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All inquiries should be addressed to the Publisher:

Haramaya University College of Law
P.O.Box 138, Dire Dawa, Ethiopia
Tel: +251-255-530084
Fax: +251-255-530102
Email: haramayalawreview@gmail.com
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FOUNDERS OF SHARE COMPANIES UNDER THE ETHIOPIAN SHARE COMPANY LAW: LEGAL ANALYSIS

Serkalem Eshetie Adinew[*]

Abstract

This article explores the Commercial Code and other laws of Ethiopia regarding founders – who they are, liabilities and benefits - who are also called 'promoters' by many other company laws. To some extent, it also looks into the business practice based on documents like memorandum of associations, articles of association and prospectuses. By so doing, it discloses many of the flaws in the existing laws. It argues that the Ethiopian share company law recognizes large number of persons as founders which is against the general convention in the area. Accordingly, it tries to indicate that not all founders in the law shall be held responsible for the liabilities that may emanate from the activities pertaining to forming a share company. In addition, it shows that the law does not adequately regulate the matters connected with the liabilities and benefits of founders. Apart from imposing liabilities on a person who should not be responsible at all, it is found that there are several challenges for both the injured parties to claim against the founders and the founders to get their benefits. Accordingly, the article suggests that the law on founders should be revisited to avoid the pitfalls arising out of the process of establishing share companies.

Keywords: *founder, joint and several liability, pre-incorporation commitments, promoter, Share Company*

I. INTRODUCTION

A share company does not exist spontaneously as its formation requires planning and other preliminary arrangements.[1] These preliminary tasks are to be carried out by persons called 'promoters'.[2] Promoters have decisive roles in a share company formation. As a result, company laws give due attention for matters related to promoters.[3] They impose various duties and liabilities to safeguard the interests of the share company that will be formed, subscribers and other third parties who have interests relating to the formation. Additionally, the laws recognize certain rights to the persons involved in share company formation.

Likewise, Ethiopia, mainly through the provisions of its Commercial Code, attempts to regulate the issues that would arise in relation to promoters. There are, however, a number of flaws in the laws that regulate the same. The problems generally relate with the definition of promoters (which the law names as 'founders'), their liabilities and their relationships with the

[*] LLB (Haramaya University), LLM in Business and Corporate Law (Bahir Dar University), Lecturer at Haramaya University College of Law. The author could be reached through serkalem.zemom@gmail.com

[1] See Seyoum Yohaness, *On the Formation of a Share Company in Ethiopia*, XXII: 1 J. ETH. L. 102, 100-127 (2008).

[2] See JANET DINE, COMPANY LAW 86 (4th ed.) (2001).

[3] See FIKADU PETROS፣ የኢትዮጵያ ኩባንያ ሕግ፣ አንደኛ እትም፣ 2004 ዓ.ም፣ at 68.

share company, third parties and the subscribers. What is more, the draft Commercial Code has maintained almost the whole provisions on founders as they exist in the current Commercial Code. It is, thus, desirable to examine the existing laws to rectify the challenges that arise during the formation of share company.

To meet its purpose, the article analyzes the relevant provisions of the Ethiopian Commercial Code and other laws dealing with founders as primary sources. It also analyzes these laws with the practice in the business community by referring to prospectuses, memorandum of associations and articles of associations. Different books, journals and laws of other countries were also consulted to examine the Ethiopian law on founders of share company.

The remaining parts of this article are organized as follows. Section II provides brief overview of promoters. It tries to define the term promoter and indicates the various tasks the promoter would do to establish share companies. Section III provides some of the rationale to identify founders from other parties involved in the formation process in different capacities. Section IV is destined to investigate the Ethiopian law on what it calls 'founders'. In particular, it dwells on dealing with the aptness of the lists of persons whom the law considers as founders. Section V is reserved to discuss the diverse duties and liabilities of founders and related issues in Ethiopia. To this end, the section gives attention to the nature and grounds of liabilities. More importantly, it also examines if all founders are equally liable for all injuries arising from the process of share company formation. Section VI is about the benefits and protections given to founders in the law. It points out the conditions for the enjoyment by founders of the benefits and protections. Finally, section VII provides conclusion and remarks on the subject.

II. PROMOTERS OF SHARE COMPANY: GENERAL

In Ethiopia, there is sometimes a claim that the term "founder" in the Ethiopian Commercial Code is the same as the term promoter.[4] On the flip side, there are others who claim that the two terms are different.[5] Despite this, the clearest thing in the Commercial Code is the fact that the term promoter is used nowhere in the Commercial Code. Terms like 'founder' and 'organizer' are said to be synonyms of 'promoter' in the general jurisprudence.[6] 'Incorporator' is also used instead of 'promoter' in some jurisdictions.[7] In addition, projector was used to refer to persons engaged in the formation of a corporation.[8]

The complete judicial acceptance of the word promoter is, however, of recent date.[9] Promoter, as a term, was not being used until after it had been used in the Joint Stock Companies Act of 1844 of UK.[10] According to this Act, promoter is every person acting by whatever name in the formation of a company at any period prior to the company obtaining a certificate of

[4] Seyoum, *supra note* 1.

[5] See, for instance, Liku Worku *et al*, የንግድ ሕግ ማሻሻያ የፖ'ሊሲ ሰነድ፡-የንግድ ሕጉን ለማሻሻል የቀረቡ የፖ'ሊሲ ሃሳቦች አጭር ማጠቃለያ፣ at 15.

[6] ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 23 (2nded.) (2004).

[7] David C. Donald, *Approaching Comparative Company Law*, 14:1 FORDHAM JOURNAL OF CORPORATE & FINANCIAL LAW, 121, 82-178 (2008).

[8] BLACK'S LAW DICTIONARY 3835 (8th ed. 2004).

[9] *Id.*

[10] *Id.*

complete registration.[11] This definition is only for the purposes of the act so that it is inadequate for general purposes.[12] Though it can be agreed that promoters are indispensable for the formation of a company, defining them seems to be a difficult exercise. Black's Law Dictionary defines promoter as ''a founder or organizer of a corporation or business venture; one who takes the entrepreneurial initiatives in founding or organizing a business or enterprise''.[13] In UK, there is no satisfactory statutory definition of a promoter.[14] The statutory attempt to define promoter has been made under section 67(3) of 1985 UK Companies Act which defines promoter as ''a person who is 'a party to preparation of prospectus or a portion of it''. Clearly, this definition cannot be sufficient since it confines the status of promoter only to the preparation of prospectus.

In the common law, the usual dictum is that of Cockburn CJ in Twycross v Grant (1877).[15] In that case, the term promoter is defined as "one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose''.[16] This definition is broader than the one given above under the 1985 UK Companies Act. The definition incorporates two necessary elements that need to be satisfied for a person to become a promoter. One is the intention element which can be expressed when the person accepts to form a company. The second is the activity element which can be expressed by taking the necessary steps during the formation process. However, judicial practices provide us with certain exceptions to which the above definition would not apply for persons who were engaged in certain activities during the formation. It does not, for instance, apply to persons acting in a purely professional capacity if they are not involved in the business side of the formation.[17] In particular, the status of founder should not be given to employees acting in their capacity as employees as per their employment contract.[18] Interestingly, however, it may be possible for a person not to have been overtly engaged in the formation process. In this case, it has been said that the person shall be held as a promoter if he/she is the real 'power behind the throne'.[19]

Though identifying promoters is approached variously in different legal jurisdictions, there is a common element in the attempts to define or explain the term. It stands for persons who are involved to carry out the necessary steps to form a company. They framed the company, prepared the prospectus, found the directors and paid for printing, advertising and the expenses incidental to establishing the company.[20] Generally, the promotional activities of promoters may

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[11] MANFRED W. EHRICH, THE LAW OF PROMOTERS 4 (1916).
[12] *Id*.
[13] BLACK'S LAW DICTIONARY, *supra note* 8.
[14] See NICHOLAS BOURNE, ESSENTIAL COMPANY LAW 44 (3rd ed.) (2000).
[15] See NICHOLAS BOURNE, PRINCIPLES OF COMPANY LAW 25 (3rd ed.) (1998).
[16] See BEN PETTET, COMPANY LAW 44 (2nd ed.) (2005). See also *Id.*
[17] *Id.* See also the Malaysian Companies Act of 1965, Section 4(1)
[18] Lantera Nadew, *Pre-Incorporation Management under the Ethiopian Company Law: The Need to Redefined the Provisions Defining Founders,* 1:1 JIMMA UNIVERSITY J.L, 12, 1-14 (2007).
[19] See DINE, *supra note* 2.
[20] *Id.*

be classified as discovery (finding business idea), investigation (studying economic feasibility of the idea) and assembly (bringing together the necessary personnel, property and money).[21]

III. THE NEED TO KNOW FOUNDERS

Naturally, the process of forming share company causes various legal transactions in which the founders and subscribers are the primary actors. The subscribers are required to make a specified amount of contribution up on subscription for shares. According to Article 338(1) of the Commercial Code of Ethiopia, the specific amount is determined by the law or company documents. More importantly, Article 339(1) of the Commercial Code obliges in kind contributors to fully pay their contribution before the company is registered. For those who subscribe shares, the main reasons are the founders as they could invite them to invest in the share company under formation. The founders may invite even small income groups by lowering the minimum shareholding threshold.[22] The subscribers will benefit when the company is established and make profit. On the other hand, they may suffer loss when the company goes nonpaying or is not established at all. In this instance, the investors need remedies against unwarranted actions of the founders that may affect their interest. In addition, other outsiders (prospective creditors) would develop interests in the success of the company formation process. Their interest may be due to the contracts they have concluded with the founders. The founders may rent offices, hire and train relevant workers, use professional expertise and may conclude other contracts. In practice, they also make use of institutions like banks to facilitate sale of shares. Moreover, third parties may conclude contracts with the share company after its formation. These parties may be urged to do so due to the statements made to the public about the company. All these persons need the assurance that they will be paid back or get the promises of the founders.

It should not also be forgotten that the company under formation may come up with its own interests against the founders. The failure of the founders to take all the due cares during the pre-incorporation period may affect the company after it becomes a legal person. The founders themselves may sell their assets to the company under formation and the company can be badly cheated.[23] Besides, the founders may be tempted to overvalue the property and fail to make disclosure of overvaluation to an independent person which, in turn, violates their fiduciary duty.[24] Therefore, it is imperative to have a way for the company to be remedied against the problems it may suffer due to the founders' pre-incorporation acts. Lastly, the need to identify the founders is not only to impose liabilities. Rather, rewarding the efforts made for the formation of the company is also something appealing which the law should recognize.[25] This can be made by allowing certain protections and privileges to founders.

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[21] See Seyoum, *supra note* 1.

[22] Fikadu Petros, *Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications*, 4:1 MIZAN L. REV. 14, 1-30 (2010).

[23] See DINE, *supra note* 2.

[24] *Id.*

[25] See FIKADU, *supra note* 3, at 70.

The above discussions justifying the need to identify founder can be further reinforced by the fact that the company under formation and the founders have no principal and agent relationship. In almost all jurisdictions, a company has no legal existence before it is formed.[26] It is incapable of entering into a contract itself and equally incapable of acting through an agent.[27]

Understandably, the transactions during the formation process call for legal regulations. As a result, rules are necessary to protect the subscribers, the creditors and the company under formation. To this effect, company law should device a special mechanism. Accordingly, the Ethiopian share company law tries to regulate the legal relation of the parties during and after the formation of the company. As we shall see later, the share company law devices mechanism to establish legally recognized relationships between the founders and the share company which they finally establish. The company law imposes liabilities on the share company and founders toward each other. Similarly, the company law regulates the relationship of the founders with the subscribers and third parties. What is more, in the event the share company is established, third parties may have claim against the company based on their relation with the founders. For all these, identifying founders is, thus, of paramount significance.

IV. FOUNDERS IN THE ETHIOPIAN SHARE COMPANY LAW

Terminologically, the Ethiopian Commercial Code consistently adopts the term 'founder' though it does not specifically define the term. Despite this, there is a practice of using the term promoter both in the academic and business community. Beyond this, the business community sometimes classifies promoters as Main and Associate Promoters.[28] However, the practice within the business community regarding the two terms is not yet consistent. In some cases, the terms are interchangeably employed.[29] It can be, however, noted that promoter (main and associate promoters) is used to refer to the persons who are called promoter in other jurisdictions. There is also an increasing trend of using the term 'promoter' for persons who principally lead the formation process and 'founder' for subscribers who pay their whole contribution within a stated time.[30] In the academics too, there is no consistent understanding regarding the difference between 'founder' and 'promoter'. In some cases, all of the persons whom the Commercial Code considers founders are called promoters.[31] Importantly, the confusion is not still clear even for some persons involved in the amendment of the Commercial Code. In the views of these persons, the existing provisions on founders have no problems, so they can be kept as they are.[32]

With regard to definition, all the Commercial Code does is listing persons that can be taken as founders of share company. Accordingly, several persons are considered as founders. As

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[26] ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY: LAW TEXT AND CASES ON THE LAWS GOVERNING CORPORATIONS IN GERMANY, THE UK AND USA, 139 (2010).

[27] *Id*.

[28] See Prospectus of Hibir Sugar Factory, available at <www.hibersugarethiopia.com>, [last accessed Dec, 12, 2015]; See also Prospectus of Dalol Oil Share Company

[29] See for instance, Memorandum of Association of Dalol Oil Share Company, Art. 9 and its prospectus in English version.

[30] See FIKADU, *supra note* 3, at 70.

[31] *Id.* at 68.

[32] See Liku, *et al*, at 16.

alluded to above, there is an agreement that founders are persons engaged in the pre-formation steps of a company. Moreover, the status should only be given to persons who took the necessary preliminary steps of company formation.[33] Contrary to this, the Ethiopian Commercial Code goes far to have broader lists of founders.

Article 307(1) of the Commercial Code makes it clear that the formation of share company is not possible by less than five persons. This minimum requirement applies to both share company established among founders and through public offering of shares. With less than five members, the company, according to Article 311(1) of the Commercial Code, will exceptionally be validly alive for a maximum of six months. When we think of the above minimum number, it is not clear if the five members are required to be founders. In this regard, there is a claim that the 'five members' requirement is about the need to have five founders to get the permission and to engage in establishing a share company.[34] Though the title of Article 307 reads as 'founders', it does not use the same term under Article 307(1). It rather says a company may not be established by less than five "members". Members do not necessarily refer to the founders only. Thus, it may be understood that it simply requires that there should be five members (they may be founders and other subscribers) for the share company to get registered.

Article 307 of the Commercial Code provides the lists of persons who should be founders. However, the list is not exhaustive. Article 547(2) of the Code mentions another set of founders. Pursuant to Article 547(2), members of a Private Limited Company (PLC) who decide to convert the PLC in to share company will occupy the status of founder of the new share company. Cumulative reading of Articles 547(1) and 536 can tell us that conversion of a PLC in to share company does not require unanimous decision of the members. As such, some members may oppose the decision to convert it to a share company. In this case, the law does not make them founders. During such a conversion, it is plausible to assert that certain groups of founders under Article 307 of the Commercial Code can be founders. This is so because Article 544(5) of the Commercial Code states that rules related to formation of relevant business organization shall apply during conversion. As a result, the rules on founders are applicable in connection with conversion of a PLC to a share company.

A. Persons who Signed Memorandum of Association and Subscribe the Whole Capital

This group of founders exists only in connection with share companies established among founders. Article 307(2) envisages two requirements to bestow a legal status of founder. First, the person should sign the memorandum of association of the share company. In a share company established among founders, the founders have no duty to present prospectus. Rather, they have to sign memorandum of association of the share company that they are to establish

[33] Tilahun Teshome *et al, Position of the Business Community on the Revision of the Commercial Code of Ethiopia*, July 2008, at 20.

[34] See Liku Worku, *et al*, *supra note 5* at 11. See also Booz Allen Hamilton, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, January 2007, at 83.

among themselves.[35] Second, the subscription of the whole capital of the share company under formation shall be made only among those who signed the memorandum of association.[36]

The requirements to establish share companies among founders are less stringent than those required for public share companies. Article 316 of the Commercial Code enumerates the elements that should appear in the Memorandum of Association. In closely held share companies, there are different categories of founders recognized in the Commercial Code. These founders may be the legal minimum of five persons or more. Irrespective of their numbers, initial subscribers of closely held share company are thus always founders. This is also true regardless of the nature and amount of their contribution to the share company. In fact, the subscribers should not be 'straw persons' as regards contribution.[37] They are expected to make relevant contributions that enable the prospective company be established and function well.

B. Persons Who Signed the Prospectus

Since prospectus is not offered by share companies among founders, such type of founders is known only in connection with share companies through public subscription.[38] As per Article 318 of the Commercial Code, prospectus is the document which should be prepared and presented for the public for selling shares. In capital goods finance share companies, prospectus is defined as ''a printed statement that describes and forecasts the course or nature of the company along with expected risks to be distributed to prospective investors.''[39] According to Article 318 the Commercial Code, the founders by signing this document have many tasks that have to be part of the prospectus. They directly influence the subscribers more than any other group of founders since they provide the very important information for subscriptions.

At this junction, it may be imperative to highlight the nature of prospectus in our law. Generally speaking, there are different positions regarding the nature of prospectus. Since the earlier time, some suggest that it is an offer and others argue that it is not an offer.[40] It has been said that an agreement to subscribe for shares would be construed as a contract by the promoter upon the stipulated basis and to sell certain shares to the subscribers.[41] On the other hand, company laws like Indian considers prospectus as documents inviting offers from the public for subscription.[42] In Ethiopia, whether a prospectus is an offer or an invitation to offer is not clear. In the Commercial Code (Art. 318(1)), prospectus seems an offer. From contractual point of

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[35] It can be said that these persons shall also sign the Articles of Association of the share company they are to form.

[36] See Commercial Code of the Empire of Ethiopia, Proc. No. 166/1960, NEGARIT GAZETA, *Gazzet Extraordinary*, 19th Year No. 3, Addis Ababa, 5th May, 1960, Art. 316 [herein after, The Commercial Code].

[37] See Seyoum, *supra note* 1, at 107.

[38] These types of share companies are formed through offering shares for the public at large. More than the closely held share companies, many interests would come in to play in this type of share companies. Consequently, the law puts some stringent and detailed requirements for their formation. The law governing the relations among the parties coming together for the events connected to the formation process is also more detailed.

[39] See Requirements for Licensing of Capital Goods Finance Business Directives No. CGFB /02/ 2013, Art 5.2.3

[40] See EHRICH, *supra note* 11, at 84-85.

[41] *Id*. at 88.

[42] See The Companies Act of India 2013, Section 2(70).

view, it is said that prospectus is an invitation to offer.[43] If so, the contents of Article 318(1) of the Commercial Code shows that the prospectus is meant to simply assist investors to make offers to subscribe shares. This, in turn, means that the founders may reject offers by this or that of the subscribers.[44]

A critical look at Article 318 of the Commercial Code may indicate the possibility to take the prospectus as an offer.[45] Of course, this article contains more information beyond what a typical offer should contain. As said above, this information is to let investors make informed decisions to make an acceptance.[46] The prospectus should allow the subscribers to make informed assessment of the activities, assets, liabilities, management and prospects as to profits and losses and rights attaching to the shares being offered.[47] This can be possible, *inter alia*, through the additional information contained in the prospectus. However, the remaining elements under Article 318 of the Commercial Code are purely the terms of the offer that must be accepted by the offerees. Indeed, the prospectus as defined in the capital goods finance directive does not contain any term as an offer. Where a subscriber introduces any modification to the terms of the prospectus, it is a defective acceptance and shall be deemed to be a rejection as per Article 1694 of the Ethiopian Civil Code. This means the subscriber is making a counter offer which the founders do not have obligation to accept. Similarly, Article 469 of the Commercial Code indicates that, during capital increment, prospectus provides offers to subscribers of new shares. This provision also mentions the information that should be provided in the prospectus and the necessary terms that should be accepted by the subscribers.

More importantly, Article 318(2) defines the offerees. This would fulfill the Civil Code requirement that the offerees shall be specifically defined.[48] According to Article 318(2), all persons who may wish to apply to subscribe shares can do so. In fact, this provision does not work for certain categories of persons, as, for instance, non-Ethiopians, influential shareholders and regional states are prohibited from acquiring shares in the financial sector.[49] Moreover, the express use of the term "offer" in Article 318 and 469 of the Commercial Code intends to consider the prospectus as an offer. It is, therefore, possible to say that subscription is an 'acceptance' by an investor to purchase shares.[50] Article 319 of the Commercial Code further

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[43] FIKADU, *supra note* 3, at 66.

[44] *Id.*

[45] The prospectus seems to be different from the declaration of intention under article 1687(a) of the Ethiopian Civil Code. As per this provision, declaring intention to give, to do or not to do something without making this intention known to the beneficiary of the declaration cannot be an offer. With the prospectus, the founders declare their intention to sell share and the beneficiary is anyone who comes to know the prospectus.

[46] The elements in Article 318(1(a) to (1c)) are purely to provide information to base decisions by the investors.

[47] Tikikile Kumulachew, *Regulation of Initial Public Offering of Shares in Ethiopia: Critical Issues and Challenges*, 4 ETHIOPIAN BUSINESS LAW SERIES, 13, 1-52 (2011).

[48] See Civil Code of the Empire of Ethiopia, Proc. No. 165/1960, NEGARIT GAZETA, *Gazzet Extraordinary*, 19th Year No. 3, Addis Ababa, 5th May, 1960, art. 1687(a) [herein after The Civil Code].

[49] *Commercial Registration and Business Licensing Proclamation* No. 686/2010, FED. NEGARIT GAZZETA 16th Year No. 42, Addis Ababa, 12 July 2010. Arts. 2(18), 2(16) and 2(26), *Insurance Business Proclamation* No. 746/2012, FED. NEGARIT GAZZETA 18th Year No. 746, Addis Ababa, 22 August 2012. Arts 9-10; and *Banking Business Proclamation* No. 592/2008, FED. NEGARIT GAZZETA 14th Year No. 57, Addis Ababa, 25 August 2008. Arts. 9-10.

[50] See Seyoum, *supra note* 1, at 110.

requires the founders to provide the application form with the prospectus. Besides, Article 319(2) of the Commercial Code requires the subscribers to declare that they read the prospectus.

Leaving the issues about nature of prospectus aside, persons who signed it are founders according to Article 307(3) of the Commercial Code. Staring at Article 318(1) may create confusion on who should sign the prospectus. Unlike Article 307(3), the reading of Article 318(1) does not suggest that the persons who signed the prospectus are founders. Rather, it requires the prospectus to be signed by the founders.[51] This pushes one to know these founders, which in turn leads to Article 307 and other provisions of the Commercial Code. Pursuant to Article 307(3) and (4) of the Commercial Code, there are different group of founders. The conclusion that can be drawn from the cumulative reading of Article 307(3) and 318(1) of the Commercial Code is that all the founders should sign the prospectus.

However, close reading of them may make this conclusion unacceptable. Or else, at least for some of the founders, the conclusion may not work as they become founders after the prospectus is presented for the public. For instance, this applies to founders under Article 307(4) of the Commercial Code and for founders who make in-kind contributions. Understandably, thus, the founders stated under Article 318(1) of the Commercial Code are those implied by the phrase "*persons who sign the prospectus*" under Article 307(3) of the Commercial Code. This means that the founders who are expected to sign the prospectus are those persons who signed it under Article 307(3). Some of the founders under Article 307(3) and 307(4) are not expected to sign the prospectus. Sometimes, this may not, however, be true for those under article 307(4) of the Code. Those who merely initiated the formation of the share company may put their signature on the prospectus. Related with this, it has been argued that persons who sign on the prospectus are founders though they do not involve in any other action in connection with the formation process.[52]

C. Persons who bring in-kind Contributions

The other group of founders is those subscribers who contribute in-kind.[53] Here, the mere contribution in-kind alone suffices to acquire the status as no regard is given to the type and amount of contribution. However, such status of founder is maintained only to in-kind contributors who make their contribution before the registration of the share company. This can be inferred from the reading of Article 370(1a) of the Commercial Code which excludes *'founders and in kind contributors'* from being elected as auditors of the company. In this Article, it is clear that the term '*founders'* includes contributors in-kind under Article 307(3).

The perplexing issue with this category of founders is the justification why these subscribers are founders while their counterparts via cash contribution are not. The distinction may be of no problem if it is considered in its face value. The problem would be vivid when we examine these

[51] Such understanding has been reflected. See Nigussie Taddese, *Major Problems Associated with Private Limited Companies in Ethiopia: the Law and the Practice* (LL.M Thesis), (AA University, School of Law, 2013), at 98.

[52] See Lantera Nadew, *supra note* 18, at 8.

[53] See The Commercial Code, Art 307(3).

founders in light of the benefits and liabilities attached to founders. Does the law have enough justification when it gives benefits to and impose liabilities on in-kind contributors, but not to those who contributed in cash? In the extreme case, one may question the basis to make in kind contributors founders even without comparing them with the cash contributors.

As stated before, the benefits for the founders are made as reward. Also, founders are required to bear liabilities. In the Commercial Code, the base for the liabilities seems to rest on the roles the founders played in making the members of the public or the would-be- company incur losses. Besides, the law does not seem to consider the magnitude and the relevance of the roles played by the founders. On the other hand, it may be contended that the Commercial Code considers the magnitude of roles played in the formation of the company and in putting the interests of other persons at risk. The distinction made between the subscribers (in cash or in kind) can support this contention. It also seems that the law tends to identify founders primarily to impose liabilities. The one who poses more potential threat on the interest of stakeholders should be required to take more of the risks. Herein below, a discussion is made based on this consideration to look if the distinction between the subscribers is tenable.

Unlike contribution in cash, contribution in-kind is subject to different requirements. In-kind contribution should be mentioned in the memorandum of association with its values, object, price, and shares allotted to the shareholder in exchange.[54] It does not mean that the value of the contributions in-kind is always equal to the value of shares given to the contributor. This may be understood from the reading of Art. 313(7) of the Commercial Code which does not require shares of equal value to be given to the shareholder. As shares cannot be issued at discount (Art. 326(1) and 306 of the Commercial Code), the value of in-kind contribution must not be lower than the sum of par values of the shares. Where shares are issued at premium as per Art 326(2), the value of the contribution should at least pay the amount including the premium.

Article 318 of the Commercial Code requires that the contribution in-kind with the above element should appear in the prospectus. On top of this, the Commercial Code under Art. 315(1) needs the valuation of the contribution to be made by experts. In the report, the experts have to show detailed description of the properties, the value and the method of valuation they employed. This requirement is to help investors make an informed decision. The valuation by the experts was designed to attach values that the in-kind contributions really deserve. These disinterested experts are much trusted than the founders or the contributors to give fair evaluation of the contributions. However, this requirement is no more applicable as it is repealed.[55] The agreement of the founders or the members of the business organization would be enough to make the valuation.[56] During the valuation process, whoever is to value, the contributors may be

[54] *Id.*, Art. 313(7). The law lacks clarity as to how valuation of in kind contribution can initially be presented in the prospectus. It may be possible when founders who signed the prospectus are also contributors in kind. Additionally, the law does not put the necessity of revising the prospectus once offered. If amendment is possible, every contribution in kind may be valued and the prospectus is amended accordingly.

[55] See *Commercial Registration and Business Licensing Proclamation* No. 980/2016, FED. NEGARIT GAZZETA 22th Year No. 101, Addis Ababa, July 2016. Art 5(9).

[56] *Id.*

expected to take the necessary steps like bringing the in-kind contributions to a certain place which have cost implication.

In addition, the time when the subscribers should perform their obligation may be important to examine the appropriateness of the distinction among the subscribers. The subscribers, if they are late, shall wholly contribute before the date of registration of the company.[57] Moreover, Article 339(2) states that shares representing contribution in-kind may not be separated from the counterfoil of the company and be negotiated before two years from registration. This bars the rights of the subscribers from simply transferring or pledging their shares before two years from the formation of the company. This is also another burden on the in-kind contributors. In this regard, there is a proposal that the length of the year should come down to one year.[58] Despite this, the Draft Commercial Code simply maintains the position of the Commercial Code. Nonetheless, the proposed one year time would not totally avoid the discrimination.

At times, the in-kind contributors may be forced to leave the company at all. To show this, we can find two situations where the in-kind contributors may face danger of leaving the company. The first instance comes when the subscribers sit to conduct the tasks of the subscribers' meeting as provided under Articles 320 through 322 of the Commercial Code. Among the purposes of this meeting is to approve contribution in-kind.[59] The subscriber shall leave the company where the subscribers' meeting reduces the number of shares allocated to contributors in-kind.[60] He may remain in the company if he can make the balance good.[61] Being successful at this stage cannot totally avoid the possibility of withdrawal of or extra contribution by the contributor. Rather, the verification of the value of in-kind contributions by the auditors and directors would remain to be another source of worry. This is, as it is provided under Article 315(4) of the Commercial Code, when the verification of the valuation results in the value of the contribution being lowered by one fifth. Indeed, it does not seem that they are forced to leave the company for every minor reduction. A reduction by an amount below one fifth of the value appears tolerable. The directors and auditors shall make the verification within six months from the date of formation of the company. The law unequivocally states that the contributor shall withdraw unless he makes the difference good. Also, Article 315(3) stipulates that the shares representing the in-kind contribution shall not be given to the shareholder until the verification is made. This means the in-kind contributors can take their shares after the verification so that they can enjoy them in a way they like. This does not yet seem true since Article 339(2) prevents the in-kind contributors from assigning their shares before two years from the time of formation of the company.

