

Addis Ababa University  
Main Campus

Litigating Human Rights Issues Using International Instruments before  
Ethiopian Courts

A Directed Research Project



Submitted to

Patrice E. Vahard, PhD

A thesis submitted to the school of Graduate Studies of Addis Ababa University in partial fulfillment of the requirements for the Degree of Master of Laws in the department of Law

By

Mekdem Belayneh

February 2008

Approval Sheet by the Board of Examiners

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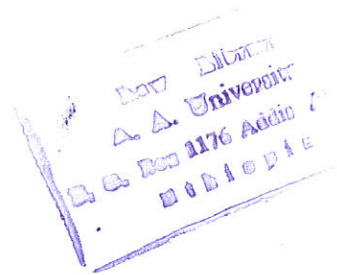
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## ABSTRACT

A democratic government with limited power is essential to the creation of an atmosphere conducive for the effective enforcement of human rights laws including international instruments. One essential element of a limited government is the division of powers both vertically and horizontally. The failure to adhere to the principle of distribution of authority is the very definition of tyranny.

This research is attempting to find out if the allocation of authority found in the FDRE Constitution and the actual practice on the ground provide an atmosphere conducive for the effective enforcement of human rights in general and international human rights instruments in particular. To answer this question, this research will explore:

- the implication of the current trend of centralization on human rights enforcement in general and
- the negative impact of centralization on the enforcement of international human rights instruments.

This research is qualitative, drawing mostly from a review of the literature to analyze critically the effect of the constitutional distribution of powers and the reality on the ground in the enforcement of international human rights instruments in the country. The literature review also helps to uncover common challenges faced in the enforcement of treaties in many countries and discern which of them has particular relevance to the Ethiopian context. To complete the research questionnaires are distributed and case reviews are conducted.

The findings of the research lead to the conclusion that there is a growing trend of centralization in the Federal Democratic Republic of Ethiopia. As a result, vertically power is still concentrated at the centre and there is no significant separation of powers horizontally as well. As long as the centralizing trend, both vertically and horizontally, continues, the likelihood of the government to violate fundamental rights will increase, as it is the typical inclination of all authoritarian governments. In case of violations, the people are less inclined to go to the courts, as it is most likely that they do not perceive them immune from the pressures of the two branches of government. Even if they decide to go, the courts are less likely to provide justice, as they are not fully capable and truly independent.

Therefore, it is not only high time to end the centralized rule; but such a move will also be indispensable to endorse the protection and promotion of fundamental rights in general. More

particularly, bringing this centralization trend to a halt will surely reduce, and in time avoid, existing challenges in the enforcement of international human rights instruments before domestic courts.



## ACKNOWLEDGMENTS

Primarily, I am grateful to the invaluable guidance of my advisor Patrice E. Vahard, PhD. My appreciation also goes to Addis Ababa University for its provision of various academic resources.

As well, I am thankful to Abyinur Abate for editing the initial manuscript and Abinet Getachew, Project Co-ordinator of Dramatool Ethiopia, for offering a convenient milieu for my research. I would also like to express my gratitude to Ameha Bedelu, Brouk Ahmed and Abraham Shiferaw for their persistent technical support all through my MA years.

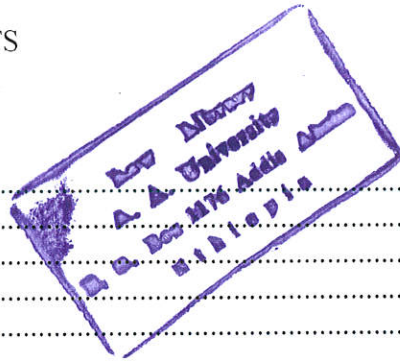
Finally yet importantly, I am indebted to the relentless support I received from my family.



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## LIST OF ACRONYMS

ANDF	Afar National Democratic Front
ANDM	Amhara National Democratic Movement
BGPDUF	Benshangul Gumuz Peoples' Democratic Unity Front
CCI	Council of Constitutional Inquiry
CUD	Coalition for Unity and Democracy
EPRDF	Ethiopian People's Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
GPDF	Gambela Peoples' Democratic Front
HNL	Harari National League
HOF	House of the Federation
HOPR	House of Peoples' Representatives
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MOJ	Ministry of Justice
OPDO	Oromo People's Democratic Organization
PDRE	Peoples' Democratic Republic of Ethiopia
SEPDF	Southern Ethiopian People's Democratic Front
SPDF	Somali People's Democratic Front
TPLF	Tigray Peoples Liberation Front
UDHR	Universal Declaration of Human Rights
UN	United Nations

# CHAPTER 1

## INTRODUCTION

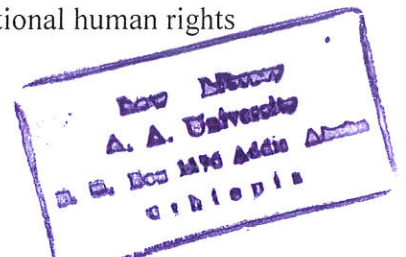
### The Problem

A democratic government with limited power is essential to the creation of an atmosphere conducive for the effective enforcement of human rights laws including international instruments. One essential element of a limited government is the division of powers both vertically and horizontally. The failure to adhere to the principle of distribution of authority is the very definition of tyranny.

### Research Question

This research is attempting to find out if the allocation of authority found in the FDRE Constitution and the actual practice on the ground provide an atmosphere conducive for the effective enforcement of human rights in general and international human rights instruments in particular. To answer this question, this research will explore:

- the implication of the current trend of centralization on human rights enforcement in general and
- the negative impact of centralization on the enforcement of international human rights instruments.



### Significance of the Study

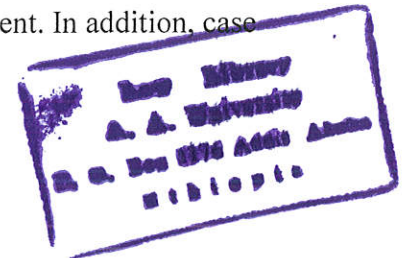
This study is particularly significant to lawyers, human rights advocates, and other stakeholders, such as courts and other organs of the Ethiopian government, who are primarily responsible for insuring the effective enforcement of international human rights instruments.

### Design and Methodology

This research is qualitative, drawing mostly from a review of the literature to analyze critically the effect of the constitutional distribution of powers and the reality on the ground in the enforcement of international human rights instruments in the country. The literature review

also helps to uncover common challenges faced in the enforcement of treaties in many countries and discern which of them has particular relevance to the Ethiopian context.

However, the research will not be complete without examining the actual practice on the ground. Hence, questionnaires are distributed to the relevant stakeholders to find out their understanding of international human rights law and its domestic enforcement. In addition, case study is also conducted for the same purpose.



## Organization of the Study

This study is organized into six chapters as follows:

Chapter 1 – Introduction. This chapter introduces the impact of constitutional distribution of powers on the enforcement of international human rights instruments, states the research question, identifies the significance of the study, and explains the research design.

Chapter 2 – Nature and Development of International Human Rights. This chapter discusses the nature of human rights in general and its development in the international community as background dealing with the main context of the problem.

Chapter 3 – The Relationship between International and Domestic Legal Orders. This chapter examines the correlation between international and national laws thereby emphasizing the need for domestic enforcement of international human rights law.

Chapter 4 – Context of the Problem I: Constitutional Power Arrangement. This chapter deals specifically with the effect of constitutional distribution of powers in the protection and promotion of human rights in Ethiopia.

Chapter 5 – Context of the Problem II: Litigation Using International Human Rights Instruments. This chapter deals with the challenges faced in the enforcement of international human rights instruments and the implication the constitutional power arrangement has on the subject.

Chapter 6 – Summary, Conclusions and Recommendations. This chapter summarizes the finding from the research and conclusions to the research question drawn from the research. It also contains some recommendations.

## CHAPTER 2

### NATURE AND DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS

This chapter discusses the nature of human rights in general and its development in the international community as background dealing with the main context of the problem. The first section of the chapter gives the enumerative and operational definitions of human rights. Some of the possible classifications of human rights are identified in the next section while the last section deals with the development of international human rights.

#### 2.1 The Nature of Human Rights

The central concept of human rights law states that the rights and freedoms belong to every human being for the mere fact that they are human. Article 2 of the Universal Declaration of Human Rights confirms this:

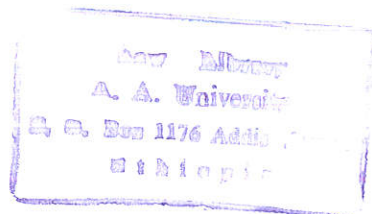
“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

However, the concept is a complex and controversial issue subject to intense jurisprudential debate. There were some theories, which tried to explain the concept; but they did not help much to the internationalization of human rights. For instance, Positivism as a theory emphasised the authority of the state and as such left little place for rights in the legal system other than specific rights emanating from the constitutional structure of that system, while Marxist doctrine, although based upon the existence of certain immutable historical laws governing the development of society, nevertheless denied the existence of rights outside the framework of the legal order.<sup>1</sup>

On the other hand, several 17th and 18th century European philosophers, most notably John Locke, developed the concept of natural rights, the notion that people possess certain rights by virtue of being human. Although this approach fell out of favour in the nineteenth century due to the problems of its non-empirical and diffuse methodology, it has proved of immense value

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<sup>1</sup> Shaw, M. N. (1997). *International law* (4<sup>th</sup> ed.). United Kingdom: Cambridge University Press, at 198



this century in the establishment of human rights within the international community as universal principles.<sup>2</sup>

Despite the difficulties in defining the concept of human rights, Locke's theory was useful as it allows the listing of the main features of the same. According to this theory, human rights are intrinsic to the human condition and are not granted by anyone, which implies that they are universal. They are independent of citizenship and law of a state. They are not limited to one particular ethnic, cultural or religious group.

Furthermore, they are inalienable and inviolable; meaning that they cannot be taken away by anyone. However, the non-derogability nature of human rights is not without limitations. Human rights and freedoms are not absolute. They may be limited to respect the rights of others and interest of the society. Public order, safety, and health are good examples justifying limitations on some rights. Nonetheless, some rights, such as the right to life, prohibition of torture, of slavery et cetera are non-derogable even in state of emergency.

They are also indivisible; meaning that they are inter-related and none of the fundamental rights is more important than any other. Nonetheless, as the result of the legacy of the Cold War, Western countries place heavy emphasis on civil and political rights as opposed to the socio-economic and cultural rights.

The inherent, universal, inalienable, and indivisible nature of human rights is acknowledged in most human rights conventions such as, the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. They define human rights in their first preambular paragraphs as "the inherent dignity and... the equal and inalienable rights of all members of the human family."<sup>3</sup>

On the other hand, the operational definition of human rights that is found in many of the recent international instruments identifies two actors- namely, the right-owner and the duty-bearer. Duty-bearers do not only include the state but also non-state actors, such as the individual and other powerful groups. There is also obviously a relation between the two. However, the relationship between the two would be meaningless unless right-holders have the possibility to

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<sup>2</sup> Shaw, M. N. (1997), at 197

<sup>3</sup> See for instance International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights in Ian Brownlie (ed.). (1971). Basic Documents on Human Rights. Clarendon Press, Oxford.

enforce their rights. There's not only a relation between the right-holder and the duty-bearer in this theory but in order to make a human rights really enforceable so that the right-holder can uphold his right there should also be a relation between the right itself and the possibilities to effectuate the right.<sup>4</sup>

Furthermore, the relationship is still meaningless until right-holders are capable of enforcing their rights and right-bearers respect those rights. Civil society organizations play a major role by contributing in the building of capacity of the right-owner to claim rights and the right-bearer to respect and fulfil obligations.

## 2.2 Categories of Human Rights

The human rights that we find in most documents today were not developed all at once. The reformers and revolutionaries of the eighteenth century drew some of the basic rights, such as the right to life and liberty, freedom of speech, assembly and worship, which are called first generation rights. On the other hand, the right to food, shelter, and welfare, called the second-generation rights, were found to be necessary for the equal enjoyment of first generation rights in the twentieth century. A useful distinction between first and second generation rights is that with first generation rights, we expect the state to restrain its activities (except when these rights are violated), while to achieve the second generation rights the state needs to intervene in order to provide a fair livelihood for all.<sup>5</sup>

Distinction is also made on the criterion of enforceability. That is, whether they can be directly enforced or not. In other words, if a complaint against the violation of a right can be successfully brought before a court of law, then the right is deemed as enforceable or justiciable. Thus civil rights are and social rights are not generally speaking directly enforceable: "no special legislation is needed to amend their wording or to specify their meaning: no special funds are needed to finance their implementation" "Violation of them can be judged to have occurred, or to be occurring, by courts of law or similar bodies" (civil rights).<sup>6</sup>

Another distinction is made based on financial basis. It is a view that civil and political rights are less costly than social rights. Thus, it is said that civil and political rights can be

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<sup>4</sup> Freeman, C. (1988). *Human Rights*. B.T. Batsford Ltd., London, at 33

<sup>5</sup> Freeman, C. (1998), at 24

<sup>6</sup> Van de Luytgaarden, E. (1993). *Introduction to the Theory of Human Rights*. Department of legal theory and jurisprudence, Utrecht University, The Netherlands, at 38

realized without significant costs being incurred, whereas the enjoyment of economic, social and cultural rights requires a major commitment of resources.<sup>7</sup>

Van Hoof makes other distinctions based on an “obligation to” –basis. These are obligation to respect, protect, ensure, and promote rights and freedoms. The first obligation is the obligation of non-interference by the state. In the second obligation, the state has to take legislative (or otherwise) steps in order to prohibit violations of rights and freedoms.<sup>8</sup> The third obligation to ensure has need of an active state policy, by regulation, policy etc., in order to protect and guarantee the effective realization of rights and freedoms.<sup>9</sup> The last obligation to promote refers to a progressive implementation, or realization in the long term of rights, or better goals, formulated in e.g. the ESC and the ICESCR (The International Covenant on Economic, Social and Cultural Rights, New York 1066).<sup>10</sup> In most cases, civil rights belong to the first two categories, while social rights belong to the next two.

Lastly, there are the group rights known as third generation rights. Third generation rights are normally held to include the rights of a people to economic and social development, the right to a healthy environment, the right to live in peace, the right of relief at time of disaster and the right to revolt against oppression.<sup>11</sup> Though this classification leads to the misconception that human rights are ranked by importance, they are nevertheless useful to understand discussions pertaining to international human rights.

### **2.3 The Development of International Human Rights Law**

#### *Prior to the 20<sup>th</sup> century*

The golden rule of “Do unto others as you would have them do unto you” was embodied in most societies and helped people throughout history to acquire rights and responsibilities. In addition, most religions of the world sought to establish comprehensive and coherent moral codes of conduct based on divine law. They contain profound ideas on the dignity of the human being. However, there was no significant effort before the 20<sup>th</sup> century to internationalize human rights except for the efforts undertaken to outlaw slavery and to improve the situation of the sick

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<sup>7</sup> Van de Luytgaarden. (1993), at 39

<sup>8</sup> Van de Luytgaarden. (1993), at 40

<sup>9</sup> Van de Luytgaarden. (1993), at 40

<sup>10</sup> Van de Luytgaarden. (1993), at 40

<sup>11</sup> Freeman, C. (1998), at 26

and wounded in times of war. Nonetheless, most of the concepts that we find in most documents of international human rights are borrowed from the period prior to the 20<sup>th</sup> century.

For instance, the intense argument over which rights to surrender during the 17<sup>th</sup> century in England led to the English Revolution of 1640, which in turn resulted in the development of the English Bill of Rights in 1689. Moreover, during the eighteenth and nineteenth centuries several philosophers proposed the different concepts of human rights-the most prominent of them being John Locke's concept of natural rights. 'Human rights' is a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.<sup>12</sup> According to this theory no one has the right to violate anyone's right to their life, health, liberty or possessions. Thus, a government's responsibility was limited to the duty to protect natural rights. The notion of natural rights has continued to attract men's minds; and the constitutions or the legal codes of practically every state in the world today give at least formal recognition to 'the rights of man and the citizen'.<sup>13</sup>

Despite its popularity, the concept of natural rights did not go unchallenged. For instance, some argue that rights belong to societies as opposed to individuals. The Declaration of Rights proclaimed by the nationalist German liberals in 1848 was no longer individualist; whereas the American and French declarations had asserted the rights of man, the German manifesto spoke instead of '*the rights of the German people*'.<sup>14</sup>

On the other hand, the development of human rights was greatly influenced by two important revolutions in the eighteenth century. The very concepts of natural rights as well as other human rights, which were widely popular during and after the French and American revolutions, are now the pillars of international human rights documents. For instance, the French Declaration of the Rights of Man and the Citizen asserts that "men are born and remain free and equal in rights", indeed that "the purpose of all political association is the conservation of the natural and inalienable rights of man: these rights are liberty, property, security, and resistance to oppression".<sup>15</sup>

The French and the American revolutions together with their constitutional documents and other documents such as the Magna Carta (1215) and the English Bill of Rights (1689)

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<sup>12</sup> Cranston, M. (1973). *What are human rights?* New York: Taplinger Publishing Co., Inc., at 1

<sup>13</sup> Cranston, M. (1973), at 3

<sup>14</sup> Cranston, M. (1973), at 3

<sup>15</sup> Cranston, M. (1973), at 2

assisted the advancement of human rights. Sweden in 1809 and Holland in 1815 followed the English model of incorporating the concept of natural rights into the constitution of a monarchy; while other nations copied the American model of a republic having the preservation of men's natural rights as its declared *raison d' être*.<sup>16</sup> As well, philosophers like Thomas Paine, John Stuart Mill, and Henry David Thoreau are credited for their contribution in the development of human rights laws.

Yet, individuals never enjoyed protection of their rights under traditional international law. Virtually all matters that today would be classified as human rights issues were at the stage universally regarded as within the internal sphere of national jurisdiction.<sup>17</sup> Individuals were not subjects of international law. Consequently, they can only resort to their own state for protection of their rights. But, if it wanted to, a certain state could violate rights of individuals belonging to another state. On the other hand, if individuals are abused by their own governments, they may not complain anywhere else except domestic courts in their countries. Circumstances get even worse for stateless persons as they could never bring their case to any court.

Later on, however, there came some exceptions to the above conditions. The principle of humanitarian intervention is the first of such exceptional cases. Based on this principle, which can be traced back to Hugo Grotius, and other early international lawyers, the use of force by one or more states to stop the maltreatment by a state of its own nationals, was deemed to be lawful when that conduct was so brutal and large-scale as to shock the conscience of mankind.<sup>18</sup>

Secondly, some states began to consent with the idea of treating their nationalities in a humane manner. Eventually, this consensus led to the gradual internationalization of human rights norms.

Thirdly, although the covenant of the League of Nations, which established the League in 1920, did not deal with human rights as such, it contained two provisions (article 22 and 23) which anticipated some aspects of modern international human rights protection.<sup>19</sup> However, the League floundered because the United States refused to join in and because the League failed to prevent Japan's invasion of China and Manchuria (1931) and Italy's attack on Ethiopia (1935). Also in 1919, countries established the International Labour Organisation (ILO) to oversee

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<sup>16</sup> Cranston, M. (1973), at 3

<sup>17</sup> Shaw, M. N. (1997), at 200

<sup>18</sup> Symonides, A. (Ed). (2000). *Human rights: Concept and standards*. England: Dartmouth Publishing Company Ltd. and Ashgate Publishing Company, at 6

<sup>19</sup> Symonides. A. (2000), at 6

treaties protecting the rights of workers with respect to their rights, including their health and safety.

Another exception is found in the traditional treaty itself. In earlier periods of its development, traditional international law recognized very early in its development that states had an obligation to treat foreign nationals in conformity with certain minimum standards of civilization or justice.<sup>20</sup>

Lastly, humanitarian law, which predates modern international human rights law provided exceptions to traditional international law by providing standards to the humane treatment of the sick and wounded in times of war. In addition, certain agreements of a general welfare nature were beginning to be adopted by the turn of the century.<sup>21</sup> For example, in 1868, the St. Petersburg Declaration condemned the use of “dum dum” bullets in war, thereby introducing the modern international humanitarian law upon which modern international human rights law could be built.<sup>22</sup>

#### *After World War II*

Even if the belief that everyone is entitled to certain human rights by virtue of her or his humanity finds its roots in earlier tradition and documents of many cultures, it still needed the horrific aftermath of World War II to propel the concept onto the global stage and into the global conscience. The impact of the Second World War upon the development of human rights law was immense as the horrors of the war and the need for an adequate international system to maintain international peace and protect human rights became apparent to all.<sup>23</sup>

Governments then committed themselves to the establishment of the United Nations, with primary goal of bolstering international peace and preventing conflict within and among nations. Fundamentally, people wanted to ensure that never again would anyone be unjustly denied of life, freedom, food, shelter, and nationality. In an accord engraved in the UN Charter, member states agree to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”, and also, under Article 1, to “promote and encourage respect for human rights and for fundamental

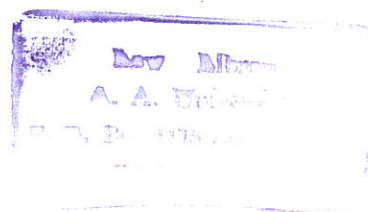
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<sup>20</sup> Symonides, A. (2000), at 8

<sup>21</sup> Shaw, M. N. (1997), at 201

<sup>22</sup> Martin, Forest, F., et al., (1997). *International human rights law and practice: cases, treaties and materials*. The Hague, London, Boston: Kluwer Law International, at 2

<sup>23</sup> Shaw, M. N. (1997), at 202



freedoms for all without distinction as to race, sex, language or religion". Today, virtually every state in the world is a member of the United Nations.

The first international legal effort to limit the behaviour of states in relation to their citizens was signified by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 by the United Nations General Assembly after the Commission of Human Rights established by the Economic and Social Council of the UN drafted the document. Thus, how a government treats its own citizens became a matter of legitimate international concern, and not simply a domestic issue left to the goodwill of nations. The Declaration, unlike the UN Charter, was the first international human rights document to spell out the rights themselves.

The Declaration was not meant to be legally binding on the signatory states. However, it urged nations to protect and promote a number of civil, economic and social rights. It served as a common standard for all nations and individuals in the protection and promotion of human rights. It also set the stage for the creation of the universal human rights norms. Although not legally binding, the Declaration has achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations." There has been such universal acceptance of this declaration that many international lawyers argue that it has the status of customary international law.<sup>24</sup>

The Declaration was not binding for all signatory states because the capitalist and the communist nations could not agree to uphold the civil and political rights on the one hand, and the economic, social, and cultural rights on the other, which are found in the Declaration all at the same time. The ideological war between the West and East was irreconcilable in their approaches to human rights in international law. The view adopted by the Western world with regard to international human rights law in general terms has tended to emphasise the basic civil and political rights of individuals, that is to say those rights that take the form of claims limiting the power of government over the governed.<sup>25</sup> However, the Eastern bloc did not like the idea of international human rights law that enables individuals to raise claims against their own governments. For them the principal focus of respect for human rights in international law was the state as opposed to the individual.

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<sup>24</sup> Freeman, C. (1998), at 53

<sup>25</sup> Shaw, M. N. (1997), at 198

Hence, it meant that the opposing ideological approaches had to be done step-by-step. Accordingly, later on, the drawing of two covenants narrowed the rapprochement between the West and the East. First in 1966, the International Covenant on Civil and Political Rights was adopted followed by the International Covenant on Economic, Social, and Cultural Rights in 1976 both of which were inspired by the UDHR. These covenants were binding and in effect, the UDHR became binding by virtue of these two conventions.

In addition to the two covenants, which together with UDHR are known as the International Bill of Human Rights, the United Nations has since adopted more than 20 principal treaties further elaborating human rights. Some of these conventions are, thus, the Convention on the Prevention and Punishment of the Crime of Genocide (entry into force: 1951), Convention Against Torture (entry into force: 1984), Convention on the Elimination of All Forms of Racial Discrimination (entry into force: 1969), Convention on the Elimination of All Forms of Discrimination Against Women (entry into force: 1981), Convention on the Rights of the Child (entry into force: 1989), and Rome Statute of the International Criminal Court (entry into force: 2002). With the rapid expansion of the range of international human rights serving as a standard for measuring national legal behaviour on the international plane, it has become quite a phenomenon that more and more states are eager to be perceived as playing a positive role in promoting and protecting international human rights.<sup>26</sup>

Along the increasing amplification and global appeal of international human rights, the respective institutions were also created. For instance, the Human Rights Committee was created to insure the compliance of nations with the International Covenant on Civil and Political Rights. The Committee has the power to subject states to intense questioning on their report submitted to it regarding the progress they have made in ensuring and implementing human rights. The Committee can also entertain direct individual complaints if the state they belong to have signed a separate agreement to this effect, which is known as the "Optional Protocol". Furthermore, a number of bodies to monitor and study human rights under the leadership of the UN High Commissioner for Human Rights have been set up.

In addition, regional documents such the African Charter of Human and People's Rights, the American Convention on Human Rights, and the European Convention for the Protection of

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<sup>26</sup> Li, Z. (1997). The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problem in China. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 330

Human Rights extended the International Bill of Human Rights. The Organization of American States has its own Commission on Human Rights, which is composed of individuals who can examine cases of alleged denials of rights and then pass them on to a court, which can make a full legal judgment.<sup>27</sup> In Europe, the Convention allows individuals, who tried and failed to get any help from their own national courts, to bring cases against their own government, which can end up in the binding decision of the European Court of Human Rights.

This proliferation of the Human Rights Conventions and institutions were due to the horrific experience of WWII, where the world witnessed man's endless capacity to cruelty. To avoid the occurrence of these atrocities once again, attention was directed to international co-operation. There existed a strong feeling in 1945 that the failure of the international community to respond earlier to the hideous crimes committed by the Nazi government, led to a chain of events that culminated in both the Holocaust and WWII.<sup>28</sup> Hence, there was the need for international co-operation. The need for co-operation is emphasized in article 1(3) of the UN Charter, in which states agree, "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Furthermore, articles 55 (c) and 56 of the same, placed an obligation on countries to respect human rights.

## Summary

In the past few centuries, the term 'Human Rights' has been a source of contention and academic debate among many scholars. However, it is John Locke's definition of human rights as a natural right, which is the most outstanding to the development of the concept at the international level. His theory served as a springboard for the international community because it asserts that human rights are not limited to one particular ethnic, cultural or religious group.

Armed with Locke's definition of human rights as inherent, universal, inalienable and indivisible, the international community that was shocked by the horrific incidents of the Second World War immediately propelled the concept of human rights into the international arena. This

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<sup>27</sup> Freeman, C. (1998), at 55

<sup>28</sup> Buergental, Thomas, et al. (1995). *International human rights in a nutshell* (2<sup>nd</sup> ed.). Minnesota: West Publishing Company, St Paul, at 54

was signified by the proliferation of human rights treaties and institutions to oversee the compliance of nations with the treaties they agreed to honour.

## CHAPTER 3

### THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LEGAL ORDERS

This chapter examines the correlation between international and national laws thereby emphasizing the need for domestic enforcement of international human rights law. First, the obligation assumed by Ethiopia in the implementation of human rights treaties is identified whereas the second section discusses the theories on the relationship between international and domestic laws. This section also discusses the situation when an international instrument is considered part of the law of the land in the Ethiopian context. The following sections reveal the argument forwarded by many scholars in favour of using domestic courts for the enforcement of international human rights instruments and its particular importance in the milieu of the Ethiopian legal system.

#### 3.1 Obligation Assumed by Ethiopia in the Implementation of Human rights Treaties

As stated in the previous chapter, the tragic experience of the Second World War was the driving force behind the recognition of individual and group rights as the concern of international law. The acknowledgment of this fact by most states led to the signing of many international human rights treaties. Most of these treaties are binding and signatory states are expected to act upon their treaty obligations in good faith. These obligations are mainly categorised in to two as negative and positive obligations. The negative obligation is the obligation to respect or refrain from violation, while the positive obligation requires states to take measures in the furtherance of the rights contained in the agreements. Thus, in the former obligation, the right to life corresponds to the state's obligation not to kill; the right to physical and mental integrity corresponds to the state's obligation not to torture; the right to vote corresponds to the obligation not to arbitrarily exclude anyone from democratic elections; while the rights to employment, health and education correspond with the state's obligation not to arbitrarily exclude anyone from the labour market, the health care and the education system.<sup>29</sup>

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<sup>29</sup> Nowak, M. (2003). *Introduction to the International Human Rights Regime*. (Vol. 14) Leiden/Boston: Martinus Nijhoff Publishers, at 49.

While we do not need to dwell much on the negative obligation of states, as it is self-explanatory, we need, however, to say further on the positive one. States have the positive obligation to protect and fulfil rights embodied in treaties. Obligation to protect aims to avoid human rights violations by private persons.<sup>30</sup> Thus, states are not only expected to refrain from violating rights, but also to prevent others from violating those rights protected under the treaties. Furthermore, treaties anticipate that states take measures in the effort to meet goals set under the so called programmatic treaties such as the International Covenant on Economic, Social, and Cultural Rights. In such cases, states have the obligation to take legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.<sup>31</sup> Hence, states are expected to go further and play an active role. They perform this activity mainly through the provision of substantive and procedural laws and the establishment of institutions necessary to enforce human rights, such as the ombudsman, human rights commissions, and an independent judiciary.

It should be noted that a right might entail both negative and positive obligation on a state. For instance, the right to life obliges a state to refrain as well as preventing others from violating the right and to take measures in the fulfilment of the right, for instance, by providing substantive and procedural laws and establishment of institution necessary to facilitate the enforcement of the right.

### 3.2 The Relationship between International and Domestic Laws

⊗ Domestic laws govern domestic aspects of governance and issues between individuals as well as between the individual and the administrative apparatus, while the relationship between states is the primary focus of international law. Essentially, there are mainly two core theories regarding the internalisation of international treaties into domestic laws. In other words, the relationship between international and municipal laws is governed mainly by two theories; namely, the dualism and the monism theories.

