based on this idea

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<sup>204</sup> Council of State Governments Justice Center, cited above at note 32, Page 2

<sup>205</sup> Ibid

<sup>206</sup> Ibid

<sup>207</sup> Id, page 8

<sup>208</sup> Schneider, R, cited above at note 196, page 157

<sup>209</sup> Council of State Governments Justice Center , cited above at note 35, page 8

<sup>210</sup> Id, page 4

<sup>211</sup> Bain, A.E., The Impact of Therapeutic Jurisprudence: A Critical Study of Toronto's Mental Health Court, (2013), page 7

<sup>212</sup> Schneider, R., cited above at note 196, page 158

<sup>213</sup> Id, page 158

<sup>214</sup> Schneider, R., cited above at note 202, page 201

<sup>215</sup> Schneider, R., cited above at note 196, page 158

<sup>216</sup> Frailing, K., "How Mental Health Courts Function: Outcomes and Observations", International Journal of Law and Psychiatry, (2010), page 1; Schneider, R., cited above at note 196, page 157

<sup>217</sup> Ibid

that MHCs focus on treatment, housing, substance addictions, job training and other matters than traditional crime systems such as fines, jail and probation.<sup>218</sup>

From the time MHCs established there is no standardized definition for these courts worldwide.<sup>219</sup> That is, because of diversity in working procedures, charge accepted, targeted population, types of treatment available and intensity of supervision, it is difficult to reach on standardized definition. But there are common characteristics that are shared by all MHCs. The following definition is shared by all MHCs:

“A MHC is a specialized court docket for certain defendants with mental illnesses that substitute a problem-solving model for traditional criminal court processing. Participants are identified through mental health screening and assessments and voluntarily participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals. Incentives reward adherence to the treatment plan or other court conditions, non-adherence may be sanctioned, and success or graduation is defined according to predetermined criteria.<sup>220</sup>

### **3.3 Objectives of Mental Health Courts (MHCs)**

MHCs are established to give response to over representation of mentally disabled persons in the criminal justice system. The courts are trying to solve this problem by using rehabilitative answer for behaviors that have been penalized.<sup>221</sup> According to Richard D. Schneider<sup>222</sup> MHCs have the following objectives:

- a. To divert mentally ill accused that are charged with minor and moderately serious crimes and giving them an option of undergoing with traditional criminal justice system or treatment plan;
- b. To assess the fitness of the accused to stand trial speedily;
- c. To treat the underlying cause for commission of crime;
- d. To minimize the cycling of mentally ill persons in the criminal justice system.<sup>223</sup>

Having these objectives in mind, MHCs are established to reduce the number of mental disabled persons in the criminal justice system using treatment plan than punishing them.

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<sup>218</sup> Ibid

<sup>219</sup> Steadman, H.J., Davidson S., & Collie B.C., *Mental Health Courts & Psychiatric Services* 52 (2001): page 457

<sup>220</sup> Ibid

<sup>221</sup> Schneider, R., cited above at note 196, Page 156

<sup>222</sup> Richard Schneider is the presiding judge of the Toronto Mental Health Court, the largest and most comprehensive mental health court in Canada; he also is a psychologist.

<sup>223</sup> Schneider, R., cited above at note 196, Page 156

### 3.4 Basic Features of Mental Health Courts (MHCs)

The massive difference in MHC design and operation has led people to say “once you see one MHC it is only that court that you see no other”.<sup>224</sup> This statement justifies that MHCs in different places have their own distinctive features. Keeping this idea in mind, there are identified essential features of MHCs regardless of their place. Let us see some of the common features of MHCs in the following paragraphs:

The first feature is goal of MHCs. The major goal of all MHCs is to address the root cause of criminal behavior. Goals of MHCs are divided into four: a) Increased public safety b) increased treatment engagement c) improved quality of life and d) more effective use of resource.<sup>225</sup> During its establishment, MHC should include these goals and work hard to achieve them.

The second feature of MHC is target population.<sup>226</sup> The target population of MHC has to be defined carefully. In determining the target population of MHCs the eligibility criteria revolves around current charges, violence, diagnosis, and prior criminal record. Listing eligibility criteria has many implications regarding political, ethical and operational issues. For example an eligibility criterion is linked with the type of treatment that is offered by the court and sometimes exclusion of others may raise ethical issues.<sup>227</sup> Thus in determining these criteria MHC planners must fight with the consequences, implications, and trade-offs of these important decisions.<sup>228</sup>

The third feature of MHC is terms of participation.<sup>229</sup> The terms of participation of MHCs include plea that participants are required to enter, program duration, the conditions of supervision and the outcome of program completion.<sup>230</sup> The general terms should be adapted to specific conditions of the participants.<sup>231</sup> The participants of the court are also required to plea guilty before entering into the program. As studies indicated, in USA, out of eight MHCs five require guilty plea to enter in to treatment program.<sup>232</sup>

The fourth feature of MHCs is information and voluntariness. Participation in MHCs should be based on voluntary choice of the participant. Voluntariness in the case of MHC is complicated.

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<sup>224</sup> Center for Addiction and Mental Health, cited above at note 34, page 12

<sup>225</sup> Council of State Governments Justice Center, cited above at note 36, page 25

<sup>226</sup> Id page 28

<sup>227</sup> Ibid

<sup>228</sup> Id, page 29

<sup>229</sup> Id, page 38

<sup>230</sup> Ibid

<sup>231</sup> Ibid

<sup>232</sup> Ibid

The court shall ensure that the defendants are legally competent and that they fully understand what participation in the court involves prior to accepting admission. The courts shall arrange the necessary procedure to ensure the competence of the participant.<sup>233</sup> If the person is not competent to stand trial s/he cannot participate in MHC. The court shall ensure that the person is competent to stand trial before expression of his/her willingness. Participation based on the willingness of the parties is a ground for the effectiveness of the treatment. So it is important to secure voluntariness of the participant before joining the treatment program.

The fifth common characteristic of MHCs is composition of court team members. The success of MHC is highly dependent on the composition of MHCs team members that work on daily basis.<sup>234</sup> MHCs' judges, lawyers are supplemented by psychiatrists, psychologists, social workers and case workers.<sup>235</sup> The various disciplines that are available in these courts are resource for the court. It is this composition that makes the court different from others.