Apart from the above, the law is not clear as to the effect of the verification of the auditors and directors or the approval of the subscribers which increases the value of the contribution by even a meaningful amount. The law is also mute as to the remedies to the contributor up on

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[57] See The Commercial Code, Art. 339(2).
[58] See LikuWorku, *et al, supra note* 5, at 14.
[59] See The Commercial Code, Arts. 321(3), 322 (5) and 315(4).
[60] *Id.*, Arts. 315(4), 322(5)
[61] *Id.*

leaving the company. In the former case, it may be possible to argue that the contributor may benefit from the increase if there is any. In support of this, Article 315(3) of the Commercial Code may be invoked. The provision generally authorizes the auditors and directors to review the valuation. Such review may increase the value of the contribution. In itself, such decision would also lead to a very important question. If the contributors are to be issued with additional new shares, it will increase the capital of the company. As can be observed under Article 464 and subsequent provisions, the Commercial Code imposes fairly stringent regulation in relation to increasing capital by share companies. In the first place, increasing capital amounts to amendment of the memorandum of association of the company.[62] If so, Article 423 of the Commercial Code gives the power to amend the memorandum of association and articles of association to extraordinary meeting of the company. Hence, the directors and auditors cannot issue new shares to the in-kind contributors in the above situation. Secondly, the Commercial Code does not seem to allow new shares to be subscribed in return for in-kind contribution. This can be inferred from Art 464(2) of the Commercial Code which in a seemingly exhaustive manner lists out the means to pay for new shares. Apparently, contribution in-kind is not in the list. Indeed, one may argue that, as far as it does not affect the subscribed capital, the amount beyond the initial value can be returned to the in-kind contributors.

In case where the subscribers' meeting examines the in-kind contribution for approval, the above issue may not be serious. In this case too, one may raise certain concerns. The law envisions that the in-kind contributor may make additional contribution or shall leave the company where the meeting reduces the number of shares allocated to contributors in-kind.[63] However, the law remains unspeaking about the consequence if the subscribers' meeting finds that the value of the contribution was erroneously reduced. Of course, it may be possible for the meeting to issue new shares for the subscriber and amend the draft memorandum of association accordingly.

Obviously, the problems related to contribution in-kind are not only the concern of the contributors. As said, the subscribers meeting may reduce the capital of the share company when it reduces the number of shares in return to in-kind contribution. Even well after six months from the date of formation, the capital of the company may be reduced when the value of the contribution is found to be lowered by one fifth of its originally assigned value. Noticeably, the six months time would cause the share company to have several creditors that would be at risk.

Apart from the above, it is imperative to consider the roles of and burdens on cash subscribers to understand the said distinction. In fact, this category of shareholders does not include persons who are to be allocated a special share in the profits and those cash subscribers who become founder under Art 307(4) of the Commercial Code. The law requires subscribers through cash to pay one-fourth of the shares they subscribed upon subscription.[64] Indeed, the

[62] *Id.*, generally Chapter 7 Amendments to the memorandum or articles of association and the articles starting from 469.

[63] *Id.*, Arts. 322(5) & 315(4).

[64] *Id.* Art. 338(1).

memorandum of association may demand more than this amount.[65] Unlike in-kind contributors, they may have five years from registration to perform the balance of their obligations.[66] In addition, there is no legal restriction on the transfer of the share of this kind of contributors. The only restriction is that the shares shall stay registered shares until full payment of the subscription.[67] Actually, it does not mean the transfer is absolutely free as it may be subjected to requirements imposed by the articles of association, resolution of an extra ordinary meeting or by law for another reason.[68] Compared to in-kind contribution, it should also be noticed that cash shares may not pose unclear danger on the company and its creditors. Because the amount cannot affect the capital of the company as they are already liquid, they are not exposed to problems like exaggeration of value.

It is said that identifying person as founder is also to bestow benefits for what they did towards the formation of the company. As discussed below**,** the benefits out of being founder are not attractive due to the various encumbrances. The mere success of the formation process alone cannot guarantee the founders realize the benefit provided for in the law. In the first place, the rule is 'no profit no benefit'. As discussed under section VI (B) of this work, there are also other strains to the benefit. On the other hand, in the eyes of the law, founders could hardly escape liabilities if there is any damage to persons due to the formation process of the company. Thus, it may be argued that the main aim of the law is to primarily regulate the liability aspects. From benefit perspective, Article 322(3) of the Commercial Code further allows the cash contributors to challenge rights of their counterparts contributing in-kind. At times, they may totally deny the benefits to all or some of the founders.

D. Persons to be allocated with Special Share in the Profit

Pursuant to article 307(3), persons that are to be allocated with a special share in the profits of the share company under formation are given legal status of founders. It can be said that this group of founders exist only in case of publicly held companies. To this effect, the phrase "*where a company is to be formed by the issue of shares to the public*" in article 307(3) can be cited. Yet, the law does not indicate the grounds that entitle these persons with special benefits in the profits. In practice, they are persons who pay all or certain percentage of their contribution before or on a certain date.[69] In fact, it is possible to get instances in the practice that certain outsiders are allocated with special benefits. For instance, advisors of promoters constitute this category. Since these outsiders are given certain benefits for their contribution in the formation process, the grounds discussed below would encompass them.

Like the in-kind contributors, persons to be allocated with special share can be founders if they subscribe before the share company is registered. Article 370(1a) of the Commercial Code

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[65] *Id.*

[66] *Id.*, Art. 338(2).

[67] *Id.*, Art. 338(1).

[68] See Articles 333 and 349 of the Commercial Code for further readings on the possible restrictions on shares.

[69] For instance, in case of Hibir Sugar Factory Share Company, it is mentioned that subscribers who may pay 50% of their subscription before Dec 11, 2009 are considered as founders. See Prospectus of Hibir Sugar Factory, *supra note* 28.

can support this assertion as it makes '*founders and beneficiaries holding special benefits'* ineligible to be share company auditors. Legally speaking, the word '*founders'* here includes persons that are to be allocated with a special share in the profits of the company under formation.

E. Persons who Initiated Plans or Facilitated the Formation of Share Company

This group of founders is known to both forms of share company. Any person who has initiated the plans for the formation of the company or has facilitated the formation of the company is a founder.[70] Sometimes, these persons are named as 'organizers' of the share company under formation.[71] In reality, the 'organizers' play very crucial roles during the formation of capital goods finance companies. Among others, they appoint project manager who is responsible to take care of the whole process of getting license for the capital goods finance company.[72]

The above group of founders may or may not constitute the legal minimum required for the formation of share company. The phrase *"even though outside of the company"* under Article 307(4) of the Commercial Code indicates this fact. Coming to judicial practice, there was the tendency of the judiciary to take outsiders like advisors of promoters as founders.[73] In some cases, those who initiate plans or facilitate the formation of the share company may be shareholders. For instance, a cash contributor who is not founder based on the other grounds may possibly become founder under this category. In case of public companies, the number of this kind of founders can be higher due to the existence of public offering of shares. The offering of shares to the public involves various intermediaries like banks, postal offices and other brokers.[74] On the other hand, the number of the outsiders in case of closely held companies may be limited for the absence of share offering. This fact reduces the relevance of employing brokers in trading the shares of closely held share companies. Additionally, there is no need to prepare prospectus which then limits participation of outsiders in the closely held share companies.

The reason in taking persons who initiate or facilitate company formation as founders seems that some persons may push investors to invest or deal with persons for the formation of the company. Those who convinced the third parties either directly or indirectly should bear liabilities. They may also cause damage to the company and other third parties. Though this argument seems logical, there is a problem as to the scope of persons under this category. It could be difficult to exactly fix what 'initiating plans' or 'facilitating formation' means.[75] This provision permits one to consider many persons, even with so insignificant contribution in the formation process, as founders. This is because the terms 'initiation' and 'facilitation' are not defined with clear boundaries. Persons appointed as agents by the founders, employees, accountants, and lawyers may thus come under the purview of this provision since, in most

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[70] See The Commercial Code, Art. 307(4).

[71] Requirements for Licensing of Capital Goods Finance Business Directives No. CGFB /02/ 2013, Art 2.8.

[72] *Id.*, Art. 4.1.1.

[73] Mesfin Shiferaw and others v. Zemen Bank, FED. FIRST INSTANCE CT., LIDETA DIV., FILE NO. 190351 (Decision of 25 June 2004 E.C).

[74] Taddese Lencho, *To Tax or Not to Tax: Is that really the question? VAT, Bank Foreclosure Sales, and the Scope of Exemption for Financial Services in Ethiopia*, 5 MIZAN LAW REV. No. 2, 280, 264-310 (2011).

[75] See Tikikile, *supra note* 47, at 38.

instances, persons who facilitate the formation of the company are paid workers and professionals.

In this regard, it is maintained that persons who act merely in a professional capacity will not be founders unless they become involved in the business side of formation.[76] Also, employees acting within their employment contract should not be taken as founders.[77] Similarly, Section 269(c) of the 2013 Companies Act of India excludes a person who is acting merely in a professional capacity from being a promoter. In Ethiopia, Article 307(4) of the Commercial Code has provided no exception like this. However, the need to clearly introduce exceptions has been felt.[78] In fact, there is still a belief that there is no problem within the law.[79] Interestingly, the Draft Commercial Code does not at all consider persons who facilitated the formation of the company as founders.[80] This outright exclusion may create its own problem as it does not permit outsiders who become involved in the business side of the formation process to be considered.

On this category of founders, it seems to appear that there is a difference between the Amharic and English versions of article 307(4) of the Commercial Code. The English version clearly deals with two types of founders. Firstly, those who have initiated plans for the formation of the company are founders. Regarding these founders, the Draft Commercial Code downsizes the scope of the provision of the Commercial Code. Art 307(4) of the Draft considers founders as those who have initiated plans in respect of commitments entered into for formation of the company. It seems to deal with person who initiates plans for entering into commitments for formation of the company which are only part of the pre-formation activities. Initiating founders to enter in to commitments may itself amount to an involvement to the business side of the formation. Therefore, maintaining founder status to these persons seems justified.

In the second place, article 307(4) of the Commercial Code stipulates that persons who have facilitated the formation of the company shall have the status of founders. As said above, these are not recognized as founders under the Draft Commercial Code. This exclusion can be appropriate as far as the persons who facilitate the formation are doing it in their professional capacity or as employees. However, this total exclusion may prevent the possibility of taking those acting beyond their professional duties as founders.

Unlike the English version, the Amharic version of Article 307(4) of the Commercial Code does not clearly put the two types of founders. It seems to recognize only one group of persons who are outside of the company. Whether it recognizes those who initiate the formation of the company or those who facilitate its formation is not clear. Actually, this may come as no surprise since the meaning of these terms and the difference between them is not vivid. Article 307(4) of the Amharic version reads as *"በማህበሩ ያልገቡ ማንኛዎቹም ሰዎች የማህበሩ መቋቋም እንዲጠና ሲሉ ማንኛዉንም እርምጃ ለማህበሩ ስራ ያደረጉ ሁሉ እንደ መስራቾ ይቆጠራሉ።"* This provision seems to provide cumulative conditions for an outsider to be a founder. Anyway, it clearly indicates that a person

[76] See PETTET, *supra note*, 16.
[77] See Lantera, *supra note*, 18.
[78] Liku Worku, *et al*, supra note 5, at 15.
[79] *Id.* at 16.
[80] The Draft Commercial Code of the Federal Democratic Republic of Ethiopia, Art 307.

would be a founder for any activity done with a view to form a company. The phrase "*የማህበሩ መቋቋም እንዲጠና ሲሉ*" implies the persons engage in the activities with an intention of helping the formation process. This would amount to an involvement in the business of forming a company. As a result, it can be contended that persons providing only professional services and employees are excluded from the ambit of being founders.

V. DUTIES AND LIABILITIES OF FOUNDERS UNDER ETHIOPIAN SHARE COMPANY LAW

A. Duties of Founders

The Commercial Code does not oblige any person to act as a founder. That is rather to be taken by volunteers whom the law then takes as founders. The law then imposes certain duties on the founders. In many jurisdictions, promoters have a fiduciary duty in relation to the company to be formed. By this, they owe duties of care and loyalty to their co-promoters, the company that is going to be formed and to others who have financial interests in the company.[81]

Similarly, the Commercial Code imposes certain duties on founders of companies. Among others, the founders shall sign memorandum and articles of association before applying for commercial registration.[82] However, before that, founders or members of a business organization shall get the verification of the registering office on whether the proposed name of the business organization has already been occupied.[83] The previous law on commercial registration required advance written permission, which was to be secured by the founders, by the registering office of companies to start formation through public subscription.[84] This condition was not required where the company to be established is among the founders. It is so because the founders of closely held companies do not offer shares for the public. In some share companies, disclosure of the formation process to the public is obligatory. As part of formation duties, founders of a bank are required to publish a notice of intention to engage in banking business in widely circulating newspapers.[85] The same duty is also expected from founders of insurance companies.[86]

As regards the specific founders to secure the written permission, it is, as a matter of fact, the founders who should sign the prospectus to obtain the permission. After obtaining the permission, the founders shall prepare the prospectus with the required details provided under Article 318 of the Commercial Code. Perhaps, the prospectus may be prepared even before securing the permission. It should be remembered that not all founders can sign the prospectus and make it available for the public. The founders should also allow the prospectus and the expert report on in-kind contribution (which is part of the prospectus as per Art. 318(1)) of the Commercial Code) to be available to all persons who may wish to subscribe. In addition, the

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[81] See PINTO & BRANSON, *supra note* 4, at 29.

[82] See *Commercial Registration and Business Licensing Proclamation* No. 980/2016, FED. NEGARIT GAZZETA 22th Year No. 101, Addis Ababa, July 2016. Art 5(6).

[83] *Id.*, Art. 5(7).

[84] See *Commercial Registration and Business Licensing Proclamation* No. 686/2010, FED. NEGARIT GAZZETA 16th Year No. 42, Addis Ababa, 12 July 2010, *Art. 12(5).*

[85] Banking Business Proclamation, *supra note* 63, Art. 4(1c)).

[86] Insurance Business Proclamation, *supra note* 63, Art. 4(1(c)).

offer through the prospectus should be accompanied by an 'application form' to be filled by any subscriber.

Pursuant to Article 309(1(c)) of the Commercial Code, the founders have also the duty to make accurate statements to the public in respect to the formation of the company. This provision envisages a means other than the prospectus of providing information to the public. Article 318 of the Commercial Code does not require that all the information shall be made through the prospectus. Actually, the contents of the prospectus are mentioned under Article 318 of the Commercial Code in a manner which seems exhaustive. In practice, founders use diverse media to provide information regarding the company under formation. In these instances, they are duty bound to keep the information accurate. It is also a duty whose violation is punishable under Article 718 of the Ethiopian Criminal Code. This provision makes it clear that a founder, who is in a position to know the state of affairs of an undertaking, intentionally gives or causes to be given essential and untrue information to the public is punishable by imprisonment or fine. Indeed, the provision puts private complaint as a prerequisite to prosecute the founder. Practically speaking, it may be difficult to effectively prosecute founders on the basis of the above provision since, for instance, it requires proving intention of the founders.

As per Article 319(1) of the Commercial Code, when the time for making applications for share has expired, the founders are duty bound to call a meeting of the subscribers. The purposes of this meeting and the manner of conducting it are stated in the law.[87] In addition, founders have the duty to draw and sign the resolutions of this meeting according to Article 322(1). The Commercial Code also imposes duties on the founders even after they successfully form the share company. It seems that the Commercial Code expects them to closely follow matters in connection with, inter alia, forms, classes and prices of shares, transfer of shares, indication on shares, register of shareholders, purchase by the company of its own shares, paying up on shares, etc.[88] What is more, not all persons whom the law considers founders are responsible to carry out the above duties. As indicated somewhere above, all of them cannot, for instance, prepare and sign the prospectus. All of them cannot practically involve in calling subscribers' meeting.

B. Liabilities of Founders

During carrying out the duties imposed by the law and initiations of the founders, it is inevitable that founders may incur liability. The liabilities may be either contractual or extra contractual. In addition, the founders may incur criminal liabilities as per Articles 718, 675 and 676 of the FDRE Criminal Code. For the purpose of convenience, the grounds of the liabilities are classified based on "commitments for formation of the company" and "other grounds".

1. Liabilities of Founders Due to Commitments for Formation of the Share Company

For long time, most common law countries follow the rule in Kelner v. Baxter (1886) which established that founders are personally responsible for liabilities arising from pre-incorporation

[87] See The Commercial Code, Art. 321

[88] See The Commercial Code, Art. 346. This article does not make such a distinction, though.

contracts and that the company cannot adopt them.[89] The principle is still maintained though there exist certain exceptions (for example, by way of ratification) under which the company up on its formation will overtake the commitments.[90] Likewise, it is accepted that there could be no contract between a promoter and his unformed company to claim reimbursement of expenses incurred in setting up the company.[91] As alluded to in this work, the primary justification for the positions is evident, i.e. the company has no personality during its process of formation.

In Ethiopia, too, the principle is that founders are jointly and severally liable for the pre-incorporation commitments.[92] Exceptionally, however, the law requires the company, up on establishment, to take the commitments of the founders and refund the expenses they have incurred.[93] The conditions under which the company may take the commitments and refund expenses are discussed in the part dealing with protection of founders. Article 308(1) of the Commercial Code states that the founders are 'fully, jointly and severally' liable to third parties for the pre-incorporation commitments. Here, the expression used to indicate the nature of the liability calls for correction. The phrase "*fully, jointly and severally*" is not different from the notion of "joint and several liabilities", so it is recommended to change it accordingly.[94]

Article 308(1) of the Commercial Code specifies two categories of parties who are liable for the pre-incorporation commitments. The first is the founders which are implicated in its first statement. The second is '*all persons who acted in the name of the company before its registration*'. With this statement, one may question as to who would be this second category of persons. Whether these persons are the founders or other persons is far from being clear. Reading this with other provisions on founders implicate that this category of persons seems to be different from the persons whom the law regards as founders. There is, however, an assertion that these persons are also founders under Article 307(4) of the Commercial Code.[95] Of course, it can be said that these persons would fall under the widest scope of Article 307(4). We may say that a person has at least facilitated company formation if he acted in the name of the company under formation.

In a different way, a more acceptable view has been offered regarding the identity of this group of persons ('*all persons who acted in the name of the company before its registration*'). Accordingly, the second statement refers to persons who prematurely act on behalf of a share company because they erroneously but in good faith believe the company has been formed.[96] There are jurisdictions that do not impose liabilities on such persons.[97] However, the Ethiopian Commercial Code does not relieve them from liabilities out of pre-incorporation contracts. In

[89] Joseph H. Gross, *Liability on Pre-Incorporation Contracts: A Comparative Review*, 18 MC GILL L.J, 513.
[90] See BOURNE, *supra note* 15, at 46.
[91] See BOURNE, *supra note* 16, at 28 & CAHN & DONALD, *supra note 26*, at 139.
[92] See The Commercial Code, Art. 308(1)
[93] Ibid, Art 308(2), As far as expenses are concerned during the establishment of public enterprises, the Expenses of the Supervisory Authority are deemed to be part of the capital of the Public Enterprise. See Public Enterprises Proclamation No. 25/1992, Art. 5(4).
[94] See Tilahun Teshome *et al*, *supra note* 33, at 19.
[95] See FIKADU, *supra note* 3, at 74.
[96] See Seyoum, *supra note* 1, at 123.
[97] *Id.*

any event, it is difficult to argue that the second statement of Article 308(1) of the Code is to consider what other jurisdictions say 'active shareholders' who influenced founders to enter into certain commitments.[98] This is because the persons envisaged in the statement are those who acted in the name of the company under formation which can fall within the ambit of Article 307(4) of the Commercial Code. If this is so, the statement remains to be redundant.

2. Liabilities of Founders Based on Other Grounds

In addition to pre-incorporation commitments, the Commercial Code recognizes other circumstances to impose liabilities on founders. Accordingly, the liabilities of the founders are generally of three types: for the company, subscribers and other third parties. The nature of the liabilities may slightly differ based on whether the intended share company is established. Article 309(1) of the Commercial Code stipulates some grounds to hold the founders jointly and severally liable to the company they have established or third parties. Once the founders take the initiation to establish a share company, they are expected to take all the necessary cares to establish a strong share company. The founders owe the share company fiduciary duty as it is entirely in their hands during its formation.[99] If this duty is violated, they will be liable for the share company they have established. Likewise, Article 309(1) of the Commercial Code does not allow the founders to cause damage on third parties that may transact with the company. It stipulates three common grounds to hold the founders jointly and severally liable to the company or third parties. It should be noticed that these liabilities of the founders to third parties are in addition to their liabilities arising from the pre-incorporation contracts under Article 308 of the Commercial Code. In joint and several liabilities, a judgment in favor of one promoter does not bar to bring a subsequent action against the other promoters.[100]

2.1.Liability for Damage Related to Subscription of Capital and Payments required for the Formation of the Share Company

Coming to the bases of the liabilities, the first source is mentioned under Article 309(1a) of the Commercial Code. As such, the founders shall be jointly and severally liable to the share company or third parties for any damage related to ''subscription of capital and payments required for formation of the share company." As is known, the law requires full subscription and payment of certain amount of the capital before registration.[101] The share company may encounter difficulties if it is formed with a capital less than the law requires. Thus, the law holds the founders liable to the company for any damage in connection with this. Apparently, the capital of the share company as it appears in the memorandum of association may entice third parties to enter into various transactions with the share company. Due to the concept of limited liability, the capital of the share company is the main guarantee for third parties. Thus, third parties may incur damage if the share company has not been properly financed during formation and is not able to perform its liabilities towards its creditors.

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[98] See CAHN & DONALD, *supra note* 26, at 138.
[99] See PETTET, *supra note* 16, at 44; & BOURNE, *supra note* 15, at 26.
[100] See EHRICH, *supra note* 11, at 298. See The Civil Code, Art. 1898.
[101] See The Commercial Code, Arts 312(1), 338 and 339.

When one talks about the liability of the founders based on the above ground, there would arise certain mind-boggling questions. The first is about the exact liability of the founders to the share company which is defectively formed at least due to the defect in relation to capital subscription and payment. In our law, a share company has a legal personality up on registration and publication notwithstanding that all the legal requirements of formation have not been complied with.[102] Exceptionally, the existence of the share company would be contested if the interests of creditors or shareholders are endangered due to the non-fulfillment of the legal requirement.[103] In such cases, the court may even order dissolution of the defectively formed share company. The Commercial Code does not, however, specify the grounds that may lead to dissolution. Despite this, Article 324(3) of the Code sets three months as period of limitation for the creditors or shareholders to submit application for dissolution based on the defects of formation.

Apart from the above, Article 324 of the Commercial Code does not entitle the share company, creditors or shareholders to proceed against the founders due to the defective incorporation. In this regard, it is argued that the founders shall be held liable to the creditors by piercing the corporate veil.[104] As dissolution may not necessarily be the measure, one may argue that the court may decide that the founders should make the defect in relation to capital subscription and payment good. To this end, Article 309(1a) of the Commercial Code may be invoked. With respect to third parties, the dissolution would actually give certain benefits for the creditors. For instance, Article 501 of the Commercial Code requires that the asset of the share company may not be distributed among the shareholders before the creditors are paid. As said above, this right is also available when there is non-compliance with the formation requirements which endangered the interests of the creditors. However, whether non-compliance of any requirement which endangered the interest of the creditors permits them to claim against the founders is not clear. It can, however, be argued that when the defect is connected with subscription of the capital and payment for the formation, the creditors can claim against the founders.

In other jurisdictions, the company would claim against the promoters if they acted in violation of their fiduciary duty. For instance, the promoters may be required to surrender to the company profits or commissions they have got at the expense of the company.[105] The promoters may acquire undeserved profit by selling their property or by enabling a third party to sell his property to the company. In Ethiopia, similar liability is not clearly imposed on founders. It is also very difficult to stretch the liability in relation to capital subscription and payment to cover liability of this sort.

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[102] See The Commercial Code, Art 324(2). Publication is not currently a requirement to acquire legal personality. See *Commercial Registration and Business Licensing Proclamation* No. 980/2016, FED. NEGARIT GAZZETA 22th Year No. 101, Addis Ababa, July 2016. Arts. 5(1) & 5(2).

[103] *Id.* Art 324(2).

[104] See Endalew Lijalem, *The Doctrine of Piercing the Corporate Veil: Its Legal Significance and Practical Application in Ethiopia*, (LL.M Thesis) (A.A University, School of Law, 2011, Unpublished), at 93.

[105] See EHRICH, *supra note* 11, at 302.

2.2. Liability for Damage Related to Contribution in-kind

The second ground to hold founders liable is when, pursuant to Articles 309(1b) and 315 of the Commercial Code, the share company or third parties incur damage due to problems arising from contribution in-kind. Here too, it is not easy to exactly ascertain the liability of founders to the share company. Article 315 of the Commercial Code contains the remedies when there is a problem connected with valuation of in-kind contributions. In the first place, Article 315(4) of the Commercial Code permits the contributor to make the difference good when the value of the contribution is lowered by one fifth of its previous value. Should the contributor be unwilling, Article 315(4) obliges him to withdraw from the company. Upon withdrawal, the same article orders the reduction of the capital of the share company. It does not require the other founders to make the difference good. This leaves the liability of the founders unclear. Despite this, one may argue that the founders should be liable for the difference though that will not constitute part of the capital. This means the amount will be the asset of the share company so that its total asset remains unaffected by the reduction of its capital. Promoters may convey property to the company at a cost beyond its price.[106] In this case, they shall be required to make the difference good or return the shares they acquired from the company.[107] In this regard, our law needs the in-kind contributors either to pay the difference or leave the share company.

Based on Articles 309(1b) of the Code, third parties may also have claims if they incur damage from the problem in relation to valuation of in-kind contribution. More than the cash contribution, in-kind contribution has great repercussion on the capital of the share company as it could be source of undercapitalization. This would in turn affect third parties who enter into transactions with the share company based on what is presented regarding the capital.

2.3. Liability for Damage Related to Inaccuracy of Statements about the Formation of the Share Company

This ground of liability to the share company is mentioned under Article 309(1(c)) of the Commercial Code. It makes the founders liable when the company or third parties incur damage owing to accuracy of statements made to the public about the formation of the share company. These statements may be available through the prospectus or through other various means. Founders are required to make sure that such statements are accurate. If not, the law holds them responsible for causing damage. Third parties may suffer damage due to false or misleading information made by the founders. Therefore, the law in such cases entitles them to proceed against the founders. As far as it is helpful, Article 2059 of the Ethiopian Civil Code can also be used to establish liability against founders based on their false information. However, the requirement could be very difficult to be satisfied to invoke this provision of the Civil Code.[108]

While discussing liabilities of founders under the Commercial Code, it should not be forgotten to appreciate the grounds of liabilities stipulated under its Article 346. This provision imposes liability on founders owing to problems out of the implementation of Articles 325

[106] See PINTO & BRANSON, *supra note*, 6, at 30.
[107] See EHRICH, *supra note* 11, at 311 & 328.
[108] At least the claimant needs to prove that the founders acted either intentionally or negligently.

through 345 of the Commercial Code which deal with shares, rights and duties of shareholders. Several of these provisions regulate matters which have no connection with the activities of the founders at all. Actually, it does not make sense to hold founders responsible for misdeeds unrelated to the formation of the share company.[109] Regarding Article 346 of the Commercial Code, there has been an understanding that the provision imposes liabilities in connection with implementation of all the above cited provisions.[110] In effect, it has been argued that the last part of Article 346 of the Commercial Code should read as "the observance of the *relevant provisions* of this Chapter".[111] In spite of this, a look at the phrase "*Subject to the provisions of Art 309*" in the provision would make the said amendment irrelevant. This phrase is meant to indicate that the founders' joint and several liabilities with the directors is not for every problem connected to implementation of the chapter. The Amharic version of the provision which says *"በቁጥር 309 በተነገረው ቃል መሰረት*" is clearer in limiting the founders' liabilities. Hence, Article 346 of the Commercial Code should be read with Article 309. This does not yet seem helpful to perfectly fix the liabilities of the founders that would arise in relation to the chapter.

Be the above as it may, it would be proper to impose liability if the founders have issued shares before the share company is registered. Pursuant to Article 327 of the Commercial Code, such shares are null and void though the liabilities thereof shall not be affected. Still, it is credible to hold founders liable for problems related to capital, par value, number, form, class of shares and premium therewith and the required payment that should be made before company registration of the share company. This can be inferred from Articles 313(6) and 330 of the Commercial Code. In addition, the founders may be liable for problems that may arise in relation to classes of shares such as if they fail to assign the same par value for the same class of shares as it can be inferred from Article 335(2) of the Commercial Code. This is so because the founders have a very important role in specifying these matters within the memorandum of association and prospectus. It would also be justified to impose liability on the founders for problems in connection with the payment of capital as provided under Articles 338 and 339 of the Commercial Code. In short, it is not the intention of Article 346 of the Commercial Code to hold the founders liable for every liability arising from non-observance of Articles 325 of the Commercial Code and the following.

Common to all the above grounds, whether all the persons whom the law considers as founders are liable remains to be another question. Actually, this question is equally significant for the liabilities of founders towards subscribers. Thus, this discussion is essential in identifying the responsible persons for the damage that may be incurred by the third parties or subscribers.

Legally speaking, Article 309 of the Commercial Code holds all the persons whom the law considers as founders jointly and severally liable to the share company and third parties. This, in turn, invites some crucial concerns to arise. One of such concerns is whether it is justified to hold all types of founders including those who initiated or facilitated the formation of the share company liable. The justification of imposing liability on in-kind contributors or persons to

[109] See Tilahun Teshome *et al, supra note* 33, at 23.
[110] *Id.*
[111] *Id.*

whom special share in profit are allotted that did nothing than subscribing remains to be another concern. In addition, the justification to hold all those founders liable for the faults committed by certain founders alone may still be a concern. Generally, it is hardly possible to establish that the law intends to make no distinction at all when it comes to liability of founders. This idea may be buttressed by the fact that founders who are subscribers are not liable for the pre-incorporation commitments. This is implied in Article 308(3) of the Commercial Code. Further, Article 309(2) of the Commercial Code can also be invoked to ossify this argument since it implies that the claimants should identify the liable person even among the founders.