The dualism theory states that international and municipal laws are essentially different. It stresses that the rules of the systems of international law and municipal law exist separately

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<sup>30</sup> Nowak, M. (2003), at 50

<sup>31</sup> Nowak, M. (2003), at 49

and cannot purport to have an effect on, or overrule, the other.<sup>32</sup> Accordingly, international law cannot 'operate directly' in the domestic sphere, needing to be 'transformed' into domestic law by the legal acts of States.<sup>33</sup>

Proponents of the dualism theory reinforce their claim in the following manner:

1.1 "With regard to sources, the sources of municipal law are custom grown up within the boundaries of the state concerned and statutes enacted by the law giving authority. The sources of international law are custom grown up among states and law making treaties concluded by them."<sup>34</sup>

2.1 "Secondly, they differ with regard to the relation they regulate. Municipal law regulates relation between individuals under the sway of a state and the relation between the state and the individual. International law on the other hand regulates relation between states."<sup>35</sup>

3.1 "Thirdly, they differ with regard to the substance of their law. Whereas municipal law is a law of a sovereign over individual subjects to his sway, the law of nations is law not above but between sovereign states, and therefore a weaker law."<sup>36</sup>

The dualists note that international law and municipal law differ in their source, in the subjects they regulate, and in their substance.<sup>37</sup> Hence, they believe that treaties need to be transformed into the domestic legal system of a signatory state to become part of the law of that state. This may be done by amending or supplementing existing legislation without any specific reference to the relevant treaty.<sup>38</sup> However, they are in disagreement as to which law should prevail in case of conflict between them.

On the other hand, the monism theory holds that international law and municipal law form a single system of law. International law and municipal law are the application to different subject-matters of different part of one great system of law but not two unrelated system of laws.<sup>39</sup> The monists believe that it is the conduct of the individuals that is governed in both cases,

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<sup>32</sup> Shaw, M. N. (1997), at 100

<sup>33</sup> Balkin, R. (1997). *International law and domestic law* (S. Blay, R. Piotrowicz and M. Tsamenyi, Eds.), at 46

<sup>34</sup> Oppenheim, L. (1986). *International law: Treaties*, (8<sup>th</sup> ed. Vol.1). London: Longmas, Green and Co. Ltd., at 37

<sup>35</sup> Oppenheim, L. (8<sup>th</sup> ed: 1986), at 37

<sup>36</sup> Oppenheim, L. (8<sup>th</sup> ed: 1986), at 37

<sup>37</sup> Oppenheim, L. (8<sup>th</sup> ed: 1986), at 37

<sup>38</sup> Craven, M. (1993). The Domestic Application of the International Convention on Economic, Social and Cultural Rights. *Netherlands International Law Review*, Vol, XL. N. 3., at 372

<sup>39</sup> Lillich, R. B., & Newman, F. C. (1979). *International human rights: problem of law and policy.*, at 68

despite the fact that it is the state that is bound by international law. In addition, they do not believe that an enabling law is needed in order to make the treaty an integral part of the law of the signatory state. However, just like the dualists, they are in disagreement as to which law should prevail when a conflict occurs between the two laws.

Commenting on this last point in her book *Problems and Process - International Law and How We Use It*,<sup>40</sup> Judge Rosalyn Higgins writes:

"Which ever view you take, there is still the problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked. The International Court of Justice has indicated that for it domestic law is a fact. On some matters, even an international court will need to apply this law ... But when the issue is whether an international obligation can be avoided, or excused, because of a deficiency or contradiction in domestic, then for an international tribunal the answer is clear - it cannot, and the obligation in international law remains. The domestic court may be faced with a difficult question, when the domestic law, which is its day-to-day task to apply, entails a violation of an international obligation. Domestic courts *do* address that problem differently. Leaving the theoretical aspects aside for a moment, it is as a practical matter difficult to persuade a nation court to apply international law, rather than the domestic, if there appears to be a clash between the two."

Hence, it should not be surprising to see national courts choosing domestic laws over international laws whenever there appears to be a conflict between the two.

A third approach governing the relationship between international and municipal law, which is a modification of the dualist position chiefly developed by Fitzmaurice and Rousseau, is aimed at being practical on the topic. It states that international law and domestic law are unrelated operating in different fields as two distinct laws. When conflict arises between the two laws, one does not affect the other. Rather the state as it operates internationally has broken a

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<sup>40</sup> Higgins, R. (1994). *Problems and Process - International Law and How We Use It*. Oxford: Clarendon Press. From [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_weeram.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm)

rule of international law and the remedy will lie in the international field, whether by means of diplomatic protest or judicial action.<sup>41</sup>

Leaving the theoretical aspect aside, when can one consider treaties as part of the law of the land in the case of Ethiopia? The answer is found under article 9(4) of the FDRE Constitution. It states, "All international agreements ratified by Ethiopia are an integral part of the law of the land." Hence, it implies that international agreements should be ratified in order to become an integral part of the law of the land.

Different states apply different approaches when concluding international treaties. It means that there is also a difference in who can fully represent the state and conclude treaties. In some states the power to represent is left to the Head of State (e.g. in the 1931, 1955 and 1987 constitutions of Ethiopia; though there is no marked difference between the Head of State and Head of Government in these constitutions). In others, it is left to the executive with the advice and consent of the legislature (e.g. constitution of the United States) or solely to the executive (e.g. in the case of Australia). Yet, in other countries such as Austria, the executive has exclusive power only in certain types of treaties. It should be noted that in no country vests the power to represent the State upon the legislature.

Reading of article 55(12) of the FDRE constitution also shows that it is the executive that has the power to represent the State in negotiation and signing of treaties. The role of the executive in this capacity, however, is not stated in the provisions enumerating either the power of the Prime Minister (article 74) or that of Council of Ministers (article 77).

The absence of any other article to elaborate on this matter implies that the Executive may not even need the approval of the legislature before it embarks on negotiating a treaty. However, it is unlikely that the executive will spend time and energy without securing, at least the tacit approval of the legislature, as the legislature may at the end refuse to ratify it, which will render its effort futile or at best prolong the process.

As stated earlier, article 9(4) implies that the simple act of signing the document by the executive would not be binding. After the signature of the treaty by the legal representative of the country, another organ must ratify the document. That organ is the lower house. According to article 55(12) of the FDRE Constitution the power to ratify international agreements is left to the House of Peoples' Representative (HOPR). The same article states, "It [the House of Peoples'



<sup>41</sup> Shaw, M. N.. (1997), at 100

Representative] shall ratify international agreements concluded by the Executive.” Note also that no treaty is subject to special majority to be ratified.

Accordingly, the process of concluding a treaty, which includes representation, adoption of the text of a treaty, authentication of the text of a treaty and expression of consent to be bound by the treaty (see article 7,9,10,11 of the 1969 and 1986 Vienna Conventions)<sup>42</sup>, is left for the two organs under the FDRE constitution. The executive negotiates and signs treaties while the legislature ratifies them in order to express the consent of the State to be bound by the treaty thereby giving it the force of law. This plainly implies that it is only after ratification that international agreements become integral part of the law of the land as per article 9(4) of the Constitution.

It should be noted that ratification in this case is not the same as transformation. In Ethiopia, treaties are published simply, in the absence of text contents and without any modification, in the Negarit Gazette, which is the official gazette for publication of laws. The statutes in this case only state that a certain treaty has been ratified, merely identifying it by name. The gazette only declares that such and such treaty is ratified.

However, the question now is whether this provision, i.e. article 9/4/ of the Constitution, applies retrospectively to include treaties ratified before the present constitution. The answer should be in the positive as the same article uses the phrase “ratified by Ethiopia.” This does not refer only to the current and future governments but also to all other governments that existed in the past.

On the whole, one can discern from the above discussion that Ethiopia follows the dualist method of incorporating international obligations into the domestic legal system. The simple act of the executive is not enough to give a treaty the force of law in the country. There is a need for an enabling act on the part of the legislature as well.

### **3.3 International Law and Domestic Courts**

Since the horrific incident of the Second World War, the international community has witnessed the rapid introduction of treaties, conventions, protocols, declarations, et cetera, all aimed at the protection and promotion of human rights. The impressive number of international

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<sup>42</sup> Article 27 of the Vienna Convention on the Law of Treaties at [untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

human rights treaties, the recognition of some fundamental human rights norms as *jus cogens* and the development of various treaty-based and non-treaty-based review mechanisms for supervising the observance of human rights norms attest to a significant change in attitudes.<sup>43</sup>

Though it cannot be denied that these developments have lent a hand to improve the situation of human rights together with the establishment of institutions aspiring to further those rights, it was immediately obvious that there was an Achilles' heel vis-à-vis the effective implementation of the rights. It is no-brainer at all that international law in general lacks effective mechanism to enforce its norms, whether embodied in treaties or not. International law exists in a social system that possesses weak central institutions.<sup>44</sup> As a result, the international community is still a bystander unable to do much when states commit gross human rights violations. In a striking contrast to the progress in which a body of general principles and rules providing for the protection of human rights has gained universal recognition, the progress in building up mechanism for the enforcement and implementation of human rights in the international plane remains unsatisfactory.<sup>45</sup>

Consequently, one of the proposed enforcement and monitoring mechanism is the creation of an international adjudicating body. While, the efficiency of the protection of human rights relies on the existence of adequate mechanism to ensure the observance of the rights embodied in international conventions, states are, nevertheless, cautious of such international machinery for the enforcement of human rights due to concerns for national sovereignty. One achievement in the rise of international human rights law is indisputable: today, in trying to escape or shield off international criticism about violation of universally-accepted human rights norms in a given country, the argument that the issue falls exclusively within domestic jurisdiction- a typical argument based on the Westphalian concept of state sovereignty-has proved old-fashioned and increasingly untenable both in the jurisprudence and practice of

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<sup>43</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997). The Role of German Courts in the Enforcement of International Human Rights. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 71

<sup>44</sup> Richard, F. A. (1964). *The role of domestic courts in the international legal order*. New York: Syracuse university Press, at xi

<sup>45</sup> Richard, F. A. (1964), at 334

contemporary international law.<sup>46</sup> Nonetheless, old habits die-hard and states still highly guard their sovereignty.

In addition, it is questionable whether a comprehensive international enforcement mechanism can be politically acceptable, socially and culturally reasonable, economically viable, administratively manageable and legally effective.<sup>47</sup> Even in the European system, which has highly sophisticated system for the protection of human rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights still faces the dilemma of maintaining its responsibility for developing a uniform standard of protection under the entire convention while at the same time recognizing the diversity of political, economic, cultural, and social situations in the society of parties to the convention.<sup>48</sup>

The uneasiness of states towards an international adjudicating organ is evident in the fact that most states refuse to accept optional clauses or protocols provided by some treaties. Only few states have accepted the optional clauses or protocols concerning the right of individuals to have recourse to independent organs established by those treaties. Besides, even where states have allowed such individual right of access to such organs, the route remains blocked until full exhaustion of domestic remedies occurs.<sup>49</sup> Even then, there is the problem of lack of resources, ignorance of local counsels of international remedies, remoteness and costliness of international organs.

Hence, since international enforcing mechanisms are expensive, remote, unable to enforce judgments, require exhaustion of other remedies and because of the difficulty to develop a uniform standard of protection internationally owing to the relativity of political, economic, cultural and social situations, domestic courts remain the most realistic and effective alternative. Domestic courts also provide a logical alternative to the refusal of most states to participate in the creation of significant international machinery under the pretext of preservation of national sovereignty. Furthermore, it has been argued that the rule of full exhaustion of local remedies

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<sup>46</sup> Li, Z. (1997). The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problem in China. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 330

<sup>47</sup> Richard, F. A. (1964), at 334.

<sup>48</sup> Richard, F. A. (1964), at 334

<sup>49</sup> Francioni, F. (1997). The Jurisprudence of International Human Rights Enforcement: Reflection on the Italian Experience. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 285

means that there is reliance by the international community on national agencies to protect human rights.

The third preamble of the U.N. charter implies enforcement of these laws in the domestic arena.<sup>50</sup> Obviously, one of the means to enforce these laws is using domestic courts. While an international obligation of a State to observe human rights norms binds all branches of government, not merely the judiciary, courts are well-suited to play a key role in the enforcement of international human rights norms at the domestic level.<sup>51</sup> The use of domestic courts is also acknowledged by some scholars. Negandra Singh articulated that:

“When confronted with the problem of enforcement of human rights, one has to rely on the well established fact that implementation of human rights is achieved best through the agency of municipal or national law *with the law courts of each state*. (Emphasis supplied)”<sup>52</sup>

States have incurred international responsibilities under the various human rights treaties and covenants. In addition, generally, article 27 of the Vienna Convention on the Law of Treaties states that “a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.” The responsibility of states is not limited only to abstaining from arbitrary intervention on the freedom of individuals and the duty of providing protection against human rights violations committed by anyone including public authorities, but it also extends to ensuring the existence of adequate protection in their domestic legal system against human rights violations. This places the positive duty on a state to set up institutions and provide effective mechanisms for them to play a positive role in the protection and promotion of human rights. The establishment and proper functioning of institutes like the office of the Ombudsman, Human Rights Commission, and courts is important. A state also has the duty to provide alleged victims with an adequate and effective remedy through the workings of its own courts and other institutions. The point is stressed by the Universal Declaration of Human Rights (UDHR) in article 8, which states, “Everyone has the right to an effective remedy by the competent national

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<sup>50</sup> It states “... establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”

<sup>51</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 71

<sup>52</sup> Singh, N. (1986). *Enforcement of human rights in peace and war and the future of humanity*. Hingham, MA, USA: Eastern Law House Private Ltd., at 31

tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>53</sup> (N.B. law includes international human rights treaties). Similarly, the International Covenant on Civil and Political Rights<sup>54</sup> and the European Convention on Human Rights<sup>55</sup> affirm the right to remedy. By implication, those remedies found in the international documents should also find their way in the domestic courts.

It has also been argued that there is mutual benefit created through the relationship between international and domestic laws. Anne F. Bayefsky elucidates this point as follows:

“The appropriation of domestic courts to serve as the missing link between promulgation and realisation of international human rights norms can benefit both international law and domestic law. On the one hand, international bodies, whose work tends to be far more interstitial than national judicial organs, can benefit from more frequent interpretations of international standards by a variety of national courts. On the other hand, more enlightened interpretations of domestic human rights laws may also be fostered through reference to international law.”<sup>56</sup>

Hence, there is a mutual benefit derived from the relationship and national courts are well placed to buttress the weak enforcement mechanism of international law.

What’s more, in the uncertain world after the Cold War, human rights norms are becoming truly universal. Faced with this situation, national judges have greater opportunities and responsibilities than in the past, both for shaping a new consciousness of international human rights in domestic law, and for providing effective remedies against their branches.<sup>57</sup>

It is particularly important for Ethiopian lawyers litigating human rights issues before Ethiopian Courts, as ordinary courts in Ethiopia do not have the power to hold acts of Parliament and the executive branch unconstitutional. That is, even if most international human rights are also incorporated in the FDRE Constitution, lawyers and human rights advocates cannot claim acts of Parliament and the executive unconstitutional before ordinary courts. It is also dangerous to raise constitutional issues before ordinary courts as it may entail the redirection of the case to the HOF.

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<sup>53</sup> UDHR can be referred in Brownlie, I. (Ed.). (1971). *Basic documents on human rights*. Oxford: Clarendon Press, at 106

<sup>54</sup> Article 2

<sup>55</sup> Article 13

<sup>56</sup> Bayefsky, A. F. (1997). International Human Rights in Canadian Courts. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 296

<sup>57</sup> Francioni, F. (1997), at 16

In short, as constitutional litigations in Ethiopia take exceptionally long time to resolve, the use of international instruments will open the door for litigants to invalidate such acts by holding them, for instance, as inconsistent with the international obligation of the country, albeit encountering the formidable hurdle of holding international treaties superior to domestic laws. This point should be treated a bit more in detail.

### **3.4 Particular Importance of International Human Rights Instruments in Ethiopia**

Indeed, international human rights and fundamental rights guaranteed in the FDRE Constitution overlap to a large extent. The FDRE Constitution contains a large catalogue of fundamental human rights in Chapter 3. The first article of the Chapter, article 13, calls for all organs of the government to respect and enforce the provision of the Chapter. Then, it enumerates the fundamental rights in the proceeding articles categorizing them, rather unskillfully, as human rights and democratic rights. Nonetheless, the rights proclaimed in the Constitution draw a parallel with the Universal Declaration and the International Covenant on Civil and Political Rights and more.

Even then, raising international human rights instruments cannot be considered redundant as the constitution enumerates those rights in a general manner requiring a more detailed law in which case the international instruments can act as a gap filling. Furthermore, one cannot claim for certain that all rights are incorporated into the national legal system. For instance, the right to have adequate time to prepare for a defence is not incorporated clearly into the domestic legal system as opposed to that of the ICCPR. Hence, in this and similar situations international human rights instruments are vital.

However, the Constitution limits the court's jurisdiction regarding its review power. The courts in Ethiopia are barred from evaluating the constitutionality of acts by public authorities be it that of the executive or the legislature. Any legal argument pertaining to the constitutionality of acts of these organs or to the meaning of provisions in the Constitution has to be considered by the Upper House.

Even though, different countries follow different modes of constitutional review, it must be admitted that Ethiopia has a unique one. In some countries, such as the United States of America, it is the duty of the Supreme Court to expound the Constitution. In other, such as Germany, there is a separate court independent of the Supreme Court that is established just for

entertaining constitutional litigation. However, when it comes to Ethiopia, in contrast to every country in the world, the power to interpret the constitution is given to a political organ. Thus, constitutional litigations in Ethiopia tend to be political. Furthermore, as in any other court in the country, the Upper House is sluggish in its duty of disposing constitutional litigations.<sup>58</sup> Any constitutional litigation, thus, may take several years to resolve, as it may involve three slow-moving organs. Constitutional issues raised in the ordinary courts may have to be transferred to Council of Constitutional Inquiry- a body that is established to assist the HOF on the legal technicalities of constitutional interpretation. This stage alone may take months if not years. Similarly, it may take such a long time for the Council to investigate the constitutional dispute and submit its recommendations thereon to the HOF. Lastly, one should also take into consideration the time that the HOF takes to make the final decision. Therefore, Ethiopian lawyers may be discouraged to raise any sort of constitutional questions in all of their cases brought before ordinary courts.

As stated before, almost all of the fundamental rights engraved in the Constitution are also incorporated in most of the international human rights instruments that Ethiopia is a party to. This would mean only one thing for an Ethiopian lawyer who has been frustrated by the long and tiresome process of constitutional litigation. In effect, acts of the two branches of government and individuals may be held inconsistent with international instrument before any ordinary court, though such a proceeding could entail holding international treaties superior to domestic laws. Even so, if lawyers can successfully pass the issue of inconsistency between international and national laws, a topic discussed in chapter five, then, there will be no need to face the notoriously sluggish process of constitutional litigation.

## Summary

Ethiopia was one of the first nations that ratified most of the human rights treaties made subsequent to the Second World War. Consequently, Ethiopia has assumed obligations in the implementation of international human rights instruments. Accordingly, the State has the

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<sup>58</sup> The low execution capacity of the house including constitutional litigations is acknowledged by the five year strategic plan of the House 2006-2010. A copy of the strategic plan is available from <http://www.hofethiopia.org/pdf/Eng-SPM%20of%20the%20House.pdf>. Dead cases posted on the same website confirm that it take years to dispose of constitutional cases.

obligation not only to refrain from acts violating the rights recognized under the treaties, but also to take positive steps in the protection and promotion of them.

However, before taking any of those steps, the treaties have to be considered as an integral part of the law of the land. In Ethiopia, treaties signed by the executive do not have the force of law automatically. Just like other countries that follow the dualist method of incorporation, treaties have to be ratified by the Parliament to be considered as the law of the land.

The whole point of incorporating treaties into the legal system is not without reason. Two main motives can be identified. One, the lack of adequate enforcement mechanism at the international level; and two, the rejection of many states to succumb to an international adjudicating body for fear of compromising their national sovereignty.

The only alternative left on the table then was the use of domestic courts. This fact has adjoined an additional value to Ethiopians. Invoking human rights provisions in the Constitution before 'ordinary' courts is not an attractive option for victims, as the process may take several months if not years. Instead, reference to international human rights instruments at the court level will deliver victims from facing the extended process of constitutional litigation. This option, however, has other additional demerits, which will be discussed in the proceeding Chapters.

## CHAPTER 4

### CONTEXT OF THE PROBLEM I:

#### CONSTITUTIONAL POWER ARRANGEMENT

A democratic government with limited power is essential to the creation of an atmosphere conducive for the effective enforcement of human rights laws including international instruments. One essential element of a limited government is the division of powers both vertically and horizontally. The failure to adhere to the principle of distribution of authority is the very definition of tyranny

An all powerful, authoritarian and unlimited government, on paper, can commit itself to the protection and promotion of fundamental rights. But, pertinent historical accounts verify that, in real terms, authoritarian governments are more inclined to violate human rights and less likely to protect and promote the same.

Moreover, in ensuring the creation of an atmosphere conducive for the effective enforcement of human rights laws, the central focus is the extent to which the judiciary is independent. Hence, this chapter first examines the legal framework and the actual practice on the ground to evaluate the extent of division of powers and independence of the judiciary in Ethiopia. Then, its effect on the enforcement of human rights laws including international instruments is assessed.

#### 4.1 Vertical Division of Power

Ethiopia became a federal state in 1995 following the coming into effect of its fourth written constitution in just over six decades. The central focus of the new constitution, *inter alia*, is the decentralization of power- an overdue project, which is held by many scholars as a major source of conflict in the country.<sup>59</sup> Therefore, similar to other federal constitutions around the world, it endorses the principle of separations of powers, both vertically between the Federal and

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<sup>59</sup> The centralization of power and economic resource by dominant groups and the subsequent marginalization of other are held as the main source of conflict in Ethiopia by many scholars such as, John Markakis, Paul Clapham, and Jon Abbink.

State governments and horizontally between the three branches of the government- namely the legislator, the executive and the judiciary.<sup>60</sup>

The vertical division of authority in federal systems largely refers to the legislative, executive, judicial and financial powers. The FDRE Constitution contains a list, which exclusively enumerate the legislative power of the federal government leaving residual powers to the states.<sup>61</sup> A close look at this division of legislative power coupled with the mechanism employed to enforce federal laws, reveals that there is a growing trend of centralization. This trend paves the way for the creation of an unlimited authoritarian government, which should be a worrying site in the enforcement of fundamental rights. The trend has legal and political explanations. The first <sup>part of this</sup> section of this chapter examines the legal aspect, while the second <sup>part</sup> looks into the practice on the ground.

The reason for the examination of the vertical distribution of power is threefold. First, it gives the reader a clear idea of the federal power arrangement. Second, the lack of decentralized power can be a source of violation of rights, especially the group and minority rights bestowed on the nations, nationalities and people of Ethiopia. Lastly, since the focus of the paper is on enforcement of rights, the extension of federal powers into the affairs of the states partially explains the similar method of organization and operation of state judiciary organs thereby helping the reader to apply, mutatis mutandis, the same conclusions reached on the independence and efficiency of the federal judiciary to the states.

#### 4.1.1 Centralization and the Constitution

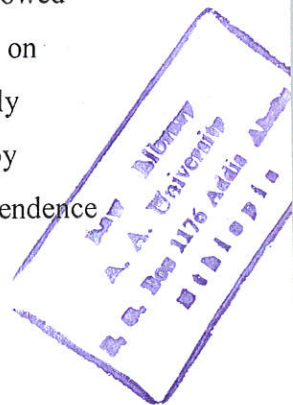
As pointed out earlier on, the vertical division of powers, denoting the legislative, executive, judicial and financial powers, is part of the structure of a political establishment that make up a limited government. The absence can be a source of violations of fundamental rights, especially those of group, minority and the so-called third generation rights. Hence, a closer look is imperative.

The FDRE Constitution contains a list, which exclusively enumerate the legislative power of the federal government leaving residual powers to the states.<sup>62</sup> Hence, the federal

<sup>60</sup> See Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Chapter five.

<sup>61</sup> See Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 51 and 52/1/.

<sup>62</sup> While article 51 lists the exclusive power of the federal government, article 52/1/ of the FDRE Constitution states that all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States.



government cannot claim powers not allocated to it by the Constitution. Another category, usually known as shared powers, which are shared between the two layers of governments, is absent from the Constitution and as a result one has to go to the whole text in search of such power. Other federations, such as the United States, Germany and Switzerland also follow similar method of distributing legislative powers.<sup>63</sup>

In the United States, for instance, the federal government's power is enumerated under Article I section 8 of the Constitution. However, its power does not end there. Through the centuries, the Supreme Court's interpretation of the controversial 'necessary and proper' clause has boosted the power of the central government. Accordingly, the clause is interpreted to give Congress the power to make all laws which are deemed 'necessary and proper' to execute its exclusive powers. As the result, the clause has been a constant battlefield between the states and Congress.

Provisions in any federal constitutions, which resemble the 'necessary and proper' clause, open up doors for the central government to usurp powers left for the constituent units through judicial interpretation. Even though, the lack of such provisions is a guarantee for the constituent units, in some federations, such as Germany, the constitution enumerates extensive powers to the central government. In so doing, such constitutions end up leaving the states with no significant authority whatsoever.

Similarly, some scholars claim that, though it has no provision resembling the 'necessary and proper' clause, the FDRE Constitution gives insignificant power to the states and bestows almost all power to the federal government.<sup>64</sup> Others do not agree with the above statement. Nonetheless, the federal government can still extend its powers as interpretation of the enumerated and shared federal powers is left to the House of the Federation [HOF], which is currently dominated by the ruling party.<sup>65</sup> This fact and other additional factors, such as the lack of a legislative second house and the use of party channels in lieu of formal institutions for intergovernmental relations, contribute to the current trend of centralization.

The source of the vertical trend of centralization, however, is disputed. Some scholars blame the constitutional document itself, while others look for factors outside the Constitution.

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<sup>63</sup> See, for instance, article 3 of the Swiss Constitution and articles 73 and 74 of the Basic Law.

<sup>64</sup> See Andreas Eshete, 'Ethnic federalism: New Frontiers in Ethiopia Politics,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003)

<sup>65</sup> For further explanation on the arrangement and power of the Upper House, refer to the next section

Those who do not agree with the claim that the current centralisation trend is inherently found in the Constitution raise many points to support their assertion.

First, they raise the absence of a supremacy clause from the Constitution as an indication for the greater autonomy of the constituent unites.<sup>66</sup> As discussed earlier, one of the common features of any federation is the division of powers between, mainly, the two levels of governments. However, no federal system is able to carry out the task neatly. It is inevitable that an overlap of powers will occur, especially when it comes to shared powers. Considering this fact, most federal constitutions have, from the outset, put in place provisions that address the problem. For instance, the United States,<sup>67</sup> Swiss,<sup>68</sup> and German<sup>69</sup> constitutions all declare, in one way or another, the supremacy of federal laws over state laws when overlap of powers exist. In other words, states may regulate a certain field but only in so far as such a regulation is consistent with, or permissible under the policy of the federal government.<sup>70</sup> The absence of a similar provision from the FDRE Constitution, thus, is held as an indication that, in fact the balance of power in the Constitution is tilted towards diversity and greater autonomy of the constituent unites.

Secondly, on top of their ability to form their own constitution, the power of the states to enact procedural and civil codes, a power absent from constitutions of other federations, such as the Indian, Swiss and German constitutions, is considered as evidence that the centralization trend is not inherent in the FDRE Constitution. Thirdly, unique from all other federal constitutions, the FDRE Constitution empowers the states to cede from the federation.<sup>71</sup> This fact is taken as further evidence showing the extent of power the constituent unites enjoy, even though, some question its practical significance due to the strict procedural requirements, and the alleged absence of political will.<sup>72</sup> Furthermore, as mentioned before, the absence of any provision in the Constitution which resembles the 'necessary and proper' clause of the US Constitution is taken to reinforce their claim. Lastly, even though it is widely acceptable that the

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<sup>66</sup> See Assefa Fiseha. (2006). *Federalism and the accommodation of diversity in Ethiopia*. The Netherlands: Wolf Legal Publishers, chapter 5

<sup>67</sup> United States Constitution article VI

<sup>68</sup> Swiss Constitution article 49

<sup>69</sup> German Basic Law article 31

<sup>70</sup> Assefa Fiseha. (2006), at 222

<sup>71</sup> See article 39 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995

<sup>72</sup> One skeptic is Andreas Eshete. He writes that EPRDF, though a champion of self-determination, is opposed to its exercise. See Andreas Eshete, 'Ethnic federalism: New Frontiers in Ethiopia Politics,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003): 168

states to a large extent depend on the financial support from the federal government, the absence of conditional grants is taken to substantiate the claim that the Constitution is not the driving force for the current centralization trend.

However, the above argument suffers from some limitations. The argument that the 'centralized' nature of the federation is not inherent in the Constitution itself is limited to the self-rule aspect of federalism. No emphasis is given to the concept of shared-rule. It is highly unlikely that arguments in the previous paragraphs would stand any chance with their critics when one considers both the absence of the shared-rule concept from the constitution and the argument that the extent of exclusive power in the hands of the federal government is too broad to leave any significant authority to the states.

The inability of the FDRE Constitution to deal with the shared-rule aspect plays a major role in the centralization trend of the federal system. Even those who do not agree that the centralization trend of the federation emanates from the Constitution, nevertheless, agree with the above point. One of them makes the following statement on the implication of the absence of shared-rule:

“... [T]he Ethiopian Constitution, by establishing a non-legislative upper house, runs the risk of concentration of power at the center, to the exclusion of the states, and consequently leaves the states alone.”<sup>73</sup>

In explaining the above statement, one should note that all federal constitutions depict the struggle to strike a balance between forces of unity and diversity, which are represented by the federal and state governments respectively. Besides other adjacent actions, such a balance is attained by the establishment of formal institutions that work towards resolving tensions through peaceful mechanisms and providing a forum for the equal participation of common policy-making. As the result, in most federations institutions are set up to protect the existence and authority of both orders of governments.<sup>74</sup>

The federal government is bestowed with powers that are generally considered vital to keep the unity of the federation while the states are bestowed with powers considered to be relevant for the expression of their identity. Accordingly, while the Lower House represents forces of unity, the Upper House represents the opposite force of diversity or the desire of states

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<sup>73</sup> Assefa Fiseha. (2006), at 135

<sup>74</sup> Watts, R. (1999). *Comparing Federal Systems*. (2<sup>nd</sup> Ed.) Montreal: Mc Gill-Queen's University Press, At 17

to be autonomous. Through the former, one of the cardinal values, unity is promoted and through the second, the other cardinal value, diversity is equally promoted.<sup>75</sup>

In addition, the Upper House acts as a counter majoritarian to the Lower House and as such, its composition is different from the Lower House. In principle, for the proper operation of the federal system both houses have legislative power.