### **3.5 Participants of Mental Health Courts (MHCs)**

Right after their establishment, most MHCs used to admit persons with mental illness that would commit minor and moderately serious offences.<sup>236</sup> But second generation MHCs have shifted toward accepting persons charged with felonies and violent crimes.<sup>237</sup> There are different justifications for the shift toward felony and violent crimes. Firstly, during its establishment, MHCs were untested model and releasing persons charged with serious offence would raise challenge from the public. Hence after testing the model, the court officials and the community providers became confident to include persons charged with felonies in the program. Secondly, persons charged with misdemeanor are incarcerated for short period of time if they are found convicted in the traditional court system, but if they join the MHC treatment program, they will be treated at least for one year.<sup>238</sup> Therefore, lawyers and the accused persons prefer traditional court system than MHC program. On the other hand admitting persons charged with felonies and violent crimes is reasonable because the treatment program would not exceed their stay in prison if convicted.<sup>239</sup>

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<sup>233</sup> Id, page 43

<sup>234</sup> Ibid

<sup>235</sup> Schneider, R., cited above at note 196, page 158

<sup>236</sup> Almquist, L., & Dodde, E., Mental Health Court A Guide to Research Informed Policy and Practice, (2009), page 9

<sup>237</sup> Ibid

<sup>238</sup> Ibid

<sup>239</sup> Ibid

### **3.6 Activities of Mental Health Courts (MHCs)**

Though MHCs have general purpose the specific activities performed by MHCs differ from one place to the other. For instance, in Canada the Toronto MHC has the mandate to confirm whether or not the accused is fit to stand trial. If the competence of the accused is in question, the court has the power to determine whether the accused is fit to stand trial or not. Ensuring the fitness of the accused does not require the voluntariness of the accused whereby this opportunity is available for all crimes regardless of its seriousness.<sup>240</sup> In USA, MHCs do not have the mandate to verify the fitness of the accused. In addition to that, the courts have the mandate to determine criminal responsibility of the accused when responsibility is an issue. Furthermore, on voluntary basis the courts will also entertain guilty plea and bail hearings.<sup>241</sup>

Lastly the activity reserved for MHCs is diversion program. Diversion program is reserved only for those persons with mental disability and charged for minor or moderately serious crimes.<sup>242</sup> To participate in this program there are terms and conditions that are set by these courts. Satisfaction of these conditions is a prerequisite to participate in this program. Those participants that successfully complete the program will be discharged and there is no criminal conviction. If the accused cannot comply with treatment programs then s/he should be permitted to withdraw and turn to the regular prosecution stream.<sup>243</sup> The accused shall not be penalized for the failure to comply with terms of the treatment.<sup>244</sup>

### **3.7 Outcome of Mental Health Courts (MHCs)**

Different researches are conducted by different researchers to evaluate the outcome of MHCs in USA and Canada. Based on the goals set by these courts there are benefits that are derived from the establishment of the courts. Persons with mental disability are known for cycling in the criminal justice system before the establishment of MHCs, but the rate of recidivism has decreased after participation in MHC.<sup>245</sup>

Persons with mental disabilities have difficulty to cope with court procedures, but after establishment of MHC the participants have witnessed that they have feelings of fairness and low

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<sup>240</sup> Schneider, R., cited above at note 196, page 158

<sup>241</sup> Ibid

<sup>242</sup> Ibid

<sup>243</sup> Id, page 164

<sup>244</sup> Ibid

<sup>245</sup> Schneider, R., cited above at note 196, page 167

level of perceived coercion in the manner of treatment and procedure.<sup>246</sup> In addition to this, based on the time spent in jail those participants of MHC system spend less time in jail than those in the traditional court system. Moreover there are improvements after the establishment of MHCs such as fewer psychiatric hospitalizations, improvements in psychosocial functioning and lower frequency and levels of substance and alcohol abuse. Due to this, a number of MHCs are increasing in USA and Canada.<sup>247</sup>

### **3.8 Overview of MHC in Ethiopia**

Studies have revealed that mental disorder is as common as in Western countries in Ethiopia.<sup>248</sup> There are different risk factors for mental disorder in Ethiopia some of which are domestic violence, poverty, and non-adherence to traditional prenatal practices.<sup>249</sup> The impact of mental disorder in Ethiopia has been shown to be high in terms of disability, under nutrition, premature mortality and economic disorder, poorer maternal and child health. To tackle this serious problem, in addition to government initiatives non-governmental organizations also work to solve the problem of mentally disabled persons in Ethiopia some of which are Mental Health Society of Ethiopia and National Initiative for Mental Health in Ethiopia established in 2003 and 2005 respectively.<sup>250</sup>

The seriousness of the problem also initiated the government to establish MHC in Ethiopia. The first reason that played a door opening role for the establishment of the court is the imbalance between numbers of mentally ill persons and mental health institutions in the country. The disease burden of mental disability is found to be 12% of the total disease burden of the country. This is believed to be the smallest portion of the problem, because mental illnesses resulting from psychiatric and behavioral disorder that are known to be enormous are not included in the study.<sup>251</sup> Another study conducted in 2003 indicates that mental disability in Ethiopia is as high as 20%.<sup>252</sup> Recent study conducted by Ethiopia Mental Health Gap Action Program working group (2010) also showed the level of mental disorder and substance abuse in Ethiopia<sup>253</sup> as

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<sup>246</sup> Council of State Governments Justice Center, cited above at note 36, page 28

<sup>247</sup> Schneider, R., cited above at note 196, page 167

<sup>248</sup> National Mental Health Strategy, cited above at note 41, page 38

<sup>249</sup> Ibid

<sup>250</sup> Id, page 13

<sup>251</sup> National Mental Health Strategy, cited above at note 41

<sup>252</sup> Ibid

<sup>253</sup> National Mental Health Strategy, cited noted above at note 40, Schizophrenia (0.5%), Bipolar disorder (0.5%), Depression (5%), Suicide completed (7.7/100000/year) Suicide attempted (3.2), Childhood Mental Illness (12-25%), Epilepsy (1%), Dementia (no data) and Cannabis Abuse (1.5%), Alcohol Dependence (1.5%), Alcohol Problem Drinking (2.2-3.7%)

indicated in the foot note below. The level of mental disorder and substance abuse disorder and their impact in suicidal attempt and completed suicide shows that it is equivalent to the one which is found in Westerners, supporting the idea that mental disorder is not a luxury of the West.<sup>254</sup>

On the other hand there are insufficient number of psychiatric units, beds and mental health professionals in Ethiopia.<sup>255</sup> The country has only one psychiatric hospital where other general hospitals and private clinics have psychiatric units alone.<sup>256</sup> Moreover, the number of mental health professionals in the country is inadequate to give service to 80 million people.<sup>257</sup> There are only 40 psychiatric doctors in Ethiopia 30 in Addis Ababa and 10 in Regions, 461 psychiatric nurses, and 120 in regions and the remaining in Addis Ababa, 14 psychologists engaged in clinical services working in Addis Ababa and 3 social workers working in Addis Ababa.<sup>258</sup>