In any way, the founders who signed the prospectus as per Article 318 of the Commercial Code should be held liable for damages in relation to the capital subscription. Taking persons who signed the Prospectus as founder may not be arguable since they trigger the formation process.[112] It may be expected that these founders should always be there where there is a matter in relation to the formation process. They should supervise the activities of those founders or other intermediaries acting in the interest of the formation process. In the eyes of the law, the intermediaries can indeed be founders since they facilitated the formation of the share company. They can be commission or sales agents who are engaged in offering the shares to the public. In practice, banks, postal offices, commercial nominees and other business organizations serve as commission agents.[113] The mere fact that they serve as sales agents should not make them equally liable with other founders. Sales agents are expected to provide the prospectus and other basic information. As a result, it will be fine to hold them liable if they commit faults in discharging their duties like not disclosing the prospectus or providing false information. Similarly, it is justified to make them liable in cases where they use their position to further their interests at the expense of the share company, subscribers or third parties. Likewise, persons engaged in providing inaccurate information should not escape liabilities for the ensuing damage.

In relation to contribution in-kind, the law attempts to state the liability of this kind of founders. In fact, it is also made clear that performing this liability is left to the will of the in-kind contributors, i.e. they may opt to make the damage good or leave the company. Apart from this, the liability of the other founders arising from the in-kind contribution is not vividly shown in the law. In any case, it would not be justifiable to hold those persons (founders) who have no connection with the in-kind contribution as stated under article 309 liable.

C. Liability Related to Damage to Subscribers

Founders have also liabilities towards subscribers who have invested in the company to be formed. Subscribers as persons who give their asset to the founders need their interests to be safeguarded. To this end, the Commercial Code imposes certain duties on the founders. As we know, Article 312 of the Code mandatorily requires full subscription of the capital. More importantly, it requires at least one-quarter of the par value of shares to be deposited in a bank. Where registration has not been effected within one year from this deposit, the founders shall

[112] FIKADU, *supra note* 3, at 69.
[113] See Tikikile, *supra note* 47, at 29.

have the duty to repay the deposit to the subscribers.[114] For any damage related to repayment, they shall be jointly and severally liable. Very importantly, if they fail to effect the payment, the sums shall bear interest at the legal rate which is 9% according to Article 1751 of the Civil Code.

On the liability of founders to subscribers, one can raise certain concerns. First, the Commercial Code is mute as to the return to their owners of in-kind contributions. In addition, it is silent as to the fate of in-kind contributors whose contribution has already been consumed or assigned during the formation process. Secondly, the law keeps quiet as to the interest of the subscribers on premium/service charges they might have paid upon subscription. Added to this, whether the founders need to hand over the interests that may accrue to the deposited amount during one year time is not clear. In this regard, it is argued that they have to distribute such interest.[115] Thirdly, there is also a problem in determining the date the one year period begins to run. This concern practically emanates from the fact that cash subscribers do not pay the required 25% of the par-value of their shares on the same day.[116] To solve such problem, it is suggested that "*the closing date for bank deposit*" should be the point of reckoning.[117]

VI. Protections and Benefits to Founders under Ethiopian Share Company Law

Apart from the liabilities, to encourage establishment of companies, there should be mechanisms to relieve founders from their pre-incorporation liabilities and to grant certain benefits. As a result, our law recognizes certain protections and benefits to founders. The term 'protection' is employed to show the ways the founders can be relieved from liabilities due to pre-incorporation commitments and other liabilities.

A. Protections of Founders

Before the establishment of a company, promoters may conclude contracts expecting the company to enjoy the rights and perform the liabilities thereof.[118] However, their expectations may not come true as they will be responsible for pre-formation commitments. Since there is no principal, there can be no ratification by the company upon formation.[119] Despite this general principle, company laws provide cases whereby the founders can be free from liabilities they have incurred in their way to establish a company. Concerning the matter in Ethiopia, this section presents two different ways contemplated in the Commercial Code to relieve the founders from the said liabilities.

1. Taking over Commitments and Refunding Expenses

In many cases, after being formed, the share company is required to take over the commitments entered by the founders and to refund their expenses. This is one way of protecting the founders. In the interest of the formation process, the founders may enter into diverse commitments. Furthermore, they may incur expenses from their own pocket. Possibly, they may

[114] See The Commercial Code, Art. 312(3).
[115] See FIKADU, *supra note* 3, at 75.
[116] See Tilahun, et al, *supra note* 33, at 21.
[117] *Id*.
[118] See DINE, *supra note* 2, at 90.
[119] See BOURNE, *supra note* 15, at 46.

also incur tort liabilities. Hence, they need the share company to take their liabilities after its formation. Additionally, they need to get refund of the expenses they have incurred. On their side, the subscribers and the company may not be so cheerful to take the commitments and expenses. Indeed, the subscribers are bound to know that a corporation cannot be organized without expense and other commitments.[120] The law should strike an appropriate balance between the above conflicting interests. While so doing, the law should not also discourage persons from being involved in company formation. Seen from this vantage point, it is fair to oblige the share company to take pre-formation commitments and refund expenses incurred by its founders.

Article 308(2) of the Commercial Code is meant to govern the situations where the share company shall take over the commitments and refund expenses made by the founders. The law is clear that the share company shall take the commitments and expenses in two cases: when they are necessary or approved by the subscribers' meeting as necessary.

1.1. Commitments and Expenses Necessary for the Formation of the Share Company

For commitments and expenses of this nature, the company has a legal duty to take over the commitments and refund the expenses. However, there is no indication as to what commitments and expenses are deemed to be necessary for the formation of the company.[121] Nor is the law clear as to who is going to decide that they were necessary. In Ethiopia, it is suggested that the board of directors is the final organ to decide on this issue.[122] Generally speaking, it is alleged that the initial board of directors should review and take action with respect to each pre-incorporation contract.[123] At this juncture, it is reasonable to question the fairness of the decision given by the board of directors on whether the commitments and expenses were necessary. The board may decide against the interest of the founders. Conversely, the board may decide every commitment or expense as necessary particularly when it is constituted of the founders.

In addition, the Commercial Code is not clear as to how the third parties can claim against the founders in case of necessary commitments. Whether the third parties can directly claim from the share company is not vivid. No doubt, there could be no agent-principal relationship between the share company and the founders when they made the commitments and expenses. Due to this, it may be purported that the third parties can have no direct claim against the share company. This means that the founders will be the only persons to be liable for the third parties. After carrying out the commitments, it can be said that the founders can require the share company to indemnify them based on Article 308(2) of the Commercial Code. At this time, the share company would have no obligation of indemnification if the founders did not pay the third parties. In fact, the third parties may proceed to attach the shares where the founders are shareholders.

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[120] See EHRICH, *supra note* 11, at 153.

[121] Nowadays, a commitment due to employing experts for valuation of in kind contributions may itself arguably be a necessary commitment as there is no legal duty to employ such experts.

[122] See FIKADU, *supra note*3, at 73.

[123] See PINTO & BRANSON, *supra note* 6, at 28.

On the other hand, it can be argued that the third parties can directly proceed against the share company since the law says that the share company '*shall take the commitments*' from the founders.[124] At this moment, one may ask about the effect of this action on the founders where the share company is not able to carry out the commitments. Actually, the third parties may not effectively recover from the share company in two cases: when the share company rejects their claim since the commitments were unnecessary or when the share company is not able to perform the liabilities even if they were necessary. In this circumstance, the assumption of the commitments by the company cannot, totally release them.[125] In Germany, it is necessary for creditors to act first against the company and then against the promoters.[126]

In Ethiopia, the law does not take a clear position regarding the liabilities of the founders in cases where the law requires the company to take over the commitments. In spite of this, it can still be argued that the third parties need to have the right to seek remedies from the founders if they are unable to recover from the share company. First, it is not fair to prevent them from suing the founders since their attempt against the company fails. From the inception, they shall not be forced to claim from the company which did not exist during their dealings with the founders. Secondly, the law, which even fails to require third parties to claim against the company, does not expressly relieve the founders because the share company assumes the commitments.

1.2. Approval of Commitments and Expenses as Necessary for Formation of Share Company

The second ground to oblige the share company handle the commitments and expenses, mentioned under Article 308(2) of the Commercial Code, is when subscribers' meeting approves the commitments and expenses as necessary. Compared to the first ground, this may be simple for enforcement. It is yet unclear if the founders can participate in the meeting during the approval process. As mentioned, the founders have no say in any capacity on the resolution approving their special share in the net profits of the share company. Nonetheless, the law does not thwart them from attending the subscribers meeting. Obviously, this permits them to get their voices heard during this meeting regarding the special benefit. From fairness point of view, there should be a mechanism to permit the founders to get their voice heard on the meeting sitting to decide if the commitments and expenses incurred were necessary. In fact, it is essential to limit the influence of the founders on the meeting like by blocking their voting rights. Anyway, the subscribers' meeting may decide the commitments and expenses were unnecessary. In this case, the only option for the founders may be showing that the commitments or the expenses were necessary for the formation of the share company. This is to be made after the share company acquires personality.

Understandably, the above mentioned commitments and expenses will be taken only if the share company is established. This means that the founders would remain helpless where the formation of the share company is aborted. The law prevents them from claiming anything from the subscribers. Article 308(3) of the Commercial Code states that where the share company is

[124] See The Commercial Code, Art. 308(2).
[125] See EHRICH, *supra note* 11, at 145.
[126] See CAHN & DONALD, *supra note* 26, at 139.

not established for whatsoever reason, the subscribers shall not be liable for the commitments or expenses made by the founders. Based on this stipulation, it may be argued that founders who are at the same time subscribers are not liable to the commitments and expenses. This particularly refers to in-kind contributors and subscribers to whom special share in the profit are allocated.

Besides, it is essential to generally ask if all persons whom the law considers as founders are liable when the share company is not formed or refuses to take the commitments. The Commercial Code does not stipulate how the founders should act in taking the necessary steps in the formation process. Unlike this, the organizers of capital goods finance companies are expected to have a committee who are then jointly and severally liable for pre-incorporation commitments.[127] The Commercial Code does not require founders to act jointly. It does not clearly state effect of dealings of individual founder on other co-founders either. However, Article 308(1) of the Code implies that commitments by one founder impose joint and several liability on the co-founders. Moreover, the acts of the real founders[128] create joint and several liabilities on founders who are not even member to the share company or who have no relation with the commitments at all.

Though not adequate, our law tries to regulate the relations of the founders with the company, subscribers and third parties regarding pre-formation commitments and expenses. Admittedly, it also attempts to regulate the relation between third parties and the share company. However, it is not as such concerned about the relationship among the founders due to the commitments and expenses. In the jurisprudence, it was once claimed that promoters are not partners and have no power to act for and bind each other in the absence of express or implied authorization.[129] As a result, only those promoters who made or authorized a contract can be liable.[130] Seen from third parties perspective, shielding some of the founders would be unacceptable, however.

In Ethiopia, it can be argued that the relevant general contract law provisions can regulate the internal relation of the founders. So the Commercial Code should not necessarily be worried about the relations among the founders. In any case, it could not be justified to hold those persons who have no involvement in the business side of the formation process jointly and severally liable with the real founders. As this work indicates, employees who acted accordingly and persons providing professional services should not be liable. On the other hand, subscribers who have been actively involved in the business side of the company formation should not escape liabilities. Actually, it seems difficult to adduce stronger reason to hold subscribers liable after the share company is formed if we say they are not liable in case the process does not result in formation of a share company.

Aside the above pre-incorporation liabilities, the liabilities of the founders towards other persons may also be extra-contractual in nature which they might have incurred while carrying

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[127] See Attachment I to Requirements for Licensing of Capital Goods Finance Directives No. CGFB /02/ 2013.

[128] The term real founder here particularly stands for persons who signed the prospectus as founders and other founders who played meaningful roles during the time of incorporating the share company.

[129] See EHRICH, *supra note* 11, at 46.

[130] *Id.*

out the necessary steps to form the share company. However, they may not get this liability taken by the share company after formation. First, there could be no agent and principal relationship. Thus, the founders may not invoke Article 2222(1) of the Ethiopian Civil Code which obliges the principal to release the agent from any liabilities he incurred in the interest of the principal.[131] Secondly, unlike the other pre-incorporation commitments, the Commercial Code does not envisage situations for the share company to take such liabilities. What is more, any founder cannot claim against the share company for damage he sustained in the course of undertaking the necessary activities though he committed no fault. Had there been an agent-principal relationship, the founders would have invoked Article 2222(2) of the Civil Code to hold the company liable for the damage they sustained. It is also very difficult to characterize such damage as necessary expenses to form the share company in the eyes of Article 308(2) of the Commercial Code.

2. Protection through Period of Limitation

In Ethiopia, period of limitation is the other mechanism to avoid liabilities of founders that might arise because of their involvement in the formation of share company. To this effect, we have Articles 1845 and 2143 of the Ethiopian Civil Code, Articles 309 and 324 of the Commercial Code and Articles 216 and subsequent provisions of Ethiopian Criminal Code. With regard to the various liabilities of founders, the period of limitation is not the same. For liabilities stated under Article 309 of the Commercial Code, actions against the founders shall be barred after five years from the date when the aggrieved party 'knew of the damage and of the person liable'. Except when the liability of the founders arises from criminal offenses, as per Article 309(2) and 309(3) of the Commercial Code, there shall be absolute limitation after ten years from the 'date when the act complained of took place'.

To establish liability against the founders, there may be possibility to invoke Article 2059 of the Civil Code. If so, the period of limitation in the Commercial Code does not apply. Rather, Article 2143 of the Civil Code requires the victim to claim his rights within two years from the time at which he suffered the damage. Obviously, this gives better chance for the founders to escape liabilities. In addition, the Commercial Code does not put specific periods of limitation to bar the liabilities of founders in tandem with the pre-incorporation commitments. As a result, there must be resort to the Civil Code. In this regard, the general period of limitation in the Civil Code puts ten years period of limitation.[132] For all periods of limitation, it must be remembered that the Civil Code provisions dealing with interruption of the periods are applicable.[133]

B. Benefits of Founders of Share Company

After share company is established, it is fair to compensate promoters for their services in addition to taking their commitments and refunding expenses.[134] Benefits for promoters may

[131] Art. 2222 of the Civil Code states that the principal shall release the agent from any liabilities which he incurred in the interest of the principal. The principal shall also be liable to the agent for any damage he sustained in the course of the carrying out of the agency and which was not due to his own default.

[132] See The Civil Code, Arts. 1845 & 1677.

[133] *Id.* Arts.1851 through 1856 and 1677.

[134] See EHRICH, *supra note* 11, at 154.

come in various forms. They may be in the form of remuneration.[135] However, particular problems may arise as there is no contractual obligation between the promoter and the company.[136] In some cases, the benefits for the promoters may appear in the form of commission.[137] The promoters may also be allowed to have founder's shares in the company, which of course is clearly prohibited in Ethiopia.

In Ethiopian, the benefit for the founders is recognized via allocation of special share in the net profits.[138] Pursuant to Article 452 of the Commercial Code, the net profits comprise the net receipts for the financial year after deduction of general costs, amortization, allowances and other charges of the company. This benefit is personal to the founders and they cannot be issued with founder's shares.[139] One may tempt to argue that founder's shares can be allocated when he/she reads that one of the tasks of the subscribers' meeting is '*approval of shares allocated to the founders'* under Article 322(4) of the Commercial Code. But, the phrase "*approval of shares allocated to the founders"* should not be taken to refer to founder's share. It is to mean the "*special share in the profit*" or "*a share which shall not exceed one-fifth of the net profits*" stated in Articles 322(3) and 310(1) of the Commercial Code respectively. Like other jurisdictions, this benefit of special share in the net profit is not automatic as it is subject to certain conditions.

Article 310(1) of the Commercial Code talks about the benefit that may be stipulated in the memorandum of association. More vividly, Article 310(2) states that no other advantage than the special share in the net profit to founders may be provided in the memorandum of association. Due to this, one may contend that other benefits for the founders can be stated in another documents like articles of association or other resolutions.[140] This, albeit, does not seem the intention of the law. The law rather tries to limit the benefits to founders. This can be deduced from the conditions encumbered on this single benefit. There is no other provision in the Commercial Code dealing directly or indirectly about any other benefit to founders than this special benefit. However, one may practically observe that additional benefit is permitted for the founders within the memorandum of association.[141] Alternatively, it may be argued that the articles of association is part of the memorandum,[142] so no other benefit can be stated in it. Yet, this argument can be challenged as the law usually takes the articles of association as a separate and distinct document from the memorandum. Some have, however, suggested that the separate document called articles of association need to be avoided by incorporating its elements in to the Memorandum of Association.[143]

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[135] See, for example, the German Stock Corporation Act, Section 26.

[136] See BOURNE, *supra note* 15, at 45.

[137] See UK Companies Act of 2006, Section 553. The UK's Act states that the amount or rate of the commission shall be authorized in the articles of associations. The same condition also applies for the remuneration of founders in German. See the German Stock Corporation Act, Section 26(2)).

[138] See The Commercial Code, Art. 310 (1).

[139] *Id. Art.* 310(3).

[140] See FIKADU, *supra note* 3, at 70-71.

[141] For example, Article 9.2 of the Memorandum of Association of Dalol Oil Share Company gives the founders an additional benefit to buy shares at their par value for four years.

[142] See The Commercial Code, Art. 314(4).

[143] See Liku Worku, *et al, supra note* 5, at 12.

Be the above as it may, the whole reading of the relevant provisions can inform us that the conditions attached to the benefit are fairly stringent. The conditions are to put hurdle against the founders not to abuse their positions. By that, it would be possible to safeguard the interests of the share company, subscribers and other third parties. As said before, the law allows the founders to agree the special share in profit in the memorandum of association. It also seems that the founders will not claim benefit unless it is indicated in the memorandum of association.[144] They are also required, under Article 313(9) of the Commercial Code, to state in the memorandum of association the reason for such share in the net profit. This requirement is to assist the subscribers' meeting to approve the special benefit that the founders allocated for themselves.

Furthermore, the law puts conditions with respect to the amount of the benefit that can be allocated to the founders. The maximum amount of the special share in the net profit that may be agreed is, as per Article 310(1), one-fifth of the net profit in the balance sheet. Regarding the lifespan of the benefit, it should be for a maximum period of three years. The law does not, however, state the time the period of three years starts to run. In this respect, it may be argued that the subscribers while approving the benefit can decide on the time. The practice reveals that the time begins at the time the company starts making profit or starts operation.[145] The law is but clear that the three years are in period, i.e. they are not randomly selected. Once a year is selected for the founders to take their share, they will be taking it for the coming two successive years.

It may be a fact that one or two of the years in the period may be of no profit. The law leaves unanswered as to what will happen to the founders when this occurs. This problem may not happen for the first year if it is determined to be the year the company starts making profit. The problem would exist if the year the company begins operation is selected. It does not yet seem that the law intends to deny the benefit. Still, it may be the power of the subscribers' meeting to decide on this issue. Failure of this meeting to decide this matter may result in conflicts in the share company as it may lure the shareholders to deny this benefit. By its nature, the subscribers' meeting is a temporary organ. It is not also clear if the subscribers' meeting can authorize the other relevant permanent organ of the future share company to take care of matters related to benefits of the founders. Practically, it has been confirmed that it is only the subscribers' meeting which is empowered to decide regarding the benefits to be allocated for the founders.[146] It is not, however, uncommon that share companies decide on this matter via their general meetings.

Apart from the above, one may also worry whether declaration of dividend is mandatory for the founders to get their special share in the net profit. As is well known, there is a possibility that shareholders may not take the net profit for themselves if they decide that dividend should not be declared. The effect of such decision on the benefits of the founders is not clearly regulated in the law. In fact, the law does not make declaration of dividend a condition to enjoy the benefit by the founders. As a result, the founders may simply claim their share in the net profit.

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[144] See The Commercial Code, Art. 313 (9) & 310.

[145] See FIKADU, *supra note* 3, at 71. See also Memorandum of Association of Dalol Oil Share Company, Art. 9.

[146] See Mesfin Shiferaw and others v. Zemen Bank, *supra note*, 73.

The conditions under Article 310 of the Commercial Code are not the only conditions. Though the founders stick to the requirements under Articles 310 and 313 of the Commercial Code, they can be entitled to the benefits only if their proposal receives the blessing of the subscribers pursuant to Article 321(3). As can be noted from Article 320 of the Commercial Code, the founders shall call meeting of the subscribers after the time for making application for share has expired. One of the purposes of the subscribers' meeting is, as per Article 321(3), to approve the special shares in the net profits allocated to the founders. At this time, the founders may not vote as shareholders or proxies on the resolution approving their special share in the profits which is the rule under Article 322(3) of the Commercial Code. This prohibition is meant to curtail the influence of the founders and block them from deciding on their own cases. Obviously, the subscribers' meeting may go to the extent of limiting or even denying the special share the founders proposed. It may discriminate among the founders and this can be made based on the involvement of the founders during the pre-incorporation period. The difference may be made as regards either to the amount of the percentage or the number of the years. To do so, the reasons that shall appear in the memorandum of association would be of great help. The practice witnessed existence of such kind of discrimination even based on whether a person is main or associate promoter.[147]

In respect of the special share in the net profit, another crucial matter is whether the special share in the net profit is for all persons whom the law takes as founders. The Commercial Code does not provide for separate liabilities or benefits for some categories of founders alone. The law simply imposes joint and several liabilities on the founders. By the same token, the law does not specifically permit the benefit for only some of the founders. However, it cannot be justified to permit all the founders to share the special benefits. Some of the persons whom the law bestow a legal status of founders can be paid workers. This is particularly true in relation to persons who have served by facilitating the formation process. If there is anything to be given for these persons, it should be as a compensation for their services. This may, in turn, be entertained as pre-incorporation commitments of the founders.

Additionally, a critical look at the law may enable one to contend that the benefits are only to some of the founders. It also seems that the benefit goes only to persons who are the shareholders. Article 310(1) of the Commercial Code clearly indicates that the special benefit to be stated in the memorandum of association is in addition to the rights of the founders as shareholders. Besides, it is the founder shareholders who are prohibited from voting in the subscribers' meeting approving the special benefit under Article 321 of the Commercial Code. Had the law intended to extend this special benefit to other outsiders, it would have incorporated provisions to deal with all the founders in relation to this benefit. Therefore, it can be concluded that those who are outside of the company are not entitled to the benefit. Practically, this is not always true. In practice, the benefits are given to those persons who were involved in the business side of the formation process, persons with special contribution and persons whom the

[147] See Prospectus of Hibir Sugar Factory, *supra note* 28.

subscribers' meeting considered as founders. Seen in light of the burdens and risks the in-kind contributors are expected to assume, assigning special benefits to them may be acceptable.

VII. CONCLUSION

As this work reveals, the allegation that company laws give special consideration to matters related to promoters is subject to several limitations when it comes to the Ethiopian Commercial Code. It is also pointed out that clear identification of the persons involved during the formation of a company is essential to safeguard the interests of subscribers, third parties and would be company. Identifying founders is also helpful to reward those who establish the company.

Though there is no single definition to the term 'founder', the Ethiopian Commercial Code provides lists of circumstances that give a person the status of founder. This paper, however, uncovers that the Commercial Code goes too far to take a person, even with any minimal contact with the process of company formation, as founder. Furthermore, the ways the law imposes liabilities on founders and gives protections and benefits to them is subject to flaws. With regard to liabilities, the law imposes joint and several liabilities, for any ground of liability stated in the law, on all persons whom it calls 'founders'. But, there are many founders who have nothing to do with many of the liabilities. Similarly, the law does not make discrimination when it assigns benefits to founders while it is obvious that such benefits cannot go to all persons involved in the company formation. Additionally, the law does not adequately show how third parties can claim against founders or the established companies when their claims arise from pre-formation commitments.

The existing practice with regard to identifying founders, their liabilities and benefits is better than the stipulations in the law. It makes distinction between the terms 'founder' and 'promoter' by reserving the latter for persons who are involved in the business side of company formation. It usually recognizes certain specified persons as founders and it actually does so for the purpose of benefit. Nonetheless, it is difficult to say that the position of the existing practice is perfect regarding who the founders are. It does not help us include all the persons who are actively involved in the process of share company formation. As it is discussed, the Draft Commercial Code also tries to downsize the scope of founders by amending certain provisions of the existing Commercial Code. This move is not still a perfect one as it prohibits considering some persons as founders at least from the vantage points of liabilities.

Thus, the law should be revisited to give status of founders to persons that other jurisdictions say promoters. With this, it has to also reconsider the existing defects on the relation between founders, the company and third parties due to pre-formation commitments. The law should also be revisited to clarify the confusions and problems that exist in implementing the liabilities, benefits and protections to founders. By so doing, it would be possible to safeguard the interests of all parties having interests in the process of share company formation. This, in turn, would facilitate the formation of share company which is much needed in the country.

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DOMESTIC IMPLICATIONS OF CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD: THE CASE OF ETHIOPIA

Anteneh Geremew Gemeda*

Abstract

Ethiopia is party to the Convention on the Rights of the Child and its two substantive Protocols. Ethiopia's reporting history to the Committee on the Rights of the Child is better in terms of complying with periodicity and participation than its reporting histories to other treaty bodies. Ethiopia submitted four reports to the Committee and received recommendations. This article aims to examine the implications of these recommendations on domestic child rights framework. Ethiopian delegates to the constructive dialogues made a number of promises and submitted reports of compliance with regard to the Committee's recommendations. Concluding observations of the Committee, which are checklist of compliance with conventional obligations, can be considered as soft obligations on the government of Ethiopia. Though concluding observations cannot sufficiently reach domestic law-making process and the law making organs, propelling role of the observations in the adoption of domestic laws, policies and plans of action is observed. With regard to the interpretative relevance of concluding observations, this article shows that there is no analytical mode of treaty application and prescribed principles of treaty reference, which would have paved the way for utilizing the concluding observations of the Committee in interpreting child rights treaties.

Keywords: concluding observations, constructive dialogue, Convention on the Rights of the Child, recommendations, reporting, rights of the child

I. INTRODUCTION

All core human rights treaties under the auspices of the United Nations have established bodies of experts to monitor implementation of the treaties. Treaty bodies employ a number of mechanisms to oversee implementation of treaties by State Parties. For instance, they adopt general comments in order to clarify provisions of the treaties. Treaty bodies may also entertain individual and state complaints filed against a State Party; and examine reports of states on the measures taken and challenges encountered in the process of implementation of the treaties. The reporting procedure is an essential tool to examine the level of state compliance with human rights undertakings. The procedure is composed of submission of reports by states and concerned organizations and oral communications in pre-session and plenary meetings. The final documents of this procedure are known as concluding observations.

* LL.B.; LL.M. in Human Rights; Lecturer at School of Law, Debre Markos University. The author is grateful for the constructive comments of the anonymous reviewers. He could be reached through antenbye66@gmail.com.

Concluding observations, besides reflecting the status of implementation of a treaty in a particular State Party, constitute recommendations that the experts believe are necessary for the improvement of human rights implementation and situations. Yet we can hardly find literature on the relevance of these instruments – concluding observation - to the process of making and interpretation of human rights laws. Broader perspective on the status of these instruments can, however, be acquired through analysis of their relevance to and implications for the domestic human rights systems.

Hence, this article tries to mitigate the dearth of literature on the role of concluding observations in interpreting, initiating and determining laws in Ethiopia. This article will examine the implications of concluding observations with a particular focus on concluding observations of the Committee on the Rights of the Child (hereinafter, the Committee) which is entrusted with the supervision of the Convention on the Rights of the Child (hereinafter, the Convention) and two substantive Protocols. The practice of the Ethiopian government in relation to concluding observations as extracted from state reports, concluding observations, domestic legislation and policies will be evaluated *vis-à-vis* human rights treaties and reports of the Committee.

This article is organized into six sections. After this introductory part, the function and reporting procedures of the Committee will be discussed. Section three introduces concluding observations. Then, the next section evaluates Ethiopia's participation in the Committee's reporting procedure. The fifth section discusses implications of the concluding observations of the Committee in Ethiopia legal system. Finally, there will be concluding remarks.

II. THE COMMITTEE ON THE RIGHTS OF THE CHILD AND ITS REPORTING PROCEDURE

The Committee on the Right of the Child is the organ entrusted with monitoring states' compliance with the Convention.[1] The central aim of the Committee is "examining the progress made by States Parties in achieving the realization of obligations undertaken in the Convention."[2] The States Parties to the Convention undertake to respect and ensure the rights set forth in the Convention by taking all legislative, administrative and all other appropriate measures.[3] The Committee monitors the progress of State Parties through investigating complaints, adopting general comments, reviewing state reports and organizing meetings for thematic discussion on child rights issues.

The Committee takes the reporting procedure as the primary tool of supervising the implementation of the rights. The reporting mechanism extends to the substantive Optional

[1] United Nations Convention on the Rights of the Child, adopted on 20 November 1989 and entered into force on 2 September 1990, General Assembly resolution 44/25, (here in after *the Convention*), Art. 43(1); Office of the United Nations High Commissioner for Human Rights, Legislative History of The Convention on the Rights of The Child 820 (2007); See also Jaap E. Doek, The United Nations Convention on the Rights of the Child, A Guide to the *Preparatore Trauvaxe* 535-539 (2006).

[2] *The Convention, Id.*

[3] *Id.* Art. 2(1) and Art. 4.