However, the Ethiopian Upper House, House of the Federation [HOF], has no legislative power, thereby limiting the participation by the states in the decision making process at the centre. While the rationale for the legislative role of the Lower House may be obvious, the legislative power of the Upper House is crucial to the proper functioning of a federation as a federation. As stated above, forces of unity in a federation are represented by the representatives of individual citizens in the Lower House. The forces of diversity are primarily reflected through the representatives of the constituent states in the Upper House. The different interest of the states and the desire for self-rule must be reflected in the decision-making process at the centre for the proper function of the federation. In defence of the same argument, Laubuschagne states that:

“Second chambers in federations provide a protective mechanism against federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units. The protective mechanism is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states.”<sup>76</sup>

Such protection is not achieved without a legislative power; hence, the justification for a legislative second house. This is one aspect of shared-rule.

In addition, it is noteworthy that powers given to the centre may affect the constituent units, as the federal government is bestowed with powers that are considered necessary for the common destination of the federation, such as inter-state commerce, communications and defence. Hence, common decisions are needed, strengthening the call for a second house with legislative power.

A second house with legislative power is especially important for minorities. The lack of legislative role and the composition of the HOF would contribute nothing to counter the

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<sup>75</sup> Watts, (1999), at 17

<sup>76</sup> Labuschagne, P. A. H. (1992). *The Role of the Second Chamber or Upper House in a Federation*. In D. J (ed.), *Federalism: the Solution? Principles and Proposals*. Pretoria: HSRC Publishers. at 71

majoritarian rule residing at the Lower House. As members of the HOPR are elected on the basis of universal suffrage,<sup>77</sup> a more populous group will have the chance to dominate it. To address the inevitable concerns of smaller and more sparsely populated states, a second house on the basis of equal representation of the states is usually provided as a solution. However, the composition of the HOF is similar to that of the HOPR. Each state is represented by at least one member and by one additional representative for each one million of its population.<sup>78</sup> Thus, the difference in the composition between the two houses is the number of constituencies. It is a million for HOF and a hundred thousand for HOPR. As a consequence, group rights and third generation rights of the less populous regions may easily be affected.

Given the nature of HOF, the states lack one vital mechanism to influence and check the decision-making process at the centre. This gives the opportunity for the federal government to encroach upon powers of the constituent units through its exclusive law-making authority. It is only after the passing of such laws that the constituent units can protest to the HOF, which is an organ dominated by the ruling party.<sup>79</sup> The very constitution, which aims to protect the nations, nationalities and peoples, betrays them by leaving their destiny in the hands of the more populous nationalities.<sup>80</sup> Hence, the denial by the Constitution to affirm a legislative power to the HOF is a concrete indication that the Constitution itself allows the centralization of power at the centre.

When this nature of the HOF is seen together with the extensive constitutional powers, which are exclusively bestowed on the federal government, it gives the impression that the states are under the total domination of the centre. Under the FDRE Constitution, the federal government has broad powers, as the enumeration of its power is not exhaustive and is contained in broad terms. Some scholars<sup>81</sup> go to the extent of claiming that the states' power is limited only to executive and cultural ones.

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<sup>77</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 54/1/

<sup>78</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 62/2/

<sup>79</sup> Member parties and affiliate parties to the ruling party occupy the majority seats in their respective regional councils. Even though the constitution envisages the possibility of electing representatives to the Upper House directly by the people or, alternatively, by the legislature, in practice all states have chosen the latter option. It means that member parties and affiliate parties of EPRDF that control the majority seats in their respective states elect representatives to the HOF.

<sup>80</sup> Assefa Fiseha. (2006), at 142

<sup>81</sup> See Andreas Eshete, 'Ethnic federalism: New Frontiers in Ethiopia Politics,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003)

The Constitution further allows the concentration of power at the centre by allowing the HOF to have the final say on the interpretation of provisions of the Constitution,<sup>82</sup> which contradicts the principle of separation of powers horizontally between the three branches of government. The HOF is a political organ, which is dominated by the ruling party. Ultimately, it is the ruling party, which is in control of the central government that interprets the Constitution. As discussed earlier, constitutional courts serve as essential tools for transferring power from the regions to the centre by way of judicial interpretation. The vertical concentration of power through the HOF is better explained by examining the existing party system. The party structure and other extra-constitutional aspects that frustrate powers of the regional governments are dealt in the next section.

#### **4.1.2 Centralization and Extra-constitutional Factors**

One of the core features of federalism is the division of powers between the two layers of government. However, when it comes to legislative powers, constitutional distribution by itself is not enough. How the federal government executes its laws is an important factor as well. The Ethiopian experience in this regard further reveals the centralizing trend in the federation.

There are basically two methods of executing federal laws. In some federations, such as the United States, the federal government executes its laws through its own agencies. In others, like Germany,<sup>83</sup> the central government relays on state machineries to implement its laws. Both methods have their own advantages and limitations, which, unfortunately cannot be discussed within the scope of this paper.

This system of intergovernmental relations has been mostly developed through time. As a result, one should not be surprised to find a weak system in Ethiopia given the short life of the federal structure. In addition, the Constitution itself offers little guidance to the way intergovernmental relations are conducted. Because of this, no formal institutions, except the Upper House, have been adopted for intergovernmental relations.

The lack of formal institutions and the heavy reliance on party lines in its place for intergovernmental relations hampers any effort aimed at checking the trend of centralization. Furthermore, it diminishes the bargaining power of the states. Developing channels of

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<sup>82</sup> See Article 62 (1) of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995

<sup>83</sup> German Basic Law, article 83

negotiation is especially imperative in the absence of a second house with a legislative power. They would have compensated the inability of states to influence decisions at the centre due to the non-legislative Upper House.

Without a legislative second house and institutionalized intergovernmental relations, the door for the states to participate on matters shared between the federal and state governments is effectively blocked. In addition, as the Constitution does not provide for a comprehensive regime of concurrent powers, conflicts are inevitable, which can eventually find their way into the HOF. As will be discussed later on, this house, which is controlled by the ruling party at the centre, is not an attractive option for the states to utilize, calling the need for other forums of communications to defuse tensions.

At any rate, co-operation between the two layers of government exists despite the lack of any formal institution for the same purpose. For instance, intergovernmental relations are conducted through delegation of powers. According to article 50 (9), the federal government may, when necessary, delegate to the states powers and functions granted to it by article 51 of the Constitution. As the provision implies a downward delegation, there is little threat of usurpation of regional powers by the centre.

Secondly, co-operation is carried out through informal institutions. This is where the danger of power concentration becomes eminent. For instance, the federal government uses the Ministry of Federal Affairs to intervene in states affairs under the pretext of providing assistance to the weaker regions. The Ministry, which is part of the Prime Minister's office, is a successor to the infamous organ called *Ye Kilil Guday Zerf* [Regional affairs Department]. It had been criticized as an organ used by the ruling party, EPRDF, to control the states. As a result, detractors bestow the same legacy to its successor.

These critics blame the 'advisors' sent by the Ministry to the regions. The advisors from the Ministry of Federal Affairs virtually run the regional government and hindered self-administration.<sup>84</sup> They are responsible for developing the political position of the regional government, review appointments and dismissals.<sup>85</sup> This is similar to what was practiced by the

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<sup>84</sup> Aalen, L. (2002). *Ethnic federalism in a dominant party state: The Ethiopian experience 1991-2000*. Bergen: Chr. Michelse, Institute of Development Studies and human rights, at 86

<sup>85</sup> John Young 'Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition,' *The Journal of Modern African Studies* 37: 2(1999), at 344

Ye Kilil Guday Zerf [Regional affairs Department]. In *Federalism and the Accommodation of Diversity in Ethiopia*, Assefa Fiseha explains:

For instance, key figures of former TPLF members were assigned to run Oromia, Somali and Afar, and Bitew Belay, most prominent of all and who was the head of the *Kilil Guday Zerf*, formed the SNNPRS and had a key role between 1997-2001. He also often travelled to other regional hot spots like Somali and Afar to reconcile contending political forces or replace inefficient or corrupt regional administrations through what were called 'peace and development conferences.' The point is that the federal government's concern over these peripheral states, as the most marginalized ones is appreciable. The issue is simply that the assistance and supervision by advisors or party officials goes too far until the ordinary person observes that the key persons running the regions in fact are not the elected regional officers but the appointees of the federal government.<sup>86</sup>

This practice in effect created a dual administrative structure, where the regional government is accountable to the second administrative structure that was managed by the party officials from EPRDF. As Jon Abbink notes:

EPRDF cadres and army units in most of the country form a kind of dual administration. They are acting behind the locally elected administration, and the local officials are ultimately accountable to and dependent (for their job) on the EPRDF representatives.<sup>87</sup>

The formation of the Ministry of Federal Affairs in this context did not help to improve its image. There is much pressure on this institution to prove critics wrong. However, as long as the party structure does not change the picture will remain dismal, as regional authorities will still be accountable to federal authorities at the top of the party structure.

This point leads us to the third method of intergovernmental cooperation. So far, intergovernmental relations in Ethiopia are mainly conducted through party channels. This is perhaps the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies.<sup>88</sup> Party congruence and the identical

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<sup>86</sup> Assefa Fiseha. (2006), at 373

<sup>87</sup> Jon Abbink, 'Breaking and Making the State: The Dynamics of Ethnic Democracy in Ethiopia', (Journal of Contemporary African Studies, vol. 13 No. 2, 1995), at 159

<sup>88</sup> Assefa Fiseha. (2006), at 377

policies in the regions is an indication to the predominance of the centre. Intergovernmental disputes are important features of federations although the excess may lead to a peril or the absence of which might be an indicator of full unification or the federal collapse<sup>89</sup>. Accordingly, the mere absence of disputes between the centre and the states indicates that power is centralized and there is an inherent problem with the federal system.

Unless it is a unitary government, such occurrence might lead to the conclusion that the central government has successfully dominated the regions, which is an unlikely scenario in any federation with free societies. However, the current federal system of Ethiopia seems to accomplish exactly that. To many critics, the federal state is a de facto one-party state in which ethnic organizations are mere satellites of one ethnic organization, the Tigray Peoples Liberation Front [TPLF], the leading unit in the ruling coalition, the Ethiopian People's Revolutionary Democratic Front [EPRDF].<sup>90</sup>

The ruling party, the EPRDF, which has a centralized party structure, is currently in total domination of the regions, either directly through the member parties or indirectly through affiliated parties. The Oromo Peoples' Democratic Organization [OPDO], the Amhara National Democratic Movement [ANDM], the Southern Ethiopian People's Democratic Front [SEPDF], and Tigray Peoples' Liberation Front [TPLF], which are the major member parties, control the four major regions; namely the regions of Oromia, Amhara, Southern Nations, Nationalities and Peoples' Regional State and Tigray. These four regions account for more than half of the country, both in terms of size and population. Furthermore, EPRDF's affiliate parties; namely the Afar National Democratic Front [ANDF], the Somali Peoples' Democratic Front [SPDF], the Gambela Peoples' Democratic Front [GPDF], the Benshangul Gumuz Peoples' Democratic Unity Front [BGPDUF] and the Harari National League [HNL] run the rest of the regions. These parties are formally autonomous from the ruling party but cannot be considered as opposition parties because of their tight links with the EPRDF.<sup>91</sup> This is the reason why intergovernmental conflicts, which are the hallmark of a healthy federal system, are very rare if not absent in Ethiopia. The current federal system of Ethiopia thus exists only in form and not in operation.

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<sup>89</sup> Riker, W., & Schaps R. (1987). Disharmony in Federal Government. In William Riker (Ed.), *The development of American federalism*. Boston: Kluwer Academic Publishers, at 73, 74,75

<sup>90</sup> Alemu Habtu. (2003). Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects. *Paper Submitted to the Second EAF International Symposium on Contemporary Development Issues in Ethiopia*, July 11-12, 2003, The Ghion Hotel, Addis Ababa, Ethiopia. From <http://homepages.wmich.edu/~asefa/Conference%20and%20Seminar/Papers/2003%20papers/Habtu,%20Alem.pdf>.

<sup>91</sup> Aalen, (2002), at 83

In addition, as Ethiopia is a parliamentary system,<sup>92</sup> there is strict party discipline. The centralized party structure, and the party discipline, frustrates the allocation of powers envisaged by the Constitution. It also affects the policy-making power of the regions. Policy documents originate as party documents, which are adopted afterwards at the federal level. Party members at federal and state level discuss them and decide to implement them in their capacity as government officers.<sup>93</sup> They rarely disagree as state governments are under the direct control of the ruling party. In theory, they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and secondly, because the states lack the required expertise to bring alternative policies.<sup>94</sup>

The centralized party structure also has its impact on constitutional litigation. As said earlier, a constitutional court serves as a vital organ in most federations to extend the power at the centre through judicial interpretation. Hence, if a federal government controls the constitutional court, then its chances of usurpation of regional powers will increase. In Ethiopia, the Upper House, which has the final say on constitutional disputes,<sup>95</sup> cannot be considered free from the influence of the central government given the party structure prevailing in the country.

The way members of the HOF are selected guarantees the total control of the house by the ruling party. Member parties and affiliate parties to the ruling party occupy the majority seats in their respective regional councils. Even though the constitution envisages the possibility of electing representatives to the Upper House directly by the people or, alternatively, by the legislature<sup>96</sup>, in practice all states have chosen the latter option. It means that member parties and affiliate parties of EPRDF that control the majority seats in their respective states elect representatives to the HOF. In plain words, the ruling party is in total domination of one of the vital organs used by many federal governments to extend their constitutional powers through judicial interpretation.

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<sup>92</sup> Article 45 of the FDRE Constitution states that The Federal Democratic Republic of Ethiopia shall have a parliamentary form of government.

<sup>93</sup> Assefa Fiseha. (2006), at 381

<sup>94</sup> Assefa Fiseha. (2006), at 381

<sup>95</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 62/1/

<sup>96</sup> Article 61(3) of FDRE Constitution states, 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of the Federation, or they may hold elections to have the representatives elected by the people directly.'

Furthermore, the impact of centralized party structure on the HOF has other implications as well. The role of the HOF is not limited to umpiring the constitution. The HOF also has an influential function in the constitutional allocation of revenue and expenditure responsibilities. The Constitution stipulates four lists of taxation powers. There are separate list of taxations both for the federal and state governments in addition to the concurrent power of taxation.<sup>97</sup> However, the HOF plays a major role on the residual power of taxation, which is to be decided by a two-third majority vote in a joint session of the two houses.<sup>98</sup> Though not impossible, it is hard to imagine any of the residual powers of taxation being assigned to the states after taking into consideration the impact that the party structure has on the HOF.

Moreover, the HOF has the power to determine the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states.<sup>99</sup> The federal government's revenue accounts for more than 80 per cent of the total. The ruling party, thus, can effectively control the states by exercising its power to distribute revenue via the HOF. As a result, states' autonomy envisaged by the constitution becomes less effective as the federal government determines the issue of matching their respective legislative and executive responsibilities by resources that will enable them to exercise the same.

The logical argument in the entire discussion above leaves one to face the cold truth. The TPLF, as the most influential member party of the EPRDF<sup>100</sup>, controls all of the states, either directly by the member parties of the EPRDF or indirectly through the affiliate parties. In turn, the TPLF/EPRDF controls the HOF as its own parties choose representatives to the house, which is a non-legislative one. All these conditions sum up to make a political structure that discourages, and even obstructs, the constitutional distribution of powers through judicial interpretation given by the same house and distribution of resources in which the HOF plays a crucial role.

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<sup>97</sup> See article 96-98 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995

<sup>98</sup> See article 99 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995

<sup>99</sup> See article 62/7/ of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995

<sup>100</sup> There is a consensus that the driving force behind EPRDF is the TPLF. This fact is signified, as elite members of the TPLF hold key positions in the government. Suffice to mention the case of the Prime Minister who is also the chairman of both EPRDF and TPLF. Furthermore, the 2001 crisis within TPLF that affected almost all of the constituent units, demonstrates how much power is centralized within this influential member party of the EPRDF.

## **4.2 Horizontal Division of Power**

Almost every democratic government has three branches- the legislative, executive and judiciary. Mostly, violations of fundamental rights emanates from the first two while the judiciary is vested with the power to redress the violations by the two branches and other players. An atmosphere conducive for the effective enforcement of fundamental rights calls for an independent judiciary that is capable of delivering a quality justice. Hence, it is time to examine the judiciary in Ethiopia to assess its degree of independence and efficiency.

### **4.2.1 The Principle of Separations of Powers**

The French political thinker Baron de Montesquieu expounded the principle of separation of powers, which was based on the idea of the English philosopher John Locke. The core element of separation of powers is the division of political authority between the three branches of government. It is aimed at limiting the powers of the government. It is a principle, which is inherent to Presidential system of government more than that of a Parliamentary system of government.

In any case, under Montesquieu's model, the state has three different branches each with different and independent powers and areas of responsibility. The term 'checks and balances,' was coined by Montesquieu to the principle of separation of powers. It refers to the various procedural rules, which allow one branch to contain another in such a way that one is prevented from becoming supreme and is induced to cooperate with the other branches.

This principle is found in almost all written constitutions in the hope of creating a limited government. In modern democracies the concern is directed at the protection of minority and individual rights. And as such, the government is not all powerful. Its powers are limited by the human rights provisions in the constitution and the division of powers, both vertically and horizontally. Similarly, the Ethiopian Constitution contains human rights provisions under Chapter Three and institutional limitations through definition and division of powers under Chapter Five.

The principle of separation of powers as an important element of a limited government and the lack of it resulting in despotism is stated by Jefferson as follows:

“All the powers of government- legislative, executive, and judicial- result in the legislative body. The concentrating of these in the same hands is precisely the definition

of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. ... As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”<sup>101</sup>

The principle of separation of powers is added to the concept of a pure democracy. As explained by Jefferson’s statement above, elected despotic governments are possible in a pure democracy. Majority rule by itself is not enough, as it is possible to abuse minority rights through a democratic majority vote. The absence of separation of powers in a government is the source of tyranny, as James Madison states:

“... the accumulation of all powers, legislative executive and judicial, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>102</sup>

The danger of such unlimited power is noted by Thomas Jefferson as follows:

"Mankind soon learns to make interested uses of every right and power which they possess or may assume. The public money and public liberty, intended to have been deposited with three branches of magistracy but found inadvertently to be in the hands of one only, will soon be discovered to be sources of wealth and dominion to those who hold them; distinguished, too, by this tempting circumstance: that they are the instrument as well as the object of acquisition. With money we will get men, said Caesar, and with men we will get money." <sup>103</sup>

The idea of limited democracy is not a novel one and is as old as the concept of democracy. The correlation between the two concepts is explained by Lord Acton when he states that “The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.”<sup>104</sup> It means that democracy should be limited in the effort to

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<sup>101</sup> Haines, C. G. (1959). *The American doctrine of judicial supremacy*, New York: Russell and Russell, Inc., at 212

<sup>102</sup> Burns, J. & Peltason J. (1960). *Government by the People*. New Jersey: Prentice-Hall, Inc., at 63

<sup>103</sup> Thomas Jefferson from <http://etext.virginia.edu/jefferson/quotations/jeffcont.html>

<sup>104</sup> Acton, L. (1924). *Modern democracies*. New York: Macmillan, at 208

secure the rights of minorities. Proponents of this idea believe that democracy is not synonymous with pure unchecked majority rule, unlimited government or legislative sovereignty.<sup>105</sup>

In the Ethiopian context, many factors upset the separation of powers between the three branches of government. Typical of any Parliamentary government, it is hard to distinguish between the legislator and the executive for three reasons. In the first place, the FDRE has a Parliamentary form of government.<sup>106</sup> And as such, the relationship between the House of Peoples' Representatives and the executive is regulated by parliamentary principles, and this altogether minimises the separation of powers and the checks and balances as seen in Presidential systems.<sup>107</sup> Secondly, the executive is responsible to the legislator, which further blurs the distinction between the two.<sup>108</sup> And lastly, members of the executive do not lose their seats in the HOPR.<sup>109</sup>

Even when it comes to the Upper House, it can hardly be considered separate from the Lower House and the executive organ. Though the principle of separation of powers does not require functions of the Upper House as separate from the Lower House, it is essential in the Ethiopian context due to the power that the former possess in expounding the Constitution. Even though, the HOF has no legislative power, the Constitution indicates areas where it can pass decisions jointly with the HOPR.<sup>110</sup> Hence, it is hardly separated from the Lower legislative house. It is not either separated from the executive entirely. Members of the HOF can participate in the executive as, according to article 74/2/ of the Constitution, the Prime Minister can choose nominees for ministerial posts from among members of the two houses.

The next part of the paper examines the independence of the third branch- the judiciary- and points out the important elements that can help ensure its independence.

#### **4.2.2 Importance of Judicial Review**

Any discussion on the independence of the judiciary will not be complete without examining the concept of judicial review. Judicial review is an important element in the principle of separation of powers.

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<sup>105</sup> Levy, L. W. (1967). *Judicial Review and the Supreme Court*. New York: Harper and Row, at 61

<sup>106</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 45

<sup>107</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, articles 56 and 74/2/

<sup>108</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 72/2/

<sup>109</sup> The Constitution does not require members of either house to give up their seats even after holding a ministerial post.

<sup>110</sup> See, for instance, articles 55/16/, 99 and 105

The principle of separation of powers ensures the existence of a limited government through the separation of the three governmental functions and their exercise by three separate persons or bodies of persons. Equally important is the concept of checks and balances. The three bodies must be able to check on the powers and activities of the rest so that one is prevented from becoming supreme and is induced to cooperate with the other branches. One of these is the ability of the judiciary to check whether the two remaining organs of the government stay within their scope of power. Shapiro and Alec note the relationship between separation of powers and judicial review as follows:<sup>111</sup>

“Put division of powers and judicial review together and we get the following.

\* The people write a division of powers contract with the government so that it will be self-enforcing through the checking of each part of the agent by the others. One facet of this self-enforcing contractual mechanism is judicial review.”

In addition, elections and representation are by no means enough. Elections are not necessarily free and representation is not necessarily genuine. Another mechanism, judicial review, must be added to the equation in order to avert the danger of what is called ‘tyranny of the majority’ or ‘elective despotism.’ In other words, once representatives are elected, there should be a mechanism to check that they stay within their scope of powers. This implies that the rights of minorities as well as individuals must be protected at all costs. The protection of individual rights, for instance, is fundamental to the Constitutionalist. As Dworkin states:

“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”<sup>112</sup>

Constitutionalists are afraid of the majority encroaching upon the right of individuals and minorities. The point of constitutions for them is the delimitation of or drawing a line between majoritarian will and individual rights, or put differently, between legitimate and illegitimate exercise of majoritarian power. Here, the constitutional rights of individuals held against the majority limits majoritarian authority. Those policies that won through the vote of the majority

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<sup>111</sup> Shapiro, M. & Alec, S. (2000). *On Law, Politics, and Judicialization*. Published to Oxford Scholarship Online: Print ISBN- 13: 978-0-19-925648-8, doi:10.1093/0199256489.003.0005

<sup>112</sup> Dworkin, R. (1971). *Taking rights seriously*. Cambridge: Harvard University Press., at xi

will be without force if they contravene those constitutional rights that individuals hold against the majority.

The core idea behind the principle of separation of powers and checks and balance is, thus, the control of majoritarian rule to the detriment of the minority and individual rights. And as such, the control of the majority in Ethiopia by a majoritarian organ- the HOF- runs short of adhering to the concepts discussed above.

In the first place, it runs contrary to the idea, which holds constitutions as the expression of the will of the people. If the FDRE Constitution is also the expression of the will of the people- or Nations, Nationalities and Peoples of Ethiopia- to use the expression of the Constitution- then, it follows that the representatives in both houses are subordinate to this will, in which case “it would be awkward to ask them to determine the very constitutional requirements that are laid down to bind and guide their actions.”<sup>113</sup>

Secondly, it runs contrary to the principle of constitutionalism and the idea of limited government. It would be a mockery to these concepts if the majority were allowed to check its own power. That is what the FDRE Constitution allows. The actions of one majoritarian organ are checked by another majoritarian organ.<sup>114</sup> It is also inexplicable why the Constitution chose one of the houses to check on the other. It indicates that it does not trust one of the majoritarian houses while it trusts the other one. As seen above, the reason behind any written constitution not to trust any majoritarian house is the fear of tyranny by the majority. If this is the same reason behind the FDRE Constitution, then there is no reason to trust one house and distrust the other.

Expounding the Constitution by the HOF also runs against the core principles of the Constitution itself. The Constitution in its preamble promises the full respect of individual and people’s fundamental freedoms and rights. However, the protection and promotion of individual and minority rights cannot be assured if the organ that is expected to control and place a limit on the majority is itself a majoritarian organ, as in the case of the HOF. This is especially true when individual and collective rights are at loggerheads. In such circumstances, it is hardly difficult to imagine the HOF to side with the majority. Therefore, it cannot be considered impartial.

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<sup>113</sup> Adreas Eshete, member of the Constituent Assembly, What institution should have the ultimate authority to interpret the constitution thereby decide what it requires? The Ethiopian Herald (December 2, 1994), at 2

<sup>114</sup> The composition of the HOF is similar to that of the HOPR. Each state is represented by at least one member and by one additional representative for each one million of its population. Thus, the difference in the composition between the two houses is the number of constituencies. It is a million for HOF and a hundred thousand for HOPR. Hence, both are majoritarian organs.

Hence, it is clear to see from the above discussion that in order to check the power of the majority effectively, the task has to be held by an impartial body, which is truly independent. That impartial body is the judiciary.

#### 4.2.3 The Importance of an Independent Judiciary

Judicial independence is one of the cardinal principles in states governed by the rule of law. In emphasizing the need for judicial independence, Dieter C. Umbach says:

“[O]f all the legal institutions the idea of the state based on the rule of law celebrates its greatest triumph in the independence of the judicial decision”<sup>115</sup>

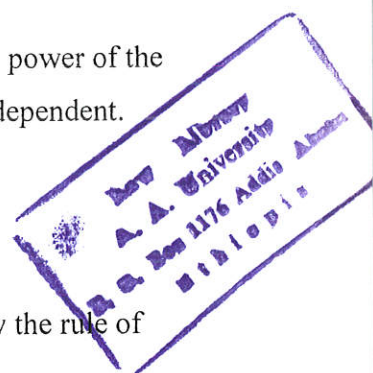
Among other things, independence of the judiciary is of a paramount importance in checking the two remaining branches of government. Hence, judicial review and the independence of the judiciary are closely interrelated. Without an independent judiciary, judicial review is meaningless and vice versa.

The judiciary has to be neutral and independent. Otherwise, it can be easily manipulated when determining the constitutionality of the actions of the two branches of the government. Justice requires a neutral third party that has no bias towards neither of the parties to the dispute. And more importantly, the majority cannot encroach upon the rights of minorities and individuals as long as the judiciary is free from the influence of either party. The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.<sup>116</sup> This statement is especially true when one of the parties is the government.

Conversely, judicial review is an important element to the independence of the judiciary. Although, it is important that the judges should be free from any outside interference, this fact alone does not guarantee the independence of the judiciary. The position of the institution in relation to the other organs of government is equally important. It makes the existence of significant levels of independence contingent on the degree to which the judicial institution has a distinct and discrete role- detached from the interests of the political system, the concerns of

<sup>115</sup> Eugene, C. & Omar, S. A. (Eds.), (1997). *The Role of the Judiciary in the Protection of Human Rights*. London, Boston: Kluwer Law International. at 247

<sup>116</sup> Larkins, C. (1996). Judicial Independence and Democratization: A Theoretical and Conceptual Analysis. *The American Journal of Comparative Law*, Vol. 44, at 608



powerful social groups, or the desires of the general public- to regulate the legality of state acts, enact justice, and determine general constitutional legal values.<sup>117</sup>

Hence, a court, which consists of judges that are able “to decide cases on the basis of established law and the ‘merits of the case’, without substantial interference from other political or governmental agents”<sup>118</sup> and “which has the power as an institution to regulate the legality of government behaviour, enact ‘neutral’ justice, and determine significant constitutional and legal values”<sup>119</sup> is made highly imperative under the concept of justice.

#### 4.2.4 Independence of the Judiciary in Ethiopia

The new Constitution affirms that the judiciary is an independent body.<sup>120</sup> Furthermore, article 79/2/ of the Constitution provides that “Courts of any level shall be free from any interference of influence of any governmental body, government official or from any other source.” It further goes on and states in sub-article 3 of the same that “judges shall exercise their functions in full independence and shall be directed solely by the law.”

As has been stated earlier, the independence of the judiciary has been largely frustrated by the continuing influence of the executive and/or the legislator. Ironically, despite the repeated reaffirmation of judicial independence in the constitution, article 81 of the same allows the meddling of the executive in the activities of the judiciary.

Article 81 deals with the appointment of judges. The first sub-article stipulates that the House of Peoples’ Representatives upon recommendation by the Prime Minister, appoints the President and Vice President of the Federal Supreme Court. Other federal judges are appointed by the Lower House after candidates selected by the Federal Judicial Administration Council are submitted by the Prime Minister to the House.<sup>121</sup> More or less similar procedures are followed by the states.<sup>122</sup>

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<sup>117</sup> Larkins, C. (1996), at 611

<sup>118</sup> Larkins, C. (1996), at 610

<sup>119</sup> Larkins, C. (1996), at 611

<sup>120</sup> Article 78/1/ states that an independent judiciary is established by the constitution.

<sup>121</sup> See article 81/2/

<sup>122</sup> See article 81/3/ and /4/ of the FDRE Constitution. One can also refer to State Constitutions to see that the organization and operation of the judiciary is similar to that of the federal courts. The absence of vertical division of power may provide a partial explanation for the reproduction, albeit the lack of educated man power is also held as a reason. Hence, the conclusions drawn from this chapter are also true, mutatis mutandis, of the judiciary at the state level.

Article 81 of the Constitution, therefore, allows the continuation of interference in the administration of the judiciary by the executive and the legislator. This should not have been a problem as the practice of appointing judges by the government is also found in many countries acclaimed for their democratic governance. However, the meddling further in the administration of the courts and the lack of transparency in the selection and promotion of judges coupled with other factors discussed in the following pages compromise the independence of the judiciary in Ethiopia.