From the above statistics it can be inferred that there is shortage of mental health facilities and trained man power in Ethiopia. Hence mentally ill persons cannot easily get access to treatment. In a society where there is insufficient mental health facility and trained man power, it is very likely that the number of mentally disabled persons increase. As the number of mentally disabled person increases there is a high probability of increase in criminal activity. This is because untreated mental illness is the main cause that leads mentally disabled persons in to criminal act.<sup>259</sup>

Secondly, mentally disabled persons that are already involved in criminal activity have difficulty of getting speedy justice. That is, when mentally disabled persons are involved in criminal activity and raise defense of criminal irresponsibility, the court will send their case to Ammanuel Hospital for examination of their mental condition in accordance with Article 51 of Criminal Code. Once their case is sent to Ammanuel Hospital getting examination result is a daunting

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<sup>254</sup> National Mental Health Strategy, cited above at note 41 page 12

<sup>255</sup> Ibid

<sup>256</sup> National Mental Health Strategy, cited noted above at note 40, Page 13. General Psychiatry Centers and Clinic (1 facility in Amanuel hospital providing service to all ward, 1 long-stay unit in Gefersa (190 beds)), In-patient psychiatric units-(2 in Addis Ababa (Amanuel=268 beds, Armed Forces = 50 beds) 2 in regional towns (Jimma= 26 beds, Mekelle= 9 beds) ), Out-patient psychiatric clinics (4 in Addis Ababa (TikurAnbessa, Amanuel, St Paul's &Zewditu) 6 in regional towns (Adama, Harar, Hawassa, Jijiga, Jimma, Mekele)), Nurse-led psychiatric units (57 (in regional, zonal and district hospitals outside Addis Ababa)), Children and Adolescent services (2 out-patient services in Addis Ababa (St Paul's, Yekatit 12)) Police(In-patient unit in Police Referral Hospital (5 beds)) Prison(In-patient unit in Police Referral Hospital (5 beds))

<sup>257</sup> Ibid

<sup>258</sup> Id, page 14

<sup>259</sup> Council of State Governments, cited above at note 39, Page 2

task. It might take a minimum of one year.<sup>260</sup> This is due to the imbalance between a few psychiatric doctors at service and the huge number of patients that seek hospitalization service. This situation causes delayed services whereby persons are denied their rights to liberty.

Thirdly, in spite of the provisions of the new criminal code from article 129-133, persons with mental disability that are criminally irresponsible are released into the society even where they are found to be dangerous to themselves and others. This practice is a good environment for mentally disabled persons to engage in further criminal activities. This also risks the life of the person's family as well as the society.<sup>261</sup>

The fourth reason is the issue fitness of the accused to stand trial. Fitness to stand trial is the ability of the accused person to understand the nature and the object of the legal proceeding, the consequence of the proceeding and ability to communicate effectively with legal counsel.<sup>262</sup> When the fitness of the accused to stand trial is in question, the court will request the Ammanuel Hospital to examine whether the accused is fit to stand trial or not the result of which takes not less than one year irrespective of the gravity of the crime committed.<sup>263</sup>

It is to bridge the gaps aforementioned that MHC was established in Ethiopia. MHC in Ethiopia is at infant stage. The court has been launched under Federal First Instance Court Lideta Division on 8, May 2015. The court was established based on the mandate given to Federal First Instance court to found specialty court whenever needed. The court is designated as FFICLDMHCB. This court is founded in collaboration with AAUCHSDP.

According to the agreement between FFICLD and AAUCHSDP, the court has the duty to support the MHC by arranging and organizing places where the court can function.<sup>264</sup> AAUCHSDP has also agreed to assign a professional psychiatrist to professionally and medically examine the mental health status of the accused person.<sup>265</sup> After the pilot test is over, the court will be expanded to other Federal First Instance Courts. Until the pilot test ends, this court will serve as referral court admitting referred cases from other federal courts.

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<sup>260</sup>Interview with Dr. AnakeLimeneh, Assistant Professor at Addis Ababa University Health Science College and Psychiatry Department, on September 13, 2015

<sup>261</sup>Dr. YonasBahiretibeb, Mental Health Court, (n.d) (unpublished), page 4-5

<sup>262</sup>Bertolote, J., (ed), cited above at note 54 page 76

<sup>263</sup>Interview with Dr. AsnakeLimeneh, cited above at note 260

<sup>264</sup>Memorandum of Understanding between the Federal First Instance Court and AAU Health Science College Department of Psychiatry (n.d), page 2

<sup>265</sup>Id, page 3

As a matter of fact FFICLDMHCB doesn't have manual that states its activities, functions and jurisdiction of the court and other matters on which it operates. In other countries MHC planning groups have discovered that a change in law or court policy is required to launch mental health court in their jurisdiction.<sup>266</sup> Change in law or policy is needed in order to define eligibility of the court and gain legislative or policy maker interest in the pilot program.<sup>267</sup> Therefore, it is very important for the court to have manual that can define the activities of the court.

For the fact that there is no document that explains the activities of the court, the information regarding the court that follows will be based on unstructured interview with members of the court<sup>268</sup> and court sessions attendances. With regard to the composition of the court, it has one presiding judge from FFICLDMHCB and a psychiatric doctor from AAUCHSDP. The composition of MHC makes the court unique from other types of courts. In other countries the court is composed of a judge, psychiatrist, social worker and representative from public prosecutor office.<sup>269</sup> But in our case it is only composed of a judge and psychiatrist.

The MHC has planned to do three major activities based on the request of other referring federal courts. Firstly the court will ascertain whether the accused is fit to stand trial or not. The question whether the accused is fit to stand trial or not can be posed by any federal court regardless of jurisdiction of the case as well as severity of the crime. When the question is about fitness the court can further inquire whether the unfitness is temporary or permanent. If the unfitness is temporary, then the court will request whether it needs treatment and how much time the treatment plan will take.

Secondly the referring court can request for the examination of the accused person's criminal responsibility in accordance with article 48 of the criminal code. If the accused is found to be irresponsible whether the accused is dangerous to the community will be assessed by the court. Moreover upon request the court is empowered to verify bail right of the accused. In other words the court is mandated to determine the possible consequences of releasing the accused on bail. In addition if bail right is allowed the court can determine the conditions up on which the accused can be released.