Protocols.[4] The initial report shall be submitted two years after the Convention enters into force for the particular state concerned[5] and periodic reports shall be made every five years.[6] The same periodicity applies for the two substantive Optional Protocols of the Convention.[7] An initial report on an Optional Protocol is due within two years after it enters in to force for the State Party, thereafter the periodic report is to be submitted with reports on the Convention. Being concerned with high rate of failure of submitting the reports and overlapping of reports, the Committee has adopted a rule which exceptionally allowed a State Party under dialogue to combine its next two periodic reports.[8] State reports are also required to meet structural and substantive specifications provided by the Committee. Apart from guidelines common for all treaty bodies,[9] the Committee adopted guidelines for initial and periodic state reports.[10]

The reporting procedure begins when a state submits a periodic report. Then, a pre-sessional working group of the reporting procedure prepares lists of issues.[11] The lists of issues are to be forwarded to a State Party to clarify facts mentioned in the State report or to provide supplementary information.[12] Though the Convention does not provide for the procedure of considering a report in the presence of delegate of a state, the Committee adopted a practice of conducting formal meeting with a State Party. A series of exchange of thoughts between members of the Committee and a State Party is known as constructive dialogue.[13] There are some features that make the dialogue a constructive one.[14] First, openness of the arguments;

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[4] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, adopted on 25 May 2000, General Assembly Resolution 54/263, A/RES/54/263 (hereinafter, *OPAC*); Art.8(1) and *Optional Protocol to the Convention on the Rights of the Child on the sale of Children* (hereinafter, *OPSC*), child prostitution and child pornography, adopted on 16 March 2001, General Assembly Resolution 54/263, A/RES/54/263, Art.12.

[5] *The Convention*, Art. 44(1)(A).

[6] *Id.* Art. 44(1)(B).

[7] See OPAC, Art. 8(1) and Art. 8(2) and OPSC, Art. 12(1) and Art. 12(2).

[8] See Committee on the Rights of the Child, *Recommendation adopted by the Committee on the Rights of the Child*, CRC, CRC/C/124, Thirty-second session, 1 (2003).

[9] Fifth Inter-Committee Meeting of the Human rights Treaty Bodies, *Harmonized guidelines on reporting under the international Human rights treaties, including guidelines on a common core document and treaty-specific document*, HRI/MC/2006/3 (10 May 2006).

[10] Committee on the Rights of the Child, *Reporting Guidelines for Initial Reports on the Convention on the Rights of the Child*, in COMPILATION OF GUIDELINES ON THE FORM AND CONTENT OF REPORTS TO BE SUBMITTED BY STATES PARTIES TO THE INTERNATIONAL HUMAN RIGHTS TREATIES, HRI/GEN/2/Rev.6 (3 June 2009) and Committee on the Rights of the Child, *CRC Treaty Specific Reporting Guidelines, Harmonized according to the Common Core Document*, CRC/C/58/Rev.2 (1 October 2010); These guidelines outlined basic formality and content requirements of State reports. Both guidelines classified provisions of the Convention in to eight clusters for preparing the state report. These clusters are: General implementation measures; Definition of the child; General Principles; Civil rights and freedoms; Family environment and alternative care; Basic health and welfare; Education, leisure and cultural activities; and Special protection measures.

[11] See Meeting of chairpersons of the Human Rights Treaty Bodies Twenty-fifth meeting, *Overview of the Human Rights Treaty Body System and Working Methods related to the Review of States Parties*, HRI/MC/2013/2, (12 April 2013), par. 28.

[12] *Id.*

[13] *Id.* at 11.

[14] See BEATA FARACIK, CONSTRUCTIVE DIALOGUE AS A CORNERSTONE OF THE HUMAN RIGHTS TREATY BODIES SUPERVISION, 3 (2006), *available at:* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2557068_code2000726.pdf?abstractid=2557068&mirid=3 (accessed on 28th October 2016).

readiness to admit that the other Party may be right on some issues; readiness to provide all necessary information requested and positivity towards proposals aimed at improving human rights observance are essential behavior of the Parties to consideration of the report. Second, unlike the complaints procedure (individual, inter-State and inquiry), the process of consideration of reports has more of a non-judgmental atmosphere than a blame and shame nature. Based on their observations of the report and the dialogue, country rapporteurs prepare a summary that may include recommendations. On the other hand, the State Party under examination may also make comments on the recommendations adopted by the Committee.[15] If the Committee understands that the State Party is in need of technical advice or assistance, it sends the state report with relevant recommendations to the United Nations specialized agencies and other bodies.[16]

III. INTRODUCTION TO CONCLUDING OBSERVATIONS

Following the dialogue with the reporting state, the Committee issues a statement of understanding with comments. This outcome of the reporting process is a document called the concluding observations. O'Flaherty designated the issuance of concluding observations as "the single most important activity of human rights treaty bodies".[17] This assertion is in congruence with the fact that reporting procedure remains the primary human rights monitoring mechanism. Bayfesky considered concluding observations as "an expert committee's carefully considered conclusion about whether a State Party has satisfied the legal obligations it assumed upon ratification of the treaty".[18] Indeed, concluding observations are not only conclusion about compliance but also serve as a tool for improvement of compliance. Concluding observations of treaty bodies have two functions: direct public attention to shortfalls and identify specific activities to improve implementation.[19] As such, concluding observations have retrospective as well as prospective implications. That is why O'Flaherty defined concluding observations as "a mechanism for committees of experts to forward an authoritative overview of the state of human rights in a country and forms of advice which can stimulate systemic improvements".[20]

As it is clear from Flaherty's definition, the observation of the committees on the state of human rights in a particular State Party is an authoritative statement. This view is shared by Santos who believes that "concluding observations are authoritative statements of a treaty body with regard to the state concerned and as a guiding reference for action to be undertaken by

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[15] See Committee on the Rights of the Child, *Rules of procedure*, CRC/C/4/Rev.4 (18 March 2015), Rule 75/2

[16] *The Convention*, Art.45(B); The Committee serves as a bridge between the child welfare organizations with the technical and financial resources and the State Party which is in need of those resources. Particularly to children's Economic and Social Rights, a system of international cooperation plays a crucial role in boosting the capacity of State Parties to realize these rights for children under their jurisdiction.

[17] Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HRLR6 27, 29 (2006).

[18] ANNE F. BAYEFSKY, REPORT ON THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS, 66 (April 2001) *available at* http://www.bayefsky.com/report/finalreport.pdf (accessed on 28th October 2016); See also KERSTIN MECHLEM, TREATY BODIES AND THE INTERPRETATION OF HUMAN RIGHTS, 923 (2009) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507877 (accessed on 28th October 2016).

[19] ANNE F. BAYEFSKY, *Id*. at 67.

[20] Michael O'Flaherty, *supra* note 17, at 27.

States Parties in general".[21] Mechlem explains the authoritativeness of concluding observations as "consensus on how the provisions of a treaty should be interpreted with regard to the particular situation in a country".[22] Therefore, concluding observations are instruments, adopted by treaty bodies after a reporting procedure that interpret a treaty, express understanding of the body as to human rights situation in a State Party and suggest measures that the State Party should take to improve the situation.

All treaty bodies adopt concluding observations (concluding comments, in the case of Convention on Elimination of All forms of Discrimination Against Women (CEDAW)) in more or less similar structure and substance. Article 45/D of the Convention empowers the Committee to make suggestions and general recommendations.[23] There is an issue on which contemporary recommendatory documents of the Committee shall the cited provision fall. The preparatory works give no hint on the issue since the text of Art. 45(D) of the Convention was adopted in 1987 with no comments and objections from negotiating states. The inclusion of the word 'general' may create an impression that the recommendations are intended to be applicable with respect to all State Parties rather than focusing on a particular State Party. But, recommendations under Art. 45(D) were not intended to be exclusively general. The phrase in the provision that "the recommendations shall be transmitted to any State Party concerned" indicates that the recommendations may also be directed towards a particular State Party. So, it is clear that the concluding observations are 'suggestions and general recommendations' that emanate from the authority bestowed up on the Committee by the virtue of Art. 45(D) of the Convention.[24] This enabling provision stipulates that the suggestions and recommendations of the Committee are to be issued on the basis of information received by the Committee in accordance with Articles 44 and 45 of the Convention. Therefore, the Committee adopts concluding observations based on information from the reporting procedure and other submissions and dialogue with stakeholders. Based on the dialogue, the state report and other sources, the Committee forward a set of recommendations.[25] With expressions of the phrase like *deeply concerned* and *concerned*, the Committee tacitly established groups of *concerns*, thereby relative difference on the priority of recommendations.

The Committee adopted its first concluding observations on February 1993 on Bolivia.[26] This concluding observation focused on limited issues. The views and recommendations of the Committee were too general. Besides, we can hardly find suggestions on follow-up on

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[21] Marta S. Pais, *The Convention on the Rights of the Child,* in MANUAL ON HUMAN RIGHTS REPORTING 393, 501 (United Nations, 1997).

[22] KERSTIN MECHLEM, *supra* note 18, at 19.

[23] See *The Convention*, Art.44 and 45(D).

[24] Office of the United Nations High Commissioner for Human rights, *supra* note 1, at par.665; N. ANDO, GENERAL COMMENTS/RECOMMENDATIONS, 8 (2010) *available a*t Max Planck Encyclopedia of Public International Law Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, www.mpepil.com (last visited on 28th October 2016).

[25] M. Kjærum, *State Reports,* in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS, 22 (2nd rev. ed., Martinus Nijhoff Publishers, 2009)

[26] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, *Concluding observations: Bolivia*, CRC/ C/15/Add.1, Third Session, (18 February 1993)

observations.[27] Concluding observations of late 1990s dedicated a paragraph for the dissemination of the reporting documents.[28] A turning point for structural and substantive improvement in the concluding observations of the Committee can be drawn at the beginning of the new millennium.[29] The primary source of the change was adoption of a system of clustering.[30]

IV. ETHIOPIA'S REPORTING TO THE COMMITTEE ON THE RIGHTS OF THE CHILD

Ethiopia is party to the Convention on the Rights of the Child since 1992 and to the African Charter on the Rights and Welfare of the Child since 2002. However, it is not party to the third Optional Protocol on Complaints Procedures. One of the recommendations of the Committee, which has just reviewed Ethiopia's combined fourth and fifth periodic report, insinuate Ethiopia to consider the ratification of the Protocol. The African Commission on Human and People's Rights and the African Committee of Experts on the Rights and Welfare of the Child remain the only human rights monitoring institutions which can examine complaints alleged against Ethiopia.[31] The implication is that the reporting procedure remains the primary mechanism available for the Committee to oversee compliance of Ethiopia with the Convention and the two optional protocols.

Different sectoral offices assume reporting responsibilities pertaining to the implementation of ratified human rights documents. The Ministry of Foreign Affairs (hereinafter, MoFA) is empowered to enforce rights and obligations that arise from treaties that Ethiopia ratified unless specific power is delegated to other organs.[32] The Ministry of Women and Child Affairs (hereinafter, MoWCA) is the duty holder to follow up implementation of treaties relating to women and children and submit reports to concerned bodies.[33] The Federal Attorney General is also bestowed with the power to enforce human rights treaties including preparation of national report on the implementation of treaties in collaboration with relevant bodies as per the Federal

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[27] In addition to the Concluding observation on Bolivia, see Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Concluding observations: Peru*, CRC/C/15/Add.8, (18 October 1993)

[28] See Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Concluding observations: Ghana*, CRC/C/3/Add.39, (6 June 1997)

[29] It is sufficient to compare the Concluding observations of the Committee adopted before and after the year 2000: Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Concluding observations: Maldives*, CRC/C/8/Add.33, (29 May 1998) with Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Concluding observations: South Africa*, CRC/C/51/Add.2, (26 January 2000).

[30] The guidelines of the Committee require State Parties to submit comprehensive information through classifying provisions of the Convention in to eight categories. See *Reporting Guidelines for Initial Reports on the Convention on the Rights of the Child*, *supra* note 10 and *Treaty Specific Reporting Guidelines*, *supra* note 10.

[31] See *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), Art. 47 and Art. 55; *African Charter on the Rights and Welfare of the Child*, adopted on 11 July 1990 at Addis Ababa, Ethiopia and entered into force Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49, Art. 44(1).

[32] *A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia*, Proclamation No. 916/2015, FED. NEGARIT GAZETTE, Year 22 No.12, Addis Ababa, 9 December 2015, Art. 15(4).

[33] *Id*. at Art. 36 (1) (j).

Attorney General Establishment Proclamation 943/2016.[34] It is also important to remind that the Ethiopian Human Rights Commission (hereinafter, EHRC) has also the power to forward its opinion on human rights reports to be submitted to international organs.[35]

So far, Ethiopia submitted four reports to the Committee. The Ministry of Labour and Social Affairs prepared the initial and second periodic reports. Whilst the Ministry of Women led the third periodic report, the Ministry of Women, Youth and Children Affairs (hereinafter, MoWYCA) managed the recent combined fourth and fifth report. An initial report was submitted in 1995 while the second and third periodic reports were made in 1998 and 2005 respectively. The combined fourth and fifth periodic reports were submitted in 2012 while the dialogue was held in mid-2015.

The reporting history of Ethiopia to the Committee remains a commendable experience compared to reports delegated to MoFA. One may take note of the facts that initial reports to the Human Rights Committee and Committee on Economic, Social and Cultural Rights were made after 17 years of delay and an initial report to the Committee on the Convention against Torture took 14 years.[36] Hence, it was rightly appreciated that Ethiopia has very mixed reporting record, with an excellent performance under the Convention and a fair one under the CEDAW, but very poor under the other treaties.[37] It can be agreed that the government is more open to be challenged by experts of the Committee and to subject its policies and laws to their scrutiny. This outstanding reporting history may also be partly attributable to availability of high technical and financial support from the UNICEF and domestic and international NGOs.[38]

Though the compliance with deadlines of submission of reports to the Committee is going well compared to other treaties, there is still a room for improvement. It is necessary to note that the initial report and the third periodic report were each two years overdue and the consolidated fourth and the fifth periodic reports were one year overdue. Another concern that shadowed the reporting procedure is the time gap between submission of state reports and adoption of concluding observations. Typically, we can see that the Committee adopted concluding observations on the initial report of Ethiopia two years after the submission of the report. Concluding observations on the second report and combined fourth and fifth periodic reports were made three years after the submission of the reports. Though a possible gap with regard to new developments may be filled with information exchange in the constructive dialogue, the

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[34] *A Proclamation to Provide for the Establishment of the Attorney General of the Federal Democratic Republic of Ethiopia,* Proclamation No. 943/2016, FED. NEGARIT GAZETTE, Year 22 No. 62, Addis Ababa, 2 May 2016, Art. 6(8)(e).

[35] *Ethiopian Human Rights Commission Establishment Proclamation*, Proclamation No. 210/2000, FED. NEGARIT GAZETTE, 6th Year No. 40, Addis Ababa 4th July 2000, Art. 6(7).

[36] *Id*.; There are also three periodic reports which are currently overdue, one each on ICCPR, CERD, CEDAW and CAT. See <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx> last accessed on April 30, 2017.

[37] Eva Brems, *Ethiopia Before the United Nations Treaty Monitoring Bodies*, 20 AFRIKA FOCUS 49, 53 (2007).

[38] For instance, the Government acknowledged that UNICEF provided the financial and technical resources required for preparation of combined fourth and fifth report. See Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Combined Fourth and Fifth Report: Ethiopia*, CRC/C/ETH/4-5, 23 December 2013, par. 10.

time gap between the submission of state report and adoption of the concluding observations may result in a concluding observations which fail to fully depict the updated picture of child rights situation in a State Party.

The Convention imposes a procedural obligation to publicize and disseminate reporting documents to all concerned organs that are required to consider the recommendations in decisions that affect children.[39] Concluding observations of the Committee shall be widely available if they are supposed to make a real impact. Contextual understanding of the instruments necessitates the publication and dissemination of Ethiopia's human rights reports and feedbacks to the reports. However, it is argued that in view of this obligation, 'Ethiopia's effort is almost zero'.[40] The EHRC and the MoWCA take the responsibility to disseminate concluding observations and prepare post-reporting conferences. States adopt various strategies to make recommendations of treaty bodies widely accessible to the lay people. For instance, Finland publishes concluding observations in the publication series of the Ministry for Foreign Affairs, and in Sweden, the observations are available online through the Ministry of Foreign Affairs Website.[41] The EHRC, which has a duty to translate and disperse international human rights instruments adopted by Ethiopia,[42] and the MoWCA, which is particularly responsible on child rights reporting, are expected to design an organized system of disseminating the human rights audit reports beyond institutional settings.

V. IMPLICATIONS OF CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE RIGHTS OF THE CHILD

A. Ethiopia's Reporting and Reactions to the Concluding Observations

A critical appraisal of the participation of Ethiopia in the reporting process and its reactions to the concluding observations and particularly to the recommendations is highly relevant to establish the attention offered to concluding observations of the Committee. In fact, the government of Ethiopia is not legally bound to give effect to a recommendation of any external entity.[43] However, the Government is aware of, at the moment of the adoption of concluding observations, the fact that there are certain expectations it needs to satisfy.[44]

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[39] *The Convention*, Art. 44(6).

[40] THE AFRICAN CHILD POLICY FORUM, HARMONIZATION OF LAWS RELATING TO CHILDREN: ETHIOPIA 39, *available at* africanchildinfo.net/documents/Ethiopia%20final%20Sarah.doc (accessed on 28 October 2016).

[41] See HELI M. NIEMI, NATIONAL IMPLEMENTATION OF FINDINGS BY UNITED NATIONS HUMAN RIGHTS TREATY BODIES: A COMPARATIVE STUDY, 26 (Abo Akademi University 2003).

[42] See *Ethiopian Human Rights Commission Establishment Proclamation*, *supra* note 35, Art. 6(8).

[43] The issue of bindingness determines the level of accountability of a State Party at the international human rights system. R. VAN ALEBEEK AND ANDRE NOLLKAEMPER, THE LEGAL STATUS OF DECISIONS BY HUMAN RIGHTS TREATY BODIES IN NATIONAL LAW, *available at* http://hdl.handle.net/11245/2.109408 (accessed on 28 October 2016). As representing a sovereign State, the Government is only bound to undertakings which are concluded in compliance with the prescribed procedures of international law making with due consideration to national interests as clearly directed by the foreign relations policy principle. See FDRE CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 86(1).

[44] Ethiopia's foreign policy recognizes that international organizations to which Ethiopia is a party may formulate laws that affect inter-State relations. Hence, it is apparent admission that human rights monitoring bodies like the Committee may put their influence on the international norm creation and interpretation process. *The*

The Committee regularly praised the commitment of the Ethiopian government for meeting the reporting procedure. One may use compliance with deadline of submission, sufficiency of replies to list of issues, quality of delegation to the constructive dialogue and pledges from the state as parameter to evaluate commitment of the state towards the reporting procedure. Ethiopian has better record in observance of periodicity of reporting to the Committee than reporting to other treaty bodies.[45] Besides, the Committee regularly appreciated, may be as a matter of routine, the composition of delegation by the Ethiopian government as a high-level representatives[46] and cross-sectional delegation.[47]

Though the Committee lacks a formal procedure of acceptance and rejection of the outcomes of the reporting process, a State Party under review is allowed to forward its comments on the observations. A practice to give formal and written comments on the recommendations is generally rare and states usually express their opinion in/at the end of the constructive dialogue. For instance, when one examines the reactions to concluding observations on the initial report, the delegation of Ethiopia pledged that the suggestions and recommendations made during the dialogue would be duly taken into account by the Ethiopian authorities.[48] Ethiopian delegations regularly used the words '*Ethiopia welcomes'*, '*Ethiopia accepts'* and '*The Government will duly take into account'* in their closing statements. These final statements of the delegations were mainly framed in a way to give the Committee promises of action and impose on one's state undertakings to alleviate problems identified and to strengthen measures which were underway to improve child rights conditions.

Subsequent state reports are the primary means to evaluate whether the state has complied with its promises and the Committee's recommendations. Except for a request to submit an interim report on concluding observation of the initial report, the Committee continued to require Ethiopia to incorporate follow-up information into its subsequent reports.[49] It also requires that measures taken shall be carefully associated with recommendations rendered by the Committee. However, Ethiopia's reports did not make the expected comprehensive nexus between the reported measures and previous recommendations. Not all measures claimed to be taken by the government were declared to be made in accordance with previous recommendations. The combined fourth and fifth report, however, mentioned the high level of attention it has given to

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Federal Democratic Republic of Ethiopia Foreign Affairs and National Security Policy and Strategy, November 2002, sec.7.1

[45] Eva Brems, *supra* note 37, at 53. "Ethiopia has an outstanding experience in reporting to the Committee on the Rights of the Child".

[46] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of The Convention, *Concluding observation on Second Periodic Report: Ethiopia*, CRC/C/15/Add.144, 21 February 2001, par.2.

[47] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of The Convention, *Concluding observation on Third Periodic Report: Ethiopia*, CRC/C/ETH/CO/3, 1 November 2006, par. 2. The quality of the delegation was praised as essential for high quality dialogue and shows serious attention given by the Government to the reporting procedure. In fact, the diversity in the delegation to the dialogue was highly reduced under the combined fourth and fifth State report.

[48] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of The Convention, *Concluding observation on Initial Report: Ethiopia*, CRC/C/15/Add.67, 24 January 1997, par. 2.

[49] *Id.* at par. 37.

previous recommendations. The combined report expressly indicated the fact that previous recommendations have guided the preparation of the report.[50] Pre-report dialogue with stakeholders was conducted to evaluate whether the previous comments were duly implemented.[51] In fact, shadow reports of NGOs perform better in rigorously substantiating facts with previous recommendations. The shadow reports also tried to create an impression of duty to report on the implementation of recommendations by accusing the Ethiopian government of not specifically responding on what was done in accordance with previous recommendations.[52]

The Committee commonly expressed its concern on recommendations that were not duly implemented by the state.[53] Recommendations pertaining to resource allocation, traditional practices, birth registration, child labor, refugee children and juvenile justice are concerns which the Committee explicitly and identically listed in the last two consecutive observations, as areas on which the government of Ethiopia was graded poorly in implementing recommendations.[54] Some of these areas are those the Ethiopian government reported that it had taken appropriate actions according to previous recommendations. This anomaly is also true particularly for juvenile justice and child labor as reported under the combined fourth and fifth state report.[55]

B. Implication of Concluding Observations on Domestic Child Rights Legal Framework

1. Implication of Concluding Observations on Domestic Laws and Policies

One of the purposes of the reporting procedure is to identify policy and legislative gaps.[56] Concluding observations are a vehicle to transform the reporting process into the policy-making process.[57] Beside the observance of the structure set by the Convention, the development of child-related policies and laws by a State Party should incorporate recommendations provided in the concluding observations of periodic reports.[58]

The domestic implication of concluding observations can be evaluated from the angle of the interplay between the observations and domestic legislative and policy frameworks. It is futile to claim that enactment of all child relevant laws and policies are exclusively attributable to the impact of recommendations of the Committee. However, suggestions of the Committee, directly

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[50] *Combined Fourth and Fifth Report: Ethiopia*, *supra* note 38, Foreword, at par. 3.

[51] *Id*., at par. 9.

[52] For instance, see The Advocates for Human Rights and The International Oromo Youth Association, *Ethiopia's Compliance with the Convention on the Rights of the Child Report for the Pre-Sessional Working Group of the Committee on the Rights of the Child*, 69th Session of the Committee on the Rights of the Child, Geneva 22-26 September 2014, par. 39. It is alleged that the Ethiopian Government has not responded to the Committee's recommendation to take all necessary measures to raise awareness about children with disabilities.

[53] *Concluding observation on Second Periodic Report: Ethiopia*, *supra* note 46, at par. 12; *Concluding observations on Third Periodic Report: Ethiopia*, *supra* note 54, at par. 6and *Combined Fourth and Fifth Report: Ethiopia*, *supra* note 38, at par. 6.

[54] *Id.*

[55] *Combined Fourth and Fifth Report: Ethiopia*, *supra* note 38, at paras. 285 and 300.

[56] Philip Alston, *The Purposes of Reporting*, in MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 1, 22 (United Nations 1997).

[57] HELI M. NIEMI, *supra* note 41, at 22.

[58] FASIL MULATU GESSESSE AND RAKEB MESSELE ABERRA, IMPACT ASSESSMENT REPORT ON THE DRAFT NATIONAL CHILD POLICY OF ETHIOPIA, 13 (Center for Human Rights, Addis Ababa University 2014).

or indirectly, have pushed the government to adopt legislative measures necessary to improve conditions of children. While the motive or objective behind certain legislative and policy actions can be deduced from the documents adopting the actions themselves, one may hardly find, in the documents, source of the initiative. The documents do not mention background processes (like a dialogue with human rights bodies) as pushing factor for the rules framed by the government. For instance, the preamble of the Revised Family Code recognizes that one of the purposes of the code was to conform laws on the wellbeing of children in accordance with international instruments.[59] However, the initiation and guidance given by the Committee towards the harmonization of child laws were not discussed. In fact, it is also practically incoherent to expect this sort of reference under such general laws.

Hence, alternative methodology for establishing the influence of the recommendations in triggering subsequent legislative and policy measures would be looking into subsequent reports of the State Party and statements of delegations. State reports may embody legislative and policy actions which the government admits that they are taken as a result of or in accordance with previous recommendations.

Earlier recommendations of the Committee generally suggest harmonization of laws with provisions of the Convention.[60] The delegation to the third periodic report reported that the Committee's previous concluding observations had been taken into account in the legal reforms and other measures taken to promote the rights of children.[61] Particularly, the initial report urged the government to prohibit corporal punishment.[62] In its second periodic report, reminding the previous recommendation, the government informed the Committee that it had issued an interim directive to prohibit corporal punishment in a school setting.[63] Recommendations of the Committee up on the initial and second periodic reports have also triggered consideration of ratification of treaties relevant to children. For instance, the second periodic report informed that the government was considering ratifying International Labor Organization (ILO) Convention No. 138 as suggested by The Committee.[64] The Committee first recommended the ratification of the two substantive Protocols of the Convention[65] though it was indicated that the Universal Periodic Review (UPR) recommendation led to the initiation of a process to ratify the Protocols.[66]

Recommendations regarding legislative measures under concluding observations on the recent two reports more specifically recommended a systematic review of laws and adoption of

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[59] *The Revised Family Code*, Proclamation No. 213/2000, FED. NEGARIT GAZETTE, Extra Ordinary Issue, No. 1/2000, Preamble, par. 3.

[60] *Concluding observation on Second Periodic Report: Ethiopia*, *supra* note 46, at par. 15.

[61] Committee on the Rights of the Child, *Summary Record of the 1162nd Meeting*, CRC/C/SR.1162, Forty-third session, 21 September 2006, par. 24.

[62] See *Concluding observations on Initial Report: Ethiopia*, *supra* note 55, at pars.13, 15 and 20.

[63] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Second Periodic Report: Ethiopia*, CRC/C/70/Add.7, (23 March 2000), par. 9.

[64] *Id.* at par.86.

[65] *Concluding observation on Second Periodic Report: Ethiopia*, *supra* note 46, at par. 78.

[66] CENTER FOR HUMAN RIGHTS STUDIES, *BASELINE STUDY FOR A COMPREHENSIVE CHILD LAW IN ETHIOPIA*, 8 (Addis Ababa University 2013).

comprehensive child law.[67] Though the Committee has never recommended Ethiopia to adopt a comprehensive child policy, it has so far made a number of recommendations for adoption of appropriate policies on specific child rights problems.[68] Recommendations of the Committee might also be part of the inspirations in the formulation of the draft child policy though there is no indication as to what inputs were integrated into the preparation of the policy.[69] However, there were other policy measures which were related to previous recommendations of the Committee. For instance, back to the initial concluding observation, the Committee had suggested Ethiopia to give particular attention to children affected by or infected with HIV-AIDS and other vulnerable children.[70] The second periodic report provided that the Committee's recommendation was addressed by a national policy developed by the government of Ethiopia to alleviate the impact of HIV-AIDS on children.[71]

2. The Law-Making Process and Concluding Observations

From the above discussion, we may conclude that though there are some legislative measures taken because of the suggestions of the Committee, it is difficult to, boldly, tell that the recommendations of the Committee are vigorously influencing lawmakers to enact laws crucial to improving the situations of children in Ethiopia. The concluding observations' influence on the law making process may be strengthened through creating mechanisms which enable the concluding observations reach the law-making organs.

From the outset, the principle of good faith dictates states not to defeat the purposes of a treaty with domestic acts.[72] Good faith and the obligation to harmonize require states not only to amend domestic laws but also to make compatibility assessment of prospective laws.[73] Hence, law-makers are expected to have comprehensive knowledge of relevant human rights systems. Outputs of treaty bodies are vital tools in the process of assessing the compatibility of bills in line with treaties. In Finland, for instance, there is a Constitutional Law Committee of Parliament to review the consistency of proposed bill with human rights standards. It has been reported that "This parliamentary Committee has significantly drawn attention to the outputs of treaty bodies,

[67] *Concluding observation on Third Periodic Report: Ethiopia*, *supra* note 47, at par. 9 and *Committee on the Rights of the Child, Concluding observation on the Combined Fourth and Fifth Report: Ethiopia, CRC/C/ETH/CO/4-5, 3 June 2015*, par. 9. However, the task of enacting a comprehensive child rights law has not been given significant attention. See CENTER FOR HUMAN RIGHTS STUDIES, *Id.*, at 135.

[68] On education, see *Concluding observation on Combined Fourth and Fifth Report: Ethiopia*, *Id.*, at par. 62; on child abuse; See *Concluding observation on Third Periodic Report: Ethiopia*, *supra* note 47, at par. 45.

[69] Concerning comprehensive child policy, it is taken as frustrating that the draft child policy failed to put at least the Convention as a reference point and adopt a right based approach. See FASIL MULATU GESSESSE AND RAKEB MESSELE ABERRA, *supra* note 58, at the Executive Summary.