The composition of the Federal Judicial Administration Council, for instance, allows for more interference by the two branches of the government. Article 4 of Proclamation No. 24/1996, which establishes the Council describes the members of the Commission. They are:

- The President of the Federal Supreme Court, Chairman;
- The Vice-President of the Federal Supreme Court;
- Three members of the House of Peoples' Representatives;
- The most senior judge of the Federal Supreme Court;
- The President of the Federal High Court;
- The most senior judge of the Federal High Court; and
- The President of the Federal First Instance Court.

Hence, this combination of members to the Council further guarantees the involvement of the executive and the legislative in the activities of the judiciary. It also shows that an independent body does not carry out the selection of judges. International standards pay significant attention to the procedures employed, including what body controls the process and how it is composed. Council of Europe, Recommendation No. (94) 12 on the Independence, Efficiency and Role of Judges, Principle I, Art. 2c, is perhaps the most specific:<sup>123</sup>

The authority taking decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the Judiciary and that the authority decides itself on its procedural rules. However, where the constitutional or legal provisions and traditions allow judges appointed by the government, there should be guarantees to ensure that the procedures to appoint judges

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<sup>123</sup> Ministry of Capacity Building. (2005). *Comprehensive Justice System Reform Program: Baseline Study Report*. Amsterdam: Primavera Quint, at 162

are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria... These guarantees could be, for example one or more of the following:

i A special independent and competent body to give the government advice which it follows in practice; or

ii The right for an individual to appeal against a decision to an independent authority; or

iii The authority, which makes the decision safeguards against undue or improper influence.

Thus the authority empowered to oversee the selection of judges has to be independent or alternatively, where the constitutional or legal provisions and traditions allow judges appointed by the government, the criteria and procedural rules has to be transparent and independent in practice as they all affect the quality of justice. The importance of the quality of judges for the overall strength of the Judiciary requires that applicable criteria and procedural rules be crafted and applied in a manner that ensures clear, rational and objective selection and promotion so as to prevent cronyism or other unmerited preferences in admission to the profession or in subsequent promotion.<sup>124</sup>

A look at article 8 of Proclamation No. 24/1996 reveals that the criteria of election for judgeship are overly general. Furthermore, the process is not transparent. Many details about the opening of and search procedure for candidates, the selection and evaluation of candidates, screening and final decisions about individual candidates are not made public.<sup>125</sup> Furthermore, there is no outside involvement. Nor other legal professionals such as the Bar or law professors, or the civil society or citizens participate in a way or another in the selection procedure.<sup>126</sup> The combination of all of these shortcomings in the selection of judges creates an ideal situation for the appointment of politically favourable judges.

Studies indicate that the promotion of judges is not transparent either. Various interlocutors, including judges, complained about arbitrariness of the promotion decisions

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<sup>124</sup> Ministry of Capacity Building. (2005), at 162

<sup>125</sup> Ministry of Capacity Building. (2005), at 162

<sup>126</sup> Ministry of Capacity Building. (2005), at 162

indicating that they are not often based on merits.<sup>127</sup> The insufficient transparency in the selection and promotion of judges affects judicial independence.

The independence of the judiciary is also affected by factors related to the accountability of judges. It may seem that independence and accountability are contradictory terms. In fact, accountability increases public confidence on the judiciary. Unless judges are somehow accountable, society will likely view their independence as a danger and seek to curtail it.<sup>128</sup>

The aforementioned lack of sufficient transparency in the selection and promotion of judges not only impinges on the independence of the judiciary, but it also affects the accountability of judges. As judges are accountable to the society, this process has to be transparent to every citizen. Otherwise, the society may get the impression that the judges are not accountable to anyone. Furthermore, judicial accountability requires that the Judiciary's internal operations be conducted in accordance with pre-established rules subject to some measure of non-controlling external scrutiny.<sup>129</sup> In the first instance, therefore, judicial accountability requires transparency and answerability, rather than formal legal liability and sanctions which always carry with them risks to judges' adjudicative independence.<sup>130</sup>

This evaluation of judges through pre-established rules has to be overseen by the Judiciary itself. Thus, responsibility for evaluation has been variously assigned to court presidents, special commissions composed of or controlled by judges, courts personnel councils, or to judges of higher courts.<sup>131</sup> However, the Federal and State Judicial Administration Commissions, which can play a role in this area relies heavily on quantitative measurements in evaluating judges. The number of cases that each disposed off evaluates the efficiency of judges. Though, this may improve the problem in the backlog of cases, it can potentially affect the quality of justice.

Furthermore, the lack of clear mechanisms to present complaints and have remedies for judicial misconduct may reduce public confidence on the judiciary. The Ombudsman, which could have played a crucial role in receiving and attending to complaints, is not yet in its proficient stage.

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<sup>127</sup> Ministry of Capacity Building. (2005), at 163

<sup>128</sup> Ministry of Capacity Building. (2005), at 163

<sup>129</sup> Ministry of Capacity Building. (2005), at 163

<sup>130</sup> Ministry of Capacity Building. (2005), at 163

<sup>131</sup> Ministry of Capacity Building. (2005), at 164

Another factor affecting the independence of the judiciary is the lack of adequate training, particularly in the fields of human rights,<sup>132</sup> which is a big problem in Ethiopia. Many judges do not have special training in the field of human rights. Training increases judges' range of knowledge and skills-essential to their professional competence- and in the process gives them the means to be more independent, both through their increased knowledge and through autonomous management.<sup>133</sup> The lack of adequate training, therefore, affects the independence of the judiciary and the capacity of the judges for the impartial, competent and efficient adjudication of cases.

The working condition of Ethiopian judges further diminishes their independence. Poor working conditions can threaten judicial independence; in some cases, the standards may be so low as to dramatically reduce the efficiency of the courts, increase the incentives for corruption- as a means of circumventing inefficient and overworked courts, and therefore increase public and political support for closer control of the Judiciary's operations.<sup>134</sup>

The lack of transparency and outside involvement in the selection and promotion of judges, the lack of accountability and absence of adequate training of the judges all have a negative effect on the quality of justice. This in turn further reduces the confidence of the society on the judiciary. Hence, considering all this, it should not be surprising if the society is not inclined to use the legally established courts, as the situation described above, creates the atmosphere neither to perceive the court as independent nor the judges as accountable.

Similarly, it should not be surprising if people are rather unenthusiastic to 'have their day in court' because of the courts' notoriously sluggish process in the disposing of cases. One can be discouraged to go to the courts for violations of their rights if one knows that it may take years to get any kind of justice.

More often than not, the poor quality of justice makes the judiciary less tempting for the ordinary citizen to use. The poor quality of justice is further aggravated by the judges' limited access to legal materials. They have limited access to the Federal and State laws. Although access to Federal laws are improving, thanks to the Compact Disk containing an electronic copy of some of the Federal laws, consolidation of applicable laws is made difficult by the legislative

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<sup>132</sup> Questioners distributed to judges and also lawyers, reveal that almost all have not received special training in the field of human rights since completing their undergraduate studies.

<sup>133</sup> Ministry of Capacity Building. (2005), at 164

<sup>134</sup> Ministry of Capacity Building. (2005), at 178

procedure. Proclamations containing new provisions fail to indicate which laws are repealed. In general, new proclamations only state at the end that the new provisions supersede any other ones.<sup>135</sup>

Furthermore, decisions of the courts, aside from the decisions of the Supreme Court and its Cassation division for the last several years, are not printed and published. Even the Supreme Court's decisions are not printed and published on a regular basis. Even though Ethiopia does not adopt the "precedent" system,<sup>136</sup> the decisions of other courts are undeniably useful for the judges to learn from each other.

Limited access to courts' decisions also affects lawyers and their chance of educating themselves and criticizing the courts. Decisions made by courts must be commented upon for the furtherance of the quality of justice. Except for the press and research work by universities, no one is able to have access to the decisions of courts unless they are party to the case. All this is despite Article 184 of the Ethiopian Civil Procedure Code, which deals with copies of judgement and decree, and which does not expressly prohibit anyone from acquiring access to courts' decisions. The refusal of court registrars to provide copies of court judgments to an interested individual asking for such documents appears thus to be a matter of practice rather than a provision of the law disallowing it.<sup>137</sup>

#### **4.3 Perception of the People and its Impact on Enforcement of Fundamental Rights**

The previous sections have illustrated that the judiciary has not yet asserted its independence and many factors compromise its efficiency to deliver a quality justice. The latter fact, especially, has a negative impact on the perception of the people concerning the judiciary. It is not hard to imagine the poor quality of justice and the protracted time to deliver it by the courts discouraging citizens from going to courts and instead developing a negative attitude towards the judiciary. Similarly, the history of the judiciary may explain the perception that the people could get as regards the judiciary.

Ethiopia's political history and its system of governance have not been strong enough to present its people with the proper picture of what a government is or should be. For instance, the

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<sup>135</sup> Ministry of Capacity Building, (2005), at 172

<sup>136</sup> Article 5/4/ of Proclamation 25/1996 as amended by Proclamation 454/2005 makes an exception for the cassation court stating that interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels.

<sup>137</sup> Ministry of Capacity Building, (2005), at 174

downfall of Emperor Haileselassie's regime is attributed to no other external factor, but the very moves of the Emperor himself. The Emperor as a sovereign rejected the idea proposed to create a constitutional monarchy against the advice of his closest aides. Despite his increasing inability to carry out his tasks due to old age, he stayed undecided on whether he should pass power to his heirs or not, creating conditions that finally led to his downfall. Hence, this historical account did not convey the message to the people that a government should be limited and that they have the power to make and unmake it.

Similarly, since the introduction of a modern government system at the turn of the 20<sup>th</sup> century, the judiciary has been part and parcel of the executive. It was not uncommon to see officials of the executive organ holding seats in the judiciary as well. For example in Menlik's era of appointment of the historic ministers in 1908, the Minister of Justice was also the Chief Justice.<sup>138</sup> Likewise, during Emperor Haile Selassie's time, the emperor himself would preside over the Crown Court known as *Zufan Chilot*.

This may affect the psyche of the people regarding the judiciary. In all these 'lessons' in history, the general message repeatedly conveyed to the people was that of a government whose functions were closely overlooked by the king; a king who claims to have driven his legitimacy from God. The king has the highest authority and was sovereign. The country as a whole was like a big corporate firm where one has someone to complain or appeal to; but may ultimately has to go to the CEO in case s/he failed to get justice. Hence, if the CEO or his cronies cannot deliver the sought justice; the injured party may be discouraged to continue his pursuit for justice any further and would be less likely to bring another case to 'court'. Similarly, no one would dare to complain against top officials for the wrongs they committed. This historical blend of the judiciary and the executive subjected the former to all kinds of pressure not only from the latter but from all sides. This well-known fact alone is enough to create a negative public attitude towards the judiciary, making it hard for the ordinary citizen to perceive the judiciary separate from the political environment.

The current structural reform may not be particularly enough if it stays on paper. Above all, the judiciary must consolidate its independence and many supplementary measures should be taken to improve the quality of justice so as to boost people's confidence in the judiciary. As the

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<sup>138</sup> Jembere, A. (2000). *An Introduction to the Legal History of Ethiopia 1434-1974*. Hamburg: LIT Verlag Munster, at 219, 227, 240

oft-cited aphorism of Lord Hewart goes, “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>139</sup> It is evident that governments have a vital role to play by taking practical steps to bring about a significant attitudinal change among the public. However, the two governments that took power after the fall of the Imperial regime have done little to this effect. In the contrary, they have both been taking actions that may result in reinforcing the public’s long-held perception of the government and the judiciary as two sides of the same coin.

In Ethiopian political history, there has always been an underlying rationale for people to view the judiciary as an instrument of the executive. The most notable one was the practice of every new regime setting up its own version of the judiciary to suit its mission.<sup>140</sup> In 1991, the current government once again resorted to the practice of exorcizing judges appointed by the previous regime and replacing them with new ones under the pretext of purging the judiciary from nepotism, corruption and the like. In any case, when a new government sets up a whole new judiciary, it should not be a surprise if the ordinary citizen gets the impression that a new regime is once again setting up its own version of the judiciary to suit its mission.

Since 1991, the current government has merely shunned the task of taking concrete steps to change such a negative attitude towards the judiciary that could result from historical account of the country. Even when presented with excellent chances, the government simply failed to take advantage. The most perfect opportunity involved the ex-defence minister Seye Abreha. This was a high profile case and many thought that it was politically motivated. Seye Abreha appeared in court after an arrest on suspicion of corruption offences; but against all expectations, the court decided that he can be released on bail.

This was the brief moment when most people thought that the courts were finally taking steps to gain their independence. However, this moment of excitement did not stay long. The police rearrested him immediately, and a few days later, Parliament passed a law forbidding bail rights to persons suspected of crimes of corruption.<sup>141</sup> What little chance the government had to change the attitude of the people had gone bagging. Some dubbed the Proclamation as ‘Seye’s Law’ and held the presiding judge as a hero who personified an ethical integrity to do the right

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<sup>139</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

<sup>140</sup> Assefa Fiseha, Federalism and the Adjudication of Constitutional Issues: *The Ethiopian Experience in Netherlands International Law Review*, LII: 1-30, 2005

<sup>141</sup> Article 51/2/ of Proclamation 236/2001 as amended by Proclamation 239/2001.

thing even if it was against the interest of the government. What was to follow a few years on may have played a major role to strengthen the people's negative attitude towards the judiciary.

The presiding judge, Birtukan Mideksa, after resigning from her post, was appointed as the vice-president of the main opposition party, Coalition for Unity and Democracy [CUD]. The much contested national election of July, 2005, by far the most open and democratic in the history of the country, unfortunately culminated in the imprisonment of top CUD officials including Mideksa.

In the much publicised trial, the incarcerated members of the CUD then reflected the people's distrust of the judiciary. All, including Mideksa, refused to answer to the court and remained silent throughout the trial. Explanations for their silence can be found in a book<sup>142</sup> written by the CUD deputy chairperson and mayor-elect of Addis Ababa, Dr. Berhanu Nega. In his book, he repeatedly refers to the lack of independence of the courts and their manipulation by the government.

The point that the writer is trying to make is that there is a lot of reason for the people to perceive the government as an all-powerful and the judiciary lacking independence. There is an overdue project for the government to change this negative attitude in order to foster democracy and the respect of human rights. Until then, however, there is little chance of progress in the practice of reference at court level to constitutional provisions pertaining to human rights and international human rights standards.

The matter gets worse when one considers the independence of lawyers. One of the main purposes of constitutional human rights provisions is the limitation of governmental power to the detriment of citizens. Accordingly, the government is a party to most of the litigations involving human rights issues whenever it steps out of its scope of power. That is why the independence of the judiciary is an indispensable element to human rights litigations. Equally important is the independence of lawyers.

The Ministry of Justice [MOJ] is currently responsible for issuing of licence for lawyers and the annual renewal. This compromises a lawyer's independence and his confidence to sue the very same government that is responsible for issuing and revoking his license. In a similar manner, the MOJ stands in court against a defence lawyer in its capacity as a prosecutor. One

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<sup>142</sup> The book entitled "*Ye Netsanet Goh Siked: Likelebes Ytemokerew Ye Ethiopia Democracy*" by Berhanu Nega was written in Amharic while in prison in 2006 and latter smuggled out.

can only imagine the situation of a lawyer “too efficient” when acting for an accused, particularly in a political case.<sup>143</sup>

## Summary

The principle of separation of powers, which is essential to create an atmosphere conducive for the effective implementation of human rights, is not well developed in Ethiopia. Pertinent historical accounts verify that in the absence of the principle, authoritarian governments are in control and are more inclined to violate human rights; and as such, Ethiopia’s centralized power structure is a highly alarming situation. This is ultimately because it paves the way to limit the independent enquiry of governmental actions and suppresses the possibility of setting up a system of ‘check and balance’. It also gives the impression that the government wants to avoid any sort investigation in to its actions.

This claim gets all the more stronger if, as discussed in Chapter 5, one looks at the failure of the government to solve the challenges faced in the domestic enforcement of international human rights. The drift to centralization provides a sensible explanation to this failure: it is in the nature of authoritarian governments to limit all possibilities leading to criticisms from any independent organ.

Furthermore, the centralized structure partially explains the virtual absence of litigations invoking national and/or international human rights instruments before Ethiopian courts. The people’s perception of government and the judiciary, which is a discouraging factor in bringing complaints before courts, is not an illusion all together. The decision of an injured party to do otherwise and go to the courts may not bear fruit, as in reality the courts, both at the federal and state level, lack many elements of a true independent judiciary, which is the result of the centralizing trend. Other explanations are given in the next chapter.

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<sup>143</sup> Ministry of Capacity Building. (2005), at 224

## CHAPTER 5

### CONTEXT OF THE PROBLEM II:

#### LITIGATION USING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The previous chapter discussed the favourable atmosphere needed and the impact of the lack of thereof in the enforcement of fundamental rights generally whether using domestic or international instruments. The use of international instruments, however, is particularly important albeit the incorporation of almost all rights in the FDRE Constitution. First, constitutional rights are addressed in general manner necessitating a detailed law. Secondary laws and international instruments can fill this gap. Second, there is a possibility that international instruments may deal with a given fundamental right better than national laws.<sup>144</sup> Lastly, the invocation of constitutional rights may entail the redirection of the case from ordinary courts to the Council of Constitutional Inquiry to the HOF, which is not a good option in Ethiopia mainly due to the political nature of the HOF and the protracted process.

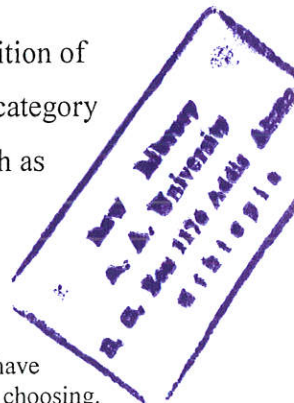
With this in mind this chapter deals with the challenges faced in the enforcement of international human rights instruments and the implication the constitutional power arrangement has on the subject.

#### 5.1 Application of Customary International Law in Ethiopia

Common Law distinguishes between customary international law and treaty-based law. In short, treaties contain very detailed catalogues of rights that can easily be identified. In contrast, rights under customary international law are hard to identify, though there is a consensus that it generally consist of fundamental rights. It basically concerns the prohibition of the so-called gross violations, that is, grave and widespread breaches of such rights; this category usually refers to those government practices that are particularly brutal and inhuman, such as

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<sup>144</sup> For instance, one of the rights of arrested persons, which is found in article 14/3/b/ of the ICCPR is to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. Either the Constitution or the Criminal Procedure Code, however, does not explicitly affirm the former right. This may be the reason why, for instance, the Arada 5<sup>th</sup> Criminal bench is notoriously convicting suspects just hours after their arrest, without even giving them time to recover from the shock they sustained following their ordeal.



*apartheid*, genocide, torture, mass execution, cruel and degrading treatment of political prisoners and common criminals, and the like.<sup>145</sup>

But again these customary rights are also found in most treaties and constitutional documents. Likewise, the FDRE Constitution contains those rights for which general consensus exists as rights enforceable under customary international law, such as prohibition on genocide,<sup>146</sup> torture,<sup>147</sup> inhuman treatment,<sup>148</sup> slavery,<sup>149</sup> and the like.

Hence, the failure of the FDRE Constitution to mention anything regarding customary international law might not create a problem in the enforcement of international law in the country. In fact, it saves all from the complex task of identifying rights enforceable under customary international law. Customary international law is not part of the law of the land. As opposed to treaties, article 9/4/ of the Constitution does not consider customary international law as an integral part of the law of the land.

## **5.2 Challenges in the Application of Human Rights Treaties before Ethiopian Courts**

As stated earlier, arguments in favour of domestic application of treaties are reinforced for two reasons. First, a party cannot invoke its internal laws as justification for its failure to perform a treaty. Secondly, the rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. Keeping this in mind, national courts should apply treaties without a problem once they are ratified and publicized. But, this is not the case owing to many problems.

### **A. Non-self-executing treaties**

The greatest obstacle preventing the full application of the human rights conventions is perhaps the tendency of the Courts to lean in the direction of the non-self-executing character of the conventions.<sup>150</sup> The non-self-executing character of conventions mainly emanates from their allegedly incomplete substantive content. To complete their content additional steps are required. Hence, they are not considered self-executing.

<sup>145</sup> Conforti, B. (1997). National Courts and the International Law of Human Rights. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 4

<sup>146</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 28

<sup>147</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 28

<sup>148</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 18

<sup>149</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 18/2/

<sup>150</sup> Conforti, B. (1997), at 7

However, one has to take caution in the determination of the non-self-executing nature of treaties. Otherwise, governments may easily find excuses not to implement rules found to be undesirable. In other words, the non-self-executing character of a treaty must be an exception to the rule. And such an exception must not lead to political manoeuvring in the form of non-implementation of rules found to be “undesirable”, either because they are considered contrary to national interest, or because they entrench progressive values, or, finally, because they are viewed suspiciously by the internal judge purely by reasons of their origins.<sup>151</sup>

For instance, Conforti says, non-self-executing rules strictly must consist of rules of two kinds: those not creating any obligations for the State but merely allowing for discretionary power and those, which, although they create obligations, cannot be implemented because the necessary organs or mechanisms have not been developed.<sup>152</sup> Hence, he limits the exception in two cases: treaties that leave states free to decide on whether to abide by its recommendations and in cases where the government has not developed the necessary organs or mechanisms for the effective implementation of the treaties. He rules out other exceptions as arbitrary.

In the same manner, German Courts, for instance, are known for applying two tests, subjective and objective tests, in determining if treaties are self-executing or not. The subjective element demands that the drafters and parties to an international agreement intended that a specific norm of that agreement should be directly applicable.<sup>153</sup> The objective element requires that the specific norms are sufficiently clear and complete and do not require further legislative concretization.<sup>154</sup> It is only in the absence of the two elements, then, that German courts refuse to accept the direct applicability of treaties.

Even when treaties include a clause of implementation, they should not affect the substance of the treaty. For instance, article 2(2) of the United Nations International Covenant on Civil and Political Rights states,

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt

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<sup>151</sup> Conforti, B. (1997), at 8

<sup>152</sup> Conforti, B. (1997), at 8

<sup>153</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997). The Role of German Courts in the Enforcement of International Human Rights. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 85

<sup>154</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 85

such legislative and other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

However, the rights referred in the treaty itself, such as, the right to be informed of the nature of the charges upon arrest (article 14 /3/ /a/), right to be tried without due delay (article 14/3/ /c/), and the right to the free assistance of an interpreter (article 14 /3/ /f/), should be considered as self executing. Similarly, with regard to the idea of “progressive realization” of economic and social rights (expressed, for example, in Art. 2 para. 1 of the Covenant on Economic Social and Cultural Rights), courts should note that some norms of such treaties, for example, non-discrimination clauses, might very well possess the necessary concreteness to be accepted as self-executing.<sup>155</sup>

However, in the United States, for instance, the non-self-executing character of both customary and treaty based human rights law are subject to a political game. The courts may not enforce human rights treaty obligations if the President and Senate have declared them to be non-self-executing, until those obligations have been implemented by legislation.<sup>156</sup> Apparently, courts might not enforce customary human rights law if the President, by an action within his independent constitutional authority, has decided to violate U.S. obligations.<sup>157</sup>

In any case, the self-executing character of a treaty depends on many domestic factors. An international rule that is considered directly applicable in a state where the judiciary is afforded broad interpretative powers may not be directly applicable in a state where the power of the judiciary is more circumscribed.<sup>158</sup> Thus, a treaty that is deemed self-executing in one state may not be considered as such in others.

Nonetheless, the point to stress is the fact that one should take caution in asserting the non-self-executing character of a treaty in order to limit the excuses for a government from disregarding its international obligation.

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<sup>155</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 86

<sup>156</sup> Henkin, L. (1997). International Human Rights Standards in National Law: The Jurisprudence of the United States. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 204

<sup>157</sup> Henkin, L. (1997), at 204

<sup>158</sup> Iwasawa, Y. (1997). International Human Rights Standards in National Law: The Jurisprudence of the United States. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 239

Unfortunately, it is too early to determine the positions of Ethiopian courts, as the practice of referring to international instruments at court level is minimal at best or nil at worst.<sup>159</sup>

## B. Question of Status

We have seen in the third chapter that after the conclusion of the treaty by the Executive branch, the House of Peoples' Representative ratifies it to make the treaty an integral part of the law of the land. In this section, we will try to figure out where these treaties are placed in the hierarchy of laws in Ethiopia. This is particularly important as there may be conflict between international and a domestic law where it calls one to decide which law prevails over which.

Examination of the 1969 Vienna Convention on the Law of Treaties between States; and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, would reveal that treaties are understood as agreements concluded between States, between States and international organizations, or between international organizations.

The manner of concluding these treaties are left for individual states. Constitutions, statutes or judicial practice may determine who is empowered to make treaties and the process of making it. They determine who can represent the State in concluding the treaty. They also determine the manner or authenticating the text of the treaty that has been adopted by negotiating members. For instance, they may determine if signature is enough by itself or an additional action, such as a referendum is necessary on top of the signature of the representative. Finally, they also determine when the treaty may get the force of law. Again, they may determine if signature alone is enough or other procedures such as ratification are needed.

In the same token, constitutions, statutes or judicial practice may also determine the status of international instruments in the hierarchy of the domestic laws. This section will examine the status of international instruments in the different constitutions of Ethiopia starting from the 1931 Constitution.

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<sup>159</sup> Chapter IV provides possible explanations for the absence of the practice in the courts.

### *The 1931 Constitution*

Before the 1931 Constitution, all power of government was concentrated on the Emperor as delegation of their powers was non-existent or unthinkable since such an act would be considered as a weakness on the part of the Emperor, thus risking a lack of respect.

Although, ministerial posts do exist before the 1931 Constitution, it is not clear if they had any power to play a part in the management of any aspect of the activities carried by the Emperor. These ministries came first in 1908 during the reign of Minilik II due to multiplying of State activities. To some extent, this was simply the giving of new titles to old officials: the *Afa-Nigus* became Minister of Justice, the *Bejerond* Minister of Finance and the *Tsehafe Tezaz* Minister of Pen.<sup>160</sup>

It was only in the 1931 Constitution that there was a mention of Ministers formally in writing. However, it was not clear what role they play, as all power was concentrated on the Emperor. Article 6 states that “supreme power rests in the hands of the Emperor.”

For the purpose of our discussion we should concentrate on article 14 of the constitution, which states that, the emperor has the exclusive power to conclude treaties. However, except this provision, there is no other provision dealing with international law. Hence, we cannot determine the status of treaties during the time.

### *The 1955 Constitution*

Two factors were particularly responsible necessitating a change to the 1931 Constitution. Modernization and the Constitution of Eritrea granted to it by the United Nations.

The 1931 Constitution was being compared with constitutions of other countries, which were much advanced in many respects. A growing number of Ethiopian scholars and those living abroad found their constitution to be illiberal and advised the government to respond for the demand of change quickly before change comes by force, which will be an embracement to the Empire.<sup>161</sup>

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<sup>160</sup> Paul J. C. N., & Clapham, C. (1967). *Ethiopian constitutional development*. Addis Ababa, Ethiopia: The faculty of Law Haile Sellassie I University in association with Oxford University, at.323

<sup>161</sup> Scholler, H. (2005). *Ethiopian constitutional and legal development. Volume I: Essays on Constitutional Development*. Rüdiger Köppe Verlag, at 32

Another embracement which the Empire could not help dealing with was the coming into effect of the much liberal and modern Eritrean Constitution, which was granted to it by the United Nations.<sup>162</sup> Thus, to save face, the Imperial Constitution was to grant a similar liberty to its people. Furthermore, there was some doubt if at all the existing Constitution was applicable in the territories of Eritrea. Hence, there came the need for a revision of the 1931 constitution.

Under the revised Constitution of 1955, the Emperor still retained considerable amount of power. However, unlike the previous Constitution, this Constitution clearly places all international agreement at equal footing with the Constitution in the hierarchy of laws. Article 122 of the Constitution states:

The present revised constitution together with those international treaties, conventions and obligations to which Ethiopia shall be part, shall be the supreme law of the empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent there with shall be null and void.

This clear indication as to the status of international agreements also provides a solution to the problem of inconsistency between international law and domestic law. It is quite clear that treaties prevail over domestic legislations, though, it is not clear which one prevails in case of inconsistency between the provisions of the Constitution and international agreements. However, it is silent as to the status of customary international law.

### *The PDRE Constitution*

The 1955 Constitution was suspended on the 12<sup>th</sup> day of September, 1974 under Proclamation No.1 of 1974, which established the Provisional Military Government.<sup>163</sup> Under the same Proclamation, the Kings power was limited to his representative duties with no power in the country's administrative and political affairs.<sup>164</sup> The Provisional Military Administration Council by virtue of Proclamation No.2/1974 assumed the function of the Head of Government. The broadness and vagueness of the two proclamations seems to suggest that the council has fused together the function of the legislative and executive activities of the government. After the passing of more than a decade, a new constitution was adopted.

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<sup>162</sup> Scholler, H. (2005), at 32

<sup>163</sup> A Proclamation Establishing the Provisional Military Government (1974). Proclamation No. 1/1974. Article 5(a)

<sup>164</sup> A Proclamation Establishing the Provisional Military Government (1974). Proclamation No. 1/1974. Article 3(c)

Under the PDRE Constitution of 1987, the President is clearly designated as the Head of State who represents the republic at home and abroad.<sup>165</sup> However, he assumes enormous power under the constitution that his role is not limited to representing the Republic.