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<sup>266</sup>Council of State Governments, cited above at note 39 page 24

<sup>267</sup> Ibid

<sup>268</sup> Interview with AtoLiulesilassieLiben(Presiding Judge at Federal First Instance Court Lideta Division Mental Health Court Bench), On September 13, 2015 and Interview with Dr. AsnakeLimeneh, cited above at note 260

<sup>269</sup> Ibid

The third objective of the court is diversion. When the accused person has committed crime as a result of his/her mental status then s/he will be given an option whether s/he wants to be diverted to treatment plan or wants to undergo punishment in the traditional court system. If the accused chooses to be diverted s/he will be released after the successful accomplishment of the treatment plan. If the accused could not finish the treatment plan successfully then s/he will return to traditional court system. This depends on the consent of the accused person.

The other important point in relation to MHC is eligibility criteria. A person can participate in the court's treatment plan if s/he is willing; if s/he has mental illness and if the crime the person is suspected to have committed is minor offence.<sup>270</sup> This criteria works only for diversion program; in the examination of fitness to stand trial and criminal responsibility these criteria will not be required.

As mentioned above diversion is possible only in the case where the accused person has committed minor offences. That is the jurisdiction of the court for diversion program is only limited to federal first instance court criminal jurisdiction. Persons charged with serious crimes cannot participate in diversion programs.

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<sup>270</sup>Criminal Code, cited above at note 27, Article 89 "Minor crimes are crimes which are punishable with simple imprisonment not exceeding three months or fine not more than one thousand Birr."

## Chapter Four

### **4. Mental Health Court in Ethiopia and Its Role in the Protection of Human Rights of Persons with Mental Disabilities [Case Analysis]**

#### **4.1 Introduction**

The MHCB has entertained about 50 cases since its establishment. Of these cases, only four have been proved to be caused due to mental illness. The rest 46 cases were found to have no connection with mental illness. This chapter would critically analyze one of the four cases decided by the MHCB. For convenience the chapter is divided in to three major sections. In the first section history of the case would be discussed in detail. In the second section the case would be analyzed critically and the role that the MHCB has contributed in the protection of the human rights of persons with mental disability would be reflected. The last section is dedicated to findings of the research.

#### **4.2 The Case Selected**

**The Federal Democratic Republic of Ethiopia**

**Federal First Instance Court Lideta Division Mental Health Court Bench (FFICLDMHCB)**

Date 03/07/2015

File no. 226552

Judge: LeulesilaseLiben

Federal Public Prosecutor vs Lishan Reta<sup>271</sup>

##### **The charge**

The suspected person is charged in accordance with Article 576(1) - maltreating minors and Article 631(3) - homosexual and other indecent acts performed on minors.

##### **The Crime in Detail**

The crime was committed on 24/04/2015 in the afternoon approximately at about 3:30 PM in Nifas Silk Lafto Sub-city woreda 06 specifically called Mebrat Hail Condominium around Blocks 34 and 35. The accused was observed by the residents of the area while she was dragging, groping or fondling—touching with finger and inserting stick into her little girl's genital organ—who was about one year and three months old and whose name was not mentioned. After that the residents of the area has brought her to police station. It is based on this complaint that this charge has been brought against the accused.

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<sup>271</sup> The name used for the accused is pseudo name for privacy reason.

## **Disposition of the Case**

The case was brought before Nifas Silk Lafto 5<sup>th</sup> Division Crime Bench. The defendant was not willing to give response to any questions nor was she willing to appear before court. The court then has ordered that the case need to be directed to MHC B on 25/04/2015 since the mental health condition of the accused was in question.

On 27/04/2015 the accused was brought before MHC B. Psychiatrist Dr. AsnakeLimenh, staff of BLSH, has examined her and reported to the court that the accused looked annoyed and emotionally disturbed and she did not give direct answers to questions. In the examination made to check her thinking/reasoning ability, she responded that she didn't know about police, public prosecutor and judge. In general Dr. AsnakeLimenh has commented that the accused person did not have stable mental condition. Based on this comment the court has ordered the police to take the accused to BLSH for treatment and brought the result forth on 11/05/2015.

In the next adjournment on 11/05/2015 the police have asked for extension of 14 days. The court has allowed the extension and ordered the police to bring the examination result on the next adjournment. On trial conducted on 25/05/2015, Dr. AsnakeLimenh has explained that he has examined the accused for the second time. He reported that the mental condition of the accused was improved from the time she started getting treatment at BLSH and taking medication. He said she told him that she knows about the role of police, judge and public prosecutor. Moreover, the Dr. has stated that she has denied the charge brought against her. He reported that she said she did not do such thing against her child and that she removed her trouser as it got dirty while they were walking hand in hand.

Furthermore, the Dr. has described that the sister of the accused, SelamReta<sup>272</sup>, has suggested that the accused has very disturbing behavior talking and laughing alone. He also stated that the symptoms are signaling mental disease called bipolar. But he confirmed that the accused could be released on bail with a condition that she is prevented from children.

NifasilkLafto Sub-city Justice Office on 03/07/2015 has discontinued the charge which was brought against the accused in accordance with article 16(5) of proclamation no. 691/2010. The office has explained that the charge was discontinued based on the examination result of BLSH brought forth that showed that the accused has a mental illness called schizophrenia—a serious

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<sup>272</sup> The name of sister of the accused is pseudo name for privacy reason.

mental illness. The eye witnesses who were at the place of commission of the crime also testified that the accused looked like someone who is mentally ill at the time she committed the crime. Because they witnessed that she was throwing stone toward them when they tried to defend the child. It was on this ground that the charge against the accused was discontinued.

On the other hand the case was still continued at the MHCB until 31/08/2015. The daughter of the accused was taken away from her and the police have given the child to Tsehaye Orphanage Center which is under Addis Ababa Women, Children and Youth Bureau. The accused has asked the court to give her daughter back to her. But, the police declined to accept her request because 1) the child was in a good condition; 2) the accused was not in a position to take care of the child. In the next adjournment the sister of the accused, SelamReta, claimed to bring up and take care of the child of the accused.

Regarding this claim, the court has given decision on 24/08/2015. As per this decision the court has ordered that the police should give the defendant's child back to the sister of the accused and made report on the accomplishment of this order. On 31/08/2015 the court has marked that the case would be discontinued for the reason that the accused was criminally irresponsible as a result of her mental condition at the time of commission of the crime.

### **4.3 The Case Analyzed**

This section is devoted to analysis of the case between Public Prosecutor vsLishanReta. The implication of the case towards the protection of human right of persons with mental disability and the peace and security of the public would be discussed. For convenience the analysis would be categorized into two major parts. The first is the role of the court in the protection of the rights of persons with mental disability while the second part focuses on the role of the court in the protection of peace and security of the public.

#### **4.3.1 The Role of MHCB in the Protection of the Human Rights of Persons with Mental Disability**

This part focuses on the contribution the court made so far in the protection of the human rights of persons with mental disability. The role of the court in creating brotherhood spirit, reintegration of the defendant into the society, the protection of the right to bail, right to trial in reasonable time, right to health and sustaining peace and security in the society would be dealt under the section that follows.