[70] *Concluding observation on Initial Report; Ethiopia*, *supra* note 48, at par. 28.

[71] *Second Periodic Report: Ethiopia*, *supra* note 63, at par. 55.

[72] Takele Soboka Bulto, *The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia*, 23 JOURNAL OF ETHIOPIAN LAW 142 (2009).

[73] *Id.*

both as part of its function of scrutinizing human rights compliance, as well as in other contexts".[74]

Since international treaties are important tools for interpreting human rights provision of the Federal Democratic Republic of Ethiopia Constitution, drafters of laws are required to ensure consistency of legislative proposals with international agreements ratified by Ethiopia and particularly with human rights treaties.[75] However, let alone a possibility of thorough compatibility analysis of international treaties and their supporting documents, the drafters are not actually making human rights impact assessment.[76]

Concluding observations may also be relevant in the reading and debate of proposed bills. It was recommended at the Bristol conference on concluding observations that "states shall craft a procedure to enable concluding observations are integrated into the discussion of bills before the legislature".[77] In the absence of a formal mechanism to consider the concluding observations, individual members of the legislature may also raise the observations during reflections on bills. Besides, parliamentary committees may also refer to treaty body materials including concluding observations in the discussion of bills.[78]

Recommendations of human rights monitoring bodies may also be subject to parliamentary debate independently from a proposed bill. In tandem with General Comment No 5 and the Committee's recommendation pursuant to Article 44 (6) of the Convention, concluding observations should be subject to detailed debate in parliaments.[79] The implementation manual for the Convention also underscored in its evaluation checklist that "whether concluding observations are debated in parliament" shall be taken as one element in evaluating whether a state has met its obligations under Art. 44(6) of the Convention.[80] Hence, the Ethiopian parliament is under obligation to consider the recommendations of the Committee in formal and especially dedicated parliamentary meetings.

In fact, consideration of concluding observations either as part of the discussion on proposed bills or with an exclusive focus on recommendations of the treaty body is highly dependent on the awareness of the members of the parliament as to the reporting procedure and particularly

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[74] INTERNATIONAL LAW ASSOCIATION, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES, Berlin Conference (2004), par. 160.

[75] Drafters are recommended to ascertain that the provisions of the draft bills are consistent with International instruments ratified and adopted by Ethiopia. See JUSTICE AND LEGAL SYSTEM RESEARCH INSTITUTE, LEGISLATIVE DRAFTING MANUAL OF ETHIOPIA, FEBRUARY 2008, ADDIS ABABA, SEC.3.2.3.2; See ALSO LIKU WORKU, LEGISLATIVE PROPOSALS AND APPLICATION OF HUMAN RIGHT TREATIES IN ETHIOPIA, (2015) *available at* http://www.abyssinialaw.com/blog-posts/item/1468 (accessed on 28 October 2016).

[76] *Id.* Various factors militate against this function of the drafters; including lack of translations of human right treaties and decisions of international organs and the decentralization of the drafting system.

[77] HUMAN RIGHTS IMPLEMENTATION CENTRE, IMPLEMENTATION OF UN TREATY BODY CONCLUDING OBSERVATIONS: THE ROLE OF NATIONAL AND REGIONAL MECHANISMS IN EUROPE: SUMMARY AND RECOMMENDATIONS FORM THE HIGH LEVEL SEMINA, University of Bristol, UK, 4 (19-20 September 201)

[78] INTERNATIONAL LAW ASSOCIATION, *supra* note 74.

[79] Committee on the Rights of the Child, *General Comment 5*, General measures of implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, (27 November 2003), par. 73.

[80] UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD, 654 (Fully Revised Third Edition 2007).

about the concluding observations. The inclusion of members of the parliament in the human rights report preparation and dialogue process is highly important to create a consciousness of the law-makers about legal gaps on the country's child rights framework. A practice from South Africa is exemplary in this regard. All South Africa reports prepared for human rights monitoring bodies are debated in the parliament so as to evaluate whether they reflect the true picture of the human rights situations of the country.[81] Members of parliament are also regularly included in national delegations to the treaty bodies to ensure that they appreciate recommendations provided by treaty bodies.[82] The reporting procedure in the Ethiopian legal system lacks such all-stages of coordination between the reporting bodies and the law-makers. Hence, dissemination of the recommendations to the law making organs by the MoWCA is indispensable to fill the information gap.

Finally, concluding observations are also relevant for those lobbying for a change in laws.[83] Accordingly, the reference to concluding observations may take the form of submission of opinions by NGOs and other interest groups in the preparation and discussion of a bill. In Finland, NGOs have experience in using the Committee's observations to influence adoption of a bill. At one instance, "a submission to Finland's Parliamentary Committee reproach the Finland government referring to the concluding observations and criticized Finland for lack of coordination among authorities".[84] Among other factors, the Charities and Societies Proclamation of Ethiopia is primarily blamed for inhibiting NGOs from engaging in such sort of activism.[85]

3. Concluding Observations and Programs and Plans of Action Relevant to Children

The creation of national action plans and programs could also take into account content of concluding observations.[86] Recommendations of the Committee are shown to be important factor and input for devising general development programs and human rights action plans as well as preparation of comprehensive and problem specific child focused plans of action.

Recommendations for improvement of policy framework and adoption of appropriate programs are mainly related to the socio-economic rights of the child on which State Parties have relatively wider margin of actions and the Committee may only cautiously call for specific measures. For instance, in its concluding observations on the initial report, the Committee expressed its concern on the impact of poverty on the well-being of children. Illustrating the problem with high infant mortality, malnutrition, low level of education coverage and other

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[81] THE HUMAN RIGHTS LAW CENTRE & THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS, DOMESTIC IMPLEMENTATION OF UN HUMAN RIGHTS RECOMMENDATIONS: A GUIDE FOR HUMAN RIGHTS DEFENDERS AND ADVOCATES, 14 (2013).

[82] *Id.*

[83] INTERNATIONAL LAW ASSOCIATION, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: INTERIM REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES ON NATIONAL COURTS AND TRIBUNALS, New Delhi Conference 27 (2002).

[84] INTERNATIONAL LAW ASSOCIATION, *supra* note 74 at par.160, footnote 354.

[85] *Concluding observation on Combined Fourth and Fifth Report: Ethiopia*, *supra* note 67, at par. 19.

[86] HUMAN RIGHTS IMPLEMENTATION CENTRE, *supra* note 77, at 4.

indexes,[87] the Committee suggested Ethiopia to allocate maximum available resources and give priority to realize the socio-economic rights.[88] The second periodic report reminded this concern of the Committee in a section which reported the adoption of five years development program. Ethiopia reported major macro-economic measures which were directly or indirectly pertinent to the rights and welfare of children.[89]

The Committee suggested in its concluding observations that plans of action adopted by State Parties shall be guided by the goals and strategies set by the Summit of the World Fit for Children.[90] Ethiopia has so far prepared and implemented two comprehensive national plans of action on children; 1996-2000 and 2003-2010. Though Ethiopia began to develop a plan of action on children prior to the first report, the recommendations of the Committee were relevant in shaping the underlying strategies and objectives of the plans by putting the outcome of the World Fit for Children summit as implementation guiding instrument. For instance, after the second plan of action was adopted by Ethiopia, the Committee recommended the state to take into account the document of the summit in implementing the plan of action.[91] In fact, the country also reported that the plan of action revolved around the central theme of the World Fit for Children.[92]

The Committee's recommendations were also important in the preparation of plans of action that targeted a specific group of children or specific area of child right. For instance, the Committee had recommended in its concluding observation on the third periodic report that Ethiopia shall adopt a plan of action to prevent and combat child labor as per relevant ILO Conventions.[93] The government reported under its subsequent report that it has adopted a nation-wide plan of action to eliminate the worst form of child labor.[94]

Unlike legislative measures which might have been adopted with direct or indirect influence of the Committee's comments, express recognition of the recommendations of treaty bodies as one driving factor in the preparation of plans of actions is noticeable. As discussed above, the Committee urged Ethiopia, at a different time, to adopt appropriate plans of action to tackle particular problems affecting children. Besides, the Universal Periodic Review (UPR) called upon Ethiopia to prepare a National Human Rights Action Plan.[95] Ethiopia's First National Human Rights Action Plan recognized that reports submitted to human rights bodies and the

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[87] *Initial Report: Ethiopia*, *supra* note 36, at par. 12.

[88] *Id.* at par. 28.

[89] *Second Periodic Report: Ethiopia*, *supra* note 63, at par. 5.

[90] See Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, *Concluding observations on Second Periodic Report: Algeria*, CRC/C/15/Add.269, Fortieth session (12 October 2005), par. 15.

[91] *Concluding observations on Third Periodic Report: Ethiopia*, *supra* note 54, at par. 13.

[92] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention *Third Periodic Report: Ethiopia*, CRC/C/129/Add.8, 28 October 2005, par. 34.

[93] *Concluding observation on Third Periodic Report: Ethiopia*, *supra* note 47, at par. 72.

[94] *Concluding observation on Combined Fourth and Fifth Report: Ethiopia*, *supra* note 67, at par. 30.

[95] UPRINFO, RESPONSES TO RECOMMENDATIONS: ETHIOPIA, (2010) *available at* https://www.upr-info.org/en/review/Ethiopia/Session-06---November-2009/UPR-Info%27s-2RP-%28responses-to-recommendations%29#top (accessed on 28 October 2016).

corresponding recommendations were sources in the preparation of the Action Plan.[96] Hence, one can conclude that the recommendations of the Committee were also important in guiding the formulation of the action plan, at least the part of human rights of children.

Finally, it is also important to note that recommendations of the Committee may guide activities of an organ entrusted to coordinate implementation of the Convention. Concluding observations of the Committee should be integrated into the child rights system from the point of affecting the plans of action of the reporting organ, the MoWCA. The MoWYCA's annual action plan for the 2015/16 budget year revealed that concluding observation of the Committee on the combined fourth and fifth report would play a crucial guiding role.

C. Concluding observations as Interpretative Guide for Child Rights: the Reality and the Possibility

1. Factors Relevant to Citation of Concluding Observations in Litigations

Literature and international law reports testify that treaty body outputs generally have become a relevant interpretative source for many national courts. Courts are referring to General Comments, views on individual complaints and concluding observations in the interpretation of Constitutional and statutory human rights laws, as well as other domestic laws.[97] Findings of treaty bodies may also be utilized in the interpretation of Constitutional and statutory human rights laws.[98] In monist States, the findings are instrumental to inform the content of relevant human rights treaties.[99] On the other hand, in dualist States the findings may be employed in the construction of domestic legislations enacted to give effect to the treaties.[100] There may also be interpretive relevance of the findings for the interpretation of domestic laws which are not exactly adopted for the domestic implementation of particular human rights treaties.[101] The practice of citation of findings of treaty bodies is highly attributable to domestic factors relevant to amenability of domestic courts and factors related to the findings themselves.[102] Common law countries are liberal to cite findings of treaty bodies.[103] Save for common law countries, African, Arab and Latin American States have no identifiable judicial practice in this regard.[104] Courts in most civil law countries make little use of international law in interpreting Constitutional provisions.[105] More specifically, the interaction of domestic courts with treaty bodies' findings is directly related to direct applicability of human rights treaties or the presence of

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[96] The Federal Democratic Republic of Ethiopia, *National Human Rights Action Plan* 2013-2015 (2013), p. 8.

[97] See MACHIKO KANETAKE, *DOMESTIC COURTS' ENGAGEMENT WITH UN HUMAN RIGHTS TREATY MONITORING BODIES: A THEMATIC REPORT FOR THE ILA STUDY GROUP ON PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW*, (2014) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393332 (accessed on 28 October 2016); INTERNATIONAL LAW ASSOCIATION, *supra* note 74, at par. 175.

[98] See for more MACHIKO KANETAKE, *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] INTERNATIONAL LAW ASSOCIATION, *supra* note 74, at par.29, footnote 28.

[105] Magnus Killander and Horace Adjolohoun, *International law and domestic Human Rights litigation in Africa: An introduction*, in MAGNUS KILLANDER (ED.), INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 1, 4 (Pretoria University Law Press 2010).

substantively comparable domestic human rights provisions.[106] Hence, the fact that domestic laws do not incorporate human rights treaties will influence the role treaty body outputs play in national court proceedings.[107] Public and judicial awareness of the findings is also an indispensable factor.[108] Besides, the entrenchment of separation of power is also equally a determinant factor. The more faithful the judicial organs are to the legislative authority of political organs, the less amenable the courts are to non-binding international instruments.[109]

2. The Law on Application of Treaties

A reference to international laws into domestic courts may take the form of direct application or indirect application.[110] Treaties may be directly referred and interpreted or they may be used as instruments essential for interpretation of domestic laws. Both direct and indirect applications of treaties are possible under the Ethiopian legal system. Concerning direct application, the Constitution of the Federal Democratic Republic of Ethiopia has incorporated international treaties ratified by the parliament as laws of the land.[111] The Federal Courts Proclamation also recognizes direct application of treaties.[112] On the other hand, indirect application of treaties is enabled through the principle of treaty-consistent interpretation.[113] The principle of consistent interpretation refers to the principle that requires domestic organs to interpret Constitutional and other laws in conformity with a rule of international law.[114] International rule is used to construe a rule of national law. A space for interpretation in the contents of the provision of national law is the basic condition for the applicability of the principle of consistent interpretation. The judiciary,[115] House of Federation[116] and other organs[117]

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[106] INTERNATIONAL LAW ASSOCIATION, *supra* note 74, at par. 182.

[107] R. VAN ALEBEEK AND ANDRE NOLLKAEMPER, *supra* note 43, at 68.

[108] See MACHIKO KANETAKE, *supra* note 97, at 25; For those judges who are familiar with the findings of treaty bodies, the latter can be sources of inspiration. See Martin Scheinin, *Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experience*, in P. ALSTON AND J. CRAWFORD (EDS.), THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, 240 (2000).

[109] See MACHIKO KANETAKE, *supra* note 97, at 27; See also Machiko Kanetake and Andre Nollkaemper, *The Application of Informal International Instruments Before Domestic Courts*, 46 THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 765, 803 (2014).

[110] David Sloss, *Domestic Application of Treaties*, in DUNCAN HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES 1, 4 (Oxford University Press 2011).

[111] FDRE CONSTITUTION, Art. 9(4).

[112] *Federal Courts Proclamation*, Proclamation No. 25/1996, 1996, FED. NEGARIT GAZZETA, 2nd Year No.13, Addis Ababa, 15 February 1996, Art. 3(1) and Art. 6(1)(A).

[113] FDRE CONSTITUTION, Art. 13(2).

[114] See Gerrit Betlem and Andre Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14EJIL 3, 3(2003).

[115] Having in mind the Constitutional duty shouldered by courts to protect human rights, it is awry to deny courts the power to determine the scope and meaning of human rights provisions of the Constitution FDRE CONSTITUTION, Art.13(1).

[116] The House of Federation Proclamation adopted the wording of Art. 13(2) of the Constitution for a Constitutional interpretation on human rights. See *A Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities*, Proclamation No. 251/200, 2001, FED. NEGARIT GAZZETA, 7th Year No.41, Addis Ababa, 6 July 2001, Art. 7(2). A provision from the previous Council of Constitutional Inquiry Proclamation which provided that an interpretation of human rights provisions of the Constitution shall be made in conformity with international instruments adopted by Ethiopia is omitted in a

are required to interpret human rights provision in consistent with treaties adopted by Ethiopia. The same principle is adopted word by word in the Proclamation which defines the powers of the House of Federation.[118]

3. The Practice of and the Constraints to Citing Concluding Observations

The reference to child rights treaties by the Ethiopian judiciary has taken a new momentum with the bold move by the Cassation Bench of the Federal Supreme Court.[119] The Bench explicitly referred to the Convention in three cases and impliedly cited it in one other case.[120] The pioneer of all these cassation decisions was made on an issue which interplay best interest of the child with appointment of guardianship. In this case, the court cited Article 3 of the Convention (on best interest of the child) besides the Constitutional provision on best interest of the child.[121] More advanced analysis of the Convention was applied by the Supreme Court in another case which however involved the same issue of best interest of the child *vis a vis* guardianship.[122] The court, citing the African Charter on the Rights and Welfare of the Child (here in after, *the ACRWC*) and the Convention, reaffirmed that treaties are part of the laws of Ethiopia. The verdict of the court has referred provisions of the Constitution and the two instruments to support the duty to take primary consideration of best interest of the child. More decisively, the court fully relied on the two instruments to hold that views of the child shall be heard in a matter which affects him/her and the views shall be given appropriate weight taking in to account the child's age and evolving capacity. This ground-breaking analysis of international instruments by the Supreme Court is an important maneuver towards impelling all courts of the State to accept law suits with a cause of action based on violation of provisions of treaties even though there is no comparative provision into other laws of the country. We can also appreciate that, unlike the worldwide trend, the Court tended to make direct application of the Convention.

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recent Proclamation. See *Council of Constitutional Inquiry Proclamation*, Proclamation No. 250/2001, FED. NEGARIT GAZZETA, 7th Year No.41, Addis Ababa, 6 July 2001, Art. 20(2) and *A Proclamation to Re-Enact for the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia*, Proclamation No. 798/2013, FED. NEGARIT GAZZETA, 19th Year No.65, Addis Ababa, 30 August 2013.

[117] The EHRC also has the power to explore the meaning of human rights provisions in a process of investigating complaints. Therefore, a wide range of organs of the Government which apply human rights provisions in the exercise of their power have at least implied power to interpret human rights provisions of the Constitution. See *Ethiopian Human Rights Commission Establishment Proclamation*, *supra* note 35, Art. 7.

[118] *A Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities*, *supra* note 116, Art. 7(2).

[119] *Tsedale Demsie v. Kifle Demsie*, FED. SUPREME CT. CASS. BEN., File No. 23632 (Decision of 26 October 2000 E.C.), Federal Supreme Court Cassation Decisions (Miazia 2001), Vol. 5, at 188.

[120] The three cases in which the Bench made explicit reference to the Convention are: *Tsedale Demsie v. Kifle Demsie, Id*; *Etsegenet Eshetu v. Selamawit Nigusse*, FED. SUPREME CT. CASS. BEN., File No. 35710 (Decision of 16 December 2001 E.C.), Federal Supreme Court Cassation Decisions, Vol. 8 (Hidar 2003), at 243; *Francis Pastor v. Dukman Veno Etal*., FED. SUPREME CT. CASS. BEN., File No. 44101 (Decision of 24 February 2002 E.C.), Federal Supreme Court Cassation Decisions, Vol. 10 (Hidar 2003), at 41. The Bench also impliedly referred to Convention by citing 'relevant international instruments adopted by Ethiopia'. See *Betezata Children Homes Association Etal* FED. SUPREME CT. CASS. BEN., File No. 52691 (Decision of 22 April 2002 E.C.), Federal Supreme Court Cassation Decisions, Vol. 10 (Hidar 2003), at 72.

[121] See *Tsedale Demsie v. Kifle Demsie*, *Id.*

[122] See *Etsegenet Eshetu v. Selamawit Nigusse*, *supra note* 120.

A research indicated that 90% of domestic cases which cited the Convention employed the Convention as interpretative guide whereas only in 10% of the cases that the judges directly applied the Convention with full force of law.[123] The best interest of the child *vis a vis* other rights of the child was the primary issue in the cassation cases depicting the worldwide picture.[124]

It is, in fact, too idealistic to search for a domestic case in which a concluding observation is cited. Poor domestic reference to treaties and shallow interpretation of the treaties highly encumbered a reference to concluding observation. Though the actual impact that the Supreme Court's initiative made on the permeability of courts to child rights treaties requires further research, it was alleged that the Court's move has increased court decisions that cite the Convention.[125] The trend of citing child rights treaties is promising, but no one may confidently argue that the status of application of child rights treaties is satisfactory.[126] Hence, concluding observations could have assisted application of the treaties but for poor level of application of treaties during domestic litigations.

However, the main constraint to the consideration of concluding observations in court litigations is the method of application of treaties. Though the status of application of treaties is witnessed as promising, a look into the above-mentioned judgments by the apex court shows that legal analyses of our courts are too shallow to reach to concluding observations. The legal analysis of the judges is hardly robust and comprehensive. Besides, the judicial consciousness of the observations, at the outset, shall be subject to broader scrutiny. In four cases in which the Court made reference to the Convention, it cited provisions to support its already reached position or corroborate corresponding Constitutional provisions instead of analyzing the very meaning of the treaty provisions in reaching to a conclusion. In fact, this is an instance of the broader picture of a less liberal analysis of law by civil law judges. However, the authority of common law judges extends to making of laws, which is one of the favorable factors that facilitate judicial references to non-binding international documents.[127] It is suggested that a judicial directive to facilitate consistent practice in the application of treaties is necessary.[128] Welcoming the growing tendency to apply treaties, the guidance is mandatory to ensure more analytical, organized and comprehensive application of treaty provisions.

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[123] See CHILD RIGHTS INTERNATIONAL NETWORK, CRC IN COURT: THE CASE LAW OF THE CONVENTION ON THE RIGHTS OF THE CHILD, 4 (2012).

[124] See CHILD RIGHTS INTERNATIONAL NETWORK, *Id.* at 14.

[125] GIRMACHEW ALEMU AND YONAS BIRMETA, HANDBOOK ON THE RIGHTS OF THE CHILD IN ETHIOPIA, 26 (Addis Ababa University).

[126] Though Ethiopia is a monist State in which an international treaty becomes part of the law of the land by the fact that it is ratified by a domestic act, the status of application of treaties remains subject to controversy. It is, in fact, proved to be a myth that monism promote the applicability of international instruments in to domestic legal system. Courts in many traditionally dualist African countries use international law to a larger degree than explicitly monist countries like Ethiopia. See Magnus Killander and Horace Adjolohoun, *supra* note 105, at 4. However, availability of domestic mechanism to make treaties applicable before courts of law is a practical necessity, beyond a question of law.

[127] Magnus Killander and Horace Adjolohoun, *Id.* at. 27.

[128] CENTER FOR HUMAN RIGHTS STUDIES, *supra* note 31, at 132.

In jurisdictions that have well-entrenched experience of the application of treaties, international law itself provides the principles for interpretation of the treaties. Concluding observations are relevant in establishing a particular form of subsequent practice in interpreting provisions of a treaty.[129] Though Ethiopia is not a party to the Vienna Convention on the Law of Treaties, principles of treaty interpretation that are developed as customary international law would be applicable if domestic courts reached to a capacity where they would analyze supplementary documents to construe the meaning of a particular treaty provision.[130]

The generality of the principle of consistent interpretation is another concern related to the method of application of treaties. The Constitutional provision on human rights interpretation and the Proclamation to consolidate power of House of Federation do not tell us sources eligible to be considered in the interpretation of human rights provisions.[131] The House of Federation and the Council of Constitutional Inquiry were empowered to develop and implement specific principles of Constitutional interpretation.[132] However, neither the House of Federation nor the Council of Constitutional Inquiry has prescribed rules of interpretation, which *inter alia* guides instruments eligible to be considered in the process of interpreting human rights issues brought, before the organs, as a point of contention.

The principle of consistent interpretation is instrumental in creating the link between domestic human rights law, in particular, Constitutional law and international human rights instruments. In the course of interpreting an international rule, citations by domestic judges to a treaty provision can serve as a bridge to interpretative legal materials.[133] This is the rational course when one considers the fact that "international instruments themselves couched in similar to or more general terms than Constitutional stipulations and may not provide much aid to the interpretation of the human rights provisions of the Constitution".[134] Therefore, findings of treaty bodies can be used to inform the interpretation and application of domestic human rights laws.[135] In fact, Judges have a large crowd to pick from, thus, they are required to be cautious in referring to those instruments while using them for interpretation.[136] This requires well entrenched

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[129] Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 FORDHAM INTERNATIONAL LAW JOURNAL 595, 614-615 (2015).

[130] Article 34 of the VCLT reads as 'nothing in Articles 30 to 33 precludes a rule set forth in a treaty from becoming binding up on a third State as a customary rule of international law.'

[131] Getahun Kassa, *Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System*, 20 AFRIKA FOCUS, 87 (2007); Interview with Mr. Mulye Welelaw, a Constitutional Interpretation Expert.

[132] *A Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities*, *supra* note 116, Art. 7(1) and *The Council of Constitutional Inquiry Proclamation*, *supra* note 116, Art. 20(1). The fact that both organs are authorized to identify and implement principles of interpretation was criticized as it might cause overlap. See Getahun Kassa, *Id.*; However, the power of the Council of Constitutional Inquiry to adopt principles of interpretation was omitted from new Proclamation No. 798/2013.

[133] Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 628 COLUM. L. REV, (2007), cited in Wayne Sandholtz, *supra* note 129, at 615.

[134] Magnus Killander and Horace Adjolohoun, *supra* note 105, at 16.

[135] THE HUMAN RIGHTS LAW CENTRE & THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS, *supra* note 81, at 14.

[136] See RAJAT RANA, COULD DOMESTIC COURTS ENFORCE INTERNATIONAL HUMAN RIGHTS NORMS? AN EMPIRICAL STUDY OF THE ENFORCEMENT OF HUMAN RIGHTS NORMS BY THE INDIAN SUPREME COURT SINCE 1997, 45 (2009) *available at* http://ssrn.com/abstract=1424044 (accessed on 29 October 2016).

knowledge of the judges about the scope and pertinence of international norms on an issue at hand. For instance, the South African Constitution provides that courts 'must consider' international law (binding and non-binding) in interpreting the Bill of Rights.[137] Pertaining to child rights provisions, the Constitutional provision was interpreted as it would include the Convention, the ACRWC, General Comments, Country Reports and other documents produced by the committees in charge of implementing these treaties.[138] This means, as one of the Committee's outputs in the interpretation of the Convention, South African courts are required to consider concluding observations of the Committee.[139]

The value to be attached to each instrument will vary.[140] The duty to 'consider' does not mean a duty to 'apply' an interpretation rendered by the treaty bodies but it means that the courts must at least take note of the non-binding materials as well. Judges do not refer the findings of the treaty bodies out of sense of obligation; instead the citation is basically triggered by the persuasiveness of the findings. Of course, this viewpoint is save for exceptional cases like the *Vishaka* case which promoted recommendations of a treaty body as having the nature of law, in default.[141] In the *Vishaka* case, the Supreme Court of India puts a dictum that recommendations of committee on CEDAW shall be taken as a reference for interpretation of the Indian Constitution.[142] The court also held that "in the absence of the domestic law to provide for the effective enforcement of the basic human right of gender equality as generally guaranteed under the Indian Constitution, employers in work places as well as other responsible persons and institutions shall observe the recommendations of the committee on CEDAW".[143]

Additionally, citation of concluding observations may take the form of Constitutional interpretation and Constitutional review of byelaws on the basis of the principle of consistent interpretation. For instance, in a Constitutional challenge to a provision of Criminal Code of Canada, Judge Arbour, citing the Committee's concluding observations on Canada in which the Committee recommended Canada to remove a provision which allows chastisement by parents, expressed his dissent against a Constitutional interpretation of the Ontario Supreme Court.[144] Similarly, in a litigation to review Constitutionality of a provision of the Civil Code on child born outside wedlock, four Justices of the Supreme Court of Japan referred to the concluding observations of the Human Rights Committee to support their dissenting and separate opinions.[145] Courts may also attach importance to what the treaty body does not mention in its Observations. In an issue whether retention of DNA materials of minors is in line with the Convention, Dutch Court remarked that it is relevant to note that the Committee had not

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[137] *Constitution of the Republic of South Africa*, 1996, Sec. 39(1)(B).

[138] See Solange Rosa and Mira Dutschke, *Child Rights at the Core: A Commentary on the Use of International Law in South African Court Cases on Children's Socio-economic Rights*, 16 (University of Cape Town 2006).

[139] *Id.*

[140] See MACHIKO KANETAKE, *supra* note 97, at 14.

[141] See RAJAT RANA, *supra* note 136, at 39.

[142] *Id.*

[143] *Id.*

[144] *Canadian Foundation for Children, Youth and the Law vs. Canada*, Supreme Ct. of Ontario, 2004, cited in INTERNATIONAL LAW ASSOCIATION, *supra* note 74, at par.24.

[145] INTERNATIONAL LAW ASSOCIATION, *supra* note 74, at par.107;

condemned the Netherlands over the law, which allows the retention, in its concluding observations on the Netherlands.[146]

Under Ethiopian Constitutional law, Adem argues that, "declarations, resolutions, and other *soft laws*, which by their nature may not be ratified, are also relevant in shaping the meaning of the Constitutional rights provisions".[147] The fact that Article 13(2) of the Constitution uses the term *instruments adopted* instead of *treaties ratified* means a reference should be made not only to treaties but also to declarations, resolutions and other treaty bodies' outputs adopted within the framework of international organizations to which Ethiopia is a member. Abdi submitted that meaning, scope and categories of rights under human rights provisions of the Constitution must not contradict with *soft* instruments as well.[148] It is in the opinion of the author of this article that, concluding observations of the Committee that suggest certain line of interpretation of child rights are important in the determination of the meaning of child rights provisions of the Constitution. I agree that "In pursuing the greater cause of protecting the rights and welfare of children, such instruments provide incontestable scales of moral fortitude, and extend practical guidance".[149] Hence, a regulated and creative application of the principle of consistent interpretation will lead organs of the government to consider concluding observations.