He is the commander-in-chief<sup>166</sup>, appoints members of the Defence Council and presides over its meetings.<sup>167</sup> In his diplomatic competence, he exercises the powers and duties to ensure the implementation of foreign policy of the country,<sup>168</sup> conclude international treaties,<sup>169</sup> establish diplomatic missions and appoint diplomatic representatives,<sup>170</sup> and receive letter of credence and recall of foreign diplomatic representatives.<sup>171</sup> He plays his legislative role by issuing Presidential Decrees<sup>172</sup> and his role in the judicial activity by granting pardon.<sup>173</sup>

Through his powers and duties to ensure the implementation of the domestic and foreign policy of the country,<sup>174</sup> and ensuring that the Council of Ministers discharges its responsibilities and presiding over the Council as necessary,<sup>175</sup> the President of the Republic play a huge role in the executive activities of the Republic as well. This is further strengthened through his power of appointment, dismissal and nomination of candidates to the National Council nominees for the post of the Prime Minister, deputy Prime Minister and ministers and also the President, Vice President and judge of the Supreme Court, the Procurator General, the Chairman of the National Worker's Control Committee and Auditor General.<sup>176</sup>

Though this Constitution does not explicitly indicate the status of international agreements as the previous one, it clearly places them below the Constitution. Article 118 of the constitutions states:

The constitution of the People's Democratic Republic of Ethiopia is the supreme law of the country. Any law or decision contrary to this constitution shall have no effect.

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<sup>165</sup> Constitution of the Peoples Democratic Republic of Ethiopia (1987). *Negarit Gazetta*. Proclamation No. 1 Article 85(1) &(2)

<sup>166</sup> Proclamation No. 1/1974, Article 85(3)

<sup>167</sup> Proclamation No. 1/1974, Article 86 (3) (a)

<sup>168</sup> Proclamation No. 1/1974, Article 86 (1) (a)

<sup>169</sup> Proclamation No. 1/1974, Article 86 (2) (a)

<sup>170</sup> Proclamation No. 1/1974, Article 86 (2) (b)

<sup>171</sup> Proclamation No. 1/1974, Article 86 (2) (c)

<sup>172</sup> Proclamation No. 1/1974, Article 86 (4)

<sup>173</sup> Proclamation No. 1/1974, Article 86 (3) (d)

<sup>174</sup> Proclamation No. 1/1974, Article 86 (1) (a)

<sup>175</sup> Proclamation No. 1/1974, Article 86 (1) (c)

<sup>176</sup> Proclamation No. 1/1974, Article 86 (1) (b), (d); 87 (1)

However, the question as to the status of international agreements vis-à-vis other domestic laws is not answered by the Constitution. Instead, one can argue that they are below proclamations in the hierarchy of laws as they are issued in the form of decree, which are legislative documents generally below proclamations in the hierarchy of laws.

#### *The Transitional Period Charter*

Similar to the PDRE Constitution, the traditional charter places international agreements below the charter but is silent as to their exact position in the hierarchy of laws. Article 18 of the charter states:

This charter serves as the supreme law of the land for the duration of the transitional period. Any law or decision that is contrary to the charter shall be null and void.

As international agreements were issued as proclamations, one can also argue that they are at equal footing with other proclamations.

#### *The FDRE Constitution*

According to the first sub-article of article 9, the Constitution is clearly designated as the supreme law of the land. No other law is vested with such hierarchy unlike the case in, for instance, the Revised Constitution of 1955, where it states under article 122 that "...[the] Constitution, together with those international treaties, conventions and obligations to which Ethiopian shall be party, shall be the supreme law of the Empire...".<sup>177</sup> On the other hand, under article 9 (1) of the FDRE Constitution, any law, which contravenes the Constitution shall be of no effect. Hence, all laws are below the Constitution and will have no effect in case they contradict with it.

It is clear that the "laws" include Proclamations, Regulations, and Directives. In addition, as we have already seen, international agreements ratified by Ethiopia are also integral part of the law of the land by virtue of article 9(4).<sup>178</sup> For two reasons then, one can argue that international treaties, which are ratified by Ethiopia, are placed below the Constitution in the hierarchy of laws in Ethiopia. First, because of the lack of any provision which designates any other law as the

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<sup>177</sup> Revised Constitution of the Empire of Ethiopia, article 122

<sup>178</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 9(4)

supreme law of the land and secondly, as any other law in contradiction to the Constitution has no effect, it is clear that international agreements- including international human rights laws- are placed below the Constitution. If the Constitution wanted to place international agreement at equal footing with the Constitution it would have said so clearly, as this experience is found in our country (see the Revised Constitution of 1955), and resolve the ambiguity that some think exists.

Some legal experts believe that the placing of sub-article 4 of article 9 under a provision talking about supremacy of the Constitution may imply that the drafters wanted to give international agreement an equal status with the Constitution in the hierarchy of laws. However, this argument is without any strong basis and is pure speculation despite the ingenuity of the draft persons in misplacing the sub-article. They could have placed it as a separate provision. Nonetheless, the exclusion of international agreements from sub-article 1 of the same as the supreme law of the land is enough to show that they do not possess such a position but instead considered as just an integral part of the law of the land.

The Constitution may have helped us in resolving whether international agreements are the supreme law of the land or not. However, the constitution gives absolutely no clue whatsoever as to where to place them vis-à-vis other laws. Are we to place them at equal footings, above or below other laws of the land? Most importantly where is their place vis-à-vis Proclamations?

The writer believes that they are placed at equal footing with the Proclamations. This is because the act of ratification, which renders international agreements as integral part of the law of the land, is an act of the Parliament. Similarly, Proclamations are also the result of the act of the Parliament. Furthermore, as the Parliament does not have the power to place some laws it passes above or below other laws and since nothing to decide the hierarchy of these treaties is found in each of the ratifying Proclamations, one can safely argue that they are at equal footings with the Proclamations. The same goes for international human rights laws as they are also considered international agreements as well. Again, as there is little or no practice of invoking international human rights instruments in Ethiopian courts, they had no chance to brood over the status of these instruments.

Hence, the question we are left with now is to decide what will happen to these treaties in case of conflict with the Proclamations. This point is dealt in the next section.

### C. Inconsistency between a Treaty Rule and a National Rule

It is clear from the reading of article 9(1) of the Constitution that treaties have no effect in case of conflict with the Constitution. However, the Constitution is silent both as to their status in the hierarchy with other domestic laws and the effect they will have in case of conflict.

The writer believes that there is no simple solution to this even after sorting out the status of treaties in the hierarchy of laws. It is shown in the previous section that they are at equal footing with other Proclamations. Hence, it seems easier to treat them as a Proclamation and try to resolve the conflict among Proclamations.

However, there is no clear rule that developed in the Ethiopian legal system regarding the unravelling of conflicting laws of equal status. Hence, one will be forced to consider principles developed in other legal systems.

Some legal systems solve the problem directly by holding treaties at a higher status than domestic laws and lower than the constitution. However, minus this particular experience, the problem is usually resolved through certain principles developed over time. There are arguments developed both for the prevalence of domestic laws over international laws and vice versa.

A common starting point for all domestic case law, when a formal superiority is not sanctioned, is the principle that the subsequent provision abrogates the anterior rule also in relations between treaties and national legislation.<sup>179</sup> The *lex posterior* rule, as it is sometimes known, is the argument used in favour of the prevalence of domestic laws. However, this argument also works in reverse. Under this principle of *lex posterior derogate prior*, if the treaty precedes the Proclamation then the Proclamation prevails. Conversely, if the Proclamation comes first and a conflicting treaty is ratified latter on, then the treaty will prevail.

It should be noted that one could only consider this principle in the absence of constitutional limitation on the legislator to enact federal laws violating pre-existing treaties. The examination of the FDRE Constitution reveals that there is no such limitation. In any case, as indicated by virtually all proclamations promulgated by the House of Peoples' Representatives, it seems that Ethiopian laws prevail over subsequent treaties under the *lex posterior* rule. For instance, most proclamations contain a provision, which states that any law or practice inconsistent with the Proclamation is inapplicable regarding matters provided within it.

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<sup>179</sup> Conforti, B. (1997), at 11

On the other hand, some argue for the prevalence of treaties by considering conventions as special laws, thus applying the principle of *lex posterior generalis non derogate priori speciali*. The *lex specialis* rule first requires a detailed comparison of two potentially conflicting norms and will only apply when these two norms embrace identical elements and one of the two norms, the more detailed one, contains at least one additional element.<sup>180</sup> However, the general wording of many international human rights treaties creates the difficulty of applying this rule in favour of the argument for their prevalence.

Others try to ensure the prevalence of treaties through presumption of conformity of the domestic law to the international law. It has long been accepted as a rule of statutory construction that where it is possible to construe a statute in a manner to make the law compatible with international obligations, this should be done.<sup>181</sup> Hence, whenever there seems to be an inconsistency, it is widely accepted practice, especially in common law countries, to try reconciling them. It is only after failing to patch up the difference that the courts of these countries precede to other measures.

This argument is reinforced by another argument, which declares that subsequent domestic law prevails only if there is a "clear indication" of the intention of the lawmaker to derogate from the treaty. However, we should note that "clear indication" is not a simple incompatibility between the international and national laws. It goes more than that. When explaining the principle Conforti states:

It has its justification in the fact that the treaty, once it has in whatsoever way acquired formal validity within the State, ultimately is upheld in the domestic legal order by a two-fold normative intent: on the one hand, the intent that certain relations be governed as they are governed by international law, and, on the other, the intent that commitments undertaken towards other States be respected. It is necessary, therefore, in order to have the posterior domestic provision prevail, that both intents be annulled; it is necessary that the posterior provision show not only and not so much the intent to

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<sup>180</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 88

<sup>181</sup> Higgins, R. (1997). International Human Rights Standards in National Law: The Jurisprudence of the United States. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 47

regulate differently the same relations as the intent to reject international commitments already undertaken.<sup>182</sup>

Thus, in order to assert the legislator intent, first one must assert that the subject matter and the subject the laws regulate are identical. Secondly, the subsequent national law must demonstrate that it intends to violate the international commitment and not just the intent to govern the subject matter in a different manner.

There is no firm judicial position on this subject as the question has never or, if at all, rarely been raised before the judiciary in Ethiopia. Hence, in the absence of any constitutional or judicial principle it remains an unresolved matter. However, as indicated earlier, one must keep in mind that the Constitution always prevails.

#### D. Publication, Language and Non-Familiarity

As stated earlier, article 9(4) of the FDRE Constitution implies that the simple act of signing the document by the executive would not be enough and binding on the country. After the signature of the treaty by the legal representative of the country, another organ must ratify the document. That organ is the Lower House.<sup>183</sup> The Constitution vests the power of promulgating laws in the form of Proclamations on this house. As ratification of treaties is an act of the Lower House, it is issued as a Proclamation as well.

However, no Proclamations ratifying international agreements contain the ratified document itself. The ratification of human rights laws are no exception to this rule. They are not annexed in the Proclamation ratifying the document. The Proclamations simply state that such and such agreement is ratified. As the result, courts may theoretically refuse to give effect to those treaties ratified by the proclamation, as the text are not found in the Proclamation under investigation.

However, this should not be an excuse. In the first place, as we have said before, a State obligation to be bound by a treaty imposes a positive duty of giving effect to the instrument. Human rights treaties impose an obligation on a State, *inter alia*, to establish properly functioning institutes like the office of the Ombudsman, Human Rights Commission, and courts. It is quite clear, however, that the establishment of these institutions is not adequate. Proper

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<sup>182</sup> Conforti, B. (1997), at 12

<sup>183</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 55/12/

functioning of these institutes is also of the essence. The proper functioning of the courts should include the effective implementation of all laws of the land. Hence, it is upon the Ethiopian government and the courts to implement ratified human rights treaties, as they are part of the law of the land as per article 9(4) of the Constitution.

Secondly, there is no provision in the Ethiopian legal system that prohibits courts or any other organs of the government from applying laws that are not published in the Negarit Gazeta. In the first place, article 2(3) of the Federal Negarit Gazeta establishment proclamation,<sup>184</sup> states that “All Federal or Regional legislative, executive and judicial organs as well as any natural or judicial person shall take judicial notice of laws published in the Federal Negarit Gazeta.” It does not necessary assert that laws will not be considered as such unless they are published in the Negarit Gazeta. The legal system does not prohibit the courts from taking judicial notice of unpublished laws, especially, when the implementing law is published.

Scholars favouring this line of argument may use Article 57 of the FDRE Constitution to reinforce their position. It states that; “Laws deliberated upon and passed by the House shall be submitted to the Nation’s President for signature. The president shall sign a law submitted to him within fifteen days. If the president does not sign the law within fifteen days it shall take effect without his signature.”<sup>185</sup> This implies that laws passed by the house may take effect after fifteen days not only without the signature of the President but also without its publication in the Negarit Gazeta.

In fact, the practice of taking judicial notice by the courts of legal documents, which are not published, is wide spread in Ethiopia. This is especially true when it comes to Directives of administrative agencies. Ethiopian courts do consider and apply Directives, which are often unpublished and sometimes deliberately hidden from the eyes of the public, as some officials believe that they are secret government documents. Hence, the courts should not make any discrimination when it comes to treaties.

Thirdly, courts should not simply consider acts of Parliament as having no effect at all. Parliament does not go to the extent of wasting its time and ratify treaties so that the courts would completely disregard them. It is hardly arguable to conclude that the intention of the Parliament would be passing laws that have no significance or no binding effect on anyone at all.

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<sup>184</sup> Federal Negarit Gazeta Establishment Proclamation No.3/1995

<sup>185</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, article 57

All acts of Parliament give rights and impose duties. Giving rights implies by itself invocation of them in courts. Hence, courts must not refuse to apply ratified treaties. The reference in the Proclamations of the treaties they ratify, therefore, should be enough.

4 However, again if the treaties ratified by Proclamations are not annexed in it then there will be a problem of getting hold of them in the first hand. As rightly stated by Rakeb Messele, the publishing of a ratified international human rights instrument in an official document (i.e. Negarit Gazeta) further facilitates the access to these instruments both to the judicial organ and to ordinary citizens.<sup>186</sup> The problem related with publication and access should not be a basis for refusal of applying the treaties, as the problem is a common one to all kind of laws in Ethiopia. Access to Proclamations and Regulations has been a long standing and persistent problem for the courts. Furthermore, not all Directives of administrative agencies are published at all. Nevertheless, these Directives are given the force of law by the courts. Therefore, the problem is not peculiar to treaties. It is the usual practice that litigants produce the legal document to the courts on case-by-case bases when they prove to be unavailable to the courts. If need be, the same practice then should apply to treaties as well.

The problem of the legal system in relation to these areas is also noted in the *Comprehensive Justice System Reform Program: baseline study report* as follows:

“To further compound the problem, international treaties ratified by Ethiopia are not published, their consistency with domestic legal norms is not checked systematically, and nobody knows for sure if they are indeed and integral ‘part of the law of the land’, as stated by article 9 (4) of the Constitution.”<sup>187</sup>

The writer is not denying that publication would have improved the implementation of international instruments. As noted by the same report:

“It is a well-established principle of law that any legal instrument, including international agreements, must be published first before it can enter into force and can be implemented. Any international instrument that has not been published cannot enter into

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<sup>186</sup> Rakeb Messele. (2002). *Enforcement of human rights in Ethiopia*. Research subcontracted by Action Professionals’ Association for the People (APAP), at 39 From <http://www.telecom.net.et/apap/pdf/ENFORCEMENT%20F%20HR.pdf>

<sup>187</sup> Ministry of Capacity Building. (2005), at 128

force. Publication of international agreements is therefore necessary to give them binding force in domestic law.”<sup>188</sup>

Even if the courts agree to refer to the treaties, there is still another problem- language. The treaties are made in foreign languages. The vast majority of them, if not all of them, are not translated into the official language of the country, Amharic.<sup>189</sup> There is no official translation of these treaties. There is no organ vested with the power to supply an official translation.

We have the practice where litigants have to translate any document they present as evidence before the courts. They translate them in those official translator offices. However, it is doubtful if these offices have the mandate to translate legal documents such as treaties. The writer personally would not advice such practice as the translators themselves are not in any way qualified to translate legal documents and they can be easily susceptible to corruption. It is doubtful if some of them are not even qualified to translate a simple non-legal document. This is arguably a major problem as the courts may refuse to work with documents, which are not written in their working language.

However, the litigants should persuade a court to follow a uniform procedure in all cases by citing the examples of regional courts. No regional court in its delegated power to see federal cases has adopted the practice of translating legal documents to its working languages. They only require the proceeding to be held and litigants’ documents to conform to its working language. Hence, there is no reason why courts should refuse referring to treaties written in a language different from their working language while they do the same regarding other laws. All laws of the land should and must be treated equally in all courts.

Nonetheless, the writer believes that official translation of the treaties, at least to Amharic (leaving alone other languages used in different state courts), would have highly improved the situation. Furthermore, it would have minimized the inconsistency that may result as the consequence of the effort to translate the treaties by different courts. There could be different understanding of the meanings of the provisions of the treaty exclusively due to mistranslation as opposed to interpretation.

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<sup>188</sup> Ministry of Capacity Building. (2005), at 162

<sup>189</sup> Ministry of Capacity Building. (2005), at 162

On the other hand, studies indicate that, some judges refuse to implement international human rights treaties for quite different reason. For instance, according to Rakeb Messele:<sup>190</sup>

Some of the interviewees stated that even judges and attorneys who understand very well the languages in which international human rights instruments are written (i.e.; English, French, Arabic and Spanish), do not use these provisions in courts of law. According to the interviewees, this is due to the fact that most provisions of international human rights instruments are incorporated in one way or another in domestic laws, the Constitution in particular. Therefore, where a violation of human rights occurs, this will not only result in violation of international human rights but also in violation of constitutional rights. They, thus, find the reference to international provisions redundant.

But still, it is doubtful if all provisions of international human rights instruments are incorporated in domestic laws<sup>191</sup> and since the Constitution contains the principles in a very broad and vague manner, not only regarding human rights, but also in other areas as well, one should not rely on these domestic documents and pronounce international treaties redundant. Furthermore, as stated earlier, litigating human rights issues using the Constitution is time consuming, leaving treaties the only alternative.

Another problem relates to the non-familiarity with the substance of treaties.<sup>192</sup> Few lawyers and judges have studied international human rights. This problem is further aggravated by the lack of systematic collection of documents on human rights treaties, general comments and views given by the committees established under the Covenants.

#### E. External Application

Domestic enforcement is the primary task of domestic courts when it comes to international human rights law. However, they also have the obligation to apply it to human rights situation in other countries as well. External application occurs when an individual brings an action against foreign state or a foreign government official for compensation for human

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<sup>190</sup> Rakeb Messele. (2002), at 161

<sup>191</sup> For instance, one of the rights of arrested persons, which is found in article 14/3//b/ of the ICCPR, is to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. Either the Constitution or the Criminal Procedure Code, however, does not explicitly affirm the former right.

<sup>192</sup> Questioners distributed reveal that lawyers and judges are not only, unfamiliar with the substance of treaties, but most also think that treaties are redundant given the protection of most rights in the Constitution. This may be the reason why judges have responded that they never made decisions solely based on human rights treaties.

rights violations. They also arise in cases, such as the application of foreign law and judgments, extradition, deportation and the granting of asylum. However, there are two main obstacles in this regard. They are namely the questions of jurisdiction and sovereign immunity and functional immunity of foreign official organs.

### *Jurisdiction*

It seems that Ethiopian courts enjoy an extensive jurisdiction to entertain any justiciable matter. Article 37/1/ of the FDRE Constitution affirms that everyone has the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power. The term “right” in article 37/1/ is not limited to fundamental rights protected by the FDRE Constitution itself but includes all individual rights recognized in the Ethiopian legal order. Hence, the Constitution also establishes a right to judicial protection in cases where Ethiopian authorities violate directly applicable international human rights norms. In fact, The Federal Courts Proclamation 25/1996, states in article 3/1/ that Federal Courts have jurisdiction over cases arising under international treaties.

An important question for the realization of international human rights, however, is how far Ethiopian courts can also review human rights violations in which Ethiopian authorities are not involved or which occur abroad. This section of the paper will examine the difficulties an alien would face in bringing an action for human rights violations committed against him overseas, which violate the laws of the nations.

It can be argued that Ethiopian courts have both criminal and civil jurisdiction over aliens. Proclamation 25/1996 does not limit jurisdiction on the basis of the place where the offence is committed. They have criminal jurisdiction over offences regarding foreign nationals and civil jurisdiction over cases to which a foreign national is a party. However, it is questionable if courts would allow adjudicating offences committed abroad. For instance, can an Ethiopian tortured in other countries sue before Ethiopian Courts? Similarly, Can a foreigner tortured in other countries sue before Ethiopian Courts? What about residual jurisdiction? That is, when no other country is addressing human rights violation? Would not the inaction of Ethiopian Courts amount to violation of human rights as well? These are difficult questions and as there are no detailed laws on these issues, the courts themselves have to provide answers in the course of carrying out their duties.

In general, however, courts throughout the world may decline to adjudicate human rights claims of aliens for lack sufficient connection with the forum, notwithstanding the recognition by the International Court of Justice that human rights norms create obligations *erga omnes*, that is, towards all states and, arguably, enforceable in all states. In the first place, it is clear that the offence has to be illegal in the host country and in the country where the offence is allegedly committed. Nonetheless, either the plaintiff or the defendant must have a sufficient connection with the forum. The literature generally agrees that a State may assume jurisdiction only if some sort of “genuine link” can be established between the respective factual situation and the State’s own interest.<sup>193</sup> Note, however, that what qualifies as a sufficient connection or a genuine link is a matter of debate. It is also a point of contention, if the plaintiff has to be an alien or not. In summary, the nationality of the plaintiff and the location of a defendant play different role in different countries when it comes to the question of jurisdiction.

Even though, international human rights lawyer would like to call for maximum freedom of jurisdiction in human rights issue, there are many sound arguments other than the respect to national sovereignty to restrict national jurisdiction over aliens. In criminal cases, for example, an unfettered assertion of criminal jurisdiction must be tempered by the general principle *nulla poena sine lege*.<sup>194</sup> Human Rights aspects such as due process of law standards and principles of fair judicial proceedings could also call for a limitation of jurisdiction.<sup>195</sup>

### *Immunity*

As discussed earlier, the nationality of the plaintiff and the requirement of the defendant to be present in the court’s jurisdiction, the “genuine link” requirement, pose obstacles in asserting jurisdiction of the court. Hence, some victims sought to overcome those obstacles by proceeding not against the foreign official but against the foreign government; they ran into the obstacle of sovereign immunity.<sup>196</sup> In such cases, remedies may be denied by the strict observance of traditional rules of customary international law on sovereign immunity and functional immunity of foreign official organs.

<sup>193</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 82

<sup>194</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 83

<sup>195</sup> Simma, B., Khan, D. E., Zöckler, M., & Geiger, R. (1997), at 83

<sup>196</sup> Henkin, L. (1997). International Human Rights Standards in National Law: The Jurisprudence of the United States. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 202

The clash between state immunity and international human rights suddenly became manifest with individuals attempting to seek a remedy in domestic courts against foreign states.<sup>197</sup> However, it is undeniable that the traditional notion of sovereign immunity has changed dramatically over time. It is argued that the ability of domestic courts to review the acts of foreign states in the abuse of human rights does not violate the recognized principles of sovereign immunity. Various commentators have urged either the drastic curtailment or the abandonment of the so-called absolute doctrine of sovereign immunity.<sup>198</sup> Regarding the major changes that the rule of state immunity has undergone, Bianchi states:

“According to the majority of commentators, the historical paradigm of state immunity has closely shadowed the evolution of the role of the state in international relations. The judicial activism of national courts marked the shift from an absolute theory of sovereign immunity to a restrictive theory under which acts performed by a foreign state in a private capacity would not be granted immunity.”<sup>199</sup>

The ground for an attack on immunity arises in response to the increasing commercial activity of governments and the need to protect individuals who are part of this international commercial life. The notion of sovereign immunity was developed in the nineteenth century when a laissez-faire economic philosophy resulted in a clear functional differentiation between private and public spheres of activity.<sup>200</sup> Thus, the sovereign did not go into business or enter into commercial transactions, and the role of government was far more limited than it is today.<sup>201</sup> However, governments around the world are increasingly involving in commercial transactions: hence, the need to protect participants in international commercial activities.

The concept of restricted immunity is also explained in its rationality. The central question has been whether to grant immunity to states even in cases of gross violation of human rights. To answer the question in the positive is deemed illogical. It is argued that it will not be compatible with the international legal order. Explaining this Bianchi states:

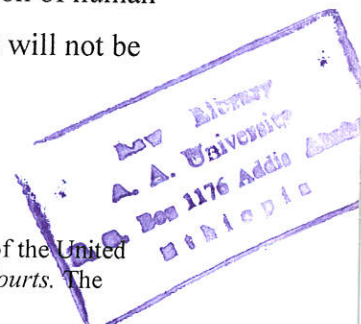
<sup>197</sup> Bianchi, A. (1997). International Human Rights Standards in National Law: The Jurisprudence of the United States. In Conforti B. and Francioni F. (Eds.), *Enforcing International Human Rights in Domestic Courts*. The Hague: Kluwer Law International, at 405

<sup>198</sup> Falk A. R., (1964). *The role of domestic courts in the international legal order*. New York: Syracuse university Press, at 140

<sup>199</sup> Bianchi, A. (1997), at 408

<sup>200</sup> Falk A. R. (1964), at 140

<sup>201</sup> Falk A. R. (1964), at 140



“Immunity is a privilege granted by international law to states to prevent abuses from being perpetrated against them. It would be contrary to elementary logic to deem that the international legal order wants to extend the cover of such a form of protection when states act in marked contrast with the foundations of the same system. Nor can the argument based on sovereignty persuasively affect the soundness of the above reasoning. One could quote plenty of authority to support the basic theory that states cannot place themselves above international law. Given the paucity of mechanisms at international law to enforce the international responsibility of a state, the grant of immunity before domestic courts may ultimately place states above the rule of law.”<sup>202</sup>

Therefore, it is apparent that under international law the subject of human rights is not deemed to be inherently domestic in nature.

It cannot be denied that judicial activism has played a major role in developing the concept of restrictive immunity as opposed to absolute immunity. As states became increasingly involved in the international commercial activities, it became hard to maintain the application of absolute doctrine. Hence, courts started to apply the rule of immunity in a very cautious manner. The acceptance of the categorization of states' acts as *jure gestionis* or *jure imperii* as a landmark in the adjudication of cases coincided with a shift of scholarly focus from more general discussions on the foundations and scope of state immunity to the evaluation of technical criteria to make the distinction effectively work.<sup>203</sup> While, *jure gestionis* is act of commercial nature by a state, *jure imperii* on the other hand, is act of governmental power or is reference to acts in the exercise of public or sovereign powers of the state. And usually, immunity is extended to *jure imperii*.

While national courts had generally the power to determine which act of a state belongs to which category, nowadays, many nations have developed legislations to this effect. The difficulties in qualifying an act as *jure imperii* or *jure gestionis* forced some states to pass domestic legislation in order to provide judges with more objective criteria of adjudication.<sup>204</sup> Although, this practice eased the difficulties in qualifying an act to either of the categories, it had also played a negative impact on the judicial activism of the courts, which proved to be vital in the development of the rule. As Bianchi confirms, to have codified the international rules of state

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<sup>202</sup> Bianchi, A. (1997), at 410

<sup>203</sup> Bianchi, A. (1997), at 408

<sup>204</sup> Bianchi, A. (1997), at 408

immunity at the level of national law has had the effect of restraining the activism of national courts, which had previously so effectively contributed to the shaping of international law on the subject and to the adjustment of the rule to the changing demands of the international legal system.<sup>205</sup>

In the wake of this development and unsatisfactory results that the rule of state immunity sometimes yields, one is obliged to look into some of the techniques those courts around the world use to obtain a positive result, especially with regards to the protection and promotion of international human rights. In other words, one has to examine some of the interpretative devices used by domestic Courts to avoid the application of state immunity to violations of human rights especially when faced with constraints imposed by those national codifications of international rules of state immunity.

It has been stated previously that the movement from the absolute doctrine of immunity to the restrictive one, has led to the removal of the application of the rule to commercial activities of states. However, this distinction is not enough when it comes to the protection and promotion of human rights, as they are not usually affected by the commercial activities of a state. But, this is not an easy task. To hold violations of fundamental human rights by foreign states justiciable, thus abandoning the old-fashioned, unconditional deference to foreign entities in the name of the sovereign character of their non-commercial acts is no more difficult than it was once to recognise non-immunity for commercial acts.<sup>206</sup> The rest of <sup>this section</sup> the chapter examines some of the methods used by national courts around the world to overcome the difficulty.

The first method of yielding a positive result emanates from the recognition of the existence of obligation *erga omnes*. This principle recognises that certain categories of rights have pre-eminence over others and that the international community has an obligation to respect those obligations. Therefore, it would be contrary to the same notion of obligations *erga omnes* to assert an obligation by states to grant immunity for violations of fundamental human rights.<sup>207</sup>

This argument is strengthened by the notion of *jus cogens*. It states that some rights have peremptory character. One method of determining this character is looking into their non-derogable nature. The concept of *jus cogens* holds that some norms, such as the prohibition of

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<sup>205</sup> Bianchi, A. (1997), at 417

<sup>206</sup> Bianchi, A. (1997), at 412

<sup>207</sup> Bianchi, A. (1997), at 413

slavery, torture, and genocide have a non-derogable nature as they are the very foundation of the law. And states may deny immunity to sanction such a grave breach of fundamental rights.

In addition, courts have used various method of interpretation to deny immunity. It is important to consider these techniques of interpretation for countries like Ethiopia with no specific statute implementing state immunity.

It is a long established rule of statutory construction both in civil law and common law countries that a domestic statute is to be construed, where reasonably possible, in a way which does not bring it into conflict with international law.<sup>208</sup> Consequently, the argument goes, that certain acts that are in clear violation of international law justify the denial of immunity. Hence, the defence of immunity is strictly limited by courts when they find that the foreign state has acted in clear violation of international law.

Another method of interpretation revolves around the implied waiver argument. It is clear that a foreign state may waive its immunity explicitly. The possibility of a foreign state to waive immunity implicitly is also admitted, but usually made conditional upon some uncontroversial conduct such as institution of or intervention in the proceedings.<sup>209</sup> However, courts have extended the implied waiver argument to human rights treaties. They argue that the mere act of signing the treaties implies a waiver of immunity. The rationale of the exception is that by the grant of immunity any substantive effect of international treaties would be robbed and states' participation would be meaningless.<sup>210</sup>

Courts also used the 'treaty exception' argument as well. The essence of the argument is that immunity should not apply if its application expressly conflicts with provisions of a treaty to which the *forum* state is a party.<sup>211</sup> This is to say that, it is understood that a state which is a party to an international human rights treaty that provide for a right to remedy implicitly accepted to allow the judicial scrutiny of foreign states act by its domestic courts.