#### **4.3.1.1 The MHCB in Creating Brotherhood Spirit between Mentally Disabled Persons and Other Members of the Society**

Article 1 of the UDHR states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another [*in a spirit of brotherhood*] [emphasis added].<sup>273</sup> According to this provision, all members of human family should treat one another with spirit of compassion. One person should consider the other person as a brother without discrimination on the ground of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>274</sup> Even if the families and the community who live with the mentally disabled persons are more vulnerable to be victimized of the acts of the disabled, therapeutic result demonstrates that the victims wish that the offender should be treated with compassionate, human, and ultimately more socially protective way.<sup>275</sup> That is the families of the suspected person and the community should work for the better treatment of the disabled than incarceration.

As recommended by Disability Rights International on New Criminal Code of Mexico there are models around the world of alternative measures to imprisonment and early identification of persons with mental disabilities which could significantly help to avoid unnecessary incarceration and create opportunities for community integration.<sup>276</sup> Treatment and diversion are among the new models that are used to avoid the incarceration of persons with mental disability.<sup>277</sup> The only way to avoid the case of revolving door is by treating persons with mental disability in their family and community. Therefore, the community in general and the family of the victim in particular have social responsibility to participate in the treatment program implemented by the MHC. This in turn creates sympathy among members of the community.

Coming to the case taken for analysis, the MHCB has given responsibly to the police so as to take care of and escort the accused to and from BLSH for treatment. When the accused recovered through psychiatric treatment, the court released the accused on bail and the MHCB again passed the responsibility of caring for the accused over to her own sister upon discharge. Had the accused been incarcerated, her illness would have been aggravated. This is because

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<sup>273</sup> UDHR, Cited above at note 6, Article 1

<sup>274</sup> Id Article 2

<sup>275</sup> Schneider, R., cited above at note 196 page 157

<sup>276</sup> Puente, S.G, The Right Of Persons With Mental Disabilities Under The New Mexican Criminal Code, (2013), Page 13

<sup>277</sup> Id Page 14

prison is high stress environment by nature.<sup>278</sup> That means, there are many reasons that make detention facilities inappropriate place for persons with mental disability some of which are overcrowding, various forms of violence, lack of privacy, lack of meaningful activity, isolation from social network, inadequate health services and insecurity about future prospects.<sup>279</sup> Considering these all repercussions of detaining persons with mental disability, the court has decided to give the responsibility of taking care of the accused to her family. Accordingly, she was given to be taken care of by her own sister—SelamReta. This helps to create smooth relation among persons with mentally disabled, their family members and the society in general while and after recovery. Furthermore, giving responsibility of treatment to their family and the community minimizes the involvement of the mentally disabled persons in criminal activities. It also helps the family and the community to easily follow up the health status of the mentally disabled persons for better and advanced treatment ahead.

On top of that, such decentralization of health services goes hand in hand with the Mental Health Strategy of Ethiopia. The strategy underscores that community-based model of care is the most appropriate, efficient and least restrictive and human way to serve individuals with mental health problem.<sup>280</sup> This could show that the activities of the MHCB coincide with the mission of government mental health strategy.

#### **4.3.1.1 MHCB in Reintegrating the Mentally Disabled Accused in the Society**

One among the aims of modern criminal law is restorative justice.<sup>281</sup> Restorative justice is a view of justice aimed at repairing the harm and relational disruption caused by criminal behavior.<sup>282</sup> One of the key principles of restorative justice is restoration of offenders as contributing members of the society by working hand in hand with the community.<sup>283</sup> MHCs would play a key role in restoring the accused by redirecting to treatment and placing the accused in the community. The courts solicit the community to provide care and supervision for troubled individuals by giving compassion and aid.<sup>284</sup> Moreover, the courts work to restore mentally disabled offenders to become contributing member of the society.<sup>285</sup>

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<sup>278</sup> Dupuis, T., Kay, M., & Nicol, J., Current Issue in Mental Health in Canada: Mental Health and the Criminal Justice system (2013) page 5

<sup>279</sup> Beynon, J., & Drew N., Information sheet on Mental Health and Prisons, (n.d), Page 2

<sup>280</sup> National Mental Health Strategy, cited above at note 41 Page 23.

<sup>281</sup> Criminal code, cited above at note 29, article 1

<sup>282</sup> Schneider, R., cited above at note 196, page 157

<sup>283</sup> Ibid

<sup>284</sup> Ibid

<sup>285</sup> Ibid

Mentally disabled offenders used to face great problem before the establishment of the courts. They were incarcerated for minor offences in jails where they could not easily access sufficient treatment.<sup>286</sup> Addition to that, their release also didn't involve comprehensive planning needed to ensure connection with community treatment providers.<sup>287</sup> Due to this there is high probability of cycling in the justice system even after their release.<sup>288</sup> Furthermore, offenders with mental illnesses appear before the court once again shortly after their release.<sup>289</sup> This would cause the mentally disabled individuals to face stigma and discrimination from the society on their discharge. Therefore, MHCs are established to treat the root causes of criminal behavior of mentally disabled persons in collaboration with the community so that it could be able to easily reintegrate them in to the society. That is, the program is helpful to restore mentally disabled persons as productive members of the society.

In the case at hand, after ascertainment of her mental condition, the suspect was handed over to her sister so that she could easily reintegrate to the society. The court released the accused after assuring that she was in a good mental health condition and after ascertaining that the sister of the accused was willing to follow up her medical treatment and stood responsible to care for her accused sister. This has affirmative consequences on the accused, family of the accused and the community at large.

The affirmative consequence could be evaluated in terms of the accused in a way that it gives her a chance to reintegrate with the society in general and her family in particular. Reintegrating the accused with the family would be helpful in terms of: 1) the accused could easily assimilate herself to the society whereby this could help her to feel at ease to shortly be able to participate in daily life activities in the community; 2) it encourages the accused to accept herself as one part of the community not as someone who is disabled.

The family of the accused could benefit from this treatment program in two different ways. Firstly, it is easier to follow up the day to day health status and progress of the mentally disabled family member. Second to this, the family could bring the mentally disabled member to be a self-reliant with good treatment whereby the family would be saved from shouldering a long lasting burden. When it comes to the society, it could benefit from this treatment plan in that the accused would less likely be involved in criminal acts forced by mental illness any longer once

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<sup>286</sup> Hand Book for Parliamentarians, cited above at note 3, page 42.