VI. CONCLUSION

Concluding observations, which are the output of the reporting procedure, are not legally binding on Ethiopia since they are not adopted within the framework of making international laws and undertaking international obligations. However, deeper investigation into the interaction between the Ethiopian government and the expert Committee indicates that the former is not free to overlook the recommendations of the latter. The government's sense of obedience to the non-binding *do and don't* of the Committee is apparent from the following trends. First, the government is forwarding its comments, most of the time acceptance, on the suggestions of the Committee in or at the end of the dialogue. Second, the government is reporting on what has been done to comply with the recommendations. This creates a cause and effect relationship between the recommendation of the Committee and the measures reportedly taken by the government. Third, the Committee is calling for the comprehensive recommendation-measure nexus between current state report and previous concluding observations. Finally, external bodies, particularly NGOs' accusations of the government through alternative reports, alleging that the latter is not acting in accordance with the Committee's recommendations and it is not reporting on what measures are taken to address the suggestions of the Committee shows that the government is required at least to consider the recommendations of the Committee.

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[146] R. VAN ALEBEEK AND ANRE NOLLKAEMPER, *supra* note 43, at 64.

[147] Adem Kassie Abebe, The Potential Role of Constitutional in the Realization of Human Rights in Ethiopia 162 (2012) (Doctoral Thesis, University of Pretoria). (Emphasis added).

[148] Abdi Jibril Ali, *Distinguishing Limitation on Constitutional Rights from Their Suspension: A Comment on the CUD Case*, 1:2 HARAMAYA LAW REVIEW 16 (2013).

[149] CENTER FOR HUMAN RIGHTS STUDIES, *supra* note 31, at 1.

On the other hand, though concluding observations are not laws in the domestic legal system, they are legally relevant to propel enactment of laws and adoption of policies. However, the concluding observations are facing hard fenced and hardly permeable law making process which in effect is weakening the recommendations' access to the table of the law-makers to make a real impression on laws which affect children.

Though familiarity of child rights treaties before Ethiopian courts has taken a positive paradigm shift, the reference to the treaties disappointingly lacks detailed analysis on the construction of the rights under litigation. Text restricted analysis of law, as prominently civil law legal system, well-entrenched separation of power and lack of judicial discourse and awareness of concluding observations are also factors that strangled creative utilization of the observations in interpreting child rights provisions.

Child rights treaties may also serve to interpret domestic child right laws. Comparative jurisprudence shows that the observance of the principle of treaty consistent interpretations of Constitutional child rights necessarily leads to the construction of the meaning of binding treaties through non-binding instruments like concluding observations. In Ethiopia's case, the Constitutional interpretation rules are not elaborated rules, and they fail short of guiding what specific human rights documents should be consulted by the House of Federation, courts or other organs for consistent interpretation of human rights provisions of the Constitution.

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EXAMINING THE DESIGN OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIAN CONSTITUTION IN THE LIGHT OF *AREND LIJPHART'S* GUIDELINES OF CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES

Teferi Bekele Ayana*

Abstract

Consociational democracy model is a political model developed by Arend Lijphart as a solution to the problem of unstable democracy in divided societies. Its core idea is that in a divided societies, stable democracy can be realized if diversities are acknowledged and accommodated through mechanisms of a grand coalition, minority veto, proportional representation,and segmental autonomy. However, Lijphart remarks that the practical effectiveness of consociational model presupposes wise constitutional design for which he provided nine main guidelines of constitutional design for divided societies (hereinafter shortly referred as, Lijphart's guidelines): 1) Proportional legislative electoral system, 2) Using the simplest form of proportional electoral system, 3) Establishing parliamentary form of government, 4) Power-sharing in the executive, 5) Ensuring cabinet stability, 6) A ceremonial head of the state who is not directly elected by the people, 7) Adopting federalism and decentralization, 8) Granting non-territorial autonomy, and 9) Power-sharing beyond the cabinet and parliament.

This article examined to what extent the design of the Federal Democratic Republic of Ethiopian Constitution (Hereinafter shortly referred as, the FDRE Constitution) reflects Lijphart's nine guidelines mainly by analyzing the provisions of the Constitution vis-a-vis the guidelines or by considering the existing prevailing political practice in some cases. The overall findings of the examination are summarized into four areas. These are:

1) *Areas where the design of the Constitution totally deviated from Lijphart's guidelines;*
2) *Areas where the design of the Constitution remained silent as to Lijphart's guidelines;*
3) *Areas where the design of the Constitution corresponded to Lijphart's guidelines in form but deviated or at least has potential to deviate in substance; and*
4) *Areas where the design of the Constitution fully corresponded to Lijphart's guidelines*

The deviations (both in form and substance, or in substance alone), or the silences of the Constitution as to the guidelines are mainly because of the choice of electoral system, lack of explicit constitutional provisions, the absence of established political practice, or silence of the constitution.

Keywords: Consociational democracy, FDRE Constitution, Lijphart's Guidelines, minority, divided societies

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* LL.B (Addis Ababa University (2007)), LL.M in Comparative Public Law and Good Governance (Ethiopian Civil Service University(2015)); Senior Legal Researcher and Research Department Assignee Head at Oromia Justice Sector Professionals Training and Legal Research Institute (OJSPTLRI). He is also co-founder and the Editor-in-Chief of Oromia Law Journal, a journal hosted by OJSPTLRI. He can be reached via email address: bekele.teferi@yahoo.com. He is thankful to the editorial team of Haramaya Law Review and the anonymous reviewers. However, any mistake in the article remains with the author.

I. INTRODUCTION

A divided society is a society where the diversities, mainly ethnicities become politically salient, that is when the diversities are markers of political identity.[1] The greatest challenge of this society is how to ensure a stable democracy.[2] Because of this, different policy options like assimilation (total denial of diversity), integration (promoting a common public identity without demanding total ethno-cultural uniformity), and accommodation (recognizing diversities) are recommended at different times to approach the challenge.[3]

Arend Lijphart believes that accommodation is the appropriate option to address the problem of lack of a stable democracy in divided societies and recommends the application of consociational democracy model for its proper implementation.[4]The basic impulse of Lijphart's consociational democracy model is to provide a political arrangement in which the tensions between the segments of plural society can be accommodated within a single sovereign state by *sharing, diffusing, separating, dividing and limiting power*.[5] According to Lijphart, consociation does this through its four components- grand coalition, mutual veto, proportionality, and segmental autonomy all of which deviate from majority democracy.[6]

Grand coalition refers that the political leaders of all of the segments of the plural society jointly govern the country.[7] It denotes the participation of representatives of all significant communal groups in political decision-making, especially at the executive level.[8]Mutual veto starts from the premises that although the grand coalition rule gives each segment a share of power at the central political level, this does not constitute a guarantee that a majority will not outvote it when its vital interests are at stake.[9]Its purpose is providing a complete guarantee to each segment so that the majority will not outvote each segment when its vital interests are at

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[1] Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, University of Toronto, Faculty of Law, LEGAL STUDIES RESEARCH SERIES, No.09-01, 5 (2009); Adeno Addis, *Deliberative Democracy in Severely Fractured Societies*, Tulane University Law School, *16* INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, Issue 1, Article 4, 63 (2009); Constance Grewe/Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies*: Bosnia Herzegovina and Kosovo Compared (Netherlands), 15 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 3 (2011).

[2] Arend Lijphart, *Constitutional Design for Divided Societies*, 15 JOURNAL OF DEMOCRACY, No.2 *96* (2004)*; see also* Adeno, *Id*. at 60.

[3] AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 44 (New Haven and London Yale University Press); Choudhry, *Supra* note 1, at 26-27; JOHN MC GARRY AND BRENDAN O'LEARY**,** IRAQ'S CONSTITUTION OF 2005: LIBERAL CONSOCIATION AS POLITICAL PRESCRIPTION, *Symposium 670* (Oxford University Press and New York University School of Law 2007).

[4] Lijphart did this in several of his writings. But, the study of the Netherlands in *The Politics of Accommodation* published in 1968 by Berkeley: University of California could be considered as his first work where he clearly advocated for consociation.

[5]Arend Lijphart, *Consociation and Federation: Conceptual and Empirical Links*, 12 *CANADIAN JOURNAL OF POLITICAL SCIENCE*, No 3, 499 (1997).

[6] *Id.* at 500. Recently, Lijphart condensed these four components into two components-primary and secondary. The former includes grand coalition and segmental autonomy; the latter includes mutual veto and proportionality. See Choudhry, *supra* note 1, at 18).

[7] Lijphart, *supra* note 3, at 25; Lijphart, *supra* note 5, at 500.

[8] Lijphart, *supra* note 2, at 97.

[9] Lijphart, *supra* note 5, at 501; Lijphart, *supra* note 3, at 36.

stake.[10] Proportionality component of consociation is a concept that serves as the basic standard of government positions: legislative representation, representation in cabinets, civil service, police, military, and the allocation of public funds.[11] All groups influence a decision, and receive resource in proportion to their numerical strength.[12] Segmental autonomy refers issues that can be left to the segments alone, together with the proportional allocation of government funds.[13] It is all about providing autonomy to the segments on issues that are unique to the specific segments and not a common concern to all segments.

These four components are all manifestations of self-determination through shared-rule and self-rule. The frameworks for their practical implementation can be spelled out in a formal legal text or be found in unwritten rules of political practice.[14]They are *not mutually exclusive of one another*. Rather, interdependence among the components exist for the well-functioning of the model.[15]

However, the practical effectiveness of Lijphart's consociational model showed variations from country to country. For example, it has been more successful in the Netherlands and Switzerland; has limited success in Northern Ireland and India;[16] and failed in Cyprus (1963) and Lebanon (1975).[17] This invited different criticisms against the model. Some critiques argued that it is not ideally democratic, and some others have focused on its methodological and measurement issues.[18] Although Lijphart responded to the critiques in details in his writings[19] that make the model remain influential to date, he generally contends that the way constitutions are designed to institutionalize the components of consociational democracy model determines the practical success or failure of the model.[20] Accordingly, he provided *guidelines*[21] of

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[10] *Id.*

[11] *Id.* at38; Lijphart, *supra* note 5; Choudhry, *supra* note 1, at 18.

[12] Lijphart, *supra* note 3, at 1; Lijphart, *supra* note 5.

[13] Lijphart, Id., p41; Lijphart, Consociation and Federation, *supra* note 5, p500.

[14] Choudhry, *supra* note 1, p19.

[15] Noura Assaf, Consociational Theory and Democratic Stability A Re-examination Case Study: Lebanon, A Thesis Submitted in Fulfilment of the Requirements for the Degree of Doctor of Philosophy in Politics, University of Warwick, Department of Political Science and International Studies, 8, 13 (2004), *available* at Http://wrap. warwick.ac.uk/1203 (accessed on 11 March 2015).

[16] Ashley A. Rees, Why Consociationalism Has Not United Iraq, 4 (A Thesis Presented to the Department of Political Science and the Clark Honors College of the University of Oregon in Partial Fulfilment of the Requirements for the Degree of Bachelor of Arts, (2007).

[17] Lijphart, *supra* note 2, at 99.

[18] *Id.* at 97-98.For example, Donald L. Horowitz criticizes the model saying that it lacks adequate incentive for elite cooperation without which consociational democracy model could not be effective. S*ee* Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, A CONFERENCE PAPER DELIVERED AT THE KELLOGG INSTITUTE CONFERENCE (1999); See also M-P-C. Van Schedelen, Consociational Democracy: The Views of Arend Lijphart and Collected Criticisms (The Political Science Reviewer, Erasmus University, Rotterdam), *available* at www.mmisi.org/pr/15_01/Schendelen.pdf (accessed on 25 February, 2015).

[19] For example, one of his articles entitled *The Wave of Power-sharing Democracy*, The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy (Reynolds ed., Oxford: Oxford University Press, 2002) fully devoted to his responses to the critiques (id., p98).

[20] Lijphart, *supra* note 2, at 99. Normally, divided societies need constitutions that do play:

a) Regulative roles by enabling or disabling decision-making;

b) Constitutive roles by creating institutional spaces for shared decision-making or changing self-understanding of citizens;

designing constitutions for divided societies that he claims will best fit for most divided societies regardless of their individual circumstances and characteristics.[22]

Lijphart's guidelines directly or indirectly explain components of consociational democracy model and address issues of: 1) proportional legislative electoral system, 2) Using the simplest form of proportional electoral system, 3) Establishing parliamentary form of government, 4) Power-sharing in the executive, 5) Ensuring cabinet stability, 6) A ceremonial head of the state who is not elected by the people, 7) Adopting federalism and decentralization, 8) Granting non-territorial autonomy, and 9) Power-sharing beyond the cabinet and parliament.[23]

Ethiopia is diverse in terms of ethnicity, language, religion, modes of life, and governance traditions.[24] Because of this diversity, her society is also a divided society.[25] This indicates that similar challenge of choosing policy option to create a stable democracy exists in Ethiopia.[26] For example, until 1991, diversity was not recognized and the attempt was even to erase it.[27] That is why Asnake rightly remarks that since the second half of the 19th century, the twin policies of the Ethiopian state regarding ethnic diversity and the state were centralization and modernization.[28] The twin policies could not realize stable democracy in the country as this is impossible at least without accepting the value of diversity in divided societies.[29] The strategy almost remained without substantial change until the fall of the *Derg* regime in May 1991.[30]

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c) Expressive roles by serving as a means to an end of justice for a society through defining rights and duties, and public institutions for their enforcement; and

d) Instrumental role by serving as a precondition for any meaningful appraisal of the justice of law. Designing constitutions that play these roles is not an easy task. For this, see generally Choudhry, *supra* note 1, at 5-6; *See* also Efrain Castaneda Mogollón, *Constitutional Design for Divided Societies: The Role of the Constitution in Shaping the Democratic Path of Society, 26-27* (Thesis Submitted in Fulfilment of the Requirement for the Research Master in Law Degree*)*.

[21] Although these guidelines are reflected in one or the other writings of Lijphart, his article "The Constitutional Design for Divided Societies", *supra* note 2 fully devoted to them.

[22] Lijphart, *supra* note 2, at 99.

[23] *Id*.

[24] Christophe Van der Beken, *Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level*, AFRICA FOCUS, No. 106, 20 (2007); Hashim Tewfik, *Transition to Federalism*: *The Ethiopian Experience Forum of Federations*, (The Global Network on Federalism), 4 (2010).

[25] For example, the political history of the country reveals that ethnic representing political frontiers like Tigray People Liberation Front (TPLF), Eretria People Liberation Front (EPLF), Oromo Liberation Front (OLF), Ogaden National Liberation Front (ONLF) etc. define themselves for political interests, which are typical features of divided societies. At this point, it is good to note that mere diversity of the country does not automatically make that country a divided society. Diversity makes divided society where that diversity, mainly ethnicity becomes politically salient-that is, when it is a marker of political identity. See generally Choudhry, *supra* note 1; Addis, *supra* note 1.

[26] Assefa Fiseha, FEDERALISM AND THE ACCOMMODATION OF DIVERSITY IN ETHIOPIA: A COMPARATIVE STUDY (Wolf Legal Publisher, 3rd Revised ed.), 61 (2010).

[27] *Id*.; Beken, *supra* note 24; Tsegaye Regassa, *Ethnic Federalism and the Right to Self-determination As A Constitutional Legal Solution to the Problems of Multi-ethnic Societies: The Case of Ethiopia*, (LLM Thesis, Amsterdam University, *available* at ECSU Library) 59 (2001).

[28] Asnake Kefale, *Containing Conflicts through Power-sharing Mechanisms: A Preliminary Survey in the Horn of Africa*, (Paper presented in Third Conference on Constitutionalism and Human Security in the Horn of Africa, Inter-Africa Group), Addis Ababa, 29 (2009).

[29] Ronald Watts, COMPARING FEDERAL SYSTEMS, (Montreal & Kingston School of Policy Studies, Queens University 2nded,, XIV (1999).

[30] Beken, *supra* note 24.

Ethiopian Peoples' Revolutionary Democratic Front, the new power holder of 1991 wanted to build the nation based on recognition of ethnic diversity[31] and hence accommodationist in approach. The Transitional Charter Government that recognized the right to self-determination of Nations, Nationalities, and Peoples up to secession is evidence to this fact.[32] The 1995 FDRE Constitution also confirmed the approach already followed by the Transitional Charter. The same Constitution not only recognizes diversity but also reflects some aspects of consociation.[33]For example, AlefeAbejeexplains that Ethiopia's model of dealing with deep diversities have a number of elements: the constitutional protection of diversities, i.e., recognition of the right to self-determination in its fullest sense, a constitutional package for power-sharing arrangements which covers three major dimensions – the territorial, fiscal, and political; and affirmation of official multilingualism.[34] The elements have many similarities with components of consociational democracy model. In fact, AlefeAbejeargues that the Ethiopian federal arrangement could be described as federal consociational one.[35]

Similarly, Assefa Fiseha observes the relevance of Lijphart's consociational democracy model by taking into account the ethno-demography of the country. That is to say, since none of the nationalities taken alone constitutes a majority at the federal level, there appears to be a constant rivalry to control the center by any one of them to the exclusion of others.[36] He goes on explaining that where no group has a clear majority or capacity for unilateral dominance, a balance of power among ethnic groups is likely to exist and such a balance of power is conducive for consociational settlements.[37]

However, it is good to note here that neither AlefeAbeje's nor Assefa Fiseha's work addressed the issue that the present study tried to examine. Abeje'swork assessed to what extent the Ethiopian power-sharing system reflects Lijphart's consociational democracy model. It focused on the model itself without considering the guidelines designed for making the model effective. Similarly, Assefa Fiseha's work is tangential and only indicates the natural 'favorable condition' of the country calling for consociational arrangement without going to examine guidelines of constitutional design as suggested by Lijphart. The present study is related to, but quite different from both works in that it tries to build the existing knowledge by examining the design of the FDRE Constitution in light of Lijphart's guidelines of constitutional design which are designed to effectively enforce consociational democracy model. Such examination is not

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[31] *Id*.

[32] TRANSITIONAL CHARTER PERIOD OF ETHIOPIA, FEDERAL NEGARIT GAZETA, 50th Year No. 1, Addis Ababa, 1991, Art. 2.

[33] It is more common that constitutions reflect one or two consociational practices than the full ensemble of consociational institutions. This is owing to constraints of the process of making constitutions. Constitutions are usually made in times of crisis. As a result, the existing arrangements are largely illegitimate or ineffective or both; and operate under different biases such as model bias, historical bias, etc. See generally Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WILLIAM AND MARY LAW REVIEW, No.1213, at 1226-1228 (2008).

[34] Alefe Abeje**,** *Evaluating the System of Power Sharing in Ethiopia in Light of Arend Lijphart's Model of Power Sharing*, 9 EUROPEAN SCIENTIFIC JOURNAL, No.31, at 261-262 (2013).

[35] *Id*., at 263.

[36] Assefa, *supra* note 26, at 225.

[37] *Id.*

made yet. Hence, identifying which accommodative constitutional provisions do contribute, do less contribute, or do not contribute to the main objective of the constitution, i.e., forging unity out of diversity[38] is not an easy task. Accordingly, this article tries to answer the following questions:

1) To what extent does the design of the FDRE Constitution reflects Lijphart's guidelines? Other related questions to this are:
   - What is Lijphart's consociational democracy model? What makes it different from the majoritarian democracy model?
   - What are Lijphart's guidelines?
   - What roles do Lijphart's guidelines play to make consociational democracy model effective?
2) In what areas does the design of the FDRE Constitution deviate from or correspond to Lijphart's guidelines?
3) How can one establish whether the design of a certain constitution reflects Lijphart's guidelines? Should a constitution explicitly address the guidelines or is it enough to recognize them impliedly by established practice?

To properly address the above question(s), methodologically, the researcher first showed the conceptual framework of Lijphart's consociational democracy model and his guidelines for designing a constitution for divided societies. Then, he made analysis to know whether the design of the FDRE Constitution corresponds to or deviates from his guidelines inform and/or substance. To this extent, Lijphart's writings, mainly his "Constitutional Design for Divided Societies" article[39] and the FDRE Constitution are used as the main sources. At times, the FDRE Constitution may be silent or less clear on issues under consideration thereby making the task of analysis difficult. In that case, the researcher has used the minutes of the Constitution to understand the spirit of the Constitution or some recent statistical data obtained from the relevant institutions, or key informant interview to show the practical reality on the ground. For example, the number of judges according to their ethnic composition has been taken from the Federal Supreme Court to explain the practice of power-sharing beyond the executive.

With regard to scope, Lijphart's consociational democracy model, which his guidelines to design constitution for divided societies want to foster, is subject to some criticisms. This article, however, did not go into examining the appropriateness or otherwise of the criticisms. Rather, it started from the assumption that the model is appropriate and could explain the Ethiopian situation. Similarly, apart from the nine guidelines listed above, Lijphart's guidelines cover other constitutional issues like amendment, approval, etc. Lijphart's recommendation on these issues is: "follow the patterns found in the world's established democracies".[40] This is, however, a very general recommendation since it has potential to pose a question as to whose democracy is really

[38] This is observable from the preamble of the FDRE Constitution; See also Alefe, *supra* note 34, at 263.

[39] Lijphart, *supra* note at 2. This is, however, not to say that the researcher has not used other literatures. Any relevant literature has been employed in the course of the study.

[40] *Id.*, at 105.

established one. Hence, the scope of examination of the Constitution is limited to the nine guidelines only.

The article is organized into four sections. Following this introductory section, section two is the heart of the paper and examines to what extent the design of the FDRE Constitution reflects Lijphart's nine main guidelines. Finally, section three draws conclusions and recommendations based on the overall discussions in the first two sections. Let us see one by one.

II. EXAMINING THE DESIGN OF THE FDRE CONSTITUTION IN LIGHT OF LIJPHART'S GUIDELINES

In this section, I try to address the core question I framed under section one: to what extent does the design of the FDRE Constitution reflects Lijphart's nine guidelines?

A. Proportional Legislative Electoral System

The electoralsystem, in general, is the system by which votes are converted into seats.[41] Choosing the electoral formula for such representation is not an easy task for constitutional writers as it involves two main competing normative criteria: to make effective and responsive government on the one hand, and to ensure the inclusion of minorities into politics on the other hand.[42] Guided by these competing interests, there are three broad available options of electoral formulas to choose from-majoritarian, proportional representation, and intermediate.[43]

These broad formulas have different categories of electoral formulas under them. Accordingly, a plurality (first-past-the-post), second ballot majority run-off, and alternative vote belong to the category of the majoritarian electoral system.[44] Similarly, proportional representations can have forms of open party lists system as is the case in Norway, Finland, the Netherlands, and Italy, where voters can express preferences for particular candidates within the list. Proportional representations may be closed as in Israel, Portugal, Spain and Germany, where voters can only select the party, and the political party determines the ranking of candidates.[45] Likewise, the intermediate category can be subdivided further into semi-proportional systems and "mixed" systems.[46]

The different electoral formulas foster different interests andhence have their own merits and demerits. Accordingly, the majoritarian electoral systems foster an effective government that can easily pass a law but at the expense of minority representation.[47] Contrary to this, proportional representation ensures the representation of all groups in politics in proportion to their number.[48] But, it makes difficult to pass a law proposed by the executive because of huge

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[41] Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian, and Mixed Systems*, 18 FOR CONTRASTING POLITICAL INSTITUTIONS SPECIAL ISSUE OF THE INTERNATIONAL POLITICAL SCIENCE REVIEW, No.3, 1 (1997).

[42] *Id.*, at 2.

[43] Lijphart, *supra* note 2, at 100.

[44] Norris, *supra* note 41, at 3-4.

[45] *Id.*, at 5.

[46] Lijphart, *supra* note 2, at 100.

[47] Norris, *supra* note 41, at 5-6.

[48] *Id.*

diverse interests in the parliament. The intermediate electoral system tries to strike the balance between the extreme merits and demerits of majoritarian and proportional electoral systems. For Lijphart, ensuring the election of a broadly representative legislature should be the crucial consideration regarding divided societies.[49] Taking that into account, Lijphart recommends pure proportional representation electoral system for divided societies.[50]

The choice of the electoral formula was not an easy task in Ethiopia, too. Different international experts had of diverse opinions as to the appropriate electoral formula for the country before the approval of the Constitution. For example, while Professor Huntington[51] suggested mixed electoral formula, Professor Hyden made it conditional upon what the constitution wanted to attain, i.e., whether the constitution wanted to pull together or pull apart the people and political leaders from different states.[52] Accordingly, Hyden was of opinion that majoritarian electoral formula is good if the constitution wanted to pull together the people and political leaders of different states. However, if the purpose was to pull apart, he recommended proportional representation electoral system.[53] Still, others opined that although proportional representation might produce weak government as its shortcoming, on balance, it would be the right electoral system in Ethiopian political life as it has potential to decrease ethnic polarization, to increase focus on the issue, and to develop broad-based coalitions.[54]

Despite these diverse opinions, at the end of the day, the FDRE Constitution adopted first-past- the- post electoral system. This is explicit under Art. 54(2) of the Constitution which provides that "[m]embers of the House [House of Peoples' Representatives] shall be elected from candidates in each electoral district *by a plurality of the votes cast*." In practice, this means that the candidate who gets a simple comparable majority of votes in the district wins the one seat in each electoral district. Based on this electoral system, "apolitical party or a coalition of political parties that has the greatest number of seats in the House of Peoples' Representatives shall form the Executive and lead it".[55]

Ethiopia's choice of plurality electoral system runs the risk of excluding ethnic minorities, as there is no perfect homogeneous ethnic group that coincides with the electoral constituencies. That is why Beza Desalegn wisely observes as follows:

> *In a country where the states are organized on ethnic lines and where none of these states are ethnically homogenous, the use of such electoral system [First-past-the-post] runs the risk that the seat in each electoral district will be won by the candidate who represents the interest of the largest ethnic group in the district. This is particularly problematic for*

[49] Lijphart, *supra* note 2, at 100.

[50] *Id.*

[51] Samuel P. Huntigton, *Political Development in Ethiopia: A Peasant-based Dominant-Party Democracy?* (Report to USAID/Ethiopia on Consultations with the Constitutional Commission), 17 May 1993, at 12 (available at Ethiopian Civil Service University Library).

[52] Comments on the Draft Constitution of Ethiopia, By International Legal Experts, November 1994 (available at Ethiopian Civil Service University Library).

[53] *Ibid.*

[54] Symposium on the Making of the New Ethiopian Constitution, A Preliminary Report (Sponsored by Inter Africa Group), 17-21 May 1993, p62 (Available at Ethiopian Civil Service Library).

[55] FDRE Constitution, Art.56.

minorities that are to be found dispersed, which will eventually make them a minority in each electoral district.[56]

Hence, one can see that the general disadvantage of the majoritarian electoral system, the plurality being one, i.e. its exclusion effect is visible in Ethiopian situation. However, plurality electoral system is not absolute. It is a qualified one since 20 seats are guaranteed for minority nationalities and peoples from the maximum 550 seats.[57] This is good as it increases the opportunity of minority representation in the legislative body than pure first- past- the- post electoral system. Such practice also exists in other federations like India.[58]But, for Lijphart, such electoral system, i.e., plurality combined with guaranteed representation for specified minorities necessarily entails the potentially invidious determination of which groups are entitled to guarantee representation and which are not.[59] Because of this, he believes that proportional

[56] Beza Dessalegn, *The Right of Minorities to Political Participation under the Ethiopian Electoral System,* 7 MIZAN LAW REVIEW, No.1, 80 (2013); Closely related to this, Assefa Fiseha also argues that plurality electoral system created the dominant political party that enables the executive dominance over the parliament in practice although the Constitution explicitly declares supremacy of the parliament. He explains that it is true that parliamentary-fit parties are a condition for a government to stay on power and this is achieved through party cohesion where party members freely discuss outside parliament and enter to parliamentary debate with common stand; or party discipline where party members vote together be it within the party or in parliament – not so much because there is consensus but because party leaders have the leverage to impose party discipline on rank-and-file members. The latter more explains the Ethiopian situation because of democratic centralism and excessive party discipline, which has compromised, if not defeated parliamentary supremacy. See Assefa Fiseha, *Legislative-Executive Relations in the Ethiopian Parliamentary System,* CONSTITUTIONAL BUILDING IN AFRICA, Community Law Centre, University of the Western Cape, Band/Volume *16, 246-247 (2015).*

[57] FDRE Constitution, Art. 54(3).

[58] Lijphart, *supra* note 2, at 100.

[59] *Id.* In Ethiopia, too there is a similar kind of reserving seats for minority nationalities or people as provided under Art. 54(3) of the FDRE Constitution. A debatable issue in relation to this is who are these minority Nationalities and Peoples entitled to enjoy the at least 20 reserved seats. The constitution does not define these categories of minorities. However, the amended electoral law, Proc. No 532/ 2007 under Art.20 (1) (d) states that "minority nationalities which require special representation shall be determined on the basis of clear criteria" set in advance by the House of Federation". Conferring such authority to the House of Federation has logical flow in that it is the House which gives recognition to the different Nations, Nationalities and Peoples of Ethiopia. In as much as the House gives recognition to these entities, it is also logical to empower the same House to determine which of these entities are considered as minorities requiring special representation in the parliament. Nevertheless, the House did not fix clear criteria. Because of this, there are different opinions among scholars. For example: (1) For *Fasil*, they are part of Nations, Nationalities and Peoples of Ethiopia. *See* FASIL NAHUM, CONSTITUTION FOR NATION OF NATIONS: THE ETHIOPIAN PROSPECT, *160 (*Lawrenceville, NJ, Red Sea Publishers, 1997); (2) Others are of opinion that they are groups who cannot establish their electoral constituencies because of their small number. *See* Beza, *supra* note 56, *at 84-85)*; (3) Still others do not accept both interpretation and resort to the definition given under Art. 2(6) of Proclamation No.7/1992, which is Nations or People whom because of the small number of their population cannot establish their own *Woreda* or local self-government. Of course, they did not pass without urging the need for defining the term. *See* Tsegaye, *supra* note *27, at 115;* Amare Manjo, *Minorities Right to Representation in the Ethiopian Federal Government Institutions, (*LLM Thesis, ECSU Library, unpublished), *59 (2009).*

For the present writer, the third argument seems more plausible at least for two reasons. First, had the definition given under Art. 39(5) works for minority Nationalities and Peoples under Art. 54(3) as construed by Fasil, guaranteeing the special representation under the latter provision would not have been necessary. Second, since Art. 54(3) says *"particulars shall be determined by law*," it is easy to infer the existence of difference between minority nationalities and peoples under Art 54(3) on the one hand, and the Nations, Nationalities and Peoples who are defined under Art. 39(5). Hence, equating entities under Art. 39(3) with entities under Art. 54(3) is missing the intention of the Constitution. Similarly, considering entities under Art. 54(3) as those who cannot establish their

representation rescues such problems not only by producing proportionality and minority representation but also by treating all groups-ethnic, racial, religious or even non-communalgroupsin a completely equal and even-handed fashion.[60]

In short, the design of the FDRE Constitution completely deviates from Lijphart's guidelines as far as the legislative electoral system is concerned. This is a paradox in a sense that the Constitution employs the winner-takes-all exclusionary electoral system of first -past-the-post although it is accommodationist in its overall approach.