Alternatively, courts have simply denied immunity to foreign states' acts, which are in clear violation of international law by using the 'tort exception' argument. The tort exception prescribes that immunity be withdrawn for illegal acts of foreign states which cause death or

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<sup>208</sup> Bianchi, A. (1997), at 421

<sup>209</sup> Bianchi, A. (1997), at 422

<sup>210</sup> Bianchi, A. (1997), at 422

<sup>211</sup> Bianchi, A. (1997), at 425

personal injury or loss or damage to property.<sup>212</sup> These acts of a foreign state are used as exceptions to the general rule of immunity.

Unfortunately, as stated repeatedly, one cannot determine how Ethiopian courts deal with any of the above problems due to the lack of sufficient cases invoking international instruments. Even when courts cite these instruments, they do not provide the basis for their decisions. They often reach to their decisions solely on the basis of domestic law, especially the Constitution, and then, in passing, cite international instruments to support their decisions.<sup>213</sup> There is not a single case the writer came across in which the court's decision was based solely on an international instrument.

### 5.3 Implication of the Constitutional Power Arrangement

There is a detailed explanation in Chapter 4 regarding the constitutional power arrangement. To recap, it concludes that there is no clear vertical as well as horizontal separation of power. Especially, the independence of the judiciary is severely hampered by many factors. This coupled with the inefficiency of the courts has detrimental effect on the public's perception of the judiciary. Moreover, the influence of the MOJ has a negative impact on the independence of lawyers. Hence, an environment conducive for the effective enforcement of fundamental rights has not been created yet due to the current trend of centralization and it should not be surprising to see no or limited number of cases invoking international human rights instruments as well.

Even those cases referring to these international instruments do so in passing to support their decisions already made on the bases of the Constitution and other national laws.<sup>214</sup> Usually, the challenges indicated in this chapter are resolved in the courts. Unfortunately, Ethiopian courts have not consolidated their independence yet and the practice of litigating human rights issues using international human rights instruments before the courts is very low. As a result, only time will tell how the judiciary deal with all of the challenges presented in this Chapter.

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<sup>212</sup> Bianchi, A. (1997), at 426

<sup>213</sup> Refer to cases attached in Appendix C

<sup>214</sup> Refer to cases attached in Appendix C

## Summary

As the FDRE Constitution is silent on customary international law, it is impossible to determine their enforceability within the domestic legal system. Considering the difficulty to determine rights enforceable under customary international law, the silence in the Constitution may not be a detrimental factor per se. In addition, those rights for which general consensus exists as rights enforceable under customary international law, are also incorporated in the Constitution and other legal documents, minimizing the danger of excluding customary international law from the domestic legal system.

On the other hand, human rights treaties are not considered an integral part of the law of the land until the House of People's Representative ratifies them. But, basically, the challenges in the enforcement of international human rights instruments before any domestic court in general are numerous. To cite a few, the non-self-executing character of some treaties, unsettled questions as to their status and inconsistency with domestic laws, lack of publications of treaties, language barriers, non-familiarity with the content of treaties and their external application, are the major challenges.

The above mentioned challenges are usually solved through the application of relevant provisions in constitutions and judicial practices. Unfortunately, as the judiciary in Ethiopia has not yet asserted its full independence, it may be a long time before any solution comes from the bench. Currently there are no sufficient cases to provide us with possible solutions at least to some of the problems identified.

## CHAPTER 6

### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

A democratic government with limited power is essential to the creation of an atmosphere conducive for the effective enforcement of human rights laws including international instruments. One essential element of a limited government is the division of powers both vertically and horizontally. The failure to adhere to the principle of distribution of authority is the very definition of tyranny.

This research is attempting to find out if the allocation of authority found in the FDRE Constitution and the actual practice on the ground provide an atmosphere conducive for the effective enforcement of human rights in general and international human rights instruments in particular. To answer this question, this research explored:

- the implication of the current trend of centralization on human rights enforcement and
- the negative impact of centralization on the enforcement of international human rights instruments.

This research was qualitative, drawing mostly from a review of the literature to analyze critically the effect of the constitutional distribution of powers and the reality on the ground in the enforcement of international human rights instruments in the country. The literature review also helped to uncover common challenges faced in the subject area in many countries and discern which of them has particular relevance to the Ethiopian context.

#### **Summary**

In the past few centuries, the term ‘Human Rights’ has been a source of contention and academic debate among many a scholar. However, it is John Locke’s definition of human rights as a natural right, which is the most outstanding to the development of the concept at the international level. His theory served as a springboard for the international community because it asserts that human rights are not limited to one particular ethnic, cultural or religious group.

Armed with Locke’s definition of human rights as inherent, universal, inalienable and indivisible, the international community that was shocked by the horrific incidents of the Second World War immediately propelled the concept of human rights into the international arena.

This was signified by the proliferation of human rights treaties and institutions to oversee the compliance of nations with the treaties they agreed to honour.

Ethiopia was one of the first nations that ratified most of the human rights treaties made subsequent to the Second World War. Consequently, Ethiopia has assumed obligations in the implementation of international human rights instruments. Accordingly, the State has the obligation not only to refrain from acts violating the rights recognized under the treaties, but also to take positive steps in the protection and promotion of them.

However, before taking any of those steps, the treaties have to be considered as an integral part of the law of the land. In Ethiopia, treaties signed by the executive do not have the force of law automatically. Just like other countries that follow the dualist method of incorporation, treaties have to be ratified by the Parliament to be considered as the law of the land.

The whole point of incorporating treaties into the legal system is not without reason. Two main motives can be identified. One, the lack of adequate enforcement mechanism at the international level; and two, the rejection of many states to succumb to an international adjudicating body for fear of compromising their national sovereignty.

The only alternative left on the table then was the use of domestic courts. This fact has adjoined an additional value to Ethiopians. Invoking human rights provisions in the Constitution before 'ordinary' courts is not an attractive option for victims, as the process may take several months if not years. Instead, reference to international human rights instruments at the court level will deliver victims from facing the House of the Federation.

As has been extensively illustrated in Chapter 4 of this paper, an environment conducive for the effective enforcement of fundamental rights has not been created yet due to the current trend of centralization. The FDRE Constitution and other non-constitutional factors contribute to the concentration of power at the centre to the extent of turning the federal government into an autocratic one. Consequently, it has blurred the separation of powers both vertically and horizontally.

Pertinent historical accounts verify that authoritarian governments are more inclined to violate human rights; and as such, Ethiopia's centralized power structure is a highly alarming situation. This is ultimately because it paves the way to limit the independent enquiry of governmental actions and suppresses the possibility of setting up a system of 'check and

balance'. It also gives the impression that the government wants to avoid any sort investigation in to its actions.

This claim gets all the more stronger if, as discussed in Chapter 5, one looks at the failure of the government to solve the challenges faced in the domestic enforcement of international human rights. The drift to centralization in the federal system provides a sensible explanation to this failure: it is in the nature of authoritarian governments to limit all possibilities leading to criticisms from any independent organ.

Furthermore, the centralized structure partially explains the virtual absence of litigations invoking national and/or international human rights instruments before Ethiopian courts. The people's perception of government and the judiciary, which is a discouraging factor in bringing complaints before courts, is not an illusion all together. The decision of an injured party to do otherwise and go to the courts may not bear fruit, as in reality the courts, both at the federal and state level, lack many elements of a true independent judiciary, which is the result of the centralizing trend.

The absence of cases in the area can be also explained by factors that are not connected to the current trend of centralization. As the FDRE Constitution is silent on customary international law, it is impossible to determine their enforceability within the domestic legal system. Considering the difficulty to determine rights enforceable under customary international law, the silence in the Constitution may not be a detrimental factor per se. In addition, those rights for which general consensus exists as rights enforceable under customary international law, are also incorporated in the Constitution and other legal documents, minimizing the danger of excluding customary international law from the domestic legal system.

On the other hand, human rights treaties are not considered an integral part of the law of the land until the House of People's Representative ratifies them. But, basically, the challenges in the enforcement of international human rights instruments before any domestic court in general are numerous. To cite a few, the non-self-executing character of some treaties, unsettled questions as to their status and inconsistency with domestic laws, lack of publications of treaties, language barriers, non-familiarity with the content of treaties and their external application, are the major challenges.

The above mentioned challenges are usually solved through the application of relevant provisions in constitutions and judicial practices. Unfortunately, as the judiciary in Ethiopia has

not yet asserted its full independence, it may be a long time before any solution comes from the bench. Currently there are no sufficient cases to provide us with possible solutions at least to some of the problems identified.

In the meantime, however, the government should take some steps towards resolving the challenges. A good start will be to assert the independence of the judiciary and taking the right steps at the right time to change the attitude of the people towards the judiciary.

Yet, as stated previously, power remains highly centralized in Ethiopia. As authoritarian governments are less prone to take concrete steps towards the betterment of the protection and promotion of human rights, the centralizing trend gives a plausible explanation to the failure of the Ethiopian government to do anything in unravelling some of the challenges.

## **Conclusions**

A democratic government with limited power is essential to the creation of an atmosphere conducive for the effective enforcement of human rights laws including international instruments. One essential element of a limited government is the division of powers both vertically and horizontally. The failure to adhere to the principle of distribution of authority is the very definition of tyranny.

There is a growing trend of centralization in the Federal Democratic Republic of Ethiopia. As a result, vertically power is still concentrated at the centre and there is no significant separation of powers horizontally as well. This paves the way for the creation of an authoritarian government and for a possible violation of the constitutionally protected human rights. Furthermore, the prospect for asserting the independence of the judiciary is bleak. This fact in turn will have a negative impact on the public's perception of the judiciary.

As long as the centralizing trend continues, the likelihood of the government to violate fundamental rights will increase, as it is the typical inclination of all authoritarian governments. In case of violations, the people are less inclined to go to the courts, as they will not perceive them immune from the pressures of the two branches of government. Even if they decide to go, the courts are less likely to provide justice, as they are not fully capable and truly independent.

Therefore, it is not only high time to end the centralized rule; but such a move will also be indispensable to endorse the protection and promotion of fundamental rights in general. More particularly, bringing this centralization trend to a halt will surely reduce, and in time avoid,

existing challenges in the enforcement of international human rights instruments before domestic courts.

## **Recommendations**

### *Recommendation 1*

#### ***Concentration of power both vertically and horizontally has to end.***

##### *Vertically*

- The shared-rule aspect of federalism must get equal emphasis with the self-rule aspect. In this respect, formal institutional mechanisms must develop to ensure the proper operation of the tasks shared between the two layers of government. Therefore, a legislative second house with some veto powers on key issues is imperative.
- Intergovernmental relations through party channels must end. The mechanism may work for a while given the party congruence at the federal and state level. However, disputes will inevitably arise that cannot be solved through party channels once the party congruence ends. Hence, formal institutions independent from the influence of political parties must be allowed to evolve in lieu of the party channels that are currently in operation.

##### *Horizontally*

- **On the independence of the judiciary:** Judicial independence must be consolidated. The interference from the two branches has to cease. Independence of the individual judges and the institution vis-à-vis the two branches are imperative to the independence of the judiciary.

To alleviate the problem of the independence of individual judges and to avoid the appointment of politically favourable judges, a more transparent recruitment and selection of judges must be set up. Similarly, the transparency must also extend to the procedures employed for administering judges' career path to avoid the exclusive promotion of politically favourable judges. The evaluation must not only be transparent but it also has to be based on pre-established rules for the same reason.

Regarding the independence of the institution vis-à-vis the two branches, the judicial review power and the power to expound the Constitution must be transferred from the HOF to the judiciary. The concept of a limited democracy as opposed to pure democracy calls for a mechanism to check the powers of the majority to the detriment of the minorities and individuals. A majoritarian organ cannot be expected to interpret the actions of another majoritarian organ in an impartial manner. Therefore, the appropriate body for the task must not be a majoritarian, but rather an independent judiciary.

- **On the independence of lawyers:** Independence of lawyers must also be consolidated. Licensing of lawyers that is carry out by the MOJ, which combines executive and judicial (prosecution) competence, must be transferred to the Bar itself. This is important as human rights litigations usually involve the government as one of the parties. The independence of a lawyer is especially important when a defence lawyer meets the MOJ in its capacity as a prosecutor in a political case.

## *Recommendation 2*

### *The people's attitude towards the judiciary has to change.*

One of the major problems in human rights litigation is the people's conception of the judiciary that is likely to result from the reality on the ground. Given the reality and the political history of the country, it should not be surprising if the public think that courts are not responsive and are also biased towards the government. The government can change this attitude by taking several steps. Some of them are identified as follows.

- **On accountability:** As judges are normally accountable to the people, their accountability has to be transparent so that people's confidence on the judiciary improves when they witness judges punished for their wrong doings as opposed for political reasons. In addition, other channels for complaints must be set up. In this regard, there is a need to strengthen the Ombudsman and the Human Rights Commission. Civil societies and an independent media also play an important role in the area.
- **On the quality of justice:** The government can also achieve the aforementioned goal by not only consolidating the independence of the judiciary, but also taking steps in the improvement of the quality of justice. Currently, the quality of justice is very poor owing

to the many reasons identified in Chapter 4. The problem can be ameliorated, for instance;

- Through implementation of a more transparent system to evaluate and promote judges based on pre-established rules so that they will be promoted solely based on their merits.
  - Increased training for the judges and administrative staff should also take priority, as the problem of poor quality of justice is not limited to the appointment and promotion of politically favourable judges, but also because most lack sufficient legal knowledge.
  - The legal knowledge of judges is also affected by their limited access to legal documents, which in turn affects quality of decisions. Hence, their access should be increased through the dissemination of the CD-ROM containing laws and the establishment of court libraries.
  - Judges working conditions should also improve to boost their motivation in delivering well-researched decisions.
- **On backlog of cases:** Equally important is the problem of backlogs. Human rights violations need immediate solutions. Justice delayed is justice denied. The sluggish process in the courts cannot boost the confidence of the people on the judiciary. Hence, concrete steps should take place to solve the problem.

### *Recommendation 3*

#### ***Treaties must clearly get the force of law.***

In addition to the above recommendations, the government must take actions for the proper enforcement of treaties at court level. For instance, Parliament must commence publishing and translating treaties it ratifies so that the courts can proceed in tackling problems related to the question of statutes, inconsistency, non-self-executing character and external application of treaties. For the same reason, it must also publish and translate treaties already ratified.

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APPENDIX B

QUESTIONNAIRE

What is your current occupation?

- A Judge
- A Lawyer

How long have you worked in your current occupation?

Other than undergraduate courses, have you received special training in the fields of human rights?

- Yes
- No

Are you familiar with the contents of international human rights instruments?

- Yes
- No
- Only to some extent

Do you know when treaties are considered as part of the law of the land?

- Yes
- No

If you do, please specify.

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How do you characterize the attitude of the judiciary towards applying provisions of human rights treaties?

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Do you believe that the judiciary have the duty to take judicial notice of human rights treaties that are considered as the integral part of the law of the land?

- Yes
- No

If no, why?

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Do you think that international human rights instruments are redundant, as the FDRE Constitution ensures the protection of human rights?

- Yes
- No

Please specify \_\_\_\_\_

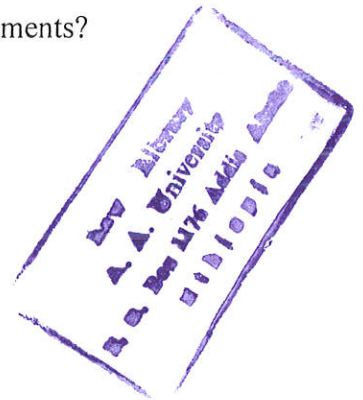
In how many instances have you cited international human rights instrument to help make your decisions?

Have you ever made a decision solely based on international human rights instruments?

- Yes
- No

What is the status of human rights treaties in the hierarchy of laws in Ethiopia?

- At a higher rank than the Constitution
- At equal level with the Constitution
- Below the Constitution but at a higher rank than Proclamations
- At equal level with Proclamations
- At a lower rank than Proclamations
- Other \_\_\_\_\_



Do you think the failure of the ratifying Proclamations to attach the treaty ratified creates a problem in the enforcement of the ratified document before Ethiopian courts? Why?

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Do you think the failure to translate the ratified documents into Amharic creates a problem in the enforcement of the ratified document before Ethiopian courts? Why?

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Can you think of challenges in the enforcement of human rights treaties before Ethiopian courts?

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APPENDIX C

CASES

ዓኖፕ: አየነፀ ለገገህ

ያለፀ ተሸፀ

ለሰፋ ለሰርፕ

ከሣጠ: ዐጋቤ ሕገ ፋጅ ለርጋፀ ቀረቡ

ተከሣሽፕ ለ ነ ለሰ ተሸ ገሰረፀ ደሀን ለገገፕ ተከሣሽ ከዓረጋጋ ሴተ ቀረቡ::

ፀዘገቡ ዛሬ ሊቀርብ የቻለፀ የተከሣሽ ፀላጃ ለባተ ልጃ ለገገፕ ተከሣሽ በፀሀ ነ .  
ሴተ ከፍ ተፍ ዳባ ደርሰበታሰ ሰላላ ነፀ:: ተከሣሽ በሰፀ ተገገፍ ጋቤ ለባሰ ቀርቦ  
.. የዓረጋጋ ሴተ ፖሊሰፕ ሦሣ ይህና ፍላ በፈር ፕ በሰላፍና በገገ ደበደቡፕ ፕ ይህ  
የሀ ነፀ ሰኔ 13 ቀን 95 ዓ.ም ከዓነ ለሰገገገ ሰዓተ ረባ ገገፀ ነፀ ፕ በፈር የ  
ተፀ ታፀ ስላላፕ ይሰግፍል ፕ የቁ ለገባሣ ሀሰፒታሰ ለሕዝቦና ሦጃ ለሰጋ የለፕ ተባ  
ተለሰቡ ፕ ለሰባህገ ይረቡ ሦገፕ ዓይ ነተ የክሆ ርገታ ለሰገገሆ ሰገገ ፀ ስባ  
ለገገፀ ተገ ለሰፀፕ ለፕ::

የሰገብ ለሰባ ዓረጋጋ ሴተ ጳላረ ነገ በዓለተ ለተ ተፀለጸ ገሰረ ለገዛለሰ ደር ቀር  
በፀ ሰፀ የተ ፕ ደርገተ የሀ ነፀ ሰኔ 11 ቀን 95 ዓ.ም ነፀ ፕ ለ ነ ለገገገፈሀተ  
በገዛፀ ስሰገተ በገላ ዘፍባ ነፀር ፕ በገባፀ ፀሰገ በዙ ለሰረፍ ለላ ፕ ፖሊሰፕ ዘፍባ  
ሰዘገብ ታራጋገፕፕ ፀደ የክፍላፕሁ ገቡ ሰፈተፀ ተከሣሽ ለሰገባፕ ይላላ ፕ በዘሀ በተ  
ከሣሽና በፖሊሰፕ ፀባባሰ ጥቀጥ ተረገር ተከሣሽ ፖሊሰፕን ሰፀ ታ ፖሊሰፕ ፀ ታገ ባይ  
ሉፕፕ በላላፕ በፖፕ ገገ ፖሊሰፕ ተከሣሽን ለገገፀ ተፀ ፀረፕ ደርሰፍል ፕ ዳባ ደባፀ  
ሪፕርተ ለላተደረገፕ ፕ ታራጋገ በገላ ፀቀባተ ለይ ታለፕ ፕ የደበደቡተ ፖሊሰፕ ገገፀ  
ተባርገፕ ለፀሣ፤ ለላሰተገገረ ቀርቦ ለየታፕ ነፀ ፕ ለላ : ፍ/ቤተፕ ተታፕፕ ተፀ  
ዘገብ ሰገፕ ጳ::

ተ ፀ ዘ ዘ

ተከሣሽ ለላፀ ተከፀን ሰለገለጸ ዓረጋጋ ሴተ ዛሬፀተ ሀሰፒታሰ ፀሰገ ለገገፕ ሰፀረ  
ፕረፀ ታላ::

ዳለተከሰሰ ገለባፕ



የሥነ ልቦና

እኔ በዚህ ላይ በሁለተኛ ደረጃ የተገለጸው ላይ በአባላዊ ከተሠወደ ተዕዛዝ የምለይ ሲሆን የምለይበትም ገና ተከላሽ ችሎታ ተርቦ ለግዳት ለገደታለሁ በውኃት ለጁንን ጫን ላትን ሲሆን ገና ተከላሽም በበርካታ የግ/ቤት ጠባቂዎች በጥላና በብረት መታትን ገልጾለሁ። የአ/አ ግ/ቤት ኃላፊም ችሎታ ተርቦ ገና ተከላሽ ለሌሎችም የሚል ያል ያል በው ሲሆን ችግሩ ገና ተከላሽን ብቻ ይመለከት ለገደብና ግ/ቤት የጥላ ቀጣይ ለገደ ላላ በችሎታ ገልጾለሁ። ይህ ከሆነ ሕጉ ስለግረግሪያ ቤት ለሰረኞች ለያያዝ ምን ይላል በገላ የሲ/ፊ/ጊ/ፊ ሕገመንግሥት ለገጽ 21/1 በጠበቀ ሥር ያሉና በፍርድ የታዘሩ በዎች ሰበግዊ ከብረቱን በሚጠበቁ ሁኔታዎች ልጁን የወያዝ ወብት ለላቸው ይላል። የአለም ስፍራ የሲቪል ስና የፖሊቲካ ወብቶች ስምምነት ለገጽ 10/1 ይህንን ይደገፋል በሌላሰረኞች ለያያዝ የተቀጠሙ መሠረታዊ ድንጋጌዎች በተ/ወ/ድ/ር/ዘ/ላ/ገ ቁጥር 663 ለ/ሌ/ላ በጥ955 ዓ.ም ተቀባይነት ያገኘው ላይ በሌላሰረኞች ሲገኙና ቀጣይ ሲዘረ ዘር የሰውነት መቻታ ቀጣይ ሕገወግ ለገደሆነ ስና ሲገኙን በደህንነት ለወያዝ ክልሆነ በበተቀር ለሰረገገ ለገገላሆነ ይገለጻል። በዚህ መሠረት ገና ተከላሽ ላይ ለገደተገለጸው ለበታው በተሳተፈበት ሁኔታ በችሎታ ግዳት ለገደሚታለሁ ከሕግ ተቆራሪ በቀን ለሠራሪ የወ ያወ በግደወሰሰ ከሌላሰረገው በላይ ኃይል በመቀጠል ቁጥጥር ሥር ለግዳል በሚያስፈልገው በላይ የታተ ለገደደረሰበት የሚያስጠረጥር በደውነቱ ወኛሩን ወረዳት ችያለሁ። ለውነ ታው ይህ ከሆነ ይህ ፍ/ቤት ያለበት በኃላፊነት ምንጭነው የሚለው ነጥብ ይነሳል። በመሠረት ፍ/ቤት ተከላሹን ግ/ቤት ፍ/ቤት በአለው ከሰ ምክንያት ለዚህ ሆኖ ለገገላረከር በሌላከው የገና ተከላሽ ለያያዝና ለጠባባቅ ፍ/ቤትን በቀጥታ የሚመለከት ነገር ነው። ላይ በተገለጸው በሲ/ፊ/ጊ/ፊ ሕገመንግሥት ለገጽ 21/1 የታዘሩ በዎች ሰበግዊ ከብረቱን በሚጠበቁ ሁኔታዎች የወያዝ ወብት ለላቸው የሚለው የሕገመንግሥት ድንጋጌ ከሚያስከብሩት ለገገ በሲ/ፊ/ጊ/ፊ ሕገመንግሥት ለገጽ 13/1 መሠረት ግንኙም ደረጃ የሚገኙ የፈጻሚ ወንገሥት የገናነት ስባሎች በዚህ ምዕራፍ የተከተተን ድንጋጌ ዎች /ለገጽ 21/1 የግደወሰሰ/ የግከበርና የግሰከበር ኃላፊነትና ገገታ ለሌላቸው በሌ ሚል ይህ ፍ/ቤት የገና ተከላሽ በግ/ቤት የሚገባውን ወብት በተመለከተ የመመለከት ሥልጣን ለሌላው። በተለይም ይህ የ1 ገለሰብ ብቻ ገገላረ ሃይሆን የፍ/ቤት ሥራ በግዝ ለገገ ተሰቀ

ኃላፊ የተሰጠው የመንግሥት አካላት አሰራርና ሕገመንግሥታዊ መብትን የሚያሰክት ስለሆነ ለገለጸው የሚተጠኝ ነገር አይደለም። ይህ ፍ/ቤት ጉዳዩ ላይ ሥልጣን ቤረቱም ለመመርመር ለማዕረግ ብሎ ከሰ ለማቅረብ ለሰጠው ስልጣንና ለቀጭ ስለሰጠው በሀገሪቷ ሕገ መንግሥት ለማዕረግ ስልጣን የተሰጠው ይህን ጉዳይ ለማዕረግ ባለው የመንግሥት ተቋም ተሳተፎ ለገደቦ በታች ያለው የፈጸሙ ፍትህ ሚኒስቴር ስለሚሆን ገና ተከላሽን በተመለከተ ያለውን ጉዳይ ለጠርቶ ከሰ የሚመሰረት ለገደቦ ለገዳሚነት ወይም ለላ ሕጋዊ ስርዓት ለገዳሚነት በተገኘ ይህ ፍ/ቤት በሚያደገው ሁኔታ ማዘዝ ስለሰጠ ጭቅም መበታተል ስለሰጠ ጉዳዩ ለገለጸው በታች ወተው የለሰውን በማለት የሰጠውን ማዘዝ ስለሰጠው ለሰጠው።

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 3/11/95  
 ለአዲስ አበባ  
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 3/11/95

ገናኛ ፣  
 ያለው ተሾመ

ዳኞች

ውብሽት ክብሩ

ልዑል ገ/ማርያም

ውሃብ ማሞ

አመልካች የፌዴራል ፖሊስ ወንጀል ምርመራ መምሪያ- ተስፋዬ ገ/አግዚአብሔር ቀረቡ

ተጠርጣሪዎች ናአድ ምሳሌ

እያሱ በርሄ

ኢንጅነር ጌታቸው እሸቱ

ሰለሞን አየለ - ቀረቡ

ፍ/ቤቱ በአመልካች በኩል የቀረበውን ጥያቄና በተጠርጣሪዎች የቀረበውን መልስ እስካሁን በመዘገቡ ከተሰጡት ትዕዛዞች ከሕጎች እና ከሕገ መንግሥቱ ጋር በማዛመድ መርምሮ ተከታዩን ትዕዛዝ ሰጥቷል።

ት ዕ ዛ ዝ

በዚህ መዘገብ የተጠረጠሩትን ጨምሮ የፌዴራል ፖሊስ የወንጀል ምርመራ መምሪያ ምርመራ የሚያጣራባቸው አሁን በጥበቃ ሥር የሚገኙት 38ቱ ተጠርጣሪዎች ላይ ፖሊስ ምርመራውን ከጀመረ ረዘም ያለ ጊዜ መውሰዱ ይታወቃል።

ምርመራው ሲጀምር የተያዙት ተጠርጣሪዎች አስቀድሞ በመጀመሪያ ደረጃ ፍ/ቤት ቀርበው የነበሩ ሲሆን ከዚህ ፍ/ቤት እየቀረቡ በጥበቃ ሥር ሆነው ምርመራ እንዲደረግ ሲታዘዝ ከስድስት ወር በላይ ጊዜ ወስዷል።

ይህ ፍ/ቤት ከስድስት ወር በላይ ለሆነ ጊዜ ተጠርጣሪዎች በጥበቃ ስር ሆነው ምርመራ እንዲደረግ ሲያዝ የጉዳዩን ውስብስብነት ግምት ውስጥ በማስገባት ነበር። በመሆኑም ከአንድም ሁለት ጊዜ ፖሊስ ለምርመራው በቁ ጊዜ ወስዷል ተብሎ ጉዳዩ ለዐ/ሕግ እንዲላክ ተደርጓል።

የፌዴራል የስነ ምግባር እና የፀረ መውሰድ ኮሚሽን ዐ/ሕግም ጉዳዩን በመመርመር ተጨማሪ ምርመራ ያስፈልጋል በማለት ለፖሊስ መመሪያ በመስጠቱ ፍ/ቤቱ ይህንኑ ግምት ውስጥ በማስገባት ወደ ኋላ ተመልሶ ተጠርጣሪዎች በጥበቃ ስር ሆነው ምርመራው እንዲካሄድ ፈቃድ ሰጥቷል።

ይሁን እና ይህን ያህል ጊዜ ተጠርጣሪዎቹ በጥበቃ ስር ሆነው ምርመራው እንደደረግ ቢፈቀድም በየጊዜው ሊሰሩ የሚገባቸው ስራዎች ሳይሰሩ ተደጋጋሚ ጥያቄዎች በፖሊስ እየቀረቡ መሆኑን ፍ/ቤቱ ሲረዳ የተጠርጣሪዎች ሕገ መንግሥታዊ

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12/20/5

መብት እየተሸራረፈ መሆኑን አረጋግጦ ለምርመራው ተጨማሪ ጊዜ የማይፈቅድ መሆኑን ገልጾ ዐ/ሕግ በጉዳዩ ላይ ክስ የሚመሰርት ቢሆን ለመጠባበቅ ብቻ ሲባል የ15 ዓን ጊዜ ሰጥቷል።

ፍ/ቤቱ ይህን ትዕዛዝ ሰጥቶ መዝገቡን የዘጋ ቢሆንም ግን የፌዴራሉ የስነ ምግባር እና የፀረ ሙስና ኮሚሽን ዐ/ሕግ አሁንም በጉዳዩ ላይ ቀጣይ ምርመራ እንዲደረግ ተጨማሪ መመርያ በመስጠቱ ጉዳዩን ዛሬም ፖሊስ ለፍ/ቤቱ በማቅረብ ለተጨማሪ ጊዜ ተጠርጣሪዎቹ በጥበቃ ስር እንዲቆዩ ነው የጠየቀው።