<sup>287</sup> Id, page 5

<sup>288</sup> Ibid

<sup>289</sup> Ibid

recovered. So, the MHCB should be acknowledged for the roles it played to nourish these all benefits to the accused, the family, and the society in general.

#### **4.3.1.3 The MHCB in the Protection of the Right to Trial within Reasonable Time**

The right to trial within reasonable time is one among the due process rights of accused persons which is protected under international, regional and domestic human rights instruments. The right is protected under article 9(3) of ICCPR, article 7(1) (d) ACHPR and article 19(4) of FDRE constitution. According to these provisions a person has the right to be tried within reasonable time. The right is grounded on logical protection which says every one charged with a crime has the right to be presumed innocent until proved guilty and that deprivation of liberty is exception.<sup>290</sup>

Though there is no hard and fast rule on the term ‘reasonable time’, the Human Rights Committee commented that what constitutes reasonable time is the matter of assessment for each particular case.<sup>291</sup> In the case between *N. Fillaestre v. Bolivia* the committee ruled that lack of adequate budgetary appropriations for administration of justice does not justify unreasonable delays in the adjudication of criminal justice.<sup>292</sup> In addition to this, the committee commented that detention of the accused for four years without trial for gathering evidence violates article 9(3) of the covenant.<sup>293</sup> The committee further strengthened that delay of trial must be substantiated with strong reason; otherwise it violates article 9(3) of the covenant.

In the complaint submitted under undue delay article 9(3) and 14(3) (c) are considered simultaneously.<sup>294</sup> Article 14(3) (c) of the covenant deals with the right to be tried without undue delay; this right includes the time in which trial commenced and judgment is rendered.<sup>295</sup> Judgment can be rendered speedily if and only if the accused is brought before court within reasonable time. Therefore the right to be tried without undue delay is closely related with the right to be tried within reasonable time.

As discussed under chapter three, in Ethiopia, once there is an issue on the mental health of accused persons, getting access to examination result was very difficult before the establishment

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<sup>290</sup> UN Office of the High Commissioner for Human Rights and The International Bar Association, cited above at note 1, page 190

<sup>291</sup> Communication No. 336/1988, *N. Fillaestre v. Bolivia* (Views/ adopted on 5 November 1991), in UN doc. GAOR, A/47/40, p. 306, para. 6.5.

<sup>292</sup> UN Office of the High Commissioner for Human Rights and The International Bar Association, cited above at note 1, Page 191

<sup>293</sup> Ibid

<sup>294</sup> Ibid

<sup>295</sup> Ibid

of MHCB. The accused was forced to stay under custody for not less than one year unless s/he could be released on bail. Delay of examination result has the potential to aggravate mental condition of the accused.

Moreover delay of trial would make getting accurate evidence difficult. Especially when the evidence was oral, there would be high probability that the witness forget things that had happened in the past as the time went. Furthermore it was very difficult to get the accurate examination result because of: firstly, through time the accused with mental illness at the time of commission of the crime might recover; secondly, an accused that didn't have mental illness in reality during the commissions of crime might develop the problem as a result of strange prison environment. Generally, delay of justice results in losing accurate evidence which was the main cause for miscarriage of justice.

When mentally disabled person's case is unduly delayed, the other problem is violation of their human rights in detention facilities. As a result of their mental condition, mentally disabled persons may react with violence, self-harm, disruptive behavior or unwillingness to follow institutional rules.<sup>296</sup> In such circumstances, disciplinary measure might be taken for the reason that mental health need is considered as behavioral or security issue.<sup>297</sup> Staff of the detention facilities may not have training about complex mental health need of the suspected persons.<sup>298</sup> Hence letting the accused persons who have mental disability to stay in detention facilities opens the door for the violation of their human rights.

Coming to the case taken for analysis, the accused was brought before court within 24 hours of committing crime. Up on suspicion of her mental condition, her case was transferred to MHCB immediately. The court requested BLSH psychiatry department to examine the mental condition of the accused. For the reason that there is agreement between AAUCHSPD and FFIC, the accused was examined getting priority. The examination result was announced without undue delay. It is based on this examination result and eye witness that the public prosecutor office discontinued the charge against the accused.

These all show that the establishment of the court averts the problem of delayed justice for persons with mental disability. The following points could better elaborate the role of the court in

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<sup>296</sup> Knight, L., and Stephens, M., Mentally Disabled offenders in Prison : A Tale of Neglect, Internet Journal of Criminology,(2009), page 3

<sup>297</sup> Ibid

<sup>298</sup> Ibid

protecting the rights of persons with mental disability. Firstly, the court is established to see only cases of mentally disabled persons and nothing less nothing more. This reduces the workload of the court and helps the court to entertain cases without undue delay. Secondly the court has its own psychiatric doctor that could examine the accused persons. Having psychiatric doctor of its own facilitates the trial proceeding because the court is not expected to invite expert or send the accused persons to psychiatric hospitals. Any information that is necessary to examine the accused is at hand. Therefore, it is possible to conclude that the opening of MHCb is a stepping stone in the protection of the right to speedy trial of persons with mental disability.

#### **4.3.1.4 The Role of MHCb in the Protection of Bail Right**

Every person suspected of a crime has the right to be released on bail.<sup>299</sup> Release on bail is the principle while denial of bail is exceptional condition.<sup>300</sup> Bail right is a constitutional right that can only be limited by law on justifiable ground. The right is protected under article 9(3) of ICCPR, and article 19(6) of FDRE constitution. It is the general rule of these provisions that persons awaiting trial shall not stay under custody. Moreover CRPD indirectly provides the right to be released on bail.<sup>301</sup> This provision of the convention expresses that persons with disability that are deprived of their liberty have the right to be treated on equal basis with others and entitled to guarantee in accordance with international human rights law.<sup>302</sup> Thus the guarantees such as bail, habeas corpus, right to speedy trial and others shall be protected to persons with mental disability on equal footing.