B. Using the Simplest Form of Proportional Electoral System

This second guideline starts from the assumption that constitutional writers have already chosen proportional representation electoral system. The proportional electoral system is a very broad category, which spans a vast spectrum of complex possibilities and alternatives.[61] These ranges of possibilities and alternatives include:

- Proportional representation that includes a high, but not necessarily perfect, degree of proportionality;
- Multimember districts that are not too large, in order to avoid creating too much distance between voters and their representatives;
- List proportional representation, in which parties present lists of candidates to the voters, instead of the rarely used single transferable vote, in which voters have to rank order individual candidates; and
- Closed or almost closed lists, in which voters mainly choose parties instead of individual candidates within the list.[62]

Of these available options, Lijphart recommends choosing the one that is simple to understand and operate- criteria that is especially important for new democracies.[63] Taking that into account, Lijphart advises constitutional writers to use list proportional representation with closed lists.[64] He further argues that list proportional representation with closed lists can encourage the formation and maintenance of strong and cohesive political parties.[65] Here again, the design of the FDRE Constitution deviated from Lijphart's guideline. This is logical because thedeviation of the design of the FDRE Constitution from Lijphart's first guideline of the legislative electoral system makes the deviation of the constitution from the second guideline automatic, as the second guideline is normally the extension of the first one.

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electoral constituency is not strong interpretation as electoral constituencies are drawn not based on ethnicity but based on population census of a country which may or may not take ethnicity into consideration. See Art. 20(1)(b), Proclamation No.532/2007.

[60] Lijphart, *Id.*

[61] *Lijphart, Id.*

[62] Lijphart, *Id.*, at 101.

[63] *Id.*

[64] *Id.*

[65] *Id.*

C. Establishing Parliamentary Form of Government

The other important issue facing constitution writers is whether to set up a parliamentary, presidential or semi-presidential form of government.[66] Each form of government has its own merit and demerit, and the appropriate choice depends upon the specific purpose a country aims to achieve in its specific context. According to Lijphart, "in countries with deep ethnic and other cleavages, the choice should be based on the different systems' relative potential for power-sharing in the executive."[67]

The presidential system entails the concentration of executive power at the extreme majoritarian end of the range, i.e., power is concentrated not just in one party but in one person making the introduction of executive power sharing extremely difficult.[68] That means, "the presidential system encourages the politics of personality by overshadowing the politics of competing parties and party programs." [69] It further states that "In a representative democracy, parties provide the vital link between voters and the government, and in divided societies, they are crucial in voicing the interests of communal groups."[70] Hence, Lijphart concludes that presidentialism is inimical to the kind of consociational compromises and pacts that may be necessary for the process of democratization and during periods of crises.[71]Similarly, "semi-presidential systems represent only a slight improvement over pure presidentialism."[72] Lijphart argues that "although there is considerable power sharing among the President, Prime Minister, and Cabinet, the zero-sum nature of presidential elections still remains."[73]

A parliamentary system, on the other hand, has relatively high potential for executive power-sharing as the cabinet in the system is a collegial decision-making body.[74] Because of this, Lijphart recommends constitutional designers of divided society to adopt a parliamentary form of government.

When we come to Ethiopia, the FDRE Constitution is very explicit in that the form of government is parliamentary.[75] Ethiopia's parliamentary choice created mixed impressions among international experts remembering unhappy African experience with the system. For some, it created a feeling of doubt since in African states, where the parliamentary system was adopted at the time of achieving independence, serious friction soon arose between the head of the state and the head of government as to the proper extent and limits of each other's powers.[76]

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[66] *Id.*

[67] *Id*, (emphasis added).

[68] AREND LIJPHART, THINKING ABOUT DEMOCRACY: POWER-SHARING AND MAJORITY RULE IN THEORY AND PRACTICE, 147 (Routledge 2008).

[69] Lijphart, *supra* note 2, at 102.

[70] *Id.*

[71] Lijphart, *supra* note 68.

[72] Lijphart, *supra* note 2, at 102.

[73] *Id.*

[74] *Id.*

[75] FDRE Constitution, Art.46: It reads as, "The Federal Democratic Republic of Ethiopia shall have a parliamentarian form of government."

[76] Comments given by Professor Carison Anyangwe on the Draft Constitution of Ethiopia, By International Legal Experts, *supra* note 52, at 4.

At the end of the day, the parliamentary system was abandoned and the presidential, semi-presidential, or simply the presidential system was adopted.[77] For others, it is commendable and trendsetter in Africa since studies show the comparative stability of the parliamentary system has the survival rate of more than three times than the presidential system in Non-Organization for Economic Cooperation and Development countries at the time.[78]

Whatever the feelings may be, a more pertinent issue to examine for the purpose of this research is as to what the FDRE Constitution wanted to achieve when it established a parliamentary form of government. Did it, for example, aim to create a conducive institutional framework for power-sharing as Lijphart suggests, or did it want to achieve any other goals? The minute of the Constitution mentions general attributes of parliamentarism like "representatives of the people are empowered to make laws, government positions are held by individuals recruited from the parliament, easy to pass laws, and facilitates implementation of other provisions of the constitution as reasons for parliamentary choice."[79] So, apparently, this form of government was consciously selected because there was a desire to share power among the diverse nations, nationalities, and peoples of Ethiopia.[80]

AlefeAbeje's opinion is valid if one considers the prevailing trends in Africa at the time of making the Constitution in this regard. As indicated above, parliamentary form of government, where it was adopted in Africa following independence could not bring sustainable peace. The logical deduction one can make from here is that Ethiopia, while adopting her Constitution, was not totally ignorant of this unhappy African experience unless she was initiated to ensure power-sharing arrangement. To this extent, AlefeAbeje's argument is sound. In addition to this, the collective responsibility of Council of Ministers for all decisions is also clearly enshrined in the Constitution.[81] However, AlefeAbeje's position may be defective if one considers the electoral system of Ethiopia. That is, if parliamentarism was chosen with the intention to ensure power sharing, why did the FDRE Constitution resort to the plurality legislative electoral system while proportional electoral system gives a better opportunity for the genuine power-sharing arrangement? In this regard, the parliamentary form of government seems to reflect Lijphart's guidelines more in form than in substance.

D. Power-sharing in the Executive

When Lijphart says a parliamentary form of government has the relative potential for power-sharing, he starts from making two premises: "those ethnic groups are proportionally represented in the parliament by the proportional electoral system and that the Prime Minister and other cabinet members who are collectively responsible are usually drawn from this proportionally represented parliament."[82] But, these premises alone do not guarantee the institutionalization of

[77] *Id.*

[78] *Id.*, Comment given on the Draft Constitution by Goran Hyden citing Stepan and Skatch in World Politics, Vol.46, No1, 1-23 (1993) on the Draft Constitution.

[79] Minutes of the Constitution, *Tiraz 4, Hidar 14-20/1987 E.C. at 7 -8 (000076-000077).*

[80] Alefe, *supra* note 34, at 263.

[81] FDRE Constitution, Art.72 (2).

[82] Lijphart, *supra* note 68, at 143.

power-sharing.[83] Power-sharing is rather guaranteed when it is institutionalized by the constitution as is the case in Belgium and South Africa.[84]In Belgium, the constitution stipulates that "the cabinet must comprise equal numbers of Dutch-speakers and French-speakers."[85] In South Africa, "executive power-sharing is dependent upon the parties' seats in parliament where, any party, ethnic or not, with a minimum of 5% of the seats in parliament was granted the right to participate in the cabinet on a proportional basis."[86]

In Ethiopia, the issue of executive power-sharing can be related to the nature of the country's federal structure. Studies show that the overall federal structure of the country suggests that it emphasizes more self-rule than shared-rule which is mainly manifested by granting of 'mother states' to ethnic groups.[87] In this regard, Assefa Fiseha observes as follows:

> The federal arrangement by territorializing the state concretizes self-rule and as some critics indicate; 'fragment' the state but there is an important aspect that is missing. It fundamentally fails to integrate what it 'fragments' through power-sharing institutions at the federal level [88](emphasis added).

Although this is a general observation that one may make and can be taken as a limitation, it does not mean that there is no constitutional framework for executive power-sharing in Ethiopia. There is Art. 39(3) of the FDRE Constitution which provides 'for equitable representation of Nations, Nationalities, and Peoples in state and federal governments'.[89] At face value, the scope of this equitable representation at the federal level should encompass all branches of governments: both Houses of the FederalParliament, the federal executive, and judicial bodies.[90] With regard to the practice, however, authorities have various opinions. For example, Assefa Fiseha argues that it is limited to executive power-sharing which by itself is conditional upon subscription of the ruling party's membership and ideology.[91] For others like Alefe Abeje, there are informal arrangements in the selection and recruitment into a federal bureaucracy which correspond to consociationalism's elite coalition and proportional representation.[92]

There are two points that worth to be considered here. The first is as to why the authorities do have different opinions on the practical application of Art. 39(3). The second is as to whether the executive power-sharing arrangement in Ethiopia exactly fits the one proposed by Lijphart.

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[83] Lijphart, *supra* note 2, at 103.
[84] *Id*.
[85] *Id.*
[86] *Id*.
[87] Assefa, *supra* note 26, at 376.
[88] *Id.*
[89] Let it be clear that although Art. 39(3) is the main, it is not the only provision we have in the Constitution for ensuring equitable representation. For example, Tsegaye argues that Arts.54(3)-which guarantees minority representation in the HoPR; 62(4)- which empowers the House of Federation to promote equality of the people and consolidate their unity; 88(2)-which lays duty on government to respect identity of Nations, Nationalities and Peoples by strengthening ties of equality, unity and fraternity; and 94(2) –which requires the federal government to give grant with due care that the grant given will not hinder the proportionate development among states are other provisions in the Constitution that serve similar purposes. *See* Tsegay*e, supra* note *27,* at 107.
[90] Alefe, *supra* note 34, at 264.
[91] Assefa, s*upra* note 26, at 210.
[92] Alefe, *supra* note 34.

Regarding the first, the present writer is of opinion that the generality of Art. 39(3) invites for discretionary decision. For example, it is less explicit when compared to the experiences of Belgium which provides for executive power-sharing based on language (French-speaker and Dutch-speaker), and South Africa which provides for executive power-sharing depending upon the number of seats in the parliament. It is also less clear even when compared to the Transitional Period Charter of Ethiopia which clearly provides that the head of state, the Prime Minister, the Vice-Chairperson and Secretary of the Council of Representatives shall be from different nations/nationalities.[93]

As regards the second, the executive power-sharing is short of the one suggested by Lijphart because of the very nature of the electoral system. Lijphart's 'logic', as indicated under sub-section C above, is that when all ethnic groups are represented in the parliament in proportion to their number by the proportional electoral system, the executive members will be drawn from this inclusive parliament. In Ethiopia, the probability of representation of every ethnic group in the HoPR is rare because of plurality electoral system.

Cabinet members, except the Prime Minister who is mandatorily elected from among members of the HoPR, are also drawn either from the two Houses (House of Peoples' Representative and House of Federation) or outside of the Houses as long as they possess the required qualifications.[94] This may be an opportunity to expand or to restrict executive power-sharing depending upon the commitment of the Prime Minister to executive power-sharing. It has potential to expand executive power-sharing as it gives an opportunity for the Prime Minister to nominate a person to the ministerial position from an ethnic group with no representation in the House of Peoples' Representatives (a state of affair attributable to plurality electoral system). On the other hand, it has potential to restrict executive power-sharing if the Prime Minister restricts him or herself to nominate members of the cabinet from the House of Peoples' Representatives.

The other is, as indicated above, subscribing to the ideology of the ruling party of EPRDF is a condition precedent to share executive power in Ethiopia which indicates clear demarcation of government-opposition. Whatever number of seats the opposition may have in the parliament, there is no practice of executive power-sharing in the Ethiopian context.[95] In Lijphart's executive power-sharing, there is no such clear demarcation of government-opposition, and the opportunity to share executive power is open.

However, there are attempts that indicate executive power-sharing concern in Ethiopia. One indicator is the expressions the Prime Minister makes when submitting ministerial nominees to the House of Peoples' Representatives following elections. Every time he submits nominees for ministerial posts for approval, he mentions to the parliament to which ethnic group each nominee belongs to although doing this is not clearly provided in the Constitution. The other indicator is the ethnic composition of the current cabinet itself which shows a tendency of distributing

[93] See The Transitional Charter Period of Ethiopia, Art.9 (b), NEGARIT GAZETA, 50th Year, No1, Addis Ababa (1991).

[94] See FDRE Constitution, Arts. 73(1) cum.74 (2).

[95] Assefa, *supra* note 26, at 210.

executive powers among different ethnic groups. As of November 01, 2016, the current FDRE cabinet comprises 31 ministers (including the Prime Minister).[96] Of this total number, 8 are affiliated with Oromo Peoples Democratic Organization (OPDO); 8 are affiliated to Amhara National Democratic Movement (ANDM); including the Prime Minister, 7 are affiliated to Southern Peoples Democratic Movement (SPDM); 4 are affiliated to Tigray People Liberation Front (TPLF); 2 are affiliated to Ethiopian Somali People's Democratic Party (ESPDP); 1 is affiliated to Afar National Democratic Party (ANDP) and 1 is not party member but belongs to Oromo ethnic group.[97] If we correspond the ethnic group of the ministers to their party affiliation (although this is not necessarily the case), the current FDRE cabinet is composed of 9 Oromo, 8 Amhara, 6 from different ethnic groups of the SNNP, 2 Somalis and 1 Afar. Considering the number of ethnic groups in Ethiopia, one can easily see that many ethnic groups are not represented. If we go even by regional states, Gambella, Benishangul Gumuz, and Harari do not have representation in this arrangement and this makes executivepower-sharing short of Lijphart's proposal.

In short, one can easily deduce that because of the generality of Art. 39(3) of the FDRE Constitution, the executive power-sharing in Ethiopia is largely left to the discretion of the Prime Minister who nominates ministers either from both Houses of the federal government or outside of the Houses. Its application is not only limited in practice but also fails to include all of those concerned in the process of policy-making.[98] To this extent, the design of the FDRE Constitution makes a slight deviation from Lijphart's guidelines.

E. Ensuring Cabinet Stability

Parliamentary sovereignty, a cardinal principle of the parliamentary system, implies that "parliament can make and unmake any law whatsoever, that a law enacted by Parliament is sovereign, and that, conversely, no individual or institution is allowed to set aside such an act of parliament."[99]This principle is also adopted in Ethiopia. Although the country's parliament is subject to the supremacy of the Constitution, the latter enshrines it as 'the highest authority of the federal government',[100] one which expresses 'the will of the people' through regular and competitive elections[101] and which serves as the primary law-making body.

With regard to legislative-executive relations, the former, as a result of its sovereignty, establishes, supports, and if need be removes the latter from power.[102] That is to say, the

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[96] List of PM Hailemariam's New Ministers; *available* at: http//:hornaffairs.com/2016/11/01/Ethiopia-hailemariam-desalegn-new-cabinet-ministers/ (last accessed on 23 May 2017).

[97] *Id.* Although the ethnic groups of the members is not explicitly written, one can easily deduce to which ethnic group they belong from their names and the office they assumed as they are politically figurative ones.

[98] Assefa, *supra* note 26, at 376

[99] Assefa, *supra* note 56, at 240-241.

[100] The FDRE Constitution, Art.50 (3).

[101] The FDRE Constitution, Art.54 (1).

[102] Sartori G, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* 101(1997); Flinders M, *'Shifting the balance? Parliament, the Executive and the British Constitution'* 50 *POLITICAL STUDIES*24 (2002) as cited in Assefa, *supra* note 56, at 242.

executive derives from and is constitutionally accountable to the legislature.[103] Here comes one potential problem of a parliamentary system that constitutional writers worry about: "the fact that cabinets depend upon majority support in parliament and can be dismissed by parliamentary votes of no-confidence may lead to cabinet instability and, as a result, regime instability[104]."

According to Lijphart, such problem can be tackled by having constitutional provisions such as 'the constructive vote of no confidence' which allows the simultaneous dismissal of the previous Prime Minister and the election of a new Prime Minister as is the case in the 1949 Constitution of West Germany.[105] However, such arrangement may create an executive that cannot be dismissed by a parliament, but does not have a parliamentary majority to pass its legislative program.[106] A solution suggested to such potential problem by Lijphart is to have a constitutional provision that gives the newly established cabinet the right to make its legislative proposals matters of confidence which are adopted automatically unless an absolute majority of the legislature votes to dismiss the cabinet as is the case in the French Fifth Republic Constitution.[107] In short, Lijphart believes that cabinet instability- a potential problem in the parliamentary system, can be contained by combining the German and French constitutional rules.

Coming to the design of the FDRE Constitution, to begin with, in its dealing with legislative-executive relationship, the Constitution did not even employ the term 'vote of no confidence'. However, one can articulate that the idea of vote of no confidence is envisaged in the Constitution. Accordingly, the House of Peoples' Representatives has the power to call and to question the Prime Minister and other federal officials, and to investigate the executive's conduct and discharge of its responsibilities.[108] At the request of one-third of its members, the House also discusses any matter pertaining to the powers of the executive to take decisions or measures it deems necessary.[109] The responsibility of the Prime Minister and the Council of Ministers is also to the House of Peoples' Representatives.[110] These provisions show the dependence of the executive upon the confidence of the parliament, which in effect means when the Parliament lost confidence in the executive, the latter could not exist- hence vote of no confidence. However, its practice has not yet been tested in Ethiopia.

Once we construct the idea of vote of no confidence under the FDRE Constitution in such a manner, the next step is to examine whether the idea of constructive vote of no confidence as construed by Lijphart is envisaged under the same Constitution. In this regard, the Constitution provides that when the Council of Ministers of a previous coalition is dissolved because of the loss of its majority in the House of Peoples' Representatives, the President may invite political

[103] *Id.*
[104] Lijphart, *supra* note 2, at 103.
[105] *Id.*
[106] *Id.*, at 104.
[107] *Id.*
[108] FDRE Constitution, Art. 55(17).
[109] FDRE Constitution, Art. 55(18).
[110] FDRE Constitution, Art. 72(2).

parties to form a coalition government within one week.[111] Here, the element of simultaneous dismissal and selection of the Prime Minister as recommended by Lijphart is missing. To this extent, the design of the FDRE Constitution deviates from Lijphart's advice of constructive vote of no confidence.

F. Selecting the Head of State

As indicated under sub-section C, parliamentary form of government in Africa brought serious friction between the head of the state and the head of government as it created confusion as to the proper extent and limits of each other's powers. Lijphart thinks that such a problem can be tackled by constitutional design, i.e., by limiting the power of the president and deciding how s/he should be chosen.[112] Accordingly, the constitution must make sure that the president will be a primarily ceremonial office with very limited power, and be the one who is not elected by popular vote.[113] Popular election provides democratic legitimacy to the president and tempts him/her to become active political participants thereby potentially transforming the parliamentary system into semi-presidential one.[114] Lijphart's suggestion is to elect a president by the parliament.[115]

In this regard, Lijphart appreciates the South African system of not having a separate head of the state at all where the president simultaneously serves both as a Prime Minister and head of state.[116] Contrary to this, he criticizes the 1999 constitutional amendment proposal to change the Australian Parliamentary System from a monarchy to a republic. The proposal was to appoint a new president on the joint nomination of the Prime Minister and the leader of the opposition, and to confirm the nomination by a two-thirds majority of a joint secession of the two houses of the parliament with a view to encourage the selection of a president who would be nonpartisan and non-political.[117] However, this proposal was rejected by the Australian voters as a majority of pro-republicans who strongly preferred the popular election of the president.[118] For Lijphart, such preference was an unwise preference for he opposed the popular election of the president.[119]

In short, with regard to the selection of the head of the state, Lijphart recommends not to have a separate head of the state at all as is the case in the South Africa; or if needs be, to have a president elected by the parliament (not by people) with limited ceremonial power.

Examining the design of the FDRE Constitution from this perspective needs to look at provisions dealing with the status, nomination, and appointment as well as powers and functions

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[111] FDRE Constitution, Art. 60(2). If, on the other hand, the political parties cannot agree to the continuation of the previous coalition or to form a new majority coalition as per the invitation of the President, the House shall be dissolved and a new election will be held. See FDRE Constitution, Art. 60(2) cum. 60(5).

[112] Lijphart, *supra* note 2, at 104.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id*.

of the President.[120] The president is the head of the state.[121] He is nominated by the House of Peoples' Representatives and is elected if a joint session of both House of Peoples' Representatives and the House of Federation approve his candidacy by a two-third majority vote.[122] Hence, no popular election of the President under the FDRE Constitution.

As regards the powers and functions, the president opens the annual joint session of the two Federal Houses; signs laws passed and international agreements approved by the House of Peoples' Representatives; appoints ambassadors and other envoys to represent the country abroad upon recommendation by the Prime Minister; receives credentials of foreign ambassadors and special envoys; awards medals, prizes and gifts in accordance with prescribed laws; grants high military titles upon recommendation by the Prime Minister; and grants pardon in accordance with conditions and procedures established by law.[123] These powers and functions are limited and most of them are initiated by the Prime Minister. Some of them can be implemented even when the President fails to do them.[124] Therefore, Lijphart's recommendation to give limited and ceremonial power to the President has clearly reflected again.

To conclude, as far as the selection of the head of the state is concerned, the design of the FDRE Constitution exactly fits (both in substance and form) one of the alternatives of Lijphart's suggestion. That is, if there is a need to have a president, she/he should be selected by the parliament with limited and ceremonial powers and functions.

G. Federalism and Decentralization

For divided societies with geographically concentrated communal groups, Lijphart prefers federalism to unitarianism, since the former provides autonomy for the group.[125] But, his suggestion does not stop there. Rather, it goes to the extent of covering the powers and composition of the second chamber; and composition and size of the federating units. According to Lijphart, having two legislative chambers with equal or substantially equal powers and different compositions is not a very good design in parliamentary systems as it is difficult to secure the confidence of both chambers for establishing the cabinet with such arrangement.[126] Moreover, he advises not to over represent a smaller federating unit in the federal chamber as doing so violates the democratic principle of 'one person, one vote'.[127] In this respect, the German and the Indian models are more attractive than the American, Swiss and Australian ones.[128] As regards size and composition, Lijphart recommends having relatively small and

[120] The FDRE Constitution, Arts. 69-71.
[121] The FDRE Constitution, Art. 69.
[122] The FDRE Constitution, Art. 70(2).
[123] The FDRE Constitution, Art. 71(1-7).
[124] For example, if he does not sign the law within fifteen days, the law can take effect without his signature. *See the FDRE Constitution, Art. 57.*
[125] Lijphart, *supra* note 2, at 104.
[126] *Id.*, at 105; he illustrates the point by remembering the 1975 Australian Constitutional crisis where the opposition-controlledSenate and refused to pass the budget in an attempt to force the cabinet's resignation, although the cabinet continued to have the solid backing of the House of Representatives.
[127] *Id*.
[128] *Id*. Generally speaking, second chambers show variations in terms of composition, selection of members and powers across federations. But, the German and the Indian models which try to balance the interests of the most

homogeneous federating units so as to avoid the possible dominance of large federating units over the federal government.[129]

In short, Lijphart advises the constitutional writers of divided societies to design the constitution with a federal arrangement to enhance the autonomy of federating units; federalism with the second chamber having no equal or substantially equal powers with the lower house with no overrepresentation of smallerunits to a higher degree, and relatively small homogeneous component units. Now, let us assess the design of the FDRE Constitution against these recommendations one by one.

1. Federalism

Article 1 of the FDRE constitution explicitly established a federal form of government. It reads as "The Constitution establishes a Federal and Democratic State structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia". Therefore, no doubt that the Constitution established a federal form of government. This form of government was opted for considering that it gives better opportunity to develop language rights, to respect history and culture, and to facilitate local decision-making of the Nations, Nationalities, and Peoples by rectifying the past failure of a unitary form of governments and bring sustainable peace.[130] To this effect, the Constitution guaranteed all "Nations, Nationalities or Peoples in Ethiopia have the right to speak, to write and to develop its own language; to express, to develop, and to promote its culture and to preserve its history."[131]

Moreover, Nations, Nationalities, and Peoples are authorized to establish their own states at any time.[132] The procedure for doing this is also clearly indicated under Art. 47(3)(a-e).[133] States

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populous states on the one hand and those of the less populous on the other; and which Lijphart opts for has the following composition, method of selection of members, and powers:

1) **German:-**Composition wise, the German Basic Law stipulates that each Land has at least three votes, Lander with a population between two to six million inhabitants five, and Lander with more than seven million inhabitants has six votes. See the German Basic Law, Art. 51(2)). As regards selection of members, each Land government sends members of its cabinet to represent the interests of the land in the *Bundesrat.* They are simultaneously delegates for the *Bundesrat* and officials of the Land government-hence they can be instructed and recalled by the Land government. As regards power, the *Bundesrat* represents one of the more effective houses in a parliamentary system and full legislative power. It is allowed to initiate legislation, it has the right to examine and comment on all bills proposed by the federal government before they are submitted to the Bundestag (lower house).

2) **India:**-Indian second chamber known as the Council of States is composed of minimum of one representative for the smallest state and maximum of thirty-four for highly populated states. In addition to this, it has twelve other members who are well qualified in science, art, literature or social services. The members are indirectly elected by the state legislature except the 12 qualified ones who are appointed by the President. *See Indian Constitution, Art.80).* It has lawmaking power (For details of second chamber in federations. *See generally* Assefa Fiseha, *supra note 26, Section 3).*

[129] *Id.*

[130] Minutes of the Constitution, Discussion made on Art 1, *Tiraz 1, Tikmte 19/1987 E.C.*

[131] The FDRE Constitution, Art. 39(2). Nation, Nationality or People is a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory (Art. 39(5)). They are the makers and the owners of the Ethiopian Constitution.

[132] The FDRE Constitution, Art. 47(2).

[133] These procedures are: (a) When the demand for statehood has been approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and the demand is presented in writing to

are also autonomous as they have legislative, executive, and judicial powers in their respective jurisdictions,[134] which in effect means the ethnic groups (Nations, Nationalities or People), are enjoying a sort of segmental autonomy, as the base of statehood creation in Ethiopia is predominantly ethnicity. To this extent, the intention of adopting federalism in Ethiopia is the same as the one intended by Lijphart, i.e., to enhance autonomy.

A point worthy of examining is whether the autonomy guaranteed by the constitution is practically genuine. Several studies show that Ethiopian federalism shows centralizing tendency in practice in spite of what is provided in the Constitution.[135] This is manifested in two ways: high party centralization and fiscal dependence of the states on the federal government.

According to Riker, the degree of party centralization is measured in terms of two variables: whether the party that controls the central government also controls the regional government; and the degree of the strength of party discipline.[136] In his view, if a party with rigid party discipline controls different levels of government in a federation, it implies high federal centralization. In Ethiopia, Ethiopian Peoples' Revolutionary Democratic Front or its affiliated parties control both federal and state level governments, to the extent of making the distinction between party and state difficult.[137] In addition to this, there is no strong opposition political party.[138]As Ethiopian Peoples' Revolutionary Democratic Front adheres to the principle of 'Democratic Centralism', its leaders at the center can also use organizational and ideological means to discipline party members at the regional level.[139] This is also supported by *gimgima* (evaluation), which serves as an institutionalized mechanism to discipline party members.[140] Hence, as rightly deduced by Abeje, the Ethiopian situation qualifies both of Riker's variables of measurement of federal centralization: the party controls both the center and regions; and the existence of a rigid party discipline.[141]

In addition to this, the autonomy of the regional states is determined by the degree of financial autonomy. Complete financial autonomy comes about only when the regional states can

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the state Council; (b) When the Council that received the demand has organized a referendum within one year to be held in the Nation, Nationality or People that made the demand; (c) When the demand for statehood is supported by a majority vote in the referendum; (d) When the State Council will have transferred its powers to the Nation, Nationality or People that made the demand; and (e) When the new state created by the referendum without any need for application, directly becomes a member of the Federal Democratic Republic of Ethiopia.

[134] The FDRE Constitution, Arts. 50(2) cum.52.

[135] See for example, Alefe Abeje, *The Role of the Federal System on the Structure and Operation of Political Parties in Ethiopia*, *EUROPEAN SCIENTIFIC JOURNAL (2014);* Zemelak Ayitenew, *The Politics of Sub-national Constitutions and Local Government in Ethiopia*, 16 *PERSPECTIVES ON FEDERALISM*, Issue 2 (2014); ASNAKE KEFALE, FEDERALISM AND ETHNIC CONFLICT IN ETHIOPIA: A COMPARATIVE REGIONAL STUDY (New York: Routledge 2013); Mehari Taddele, Federalism and Conflicts in Ethiopia, Conflict Trend, *available at* www. meharitaddele.academia. edu/ TeshagerMehari pdf (last accessed on 20 March 2015).