እነዚህ ተጠርጣሪዎች የተጠረጠሩት በሙስና ወንጀል መሆኑ አስቀድሞ የተገለፀ ነው። በሙስና ወንጀል የተጠረጠረ ሰው ደግሞ በአዋጅ ቁ 239/93 አንቀጽ 2 የዋስትና መብት የማይኖረው መሆኑ ተደንግጓል። በዚህ አዋጅ በሙስና ወንጀል የተጠረጠረ ሰው የዋስትና መብት የለውም ሲባል ግን ፖሊስ ወይም ኮሚሽኑ ጠርጥረንዋል የሚሉትን ሰው ፍፁም ላልተወሰነ ረጅም ጊዜ በእስር እንዲቆይ ሊያደርጉ ይችላሉ፤ ይህንንም ማንም ሊያስቆም አይችልም ማለት አይደለም።

ተጠርጣሪዎቹ ወደ እዚህ ፍ/ቤት በየወቅቱ እየቀረቡ በጥበቃ ስር እንዲቆዩ ጥያቄ ሲቀርብ የነበረውም ፍ/ቤቱ ተጠርጣሪዎች በጥበቃ ስር እንዲቆዩ የሚደረግበትን ምክንያት በመመርመር ተገቢ ትዕዛዝ መስጠት ያለበት በመሆኑ ነው።

ፍ/ቤቱ የዚህ ዓይነት ጥያቄዎች ሲቀርቡ የሚሰጡትን ምክንያቶች አጥጋቢነት በአንድ በኩል የተጠርጣሪዎቹን ሰብአዊ መብት ደግሞ በሌላ በኩል በማመዛዘን ትዕዛዝ መስጠት ይኖርበታል።

የአፈዲሪ ሕገ መንግሥት አንቀጽ 19 የተያዙ ሰዎችን መብት አስመልክቶ በነዑስ አንቀጽ 4 ላይ ሲደነግግ

"የያዘቸው የፖሊስ መኮንን ወይም የሕግ አስከፊዎች በጊዜው ገደብ ፍርድ ቤት በማቅረብ የተያዙበትን ምክንያት ካስረዳ ፍርድ ቤቱ የአካል ነፃነታቸውን እንዲያስከብርላቸው የመጠየቅ ሊጣስ የማይችል መብት አላቸው። ሆኖም ፍትሕ እንዳይጓደል ሁኔታው የሚጠይቅ ከሆነ ፍርድ ቤቱ የተያዘው ሰው በጥበቃ ሥር እንዲቆይ ለማዘዝ ወይም ምርመራ ለማካሄድ ተጨማሪ ጊዜ ሲጠየቅ አስፈላጊ በሆነ መጠን ብቻ ሊፈቀድ ይችላል። የሚያስፈልገውን ተጨማሪ የምርመራ ጊዜ ፍርድ ቤቱ ሰውስን ኃላፊ የሆኑት የሕግ አስከፊዎች ባለሥልጣኖች ምርመራውን አጣርተው የተያዘው ሰው በተቻለ ፍጥነት ፍርድ ቤቱ እንዲቀረብ ያለውን መብት የሚያስከብር መሆን አለበት" ይላል።

ይህ ድንጋጌ የተያዙ ሰዎች በጥበቃ ሥር እንዲቆዩ ሊታዘዝ የሚችለው በተወሰኑ ሁኔታዎች ብቻ እንደሆነ የሚገልፅ ከመሆኑም በላይ የሚሰጠው ትዕዛዝ በተቻለ ፍጥነት

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የተያዘው ሰው ፍርድ ቤት እንዲቀርብ ያለውን መብት ማስከበር ያለበት መሆኑን ያረጋግጣል።

ይህን ሕገ መንግሥታዊ የሰብአዊ መብት ድንጋጌ ይህ ፍ/ቤትም ሆነ ሌሎች ጉዳዩ የሚመለከታቸው የሕግ አውጭም ሆነ የሕግ አስፈጻሚው አካላት ማክበርም ሆነ ማስከበር አለባቸው።

ይህ ግዴታ በሁሉም አካላት ላይ በዚህ ሕገ መንግሥት አንቀጽ 13/1/ ተጥሏል።

ከሕገ መንግስቱም ባሻገር ኢትዮጵያ የተቀበለቻቸው እና የሕገ አካል ያደረገቻቸው አለም አቀፍ የሰብአዊ መብት ስምምነቶች የተያዙ ሰዎችን ይህንን መብት ያረጋግጣሉ።

ከእነዚህ ስምምነቶች መሀከል አንዱ የሆነው "International Covenant on civil and political rights" በአንቀጽ 9/2/ የተያዙ ሰዎች የተፋጠነ ፍትሕ ማግኘት መብታቸው መሆኑን ያረጋግጣል።

እነዚህን መብቶች ደግሞ ማክበርም ሆነ ማስከበር የፍ/ቤቶች አንድ ግዴታ ነው።

ይህ በመሆኑም ይህ ፍ/ቤት የቀረበለትን ጥያቄ የሚመለከተው ይህንን የተያዙ ሰዎች መብት በአንድ በኩል በመያዝ በሌላ በኩል ደግሞ ፖሊስ የቀረበውን ምክንያት በሌላ በኩል በመያዝ ነው።

ከላይ እንደተመለከተው በሙስና ፖሊስ ጠርጥራዎች የላቸውን ተጠርጣሪዎች በጥበቃ ሥር አድርጎ ምርመራውን ማካሄድ ከጀመረ የ6 ወራት ጊዜ አልፏል። ከፍ ብሎ እንደተጠቀሰውም ፍ/ቤቱ በጉዳዩ ላይ ተደጋጋሚ ትዕዛዞች ሰጠው ተጠርጣሪዎቹ የተፋጠነ ፍትሕ የማግኘት መብታቸው እንዲጠበቅ ፖሊስም ምርመራውን አድርጎ ለጉዳዩ እልባት እንዲሰጠው ለማድረግ ጥረት ሲያደርግ ቆይቷል።

በመሰረቱ በዚህ ጉዳይ ምርመራ የማድረግ ስልጣን የፌዴራል የስነ ምግባር እና የፀረ ሙስና ኮሚሽን መሆኑ ይታወቃል። ይሁን እና ምርመራውን እያካሄደ ያለው ይህንን ምርመራ እንዲያካሄድ በኮሚሽኑ ትዕዛዝ የተሰጠው የፌዴራል ፖሊስ ወንጀል ምርመራ መምሪያ ነው።

ኮሚሽኑ የጉዳዩ ዋና ባለቤት እንደመሆኑ ምርመራውን ሌላ አካል እንዲያደርግ ትዕዛዝ ሲሰጥ ትዕዛዙን ሰጥቶ መቀመጥ ብቻ ሳይሆን ምርመራው በምን መልኩ

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እየተካሄደ እንደሆነ በየጊዜው መከታተል፣ ተገቢ የሆኑ ትዕዛዞችንም መስጠት ይኖርበታል። የሙስና ጉዳዮች ራሱን በቻለ የተለየ አካል ምርመራ እንዲደረግባቸው፣ ለክስ የሚያበቃ ነገርም ሲኖር በዚህ አካል ክስ እንዲቀርብ የሚደረግበት አንዱ ምክንያት ጉዳዩ ከስር ጀምሮ በተገቢ ጥራት ለመከታተል እንደሆነ ይታመናል። በዚህ መልኩ ኮሚሽኑ ክትትል ማድረግ ስራው በጥራት መከናወኑን የማረጋገጥ ብቻ ሳይሆን ተጠርጣሪዎች በምልልስ ለረጅም ጊዜ በእስር እንዳይቆዩ የማድረግ ጥቅምም አለው።

በዚህ ጉዳይ እየተደረገ ያለው ምርመራ ሲታይ የፌዴራል የስነ ምግባርና የፀረ ሙስና ኮሚሽን ዐ/ሕግ ምርመራውን እንዲያደርግ ለፖሊስ ትዕዛዝ ከሰጠ በኋላ ጉዳዩን ለመከታተል ያደረገው ጥረት አለመኖሩ ነው የሚያረጋግጠው። የኮሚሽኑ ዐ/ሕግ በተደጋጋሚ ጊዜ /3ጊዜ/ መመሪያ በመስጠት ጉዳዩን የመለሰው ይህንኑ ስራ ማከናወን ባለመቻሉ ነው።

ኮሚሽኑ ከመጀመሪያው ጀምሮ ጉዳዩን የሚከታተል እና ምርመራው ከመጠናቀቁ በፊትም የሚያውቀው ቢሆን ዛሬ ማጣሪያ ይደረግባቸው ብሎ የነሳቸውን ነጥቦች አስቀድሞም ቢሆን ሊያነሳቸው ይቻል ነበር። ይሁን እና ይህንን ሕግ የጣለበትን ኃላፊነቱን በወቅቱ ሊወጣ ባለመቻሉ ዛሬም ለጉዳዩ እልባት መስጠት ካለመቻሉም በላይ ተጠርጣሪዎች ለተጨማሪ ጊዜ በጥበቃ ሥር እንዲቆዩ ለቀረበው ጥያቄ ምክንያት እየሆነ ነው ያለው።

ምርመራውን በማከናወን ላይ ያለው የፖሊስ ክፍልም ቢሆን ተጠርጣሪዎች ከ6 ወር በላይ ለሆነ ጊዜ ጥበቃ ስር ሆነው ምርመራ እንዲያደርግ ተፈቅዶለት ምርመራውን ሊያጠናቅቅ አለመቻሉ በእርሱም በኩል ኃላፊነቱን በሚገባ አለመወጣቱን የሚያረጋግጥ ነው። በቀዳሚዎቹ ቀጠሮዎቹ በተመሳሳይ ምክንያቶች ተደጋጋሚ ቀጠሮዎች ሲጠየቁ መቆየታቸው ይህንኑ ነው የሚያረጋግጠው።

ፖሊስ በበኩሉ ለተጨማሪ መመሪያው ምክንያት የሆነው የኢትዮጵያ ቴሌኮሙኒኬሽን ኮርፖሬሽን መሆኑን ነው የሚገልፀው። ኮርፖሬሽኑ ለሚቀርቡለት ጥያቄዎች እርስ በራሳቸው የሚቃረኑ መልሶች እየሰጠ ያስቸገረው መሆኑን ቀድሞውኑም ቢሆን የተረዳው ግን ምንም መፍትሔ ያላገኘለት ነገር እንደሆነ ነው የሚገልፀው።

12 20 1

በጥቅሉ ሲታይ ይህ ተጠርጣሪዎችን ከ6 ወር በላይ ለሆነ ጊዜ በጥበቃ ስር እንዲቆዩ ያደረገው ምርመራ እልባት ሊያገኝ ያልቻለው የጉዳዩ ባለቤት የሆነው የፌዴራል የስነ ምግባር እና የፀረ ሙስና ኮሚሽን ዐ/ሕግ፣ ምርመራውን የያዘው ፖሊስ እና ፖሊስ እንደሚገልፀው የወንጀሉ ተጠቂ የሆነው የኢትዮጵያ ቴሌኮሙኒኬሽን ኮርፖሬሽን ኃላፊነታቸውን በሚገባ ባለመወጣታቸው ነው። እነዚህ አካላት ደግሞ ከአሁን በኋላም ቢሆን ኃላፊነታቸውን ሊወጡ የሚችሉ መሆኑን አይታወቅም። ዐ/ሕግ ዛሬም ቢሆን መመሪያ የሰጠባቸው አንዳንዶቹ ነጥቦች አስቀድሞ የተገለፁ ግን ያልተሰሩ መሆናቸው፣ ዐ/ሕግ ፖሊስን ፖሊስ ደግሞ ኮርፖሬሽኑን እየወቀሱ መወዛገባቸው ይህንን አመለካከት ነው። በሌላም በኩል ዐ/ሕግ መመሪያ የሰጠባቸው አንዳንዶቹ ነጥቦች ሲታዩ የራሱን ውሳኔ የሚጠይቁ እንጂ የሌላን ወገን ሥራ የሚጠይቁ አለመሆናቸው ይህንን የሚያጠናክር ነው።

በዚህ ምርመራ ይህን ያህል ጊዜ ከተወሰደ በኋላ የተደረሰበት የተጨማሪ ነገር አለመኖሩ እና አሁንም ቢሆን ካለፈው የተለየ ሥራ የሚሰራ መሆኑን የሚያሳምን ነገር አለመኖሩ ኮሚሽኑም ሆነ ፖሊስ ለፍ/ቤት ሊያሳዩ የሚችሉት ጉዳይ ያላቸው መሆኑን የሚያረጋግጥ መሆኑን ፍ/ቤቱ ግንዛቤ ወስዷል።

በሌላ በኩል ፖሊስም ሆነ ኮሚሽኑ ይህንን ለፍ/ቤቱ ማሳየት ባልቻሉበት ሁኔታ ተጠርጣሪዎቹን ከዚህ ለበለጠ ጊዜ በጥበቃ ስር እንዲቆዩ ማድረግ በኢ.ፌ.ዲ.ሪ ሕገ መንግሥት፣ በአለም አቀፍ የሰብአዊ መብት ስምምነቶች እና በሌሎች ሕጎች እውቅና የተሰጠውን የተያዙ ሰዎች የተፋጠነ ፍትሕ የማግኘት መብታቸውን በእጅጉ የሚቃረን ሆኖ ፍ/ቤቱ አግኝቶታል።

በመሆኑም ፍ/ቤቱ በአመልካች የፌዴራል ፖሊስ የወንጀል ምርመራ መምሪያ የቀረበውን ጥያቄ ባለመቀበል ይኸው አመልካችም ሆነ የፌዴራል የስነ ምግባርና የፀረ ሙስና ኮሚሽን ዐ/ሕግ ጉዳዮቸውን በቅጡ ለፍ/ቤቱ ሊያሳዩ ባለመቻላቸው የተጠርጣሪዎችን የተፋጠነ ፍትሕ የማግኘት ሕገ መንግሥታዊ መብት መሰረት በማድረግ በዚህ መዝገብ የቀረቡት ተጠርጣሪዎች/ ከአስር እንዲፈቱ አዟል። መፍቻ ይፃፍ።

መዝገቡ ተዘግቶ ወደ መዝገብ ቤት ይመለስ።

*Handwritten signature*

*Handwritten signature*

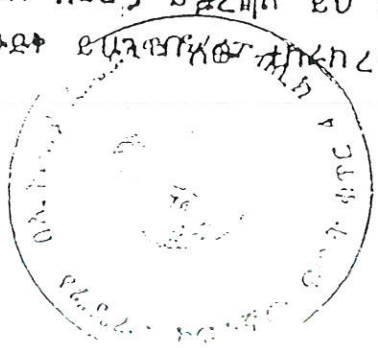
*Handwritten signature*



በሉ ዋናውን የመለስ ሠጥቻ ጥያቄ የሆነ ድጋፍ የለውም ነገር ገን የለውም ሠራተኛ  
 ወ ነገ ደመወዝ ጠር 55 ከፍ አይደረገ የጠጠበት ግብረጃ ቱርባ ቢታይና አርገጥ ከሆነ  
 የተደመረ አሠራር ጽ ነው የሚያሰገን ሁኔታ ወኖረን ለመርገት ይተላላል :: በደንቡ ላይ  
 ያለ ተፈ ቀይ ቢሆንም ለሁሉም ሠራተኛ በአክሲዮን ላይ የተመሰረተ ሁኔታ የተሻለ ጥቅም  
 መስጠት የሚከለክል አይደለም :: ተከሃሽ ስለሌሉት ሠራተኛ ግብረጃ አገዳያቱን ተብሎ  
 በላለ ተረብ የተሟላ አስተያየት መስጠት ለሰተኛውም በተጠቃሚ ጉዳዩን የሚያውቁ ክፍለ ይህን  
 አስ ቱርባ ለመለስ ለአወሰሰት ይረገሳል በሉ ሀሣብ አቀረቡ ::

መለስ ሰጥቻ ጥያቄ በ25\_11\_90 ዓ\_ም ለጠርፉ በአቀረበት ጥያቄ ከአስጣጣው ጋር  
 መዘገብ ቱርባን በገሩ ተገኝ መካከል የተረባውን የደመወዝ ቀ ነገና ከ500 ሠራተኛ  
 የደርጃት ሠራተኛ ከመለስ ሰጥቻ ጠበቀው ደመወዛቸው ላይ የሚገኙት ጥግፊ በር  
 55 ላይ ጽጽጽ ቀ ነገና ላይ ነገባቸው አ የተከረላቸው ያለው የደመወዝ ክፍያ አከፋፈል  
 ላይ ባይተ በአ/ ቀ 42/85 ከተጣተ ጋር የተተነሰገ ደመወዝ ወዘፍ ይከረላገ ለወደፊት  
 ተስተካክሎ አገዳኝነቱን ይገባገን ባይተ አስጣጣ አቀርቦ ያለውን ተገዶ አቀርቦ አገዳኝ  
 ፍላጎ አገዳደሪን በግልት አቀረቡ ::

ተከሃሽ ወይም በዚህ መዘገብ ይገባገን ባይ በ13\_1\_91 ዓ\_ም በአቀረበው ወቅት  
 ጥያቄ በአ/ ቀ 42/85 አገዳኝ 138/1/ ለመሠረተ ክፍያን የሚመለከት በሰተ የሚቱርባት  
 ለረ/ወ/ደረጃ ፍ/ቤት አገዳኝ የጠርፉ አይደለም የመለስ ሰጥቻ ጥያቄ የዚህ አይነት  
 በሌላ ጠርፉ ሥልጣን የለውም :: በዚህ ሌላ መለስ ሰጥቻ ከወቅቱ ጀምሮ ያለው የገንባታ  
 ተ ላይ ጥ ግፊ አገዳኝነቱን አገዳዳሪ ስለመሆኑም :: የገንባታ ላይ ጥግፊ ተገባሪ  
 የሆነው በመስከረም 1 ቀን 1985 ዓ\_ም ነው :: መለስ ሰጥቻ ከሰ መሠረተት ይገባ  
 5ተኛው አወት ባለቀ በኃላ በአ/ ቀ 42/85 አገዳኝ 162/1 መሠረተ ግንኙም ከሠራ  
 ወላ ጋር በተያያዘ ሁኔታ ለመ ነጥ የሚታል መብት መጠየቅ ባለበት በአገዳ አወት ወሰን  
 ባለቀ የተ በደርጋ ይ ቀረል :: ስለሆነም ከሃሻኛ ወይም መለስ ሰጥቻ ለሆነ የሆነት  
 ከባቸው ባይርጋ ተፈ ይሁናል በለው :: በሌላ በኩል 74 ሠራተኛ ሰም አለቀውም  
 አገዳ ላይ መለስ ሰጥቻ ተጠቅሞ መከሰስ አይተሉም :: የይገባገን ባይን ሰም በተገባው  
 ሁኔታ መለስ ሰጥቻ ለላባረረም የመለስ ሰጥቻ ጥያቄ በፍ/ቤ/ወ/ሥ/ሀ/ ቀ 92/ሀ  
 መሠረተ አለ ተገደገጠም :: ለሰተኛውም :: በአጠቃላይ ጠርፉ ጉዳዩን ለግደት ሰለጠን  
 የለውም ለሌላን ቢሆን ከሰ በደርጋ ይታረጣል ይህ ቢታረፍ በሌሉት የሰተ  
 የመለስ ሰጥቻ ከሰ ወይም ይሁን የሌላውን አቅርቦት ::



የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ስርዓት የይገባኝ ባይን ወታደራዊ ጥቅም ላይ የዋለው ለተባለው በአ/ቁ 42/85 አንቀጽ 138/1/ሐ ላይ ጥያቄ የሚያደርግ ምራ ወሳኛው ከተቋረጠ በኋላ ቀሬ መብታቸውን ለማወቅ ተሠናባት ሠራተኛዎች እንዲሥሩ ላይ ላሉ ሠራተኛዎች አይደለም :: የመሰሉ ሰዎች ጥያቄ በአ/ቁ 92/85 አንቀጽ 142/1 መሠረት ሆሠራተኛውንና የደርጅቱን ሀሰውና የሚመለከት ስለሆነ የአሠሪና ሠራተኛ ጉዳይ ወሳኝ ስርዓት ስርዓት የይገባኝ ባይን ጥያቄ አስተባባሪዎች :: ደርጅቱን በተመለከተ በአ/ቁ 42/85 አንቀጽ 162/1 የአተረጋጎሞ መገረስ መጠየቅ ከሚገባው ጊዜ አንስቶ ይላል :: ሥራ ላይ ያለ ሰው መብቱን ማግኘቱ ተክተ ለመቀየር ይገባል :: የደርጅ ክርክር ሊነሳ የሚችለው ምራ ወሳኛው ተቋሙ ወይ ሥራ ለመመለስ ወይም ተከፋይ የሆነ ለመጠየቅ ለሚቻል እንዲሥሩ ላይ ሆኖ በደረሰበት ወቅት ጥያቄ በደርጅ ቀሬ ይደረግ የሚችል ሆኖ ላይ ላይ :: በደርጅም የሰው ለጁ መብት ይቀር አይሆንም በመሆኑም የይገባኝ ባይን የደርጅ ተቋሞች ለሰጠው ነው ብሏል :: የመሰሉ ሰዎች ስርዓት ስርዓት ለሰጠው ለተባለው የመከላከያ ደብዳቤ የተረገበ ስለሆነ የይገባኝ ባይን ተቋሞች ስርዓት ለሰጠው :: ለጥቅም ክፍሉ ላይ ወሚላት ለሰጠው በዓለት ይገባኝ ባይን ያቀረበውን በተመለከተ ስርዓት አሰፋፊ :: የይገባኝ ባይን ስርዓት በተከሰሰ ለሰጠው ለተባለው የክርክር ረር አገልግሎት ተባብሮ :: በዚህ ላይ ይገባኝ ባይን ለሰጠው መሰሉ ለጥያቄ ያላቸው ያለ ሥራውና ገንዘቡ ለመውጣት ይገባል ለገንዘብ በዚህ ጉዳይ ላይ በሠራተኛው መካከል ለሆነው በዓይነት ጥያቄ ለተሰጠው ሠራተኛዎች ለማዘዝ ገና የሆነረገገ ስርዓት ስርዓት 2 ተኛ /ከጥያቄው በፊትና ከጥያቄው በኋላ ያሉትን ክርክር የደርጅቱ ምራ መደባት ደርጅቱ እንዲያቀርብ ቢነገራቸው ለማቅረብ ፈቃደኛ ለሌሎችም በሉ ለሌሎችም የተወሰኑት መረጃዎች ተወይተው ለማቅረብ ፈቃደኛ ለሌሎችም የሚያስፈልገው የይገባኝ ባይን አገልግሎትና ወይም ቢቀርብ ስርዓት አይተት ለውነትን እንዳይረገግ ለመከላከል ታስቦ የተደረገ መሆኑን ስርዓት ተገንዝቦ ለሰጠው :: መደብ ሰዎች ለደርጅ ያቀረቡት የ/ዐ ለሆኑ ሠራተኛዎች በየደረጃ የተከረሰ ስርዓት ተመለከቱ :: በዚህም መሠረት በሰጠው ውሳኔ መሰረት ለሰጠው የደርጅ ጥያቄ የተደረገው ለሰጠው ጊዜ በፓ ለመሰከረም ወር 1985 ዓ.ም ጋራ የደርጅ ላይ ስለሆነ መነሻው የነበረው ወር 1985 ወሰን ይሆናል የተደረገው ለሥራ መደብ ስርዓት ለገለሰበት ነው ::



ይገባን ባይ ለገንዘብ ይህንን በተዘገገው ጊዜ ወስደት በሥራ መደብ ላይ ብር 55  
 በመጨረሻ ሥራ መደብን ከሻሻለ ከመጠን ውጭ ነው ይህንን ስራዎችን ባለግብረት ከራሱ  
 ሆኖ ማረጋገጥ ባይቻልም ከመሰብሰብ ሰዓታት ከተረገጡት ግዴታዎች ለማረጋገጥ ይቻላል  
 ሆኖ ባይረደም መጠንቀቅም ባይቻል ደርጅት ለሌሎች ሠራተኞች ያደረገውን ልዩ ጥያቄ በ  
 ለኩሳ ደረጃ ለሌሎች ሠራተኞች ለሌላ ጥያቄ ለሠራተኛው መጠን በተመለከተ  
 ሆኖ ሆነ የህብረት ስምዖን በሌላው ሰዓታት ለሠራተኛው መካከል ልዩነት ማድረግ ስር ጥ  
 ለተተባበረው :: የሥራ ወይነት ደንብ ብሎ የረደቡን ለገደቡ ጥያቄ በማድረግ  
 በሌላው ጊዜ በደውዘ ላይ መጨረሻ ከመጠን ውጭ ሲሆን በሌላው ደርጅት ወሰን በሌ  
 ገደ ህብረት ስምዖን በግብር ሠራተኛ መሆኑን በጥራት ምክንያት ልዩነት ማድረግ ጥ  
 ፍተህዲ ለይደለም ስለዚህ የፊርማ ወይን ለገደቡ በመሄድ በየቦታ 55 ብር ለገደቡ ገባው  
 ተደርጎ ለገገው ሠራተኛው ወዘተ ይከፈላል በግልጽ ወሰናለል ::

ለገንዘብ ይገባን የተባለው ውሳኔ ጽሑፍ ይህ ሲሆን ይገባን ባይ ያተረጎሙ የይገባን  
 ተረጎጦ ስር ጥ ይገባን ባይ ነገረረጁ ላይ የሰጠው ተተገብሮ ለይደለም 2 ተ/የ  
 ሥራዎችን ገንዶ በተመለከተ ስር ጥ ስሥራ መሰብሰብ ሰዓታት ስላል ተጠናቀቀ ስላል ነው በ  
 ግልጽ ያሰረረው ተገብሮ ለይደለም 3 ተ/ የመሰብሰብ ሰዓታት ጥያቄ የሠራተኛውን የደርጅት  
 ጠቅላላ ሀላውና የደንበኞች ነው ስር ጥ ያለው በሌላው ለይደለም የደርጅት ሀላውና ለ  
 ይገባን 4 ተ/ የመሰብሰብ ሰዓታት ጥያቄ ስር ጥ በይርጋ ለይደለም ያለው በሌላው ለይደለም  
 5 ተ/ ስር ጥ ይገባን ባይ በሠራተኛው መሆኑ የ55 ብር ጥራት ልዩነት ረገገለል ለተባለው  
 መሰብሰብ ሰዓታት በሌላው ሰዓታት ማረጋገጫ ሲሆን ለዚህ የተባለው ለተገባው ገባው  
 ተው በመሆኑ ይህን ስህተት ስለሰጠው :: ስር ጥ ለገንዘብ ለተገባው ያለን ነገር ጥ ተገ  
 ባይነት የሰጠው በሌላው ስር ጥ ይህን ስህተት ስለሠራ በሆኑ ጽሑፍ መሠረት ውሳኔ  
 ይሰጠዋል ስለሆነ ::

መሰብሰብ ሰዓታት ለይገባን ባይ የይገባን ግዴታዎችን በሰጠው መሰብሰብ ይገባን በተገባው  
 ጊዜ ስለተረገጡ :: ፍ/ቤተ በ30 ተ/ ውሳኔ መሰጠት ስለሰጠ ከሌ በ30 የሠራተኛ  
 ሠራተኛ ስር ጥ የሆኑ ገንዶ ለግዴታ ስላል ለሌላው ይህም በሌ/ ተ 42/85 ለገንዘብ  
 142/1/ ሆኖ ይህን ስር ጥ ለ መሠረት ነው ስር ጥ ውሳኔ ሲሰጥ በሌ/ ተ 42/85  
 ለገንዘብ 150/3 መሠረት የሌሎች ፍ/ቤተ የመረጡትን የሆኑ መሠረታዊ ደንቦችን በ  
 የተተገበሩ የተረገጡትን ክርክር ለወሰን ለገደቡ ስለተደረገው ስር ጥ ይህን  
 ስላረገ የደንበኞች ምክንያት ስለሰጠው መሰብሰብ ሰዓታት መሰብሰብ ይተረጎባል ::



ይገባን ባይ ህገ ስህተት ጥግሪን በተላከተ አለ ያለው ተገቢ አይደለም ብለዋል።  
ይርጋን በተላከተም ይገባን ባይ በጸሀፍ ጾ ሄገን ሰላላ ይርጋውን ያቁጣል ገርጉ  
ሰውሰጥም ግንኙት የሚገባንን ተገቢ በመሆኑ ይርጋ አለ የሚባል ከሆነ ግብረረዳዎችን ይታይ  
በአጠቃላይ የይገባን ባይ ጥያቄ ወይት ሆኖ ውዘፍ ደመወዛችን ከባንክ ወለድ ጠምር በሚ  
ሰጥና ወጪና ኪሃረ ይከረለን በግለት አቅርቦታል ።

ይገባን ባይ ለመልስ መልስ አለሁጠም ።

በዚህ በኋላ ፍ/ቤት ለአወባባሪ አገገኞቹ የሰጠውንና የገርጉን መዘገብ አስገብ  
አይታል ።

በዚህም መሠረት ፍ/ቤት የተረበሰተን ከህጉ ጋር አገናኝቦ መርምሮአል በቀዳሚያ የ  
አሠሪና ሠራተኛ ጉዳዩ ወሰን ገርዶ ጉዳዩን ለግድ በሰጠን ነበረው ወይ? የሚለውን  
ጥያቄ ተይዟል ። በመጠቀም ገርጉ በሰጠን ባለው የሰጠው ውሳኔ በአገባቡ ነው ወይስ  
አይደለም የሚታይ ።

በሰጠን በተላከተ ፍ/ቤት አገገኞች መልስ ሰጥቶ ገርዶ ጋር የጠየቀ ይገባን  
ባይ አይገባቸውም ብሎ ያለውን ጥግሪ ይገባናል በግለት ሲሆን ይህም የተወሰነ የጥያቄ  
ጥያቄ መሆኑን አያሳይም በአ/ ቀ 42/85 አገገኞች 138/1/ሐ ሥር የሚደገው ተኩፋ  
ይ ሲሆን የተወሰነ የጥያቄ የሚለከተ ነው ። በአ/ ቀ 42/85 አገገኞች 142/1/ሀ  
ላይ ይገባ ያለውን የጥያቄ አገገኞች የሚቀርቡ ጥያቄዎችን ያስተናግዳል ይህ ምን ለግለት  
ነው ለ የ ደመወዛ ጥግሪው መጠቀም ለመልስ ሰጥቶ ጥግሪው ይገባቸዋል ያለው ነገር ባ  
ሰጠና ይገባን ባይም አይገባቸውም ሰላላ መልስ ሰጥቶ የሚያቀርቡት ጥያቄ አሁን  
ጥያቄ አገገኞችን ለተው በመሆኑ በአ/ ቀ 42/85 አገገኞች 142/1/ሀ እና 147/1/ሀ  
መሠረት ገርጉ ጉዳዩን የጥያቄ በሰጠን አለው ። ገርጉ ጉዳዩን ለግድ ያስተላልፍል በ  
ግለት ይሠጠው ለግ ምክንያት ሲሆንም በሰጠን ነው ብሎ ስለሠራ በዚህ ታላቁ አል ።