The court should allow release on bail by taking in to consideration different circumstances. The circumstances that the court takes in to account while granting bail in most legal provisions is danger of abscond, risk of influencing witness, gravity of the offence, detainee's behavior and committing of another offence can be mentioned.<sup>303</sup> Additionally, the court shall take into consideration the bail record of the defendant, the strength of evidence and the character antecedents of the association and community ties of the defendant.<sup>304</sup>

The court may deny bail if it loses confidence on the appearance of the suspected person on the date of trial. The court allows release on bail based on different conditions. Most of the time the

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<sup>299</sup> ICCPR, cited above at note 8 article 9(3)

<sup>300</sup> Ibid

<sup>301</sup> CRPD, cited above at note 23, Article 14(2)

<sup>302</sup> Ibid

<sup>303</sup> Criminal Procedure Code, cited above at note 177, Article 67

<sup>304</sup> Aderajew Teklu & Kedir Mohammed, *Ethiopian Criminal Procedure Teaching Material*, (2009), Page 157

conditions are divided into two major parts; monetary and non-monetary.<sup>305</sup> The court is authorized to use only monetary condition or non- monetary or both simultaneously. Monetary condition includes; surety, cash and bond.<sup>306</sup> In a non-monetary condition the court is authorized to put conditions such as mandatory calls to the police, surrendering passports, home detention, electronic monitoring, drug testing, alcohol counseling and surrendering firearms.<sup>307</sup> Bail may be forfeited and the defendant person will be remanded to jail for failure to appear when required.<sup>308</sup> Therefore bail right is important for the protection of the rights of the defendants.<sup>309</sup>

Consistently mentally disabled persons have the right to be released on bail. When the court allows release of the defendant with mental disability the court shall take into consideration the interest of the defendant and the society. However, in the case of defendant with mental disability his/her mental condition should be assessed in addition to the grounds that are listed above. For instance, defendant with serious mental illness may cause problem if released on bail. In such cases, the court should strictly set conditions of bail such as being monitored by responsible person, not to reach a particular area, to be treated in health facility and report to the court about his/ her mental health status weekly etc. Mentally disabled defendants may become danger to the society once the court releases them without any treatment; because s/he may cause harm on themselves or others as a result of their mental condition.

Taking the case at hand, the defendant was released on bail. The court allowed it after police has taken her to health facility and she was recovered. In addition to that the court released her under the responsibility of her sister. Moreover, the court has ordered the defendant not to have contact with children. The court has set this condition for the reason that she has mistreated her own child. It was to protect danger that might arise against children in the future. This condition reduces risk of danger against the society; and protects the right to release the defendant on bail. Consequently the establishment of MHCB has brought change in the protection of the right to bail of mentally disabled accused by critically scrutinizing bail conditions that are provided under the law with specific case of mental condition of the accused.

#### **4.3.1.5 The Role of MHCB in the Protection of the Right to Health**

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<sup>305</sup> Ibid

<sup>306</sup> Ibid

<sup>307</sup> Id page 154

<sup>308</sup> Ibid

<sup>309</sup> Id page 157

Health is “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.”<sup>310</sup> The right to health is covered under UDHR article 25(1), CRC article 24, CEDAW article 11(1) (f) & 12, CRPD article 25, ACHPR article 16. These provisions guarantee the right to health from different perspectives. The right to health is also incorporated under ICESCR.<sup>311</sup> It is covered under ICESCR in most comprehensive way than in any international human rights instruments.<sup>312</sup> According to the covenant “everyone has the right to enjoyment of the highest attainable standard of physical and mental health”. Right to health is all inclusive; it extends not only to timely and appropriate healthcare but also it extends to underlying determinants of health such as adequate supply of safe food, nutrition, access to safe and portable water, adequate sanitation, healthy occupational and environmental conditions.<sup>313</sup>

The right to health has interrelated and essential elements such as availability, accessibility, acceptability and quality. Accessibility includes; non-discrimination, economic accessibility, information accessibility and physical accessibility.<sup>314</sup> Therefore, like other human rights states have obligation to respect, protect and fulfill the right to health.<sup>315</sup> These obligations of states are to be realized progressively. Progressive realization of the right to health means that states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.<sup>316</sup> Coming to the implementation of the right to health on persons with disability, increasing number of researches show that persons with disability experience poorer levels of health than the general population.<sup>317</sup>

Access to health facility is less in prisons than the general public.<sup>318</sup> Lack of access to health facility is one cause that worsens the mental condition of defendant with mental disability. When it comes to the case we are dealing with, after the establishment of MHCB the accused has got access to mental healthcare services at BLSH. Had the court not been established, getting access to mental health service would have been very difficult to the defendants with mental disorder. The path of accessing mental healthcare services is being shortened because of the establishment of MHCB. This shows that the establishment of MHCB has improved the right to health of persons with mental disabilities.

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<sup>310</sup>Swendiman, K.S., Health Care: Constitutional Rights and Legislative Powers, (2012),Page 1

<sup>311</sup> ICESCR, cited above at note 9, Article 12

<sup>312</sup> Committee on Economic Social and Cultural Rights, General Comment no. 14, 22<sup>nd</sup> Session (2000), Page 2

<sup>313</sup> Cited above at note 202 page

<sup>314</sup> Id page 3-4

<sup>315</sup> Id Page 9

<sup>316</sup> Ibid

<sup>317</sup> WHO & The World Bank, World Report on Disability, (2011), Page 57

<sup>318</sup> Cited above at note 202

### 4.3.2 The Role of MHCB in Ensuring Peace and Security of the Society

The criminal justice system is charged with protecting the public, punishing criminals and administering the laws in a fair and just manner. Most of the time the police, prosecutors and courts engage in a way to protect only the right of the victim. But this should not be the case because they are also expected to protect the interest of vulnerable groups including persons with mental disability.<sup>319</sup> Many people with mental disorder are being incarcerated in prison rather than being cared for in mental health institutions. In some countries there are many individuals with schizophrenia in prison as there in hospitals.<sup>320</sup>

A number of persons with mental disability are found incarcerated in prisons. This is the result of unavailability or reduced availability of public mental health facilities, having laws that criminalize nuisance behavior, widespread misconception that all persons with mental disability are dangerous and intolerance in a society of difficult or disturbing behavior.<sup>321</sup> This trend can be reversed by enacting mental health legislation that is capable of diverting persons with mental disorder at any stage of the criminal proceeding.<sup>322</sup> When minor offences are committed it is preferable if the police immediately take such persons to treatment center rather than having them subject to criminal proceedings.<sup>323</sup>

Prior to the establishment of the MHCB, persons that are found to be criminally irresponsible were treated in a different manner than what is provided under the criminal code.<sup>324</sup> Where the criminally irresponsible offender is dangerous to self and others, s/he would be confined in suitable institution.<sup>325</sup> If s/he is in need of treatment, s/he shall either be treated in an institution in which s/he is confined or transferred to other appropriate institution. Even though the law says so in Ethiopia there is no institution in which persons that are criminally irresponsible are confined.<sup>326</sup> Criminally irresponsible persons are either released to the society or ordered to stay in prison facility. Both places are not appropriate for persons with mental disability for the fact that when they are released to the society, they may cause danger to the society as well as to themselves. On the other hand, once a person is ordered to stay in prison cells, this is also

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<sup>319</sup> Funk, M., and Drew, N., (ed)et.al, cited above at note 48, page 76

<sup>320</sup> Ibid

<sup>321</sup> Ibid

<sup>322</sup> Ibid

<sup>323</sup> Ibid

<sup>324</sup> Criminal Code, cited above at note 29, Article 129- 133

<sup>325</sup> Id Article 130

<sup>326</sup> Dr. YonasBahiretibeb,cited above at note 261, page 6

problematic because prisons are not suitable place for persons with mental disability.<sup>327</sup> That is, because of the conditions that exist in prison, prisons are not appropriate for persons with mental disability.