የሰጠን  
ሠጠን  
7

ይርጋን በተላከተ ይገባን ባይ ለአቀረበው የይገባን ቀሪት አገገኝ መልስ ሰጥ  
ቶ ቀርቦ የሚሰጥ 55 በር ጥግሪ በ የወረ ከደመወዛ ጋር የሚጠየቀው በመሆኑ መጠየቅ  
የሚገባው በ የወረ ነው ። ሠራተኛት ይገባ በሰራ ላይ ሆነው በሌላ የተሰጠ ሰጥቶ  
የሚለከተው የይርጋ አገገኞች አ/ ቀ 42/85 አገገኞች 162/3 ነው ። እዚህ አገገኞች  
ወሰን የመልስ ሰጥቶ ጥያቄ ገብተው ሲታይ ከጠየቁት ወይ ኋላ 6 ወር ያለውን በይርጋ  
አያጠም ምክንያት ከደመወዛቸው ጋር መጠየቅ ያለባቸው ይህ ጥግሪ ከ6 ወር በኋላ ይ  
ርጋ ያረፈላል በግለት ባይ የተጠቀሰው አገገኞች ስለሚሰጡ ነው ። የአሠሪና ሠራተኛ





ሰዎች ነት / ቁ 111 እ.አ.አ 1958 እንደ 1 ፖሪሲንግ 2 ከሰራው ጋር የተገኘው  
 መግለጫ ሆለብት INHERENT REQUIREMENTS ፣ ስለሆነ በቱርክ ወጭ በሠራተኛት  
 መካከል የሚደረግ ልዩነት በእገልግሎት DISCRIMINATION መሆኑን ይደነገጋል ይህም  
 መቀረት ያለበት ነገር እንደሆነ ያስቀመጠ ። ስለዚህም በመሰብሰብ ሰዎችና በሌሎች ሠ  
 ራተኛት መካከል ከሠራ ጋር መግለጫ ተለበት ነገር ሳይገለጽ ይገባል ባይሆንም መጠይቅ  
 ባይታይ ልዩነት መፍጠር አይቻልም ። መሰብሰብ ያቀረቡት ላይ ይገባል ባይሆንም ለሰተ  
 ያየት ለሰብዓዊትም ላለው በአ/ ቁ 42/85 እንደ 149/5 ብርቱ የራሱ የመርጃ  
 ስራ ለራሱ ደንብና የሥራ ስራ ደንብ ማወቅ እንደሚችል ሰለተደነገገ ብርቱ የተጠቀ

መው የራሱን ደንብ ነው ። ይገባል ባይሆንም ለሰተ ያየት ባለመስጠት የሚቀየር ምን እንደሆነ  
 የራሱን ማሰራጨ ለቀርቦ ለባለ ለቀርቦ በማሳየት ብርቱን ስራ ስራ የተሻለ ይሆን ነበር ።  
 ። ስለዚህም በዚህ ነገር ላይ ብርቱ በሀገር እንዲሆን የተሻለው ነገር አላገኘም

ከዚህ ሌላ ይገባል ባይሆንም ነገረረጅ ብርቱ ዘላቂነት በሌላ ላቀረቡት ብርቱ ነገረ  
 ረጅም ዘላቂነት ለሰብዓዊት የሚሰጥ ፍ/ቤት ለሰዎች አይቻልም ምንም እንኳን የፍርድ  
 ቤት ያቆረረበት ነገር ስለሆነ ይህ ይህን ወይም አይሆን ማለት የሚቻልበት አይደለም ።

በአጠቃላይ ላይ በተገለጹት ምንም እንኳን የአሠራር ሠራተኛ ጉዳይ ወሳኝ ብርቱ የሆነ  
 ሰህተት ሠራተኛ ነገር ስለላገኘን የብርቱን ውሳኔ በማሻሻል አጽንኖት ።

ተለዘዘ

የውሳኔው ገሰገዮ ለብርቱ ይደረግ ። ፍ/ቤት በ9\_10\_91 ዓ\_ም የጠቀሰው ለገና  
 ተነስቷል የተረጉት የብርቱ የሰብዓዊ መዘገብ ወይ መጠን ይመለሱ ። የፍርድ ስራ  
 ገራ ቀኝ ይገኛሉ ። መዘገቡን ዘገተን ወይ መዘገብ ስት መሰጠት ።

የገናኑ ፊርማ ለለው





የሥ/ክ/ይ/መ/

ቁጥር 709/94

ገንቦት 14 ቀን 1994 ዓ/ም

**የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ  
የፌዴራል ከፍተኛ ፍርድ ቤት**

አዲስ አበባ

The Federal Democratic Republic of Ethiopia

**Federal High Court**

Addis ababa

ፖ.ሣ.ቁ.

3483

P.O.BOX

ዳኞች፣ ወብሽተ ክብረ

ገር ማ ጥሏሁን

ያለው ተሾመ

ከሣቦች፣ በአዘብ ተሣትፍ የተቀነባበረ ዘላቂ የልማት ድርጅት 58 ሰዎች

ተወካዎች እና አቶ ሰለሞን መንገሥቱ 5 ሰዎች ቀረቡ

ተከሣሾች የአዲስ አበባ ከተማ ሰራተኛና ማህበራዊ ጉዳይ ቢሮ

ይህ ፋይል በዚህ ዓመት ተከፍቶ ለሹሉት ሊቀርብ የቻለው ይገባል ባይ ገንቦት 6 ቀን 1994 ዓ.ም. ጸደቀው ያቀረቡትን 3 ገጽ የይገባኝ ማመልከቻ መነሻ ምክንያት ሲሆን ከ\_\_\_\_\_ ፍ/ቤት ሥራ ክርክር ችሎት ውሳኔ የተሰጠበት ገጽ በወቅቱ ቁጥር ከፋይሉ ጋር ተያይዟል።

ሰለሞን ነት አከፋፈል በሠራተኛ አዋጅ ቁጥር 42/85 መሠረት የሠራተኛ ጉዳይ በመሆኑ በነጻ ተከፍቶ ለሹሉት ቁጥር ይሆናል።

ተ \_\_\_\_\_ ክ \_\_\_\_\_ ዘ \_\_\_\_\_ ዘ \_\_\_\_\_ ፣

ከሣቦች በማሕበር እንዲገደሩ ለአዲስ አበባ ከተማ መስተዳድር ሠራተኛ ማሕበራዊ ቢሮና ለሠራተኛ ማህበራዊ ጉዳይ ሚኒስቴር አመልክተን ውሳኔ አንሰጥም ብለው ሰለከለከሉን እንዲገደሩ ውሳኔ ይሰጥልን በማለት ገንቦት 6 ቀን 94 ዓ.ም. የተጻፈ ክስ አቅርበዋል።

ተከሣሾችን አስቀርቦ መልስ እንዲሰጥ ከማድረጋችን በፊቱ ይህ ችሎት የቀረበውን ክስ የማየት ሥልጣን ያለውና የሌለው መሆኑን በቀዳሚያ መመዘኛነት አስፈልጎናል።

ከሣቦች በአዋጅ ቁጥር 42/85 አንቀጽ 113 መሠረት በማሕበር ለመደራጀት አቤቱታ አቅርቦት ሰለክልተኛ ቀደሏቸው ተከሣሾች መሥሪያ ቤት አቤቱታቸውን ተቀብሎ እንዲፈጸምላቸው ክስ ያቀረቡ ሲሆን፣ ይህ ችሎት በማሕበር መደራጀት አሰባሰብ ወይም የሰባቸው ለማለት በአዋጅ ቁጥር 42/85 አንቀጽ 139 እና 140 መሠረት የይገባኝ

ሰሜናት ሥልጣን የተሰጠው እንጂ ቀጥታ ክሶቹን የማየት ሥልጣን አልተሰጠውም፡፡

ከሣሾች እንደሚሉት በአዋጅ ቀጥር 42/85 አንቀጽ 113 መሠረት ማህበር ለጭቋቋ መብት እንዳሳቸው በሕግ የተረጋገጠ ከመሆኑም በላይ ማህበራቸውን በዚህ አዋጅ አንቀጽ 118 መሠረት በሚኒስቴር ወ/ቤት ማስመዘገብ መብት አሳቸው፣ የሚኒስቴር መሥሪያ ቤት መዘገባቸውን አልቀበሉም ባለ ሌቀቀሉ የማይቸልበትን ምክንያት ዘርዘሮ በዚህ አዋጅ አንቀጽ 119 መሠረት ሊገልጽላቸው እንደሚገባ ተደንገጓል፡፡

የሠራተኛና ማህበራዊ ጉዳይ ሚኒስቴር ወይም የክፍል ሠራተኛና ማህበራዊ ጉዳይ ቦርድ በአዋጅ አንቀጽ 118 ንዑስ ቀጥር 3 መሠረት ያቀረበሉትን የመመዘገቢያ አቤቱታ በአሥራ አምስት ቀን ጊዜ ውስጥ ጭቆና ተጠቅሞ ስልጠና ስለሚሰጥ እንደ ተመዘገቡ ይቆጠራል ስለሚል ከሣሾች አቤቱታቸውን ለሚኒስቴርና ለሠራተኛ ጉዳይ ቦርድ አቅርበው ለአቤቱታቸው መልስ ሳይሰጡ ቁርባ ከሆነ እንደ ተመዘገቡ ስለሚቆጠር ከሣሾች ሥልጣን ባለውጭ ፍ/ቤት የምስክር ወረቀት አልሰጥ እሉን በማለት ክስ ከሚያቀርቡ በስተቀር በዚህ የይገባኛቸውን ሰሜን ፍርድ ቤት ከሣሾችን ተቀብሎ ማለት ባለመቻሉ በፍትህ ቤቱ ሥነ ሥርዓት ሕግ ቀጥር 9/1/ እና 231/1.ለ/ መሠረት የቀረበውን ክስ በድምጽ ብልጫ ባለመቀበል መዘገቡን ዘገብተን ወደ መዘገብ ቤት መልሰናል፡፡

የዳኞች ፊርማ፣ ውጤት ክብሩ  
ገርማ ጥላሁን

የሀሳብ ልዩነት ፣

እ.ኤ.አ በሚኒስቴር ወይም ደረጃ ያለው ዳኛ በአብሳጫ ከተሠጠው ትእዛዝ የምለይ ስሆን የምለይበትም በቀዳሚያ ከሣሾች/ ይ/ባዳቸው ተብሎ የቀረቡት እንደራጅ የሚል ጥያቄ ያቀረቡ ስሆን ይህን ገን አራሣቸው ያሟሉ ስለሆነ ጥያቄአቸው የእንመዘገብ መሆኑን መገንዘብ ይቻላል፡፡ ይህን ገልጽ እንዲያረጉ አቤቱታቸውን ቢያሻሽሉ የበለጠ ገልጽ ይሆን ነበር ፡፡ ይህ ባይሆንም የእንመዘገብ ጥያቄአቸውን በመውሰድ ስንመለከት ማህበራት በአ/ቀ 42/85 አንቀጽ 118/3 መሠረት ለተገቢው መዘጋቢ አካል የምዘገቡ ጥያቄ አቅርበው በ15 ቀን ውስጥ መልስ ባልተሰጠባቸው እንደ ተመዘገቡ ይቆጠራል ስለሚል ይ/ባዳቸው /ከሣሾች ጥያቄአቸው መልስ ባላገኘ እንደ ተመዘገቡ ይቆጠራሉ ማለት ነው፡፡



ዳኛ ፣ ያለው ተሾመ

ከሣሽ - ስራተኛና ማሕበራዊ ጉዳይ ሚኒስቴር ነ/ፊ. መንገሻ ማሞ ቀረቡ

ተከሣሽ - ትራንስፖርትና መገናኛ ሠራተኞች ማህበራት ኢንዱስትሪ ፌዴሬሽን  
ጠበቃ ግርማ መኮንን ቀረቡ።

መዝገቡ የተቀጠረው ለምርመራ ሲሆን ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል።

ፍ ር ድ

ይህ መዝገብ ሊቀርብ የቻለው ከሣሽ በየካቲት 8 ቀን 1999 ዓ.ም የተፃፈ የክስ ማመልከቻ ስላቀረቡ ነው። የክሱ ይዘትም ባጭሩ፣ ተከሣሽ ፌዴሬሽን በሚያዚያ 4 ቀን 1998 ዓ.ም በካሄደው የምክር ቤት ሰብሳቢ የማሟያ ምርጫ ማካሄዱን ጠቅሶ የተመረጡት አባላት እዉቅና እንዲያገኙና የአመራር አባልነት መታወቂያ እንዲሠጣቸው የኢትዮጵያ ሠራተኛ ማህበራት ኮንፌዴሬሽን ሚያዝያ 17 ቀን 1998 ዓ.ም በቁጥር ኢሠማኮ 29/1274/98 ለሚኒስቴሩ በፃፈው ደብዳቤ ጠይቋል። ሚ/ር መ/ቤቱ ጉዳዩን ሲያጣራ ቆይቶ ከተመረጡት አባላት መካከል የኢትዮ ጅቡቲ የምድር ባቡር ድርጅት መሠረታዊ ሠራተኛ ማህበርን ወክለው ተመረጡ የተባሉት አቶ ግርማይ ታረቀኝ ከኢንዱስትሪ ፌዴሬሽን ሕገ-ማህበር አንቀፅ 18.4 መሠረት ግንቦት 22 ቀን 1995 ዓ.ም ጀምሮ ለሦስት አመታት የተመረጡና የምርጫ ዘመናቸው የሚጠናቀቀው ግንቦት 21 ቀን 1998 ዓ.ም በመሆኑ ይህ የተካሄደው የማሟያ ምርጫ የተጠቃሽ የምርጫ ዘመን ሊጠናቀቅ ጥቂት ቀናት በቀረበው ጊዜ ውስጥ በመሆኑ ግለሰቡ በኢንዱስትሪ ፌዴሬሽን ሕገ-ማህበር አንቀፅ 13 መሠረት ከኢትዮ ጅቡቲ ምድር ባቡር ድርጅት መሠረታዊ የሠራተኛ ማህበር ተመርጠው ስለመወከላቸው የሚገልፅ መረጃ እንዲቀርብና የተቀሩት የኢንዱስትሪ ፌዴሬሽን ተመራጮች ሚኒስቴር መ/ቤቱ ቀርበው አስፈላጊውን ፎርማሊቲ እንዲያሞሉ እንዲደረግ ለኢትዮጵያ ሠራተኛ ማህበራት ኮንፌዴሬሽን ነሐሴ 29 ቀን 1998 ዓ.ም በቁጥር አ9/ተ/7/64 በተፃፈ ደብዳቤ የተገለፀ ቢሆንም ኮንፌዴሬሽኑ ሠራተኛና ማህበራዊ ጉዳይ ሚ/ር ተካሂዶል የተባለውን የኢንዱስትሪ ፌዴሬሽን የማሙያ ምርጫ የማጣራት ሥልጣን የለውም፣ ተጠቃሽ ግለሰብ በመሠረታዊ ማህበር ውክልናቸው ጉዳይ በፍ/ቤት የተያዘ በመሆኑ ሚ/ር መ/ቤቱን አይመለከተውም በማለት መልስ ሰጥቷል።

በሌላ በኩል የኢትዮ ጅቡቲ የምድር ባቡር ድርጅት ሠራተኞች ሚያዚያ 29 ቀን 1997 ዓ.ም ባደረጉት ጉባኤ አዲስ የሠራተኛ ማህበር አመራር አባላት መርጠው አመራር አባላቱም በድራዳዎ ጊዜዓዊ አስተዳደር ሠራተኛና ማህበራዊ ጉዳይ ፅ/ቤት እውቅና እንዳገኙ የአመራር አባልነት መታወቂያ እንደተሰጣቸው ጠቅሶ በእነ አቶ ሙስጠፋና በእነ አቶ ግርማይ ታረቀኝ የሚመራው የቀድሞ ሰራተኛ ማህበር ፅ/ቤቱ አዲስ ለተመረጡት የአመራር አባላት ህጋዊ ያልሆነ ዕውቅና ሰጥቷል በሚል በድራዳዎ ከተማ የፌ/መ/ደ/ፍ/ቤቱ ክስ መስርተው ፍ/ቤቱ ጉዳዩን የማየት ስልጣን የሰጥቶ በማለት መዘገቡን መዘጋቱን በመጥቀስ እንዲሁም አቶ ግርማይ ታረቀኝ መሠረታዊ ማህበራቸውን መወከል እንደማይችሉና በትራንስፖርት መገናኛ ሠራተኛ ማህበራት ኢንዱስትሪ ፌዴሬሽንም ተወክለዋል የተባለውም በህገ ወጥ መንገድ መሆኑን በመግለፅ ህዳር 12 ቀን 1999 ዓ.ም በቁጥር ም/ባ/ሠ/አ/ማ/14/99 ዓ.ም ለተለያዩ ኢንዱስትሪ ፌዴሬሽኖች በአድራሻ ሲፅፍ ለሚኒስቴር መ/ቤቱ በግልባጭ አሳውቋል።



ስለዚህ ከላይ በተጠቀሰው ምክንያት አቶ ግርማይ ታረቀኝ የመሠረታዊ ማህበሩ ውክልና ስለሌላቸው ህገ - ማህበሩን የሚቃረን በመሆኑ ሁኔታው እንዲስተካከል በተደጋጋሚ ተጠይቆ እንዲሁም በአዋጅ ቁጥር 377/96 አንቀፅ 121/1/ መሠረት ማስጠንቀቂያ ቢሠጠውም ተከሣሽ በአንድ ወር ጊዜ ውስጥ መቃወሚያ ስላላቀረበ በአዋጅ አንቀፅ 121/2/ መሠረት ተከሣሽ ፌዴሬሽኑ እንዲሠረዝ ውሳኔ እንዲሠጥ የሚጠይቅ ነው።

የክሱ ግልባጭ ከነአባሪዎቹ ለተከሣሽ ደርሶት በሚያዚያ 8 ቀን 1999 ዓ.ም በተፃፈ መልስ፣ የማህበራት ስረዛ ስልጣን ላለው ፍ/ቤቱ ሊቀርብ የሚችለው በአዋጅ አንቀፅ 120/1/ ላይ ከተዘረዘሩት አንዱ መፈፀሙ ሲረጋገጥ በመሆኑ ከሣሽ ግን ከላይ በተጠቀሰው የአዋጅ ድንጋጌዎች አንዱ መፈፀሙን በክሱ ላይ ባለመግለፁ ክሱ የክስ ምክንያት /cause of action/ የለውም የሚል የመጀመሪያ መቃወሚያ ያቀረበ ሲሆን በአማራጭም አቶ ግርማይ ታረቀኝ ከኢትዮጵያና ጅቡቲ የምድር ባቡር ድርጅት መሠረታዊ ሠራተኞች አንድነት ማህበር ተወክለው የፌዴሬሽኑ ዋና ፀሐፊ ሆነው በማገልገል ላይ ሳሉ የፌዴሬሽኑ ፕሬዝዳንት የነበሩት ግለሰብ የአሠማኮ ውጭ ግንኙነት ዘርፍ ሃላፊ ሆነው በመመረጣቸው ፌዴሬሽኑ ሚያዚያ 4 ቀን 1998 ዓ.ም ቀደም ብሎ በሥራ ላይ የነበረው ምክር ቤት የማሟያ ምርጫ አድርጓል። በዚህ የማሟያ ምርጫ ከመደረጉ በስተቀር ምክር ቤቱ እንደ አዲስ ምክር ቤት አልተቋቋመም እናም ከመሠረታዊ የሰራተኛ ማህበራት የአዲስ ውክልና ማካሄድ ሥነ-ሥርዓት አልተፈፀመም። የማህበሩ ህገ ደንብም እንዲፈፀም አያዝም። በፌዴሬሽኑ ህገ-ደንብ አንቀፅ

✶

18.4 መሠረት የሥራ አስፈጻሚ ኮሚቴ የሥራ ዘመን አራት ዓመት በመሆኑም የፕሬዝዳንቱ የሥራ ዘመን የሚጠናቀቀው ከሣሽ በክስ ማመልከቻው በጠቀሰው የሦስት ዓመት ጊዜ ውስጥ አይደለም። አቶ ግርማይ ታረቀኝ በፌዴሬሽኑ ሥራ አስፈጻሚነት መመረጣቸው በህገ-ደንቡ የተቀመጠውን የሥራ ዘመን ለማጠናቀቅ የሚያስችል መብት ከሚሰጣቸው በስተቀር በመሠረታዊ ማህበር ውስጥ የአመራር ለውጥ ማካሄድ ማህበሩን ወክሎ በፌዴሬሽኑ ውስጥ የተመረጠን የሥራ አስፈጻሚን በህግ ከተቀመጠው የጊዜ ገደብ በፊት ሃላፊነቱን እንዲለቅ የሚያደርግ ድንጋጌ በፌዴሬሽኑም ሆነ በመሠረታዊ የሠራተኛ ማህበሩ መተዳደሪያ ደንቦች ላይ አልሰፈረም። ከሣሽ በድራዳዋ የፌ/መ/ደ/ፍ/ቤት አቶ ግርማይ ታረቀኝ የኢትዮ ጅቡቲን መሠረታዊ የሠራተኛን ማህበር አይወክሉም ሲል ወስኖል ይበል እንጂ ፍ/ቤት በወቅቱ ቀርቦ የነበረው ክርክር የወል በመሆኑ ስልጣን የለኝም ስልጣኑ የአሰሪና ሰራተኛ ወሳኝ ቦርድ ነው ከማለት በስተቀር ከሣሽ የሚለውን ውሳኔ አልሰጠም ስለዚህ ከበቂ ኪሳራ ጋር በነፃ እንሰናበት በማለት መልስ ሰጥቷል።

ግራ ቀኙም ክርክራቸውን አሠምተዋል። ፍ/ቤቱም የግራ ቀኙን ክርክርና ማስረጃዎች አግባብነት ካለው ህግ ጋር አገናዝቦ መርምሯል። በዚህም መሠረት ምላሽ የሚሻው የክርክሩ ጭብጥ መ/ሠጭን ማህበር ለመሠረዝ የሚያበቃ ምክንያት አለ ወይም የለም የሚለው ሆኖ ተገኝቷል።

መጀመርያ ስለማህበር መሠረዝ ህጉ ምን ይላል የሚለውን ስንመለከት አ/ቁ 377/96 አንቀጽ 120/1 መሠረት በ1ኛነት /አንቀጽ 120/1/ሀ/ የመመዝገቢያ ምስክር ወረቀት ማጭበርበር በስህተት ወይም በማሳሳት የተገኘ ከሆነ ሲሆን በ2ተኛ/አንቀጽ 120/1/ለ/ የማህበሩ ዓላማዎች አንዱ ወይም የማህበሩ መተዳደርያ ደንብ በዚህ አዋጅ መሠረት ህገወጥ ከሆነና ይህ ካልታረመ 3ተኛ/አንቀጽ 120/1/ሐ/ ማህበሩ በዚህ አዋጅ ውስጥ የተከለከለ ወይም ከዓላማውና ከመተዳደርያ ደንቡ ውጭ ለሆኑ ተግባራት ውሎ እንደሆነ እነዚህንም አድራጎቶች ለማረምና ለማስወገድ ፈቃደኛ ሆኖ ካልተገኘ ለማህበር መሠረዝ ምክንያት ተደርገው የተቀመጡ ሲሆን፣ አሁን በተያዘው ጉዳይ ላይ በ1ኛ እና 2ተኛ ላይ የተቀመጡት ምክንያትን በከሣሽ እንደ ምክንያት ያልታገዱ ሲሆን ስለዚህ ከወዲሁ ታልፈዋል በአ/ቁ 377/96 አንቀጽ 120/1/ሐ ላይ የተደነገገው ስንመለከት ደግሞ ከህግ ውጭ ተደረገ የሚባሉት ተግባራት ከሣሽ እንደሚለው ያሉትን ተግባራት ሳይሆን በህግ ወይም መተዳደሪያ ደንብ ላይ ያልተጻፉ ግን ከማህበሩ ተግባራት ውጭ የሆኑና በህግ ላይ ህገወጥ የተባሉ ድርጊቶችን ነው በተለይም የእንግሊዝኛው የአንቀጽ ትርጉም ይህን ግልጽ በሚያረግ መልኩ "--- Prohibited under this proclamation ... Contrary to its purposes and constitution" በማለት ከሣሽ በተከሣሽ ተፈጸመ የሚለውን በራሱ ህገወጥ ያልሆነ ድርጊትን ለማለት እንዳልሆነ ገልጾታል። ይህ ከሆነ ደግሞ የከሣሽ የይሠረዝልኝ

ክስ ተቀባይነት የሌለው ነው። በሌላ አነጋገር በህጉ ላይ ከመሠረታዊ ሠራተኛ ማህበር አንድ ሠው ካልተመረጠ ፌዴሬሽን ውስጥ አመራር ሆኖ መስራት አይችልም አይልም። በዚህም ፌዴሬሽን ይሠረዝ የሚል ድንጋጌ የለም።

አንድ ሠው መሠረታዊ ሠራተኛ ማህበር ሳይመረጥ ደግሞ ፌዴሬሽን ውስጥ መሥራት ይችላል ወይስ አይችልም የሚለው ሲታይ አ/ቁ 377/96 ላይ ስለዚህ ብዙም የተባለ ነገር የለም። ኢትዮጵያ አጽድቃ የህጉ አካል ባደረገችው በኮንቬንሽን ቁጥር 87(አ/ኤ/አ 1948) አንቀጽ 3 መሠረት ደግሞ "workers and employers' organizations shall have the right ... to elect their representatives in full freedom ..." (ሠራተኞች በነፃነት አመራሮቻቸውን መምረጥ ይችላሉ ተብሎ ሊተረጎም ይችላል) በዚህ መመዘኛ የተቀመጠ ሲሆን ይህ ደግሞ ማህበራት በነፃነት የፈለጉትን መምረጥ እንደሚችሉ የሚያስገነዝብ ነው።

ይህ ድንጋጌ ደግሞ በአይ ኤል ኦ የኮንቬንሽኖችና ሪኮሜንዴሽን አፈፃፀም ኤክስፐርቶች ኮሚቴ በአይኤል ኦ 81ኛ ስብሰባ እ/ኤ/አ 1994 ስለ ላይ ስለተደነገገው አንቀጽ በአቀረበው ጠቅላላ ዳሠሣ ሲተነትን " Requirement that the officers of the organization be chosen from its members --- infringe the organization is right to elect representatives in full freedom by preventing qualified persons such as full time union members or pensioners from carrying out unions duties or by depriving unions of the benefit of the experience of certain officers when they are unable to provide enough qualified persons from among their own ranks" (ገጽ 52 አንቀጽ 117)

የዚህ አጭር ትርጉም የማህበር አመራሮች ከአባላት ብቻ ይመረጡ ማለት የማህበሩን በነፃነት መሪዎችን የመምረጥ መብት ይጋፋል። ማህበሩንም ልምድ ያላቸው ሠዎች ማለትም እንደሙሉ ጊዜ የማህበር ስራ ከሚሠሩና እንደ ጡረተኞች ያሉትን ማህበሩ እንዳይጠቀም ያረጋል የሚል ነው።

በዚህ መሠረት አባላት ካልሆኑ ማህበራትም ብቃቱ አለ ከተባለ ከመሠረታዊ ማህበር ባይመረጡም መሥራታቸው በነፃነት የማህበር አመራር አካላትን ከመምረጥ ዓላማ ጋር አብሮ የሚሄድ ነው። ይህ ላይ ከተባለው መረዳት እንደሚችለው ማህበራት በነፃነት ብቃት ያለው አመራር አባል እንዲኖራቸው ነው። በዚህ ዓይነት ከሣሽም ተከሣሽ ሳይ ያቀረበው ቅሬታ የተከሣሽ ድርጊት ከኮንቬንሽን የወጣ ተግባር ስላልሆነ ተገቢ ሆኖ አልተገኘም።

በሌላ በኩል የከሣሽ የመሠረዝ ጥያቄ ሲታይ ከተከሣሽ አንድ ተመራጭ ጋር የተያዘ ሲሆን ለ1 ተመራጭ ሲባል በዕርካታ ሠራተኞች እና መሠረታዊ ሠራተኛ ማህበራት ያዋቀሩትን ፌዴሬሽን መሠረዙ የተመጣጠነ ድርጊት ሆኖ አይታይም።

ከሣሽ የተከሣሽ አመራር አባላት ፎርማሊቲ አላሟሉም ላሉት ለፎርማሊቲ ተብሎ በህገ መንግሥቱ አንቀጽ 42/1/ሀ እና አ/ቁ 377/96 ላይ የተረጋገጠውን የመደራጀት መብት መጣስ የለበትም ብሎ ይህ ፍ/ቤት ያምናል።

በአጠቃላይ ላይ የከሣሽ አቤቱታ ከመደራጀትና ተመራጮችን በነፃነት ከመምረጥ መብት ጋር አብሮ የማይሄድ ነው። በአ/ቁ/ 377/96 አንቀጽ 120/1 ሥርም ማህበር ለመሠረዝ በቂ ምክንያት አይደለም የመሠረዝ ምክንያት ሆኖ የቀረበውም ከማህበሩ አባላት ግዝፈትና ዓላማ አንፃር ተመጣጣኝ ያልሆነ እናሣ ነጥብ ስለሆነ የከሣሽ ክስ ውድቅ ተደርጓል።

ተከሣሽ የወጪና ኪሣራ ዝርዝር ያቅርብ መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል።

የዳኛ ፊርማ፣ ያለው ተሾመ

ሀ. ገ  
26/11/99

The thesis is my original work. It has not been presented for a degree in any other university and that all sources of material used for the thesis have been duly acknowledged.

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