The plan of the court to lobby for the establishment of an institution to accommodate criminally irresponsible persons that are dangerous to the society and themselves has advantage for persons with mental disability as well as the society. It is advantageous for persons with mental disability because these persons are believed to get appropriate treatment and care in the institution. There is high probability that the persons will be normal, mixed with society and become functional member of the society. Moreover, such institutions are useful for the security of persons with mental disability. That is they will be protected from attack by other members of the society. Furthermore, they will be protected from causing attack on themselves. Most importantly, it is believed that mental disorder leads a person to criminal activity. In such case if persons that are dangerous to the society are confined in suitable institution based on strict criteria this could protect the society from danger caused against them.

Establishment of MHC is expected to bring new system concerning the treatment of criminally irresponsible persons that are dangerous for themselves and others. The court has set goal for the establishment of an institution for such purpose. Therefore, establishment of this institution is believed to bring new era in the protection of the human rights of persons with mental disability and for peace and security of the society.

#### **4.4 Major Findings of the Research**

The following points are the major findings of the research on the role of MHC in the protection of human rights of persons with mental disability in Ethiopia. The research has shown that there are changes that took place following the establishment of MHC on the rights of persons with mental disability. The major findings of the research are put as follows:

- ❖ The study has shown that the establishment of the court has strengthened brotherhood spirit to exist among persons with mental disability, families of the disabled persons and the community in general.
- ❖ The study found out that the establishment of the court has brought change on the implementation of the right to speedy trial.

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<sup>327</sup> Funk, M., and Drew, N., (ed)et.al, cited above at note 48, page 77

- ❖ The MHCB has significance in restoring the defendant with mental disability in to the society.
- ❖ Bail right of the defendant is respected by balancing the interest of the defendant and the public at large.
- ❖ The defendant can get access to health facilities without difficulty following the establishment of the court.
- ❖ The court is working to avert the imprisonment or release of criminally irresponsible persons in to the society. This is important for protection of peace and security of the society as well as the interest of the mentally disabled offenders.

## **Chapter Five**

### **Conclusions and Recommendations**

#### **5.1 Conclusions**

Contemporary human rights movement was launched after the Second World War. Many human rights instruments were promulgated after this historic event. The first human rights instrument

was the UDHR which was adopted in 1948. After the declaration there are a lot of human rights instruments under UN as well as regional human rights systems. But none of these instruments has made specific reference to persons with disabilities in general and mental disability in particular. All have made implied reference to disabled persons in their equality and non-discrimination provisions.

The number of persons with mental disability has increased extremely in USA and Canada. Because of this increment, prisons cells have become de facto mental health institution. It was to curb this problem that the idea of establishing MHC came to being. That means the courts have been established to reduce recycling of mentally disabled persons in the criminal justice system. MHCs are therapeutic jurisprudence focusing on treating the root cause of criminal behavior than punishing criminals with mental health defect.

Likewise, MHC was launched in Ethiopia with a similar objective under FFICLDMHCB in collaboration with AAUCHSPD. The court does not have First Instance Jurisdiction rather it serves as referral court. The court has three major objectives: evaluating fitness of the defendant to stand trial, examining criminal responsibility of defendants and diversion program.

The objective of the study is to show the role of mental health courts in the protection of human right of persons with mental disability. The study used qualitative methodology. Different international, regional and domestic human rights instruments on the rights of persons with mental disability have been discussed. A case found relevant for the study among the rest four cases decided by the MHCB has been selected for analysis.

The analysis was made on the case between Public Prosecutor and LishanReta. The case was critically analyzed and came up with different findings. The conclusions were derived from the findings of the research some of which were put in the following lines. Firstly, the establishment of the court has improved brotherhood relationship to exist among members of human family. Secondly the court is a cause to restore the accused in to the society. Thirdly cases of offenders with mental disabilities are being entertained speedily. Fourthly the right to bail of defendants is strictly considered by the court balancing the interest of the defendants as well as the public at large. Lastly the court has contribution on the peace and security of the public.

## **5.2 Recommendations**

The following recommendations are addressed to the concerned government bodies,NGOs and the MHCB.

### 5.2.1 Recommendations to the Concerned Government Bodies

- ❖ The government should allocate sufficient budget for the training of mental health professionals.
- ❖ The government should build mental health institutions in which criminally irresponsible persons that are dangerous to the society treated and confined.
- ❖ The government has to adopt Mental Health Legislation that can address specific issues of persons with mental disability for better protection of the rights of persons with mental disability.
- ❖ The government should expand MHCB under Federal First Instance Courts and regional courts.
- ❖ The Ministry of Justice should support the MHCB by appointing public prosecutors that can handle the cases of defendants with mental disability responsibly and permanently.
- ❖ For the fact that mental health problem increases from time to time, the governments should give more attention to it like other diseases such as HIV/ AIDS and Tuberculosis by working in hand in hand with NGOs.
- ❖ The government in collaboration with civil societies and NGOs has to create awareness with regard to mental disability through different media platforms to change the attitude of the society towards persons with mental disability.
- ❖ The government should intensify community-based treatment of mental illness by teaching the society and allocating the necessary budget.

### 5.2.2 Recommendations to the MHCB

For the fact that the court is on a pilot program the following are things that it is recommended to improve.

- ❖ The MHCB should have legislation or policy that specifically deals with goals of the court, participants of the court, terms of participation, confidentiality, target population, the court team, integration of treatment and community service etc.

- ❖ The MHCB has to incorporate team members such as social workers, public prosecutors, and defense counsels in its composition.
- ❖ The court should lobby for the establishment of psychiatric institutions that can accommodate persons that are decided to be criminally irresponsible and dangerous to themselves and others.

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## **Appendices**

### **Appendix A**

#### **Interview Questions**

1. When was MHCB established?
2. What were the major problems in relation to defendant with mental illness that necessitated the establishment of MHC in Ethiopia?
3. Are there documents that describe the overall activities of the court?
4. What are the main objectives of the court?
5. Who are the participants of the court?
6. Who are the direct beneficiaries of the court?

7. What are the future targets of the court?
8. What is the jurisdiction of the court?
9. What are the responsibilities of the FFICLD and AAUCHSPD towards the operation of the court?