[136] WILLIUM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (Boston: Little Brown, 1964), at 130 as cited in Abeje, *Id.*, at 203.

[137]Alefe, *supra* note 135, at 203-205.

[138] Id., at 203.

[139]*Ibid.*

[140] *Id.*, at 205.

[141] *Id.*

generate enough revenue to pay for their expenditure.[142]The study of fiscal federalism in Ethiopia shows that the fiscal powers which have been assigned to the regions do not generate sufficient income that covers regional expenditure-hence high vertical fiscal imbalance which is usually corrected by federal transfer explains the Ethiopian situation.[143] In this regard, the autonomy of the states is also minimal.

Therefore, from the above paragraphs, one can easily conclude that high party centralization and high vertical fiscal gap challenge the original intention of opting for federal arrangement, i.e., to enhance autonomy of the federating units in Ethiopia.

2. Second Chamber

Lijphart's advice is to have a second chamber that tries to balance the extremes of the principles of territoriality and citizen equality, as is the case in Germany and India. The second chamber, the Upper House in Ethiopia is the House of Federation. The composition, methods of selection of members, and the power of the House are provided in the Constitution.[144] Accordingly, the House is composed of representatives of Nations, Nationalities, and Peoples.[145] Although each ethnic group is authorized to be represented at least by one, each Nation, Nationality or People shall be represented by one additional representative for each one million of its population with no maximum limit.[146] This makes the composition of the House different from Germany's *Bundesrat* or India's Council of States. Ethiopia's House of Federation representation formula has a majoritarian element as the ethnic group with many people have muchrepresentations with no maximum limit. To make the point clear, let us see the current composition of the House in terms of regions as follows:

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[142] Christophe Van der Beken, *Federalism and the Accommodation of Ethnic Diversity: The Case of Ethiopia*, A Conference Paper Presented at 3rd European Conference on African Studies, ECAS, Leipzig, 13 (June 2009) *available at*www.aegis-eu.org/old/archive/ecas2009panels_round_tables/31.htm (accessed 11 December 2014).

[143] Detail discussion as to why vertical fiscal imbalance exists in Ethiopia is well examined by Dr. Solomon Nigussie. See generally, SOLOMON NEGUSSIE ABESHA, FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC-BASED FEDERAL SYSTEM (Utrecht: Universiteit Utrecht, PhD Thesis, 2006).

[144] The FDRE Constitution, Arts.61-62.

[145] The FDRE Constitution, Art. 61(1).

[146] The FDRE Constitution, Art. 61(2).

Table 1: *Table showing the current composition of the House of Federation (from 2010-present)*

N 0	***Region***	***Total Population Number***[147]	***Number of represented ethnic groups***	***Total members in HoF***	***Remark as to the number of ethnic groups in the region***
1	Tigray	4,522,124	3	7	In addition to the Tigray people, the Irob, Kunama and the Argoba are recognized as indigenous to the region by the state constitution
2	Afar	1,276,374	1	2	Argoba is considered as indigenous by the Afar Constitution
3	Amhara	20,910201	4	23	The dominant Amhara, Agew Himra, Agew Awi and Oromo can exercise the right to self-determination as per the state Constitution
4	Oromia	25,489,024	1	26	Many ethnic groups reside in the region but sovereign power resides in the people of Oromo as per the regional Constitution
5	Somali	4,581,794	1	5	Sovereign power resides in the Somali nation as per the state Constitution
6	Harari People	31,869	1	1	Only the nominal Harari is represented by one representative
7	B/Gumuz	446,674	5	5	5ethnic groups(Berta, Gumuz, Shinasha, Mao and Komo) are considered as indigenous ones by the state Constitution
8	Gambella People	257,142	5	5	5 ethnic groups (the Nuer, the Anuak, the Mejenger, Upo & Komo) are considered as indigenous ones by the State Constitution
9	SNNP	16,077,036	55	62	Has no less than 56 ethnic groups
		Total	***75***	***135***	

Source: Profile of Represented Nationalities of the House of Federation in the 4th Term, The House of Federation, Communication Service Directorate, 2003 E.C (in Amharic)

Normally, regions pay attention to the representation of the indigenous groups to the House of Federation. From the above table, one can easily read that an ethnic group with larger population number has many members; and those with small population size have small members in the House of Federation in a similar fashion with the House of Peoples' Representatives.[148] The implication of this arrangement is that the House of Federation has little

[147] Taken from the 2007 Central Statistics Agency (CSA) Ethiopian Census.

[148] The assertion obviously presupposes the case where minority ethnic groups do not block by having a common agenda which they want to defend against encroachment by larger ethnic groups. Otherwise, the combined forces of several minority ethnic groups has great potential to dominate over the dominant ethnic groups in the House of Federation. This can also be deduced from the table where the combined forces of all the major ethnic groups

potential to give protection to ethnic groups with small population size, and this is missing the very rational of having a second chamber in federations.[149] Hence, composition wise, the House of Federation deviated from the second chamber proposed by Lijphart.

Regarding the mode of selection of members, the Constitution provides two possibilities. They may be elected indirectly by the state legislatures, or the state legislature may decide the members to be elected directly by the people.[150] However, the existing practice so far indicates that the members are elected by states legislatures.[151] This invited for different opinions. For example, Manjo argues that "if members of the House of Federation are representatives of Nations, Nationalities, and Peoples, the logic why the state parliaments select the House of Federation representatives is not clear."[152] He tries to substantiate his argument by showing the experiences of Canada, Germany, and India where the state parliaments select members of the second chamber. For those countries, Manjo argues, this is quite logical, as the second chamber is the representatives of the states, not the Nations, Nationalities, and Peoples as is the case in Ethiopia.[153] For him, the appropriate mode of selecting the members should be either through direct popular election or through Councils of Nations, Nationalities, and Peoples; not councils of state parliaments.[154]

On the other hand, Van der Beken argues that "the fact that the members are selected by regional legislatures is an expression of constitutional logic."[155] That is, the government tried to realize coincidence between ethnic and territorial boundaries. As a result, all Ethiopian ethnic groups (more than 80) were, figuratively speaking coupled to one (in rare cases several) of the nine regional states. The parliament of a regional state is, therefore, the representative organ of those ethnic groups that have been localized in the state concerned.[156]

The constitutional logic that Van der Beken established is quite interesting. It also goes in line with the German and the Indian model which Lijphart recommended for selection of the second chamber. However, practically, it does not guarantee representation of every Nation, Nationality, or Peoples for the simple reason that the ethnic groups are dispersed in different regional states and the members of the state legislatures are elected under plurality electoral system. Had the chosen electoral system been the proportional representation, the election of members of the House of Federation by the state legislatures would have been alright. Hence, the

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including Oromo, Amhara, Tigray and Somali add up to secure only 61 seats while the combined forces of other ethnic minorities secured 74 seats out of the 135 total seats.

[149] The rational for having second chamber in federations is to 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. It is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states; See Assefa Fiseha, *supra* note 26, at. 124.

[150] The FDRE Constitution, Art. 61(3).

[151] Manjo, *supra* note 59, at 70; Assefa, *supra* note 26, at 133.

[152] Manjo, *Id.*, at 70.

[153] *Id.*

[154] *Id.*

[155] Van der Beken, *supra* note 24, at 110.

[156] *Id.* His example is that the Amhara ethnic group has been coupled to the Amhara regional state. That is the Amhara regional state has been created for the Amhara ethnic group. Hence, it is logical for Amhara parliament to select the Amhara representative in the House of Federation.

best way to ensure representation is either following Manjo's suggestion of selection by the Council of Nations, Nationalities, or Peoples; or alternatively to select by state legislatures with the precondition that members of state legislatures are elected under the proportional electoral system.

With regard to power, unlike Germany's *Bundesrat* and India's Council of States which have law-making power with the lower majoritarian Houses, Ethiopia's House of Federation does not have a legislative function. The only provisions where one may by stretch of imagination trace legislative functions are Art. 99 where the House has concurrent power with the House of Peoples' Representatives in the determination of residual powers over taxation, Art. 62(7) where the House determines division of revenues derived from joint federal and state tax sources and the subsidies that the federal government grants to states, and Art. 105 where the House participates in the amendment of the Constitution.[157]

In general, one can easily grasp that Ethiopia's second chamber deviated from the one suggested by Lijphart in terms of its composition, power, and partly mode of selection of members.

3. Composition and Size of the Federating Units

As indicated above, Lijphart recommends having a relatively small size and homogeneous federating units for such arrangement avoids potential dominance of the federating units over the federal government. In Ethiopia, there are nine states and constitutionally speaking they have equal rights and powers.[158] However, they show great variations in their composition. For example, based on the ethnic composition of their population, Van der Beken grouped the nine regions into four categories:

1) The first five regions (Tigray, Afar, Amhara, Oromia, and Somali) are dominated by the title ethnic groups in terms of both numerical and political dominance;
2) Benishangul Gumuz and Gambella where there is no dominance of a particular ethnic group, but of two ethnic groups jointly. Accordingly, in Benishangul Gumuz, Benishangul and Gumuz groups; in Gambella, the Nuer and Anuak groups make dominance in the respective regions;
3) The Southern Nation, Nationality, and People Region where extreme diversity exists and there is no single numerical dominant ethnic group; and
4) The Harari region where Harari the people is politically dominant without having a numerical majority.[159]

[157]Assefa, *supra* note 26, at 127. Since the House is authorized to interpret the constitution, under the present status quo, making it non-legislative chamber is logical. Allowing it to make a law and at the same time authorizing it to interpret the constitution amounts to judging one's own case and this betrays universally accepted principle. In both Germany and India, a body authorized to interpret the constitution is not second chamber. This task is given to Constitutional Court in the case of Germany, and to the Supreme Court in the case of India. Hence, no overlap of law-making and constitutional interpretation functions in those countries.

[158] The FDRE Constitution, Art.47 (4).

[159] Van der Beken, *supra* note 24, at 115-116.

This shows that as regards composition, the constituent units in Ethiopia range from relatively homogeneous to extremely heterogenous as is the case in the South. As regards the size, one can observe similar variation. Some are large; some are small. For example, while the largest region, Oromia has a total surface area of 353,690 km^2, the smallest region, Harar has only about 340km^2. This has its own negative implication on the stability of the federalism, especially in Ethiopian federation where federal supremacy is not declared, and the right to secession is unconditional.[160] Some studies also suggest for the reorganization of the present constituent units.[161] Therefore, in terms of both composition and land size; the Ethiopian constituent units deviated from Lijphart's advice.

Generally, based on the above analysis, it is possible to conclude that Ethiopian federalism reflects Lijphart's guideline on federalism more in form than substance.

H. Granting Non-territorial Autonomy

Non-territorial autonomy is the concept that deviates from the paradigm that makes an automatic association between autonomy and territory.[162] In this case, autonomy is granted not to a specific territorial administration, but to the ethnic group which realizes the self-administration of all ethnic groups irrespective of their territorial concentration.[163] Although federalism is important because it gives territorial autonomy, it is not a perfect solution since the exact coincidence of homogeneous ethnic group to the specific territory is mostly unrealistic in practice. Lijphart proposes non-territorial autonomy for the groups that are not geographically concentrated.[164] Therefore, non-territorial autonomy in effect remedies the defect of territorial autonomy.

Had such type of autonomy been granted in Ethiopia, it would have taken the form that every Nation, Nationality, or People of Ethiopia has the right to establish legislative, and executive councils that are not linked to a particular territory.[165]The authority of these ethnic institutions will be limited, however, to the members of the concerned ethnic group, but it will extend to all members of the group, regardless of where they live on the territory of the state.[166] As to its relevance in Ethiopian context, Van der Beken observes that it could be applied not totally by replacing the existing territorial autonomy, i.e., federalism but by complementing the latter.[167] He goes on saying "while powers that now belong to the regions in the areas related to ethnic identity protection (language, culture, and education) would be transferred to the non-territorial institutions in which only members of one ethnic group are represented, powers that

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[160]At this juncture, one may wonder whether or not Lijphart's federalism and decentralization guideline extends to include secession. The guideline does not explicitly address such query. However, it is possible to infer that it is short of secession. The overall effort of Lijphart is to bring a stable democracy in divided societies by bringing them together within a single sovereign state. As such, it is reasonable to argue that the design of the FDRE Constitution by making the right to secession unconditional deviated from Lijphart's recommendation.

[161] Assefa, *supra* note 26, at 374-375

[162] CHRISTOPHE VAN DER BEKEN, UNITY IN DIVERSITY-FEDERALISM AS A MECHANISM TO ACCOMMODATE ETHNIC DIVERSITY: THE CASE OF ETHIOPIA, 303 (Muenster, Lit Verlag, 2012).

[163] *Id.*

[164] Lijphart, *supra* note 2, at 105.

[165] Beken, *supra* note 162.

[166]*Id.*

[167]*Id.*

are territorial because of their very nature such as police, land administration, agriculture would continue to be under the authority of the regional institutions."[168]

In spite of Lijphart's proposal and possible applicability of the concept of non-territorial autonomy in Ethiopia, the FDRE Constitution does not give recognition to it. However, this does not mean that there is no practice of non-territorial autonomy in Ethiopia. One instance is the case of Harar where members of Harar National Assembly (one of the constituent chambers of the regional Parliament) are elected by members of the Harari ethnic group, even when the latter live outside of Harar.[169]The practice of learning in one's own mother tongue in a region where the working language is different from the mother tongue of the community concerned is also manifestation of non-territorial autonomy. For example, even though the working language of the respective regions is not Amharic, there is the practice of offering primary education in Amharic in Oromia and Somali regional states. Similarly, even though the working language of the Chartered Dire Dawa is Amharic, there are Afaan Oromo schools in it. These are, however, exceptions and do not warrant to conclude that in spite of the failure of the Constitution to recognize the concept of non-territorial autonomy, its practice is prevalent. Hence, it is discernible that the design of the FDRE Constitution deviated from Lijphart's guideline of constitutional design for divided societies in this regard.

I. Power-sharing beyond the Cabinet and Parliament

Lijphart suggests that in divided societies, broad representation of all communal groups is essential only not in the cabinet and parliaments but also in the judiciary, civil service, police, and military.[170]Lijphart provides two alternative mechanisms for doing this. The first is by instituting ethnic or religious quotas, which do not necessarily have to be rigid. For example, instead of mandating that a particular group is given exactly 20% representations, a more flexible rule could specify a target of 15-25%.[171] The other, which he thinks is more appropriate than the first mechanism, is to have an explicit constitutional provision in favor of the general objective of broad representation and to rely on the power-sharing cabinet and the proportionally constituted parliament for the practical implementation of this goal.[172]

In this regard, the general framework provided under Art. 39(3) of the FDRE Constitution seems to correspond to the second mechanism proposed by Lijphart. However, a close examine shows that the correspondence is not a real one as Lijphart starts from the premises of proportionally constituted parliament and this is lacking in Ethiopia because of the chosen plurality electoral system, an issue discussed in sub-section A above.

In this regard, the existing practice is not consistent. For example, in Ethiopian Federal Police, although there is an attempt to consider different ethnic composition administratively, for example, by recruiting police members from all regional states, it cannot ensure

[168]*Id.*, at 304.

[169] This is mandated by the regional constitutions. See The Revised Constitution of Harar Regional State, Art. 50(2).

[170] Lijphart, *supra* note 2, at 105.

[171] *Id.*, at 105-106

[172] *Id.*

representation.[173] One reason is the presence of significant turnover of human resource in the Commission. Because of this, the concern of the Police Commission is more on recruiting competent police officers than balancing different ethnic groups.[174] On the other hand, Assefa Fiseha contends that the practice of power-sharing in Ethiopia is limited to executive and does not extend beyond that.[175]The existing trend in the federal judiciary more explains Assefa's conclusion.[176]

Table 2: *Table showing ethnic composition of federal judges at Supreme, High and First Instance Courts*

No	Ethnic Group	No of judges at Supreme Court	No of judges at High Court	No of judges at First Instance Court	Total number of judges	No of judges in %
1	Amhara	7	24	52	83	37.99
2	Tigre	6	15	20	41	18.72
3	Oromo	5	14	21	40	18.26
4	SNNP[177]	3[178]	18[179]	18[180]	39	17.81
5	Somali	0	1	0	1	0.5
6	Afar	0	1	0	1	0.5
7	Harari	1	0	1	2	0.91
8	Agew	1	2	2	5	2.28
9	Argoba	0	0	1	1	0.5
10	Shinasha	1	0	0	1	0.5
11	Amhara-Oromo hybrid	0	0	4	4	1.83
12	Amhara-Burji hybrid	0	0	1	1	0.5
	Total				219	100%

Source: Federal Supreme Court, Judicial Administration Council (synthesized by the researcher, May 2015).

From the above table, one may observe two things: the ethnic composition and the proportionality of the composition as suggested by Lijphart. Composition wise, of the existing 75

[173] Interview conducted with Mesfin, Commissioner, Ethiopian Police Commission; Commander Yemane, Criminal Directorate, Ethiopian Police Commission, April 16, 2015.

[174] *Id*.

[175] Assefa Fiseha, *Supra* note 26, p210.

[176] Data taken from Federal Supreme Court, Judicial Administration Council reveals that the federal judiciary has 24 judges at the Supreme Court, 75 judges at High Court, and 120 judges at First Instance Court together making total number of 219 judges.

[177] As per the 2007 census, there are 56 ethnic groups in the South. Of these, only 14 ethnic groups, viz., Gurage, Sidama, Hadiya, Gedio, Alaba, Gamo, Malee, Dwro, Kembata, Bench, Silte, Kafa, Konta, Kebena are represented in the federal judiciary.

[178] These are 1 Hadiya,1 Gedio,1 Alaba

[179] These are 5 Gurage; 4 Sidama; 1 Hadiya; 1 Gamo; 1 Alaba; 1 Malee; 1 Dwro; 1 kembata; 1 Bench; & 2 Silte.

[180] These are 5 Gurage; 1 konta; 2 Hadiya; 1 Kebena; 1 Sidama; 2 Silte; 2 Kafa; 2 Gamo; 1Alaba; & 1Dwro

ethnic groups of the country,[181] the federal judiciary is filled by 23 ethnic groups, 4 Amhara-Oromo hybrids, and 1Amhara-Burji hybrid. Hence, the accommodative capacity is less than 1/3rd of total ethnic groups. The proportionality element is also not reflected. As per 2007 census, the Oromo, the Amhara, the Southern Nations, Nationalities and Peoples, the Somali, and the Tigre people respectively stood the first five ranks. However, the Amhara with 37.99%, the Tigre with 18.72%, the Oromo with 18.26%, the Southern Nations, Nationalities and Peoples 17.81%, the Agwe with 2.28% representation respectively occupy the first five ranks. Therefore, although diversity is reflected to a limited extent in the judiciary, the proportionality is by no means taken into consideration.

Of course, one may expect the practical challenges that may encounter Ethiopia in ensuring ethnic representation in the federal judiciary. Compared to other branches of government, arguably, one may say that because of its nature, the judiciary needs well trained, skilled, and knowledgeable judges and getting these judges from all ethnic groups in proportion to their number may be difficult. This is a problem of inefficiency and as explained in the first section, one of the critiques against Lijphart's consociational democracy model. However, since consociational democracy model emphasises representation of ethnic groups than the individual merit, it cannot be a valid explanation for not considering proportionality element.

In short, neither the Constitution explicitly provides nor the practice reveals the existence of power-sharing beyond executive in Ethiopia. If at all it exists, it depends upon the willingness of leaders and cannot exactly explain the one suggested by Lijphart.

III. CONCLUSION

This paper examined to what extent the design of the FDRE Constitution reflects Lijphart's nine guidelines for constitutional design. The findings of overall examination can be summarized into four areas.

First,the FDRE Constitution showed a significant and clear deviation from Lijphart's guidelines on the choice of electoral system. Lijphart recommends a proportional electoral system for divided societies. But, the FDRE Constitution adopted plurality electoral system.

Second, in areas of a constructive vote of no confidence for ensuring cabinet stability in the parliamentary form of government and non-territorial autonomy, the FDRE Constitution remained silent as to Lijphart's guidelines.

Third, there are areas where the design of the FDRE Constitution correspond to Lijphart's guidelines in form but deviated or at least has potential to deviate. The design of the FDRE Constitution on issues of the parliamentary form of government, federalism, and power-sharing within or beyond the executive fall under this category.

Fourth, the design of the FDRE Constitution fully corresponds to Lijphart's proposal with regard to the selection of the head of the state (the President) as the President is elected by the parliament (not directly by the people) with limited ceremonial powers (Arts.69-71).

[181] According to the 2007 Ethiopian Population and Housing Census, more than 80 ethnic groups exist in the country. However, at present, the House of Federation recognized only 75 ethnic groups. S*ee the 2007 census cum. supra Table 1.*

The deviations (both in form and substance, or in substance alone), or the silences of the FDRE Constitution as to the guidelines are mainly because of choice of electoral system, lack of explicit constitutional provisions, the absence of established political practice, or silence of the constitution.

Considering the above findings, one would normally expect to recommend the revision of the FDRE Constitution to the extent that it totally deviated from the guidelines or changing the existing political practice where the Constitution corresponded to the guidelines in form but deviated in substance. However, the author deliberately restrained from making such recommendations for the reason that such recommendations need first to test and establish with empirical evidence that Lijphart's consociational democracy model and his guidelines are proved values for Ethiopia. This study, however, is short of doing that as it already started from warranted assumption that the model is appropriate and can explain the Ethiopian situation.

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FREEDOM OF EXPRESSION AND THE ETHIOPIAN ANTI-TERRORISM PROCLAMATION: A COMPARATIVE ANALYSIS

Henok Abebe Gebeyehu[*]

ABSTRACT

The Anti-Terrorism Proclamation of Ethiopia has a far-reaching effect on human rights, such as freedom of expression. The provisions of this law that impact freedom of expression are discussed in this article. The law gives leeway to criminalize innocent acts of individuals who are critical of government policies. It criminalizes in/direct encouragement to the preparation, instigation and commission of terrorism through the publication of statements. The law falls short of international standards that require only the criminalization of a speech intended and likely to incite terrorist acts. The Proclamation demands everyone including the media and journalists provide terrorism-related information to law enforcement agencies. The only way to be relieved of this obligation is showing the existence of a 'reasonable cause', a phrase that is not defined by the law. Moreover, the journalistic privilege of confidentiality of information and the protection of sources is not stipulated as an exception to the obligation of disclosure of information. Nor does the law provides the circumstances in which a journalist may be forced to divulge her information. Though surveillance and interception undermine democracy, a mere suspicion of terrorism gives the National Intelligence and Security Service a power to conduct surveillance or intercept any type of communications. The Proclamation failed to provide circumstances that a court should consider before permitting surveillance or interception. Surveillance and interception invade privacy and chill freedom of expression. However, the Proclamation failed to provide any safeguards that limit the misuse of executive power against freedom of expression. The legal ambiguity together with the nascent jurisprudence pose problems on freedom of expression. Hence, domestic courts should draw upon or transplant principles and their interpretations from jurisdictions like South Africa and Council of Europe to fill legal loopholes. Moreover, the "jurisprudential dearth" could be filled and the impact of the Proclamation on freedom of expression may be assuaged by incorporating the three-part test (prescribed by law, legitimate aims and necessary in a democratic society) from the well-developed jurisprudences of human rights bodies and regional courts, notably the European Court of Human Rights, which stands at the heart of the Council of Europe system.

Keywords: encouragement of terrorism, freedom of expression, human rights, interception, journalistic privilege, terrorism, surveillance

I. INTRODUCTION

The security—freedom paradox is the major dilemma that countries are currently confronting. Security legislation like anti-terrorism laws widens executive power without a judicial supervision against human rights. Governments use their power not only to maintain

[*] Lecturer and Program Coordinator, Haramaya University, College of Law (LL.B--Addis Ababa University 2013), LL.M--Central European University 2016). This article is a refined version of part of my LL.M thesis. I would like to thank the editors and anonymous reviewers of Haramaya Law Review.

legitimate national security and public order but also to silence political dissidents. In their joint declaration of 2010, the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression and other international mandate holders working on freedom of expression singled out ten key challenges to freedom of expression in a decade starting from 2010.[1] The eighth challenge to freedom of expression is governments' over-zealous national security concern that aims to keep their security tight.[2] The groups also picked counter-terrorism legislation as a threat to freedom of expression.

Like other nations that are prompted by the 9/11 incident to devise counter-terrorism mechanisms, Ethiopia, though not immediately, has adopted its anti-terrorism Proclamation in 2009 "to prevent, control and foil terrorism" and "in order to bring to justice suspected individuals and organizations".[3] However, the law hardly escapes criticisms of human rights groups, politicians, peer states, journalists and international human rights authorities.

Amnesty International and other human rights groups reiterated that the terms used to define terrorism and terrorist activities in the Proclamation are imprecise, and vague that can be used to criminalize a legitimate exercise of freedom of expression.[4] In its evaluative comments, Article XIX said that "[t]he Proclamation seriously undermines freedom of expression rights in a manner that is unlikely to improve security."[5] Human rights groups have repeatedly urged Ethiopia not to use its anti-terrorism legislation as a pretext to impinge on freedom of expression.[6] Similarly, Amnesty International vociferously criticizes how the Ethiopian Government is implementing its anti-terrorism law.[7] Even though some of the provisions of the law are similar with other democratic countries,[8] its implementation in the absence of due process negatively infuses all human rights that the country has pledged to respect and protect. For instance, at times, the evidence adduced by prosecutors are not "sufficient and relevant" for conviction. Rather they are mere critical articles and journalistic reporting that epitomize a

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[1] *Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression*: *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, A/HRC/14/23/Add.2 (2010). (hereinafter "the Joint Declaration of Special Rapporteurs")

[2] *Id*, at 6.

[3] *Anti-terrorism Proclamation* No. 652/2009, FED. NEGARIT GAZZETA 15th Year No. 57, Addis Ababa, 28th August 2009, Preamble, Para 4. Hereinafter "Anti-Terrorism Proclamation."

[4] *Id*; Oral Statement by Amnesty International to Special Rapporteur on Freedom of Expression and Access to Information in Africa (2011), available at http://www.achpr.org/sessions/50th/ngo-statements/10/ (accessed 20 September 2016) (hereinafter "Comments of Article XXI").

[5] Article XXI, *supra* note 4, at 11.

[6] Amnesty International Submission to the UN Universal Periodic Review, Ethiopia: Failure to Address Endemic Human Rights Concerns (2014), 6; Amnesty International Public Statement, Ethiopia: Concerns that Anti-Terrorism Law is Being Used to Suppress Freedom of Expression (2011), UN Experts Urge Ethiopia to Halt Violent Crackdown on Oromia Protesters, Ensure Accountability for Abuses (2016), available at file:///C:/Users/Me/Desktop/UN%20experts%20urge%20Ethiopia%20to%20halt%20violent%20crackdown%20on%20Oromia%20protesters,%20ensure%20accountability%20for%20abuses.html (accessed 5 November 2016)

[7] The Oakland Institution and Environmental Defender Law Center also conclude that the law at its face value and application violates international human rights standards. The Oakland Institution and Environmental Defender Law Center, Ethiopia's Anti-terrorism Law: A tool to Stifle Dissent 5 (2015), available at https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf (accessed 4 November 2016) (hereinafter "Report by Oakland Institute")

[8] For instance, alike the Ethiopian Proclamation, the counter terrorism laws of Austria and United Kingdom criminalize encouragement of terrorism.

legitimate exercise of freedom of expression.[9] Besides, evidence obtained through illegal means including torture, inhuman and degrading treatments are used to prosecute and convict individuals.[10]

Ethiopia is infamous for using its anti-terrorism legislation to silence political dissents, critical voices, and journalists who express innocent concerns against national policies, laws, and their implementations. The government has repeatedly failed to cooperate with the United Nations (hereinafter "the UN") human rights groups (failed to accept and implement recommendations, to respond to communications, and to allow independent groups to investigate alleged human rights violations).[11] Against this backdrop of human rights violations and muzzling of freedom of expression, the article is devoted to discussing how the Ethiopian anti-terrorism law limits freedom of expression. The legal landscape of South Africa and Council of Europe will be discussed to examine and *compare* the status given and the protection accorded to freedom of expression under the Ethiopian counter-terrorism law. The relative effective protection of human rights and the well-developed case law on human rights in general and freedom of expression, in particular, prompted the author to choose the Council of Europe, particularly the European Court of Human Rights (hereinafter ECtHR), as a jurisdiction for a comparative analysis. The relative familiarity of the author with the case-law of the European Court of Human Rights and language accessibility of laws are other pushing factors that lead to the selection of the jurisdiction. There are also reasons that lead to the selection of South Africa as a comparator. Among other things, it is a democratic state and her anti-terrorism law, alike the Ethiopian one, is influenced by the Prevention of Terrorism Act of the United Kingdom.[12] In addition, Ethiopia and South Africa have duties that emanate from the same regional human rights regime, under the African Charter on Human and Peoples' Rights and other regional human rights instruments.

The article is divided into five sections. The first section outlines some backgrounds of a contemporary protection of freedom of expression in Ethiopia. The second section discusses the legal framework of freedom of expression in the three jurisdictions. The permissible limitations that may be imposed on freedom of expression are discussed in the third section. As the main part of the article, section four deals with articles that give leeway for unwanted restrictions of freedom of expression. The definition of terrorism, encouragement of terrorism, the journalistic

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[9] Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), available at http://www.amnestyusa.org/research/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia (accessed 3 September 2016)

[10] Political prisoners usually complain before courts that they meted out torture and inhuman and degrading treatments by security agents and investigative police officers who aligned with the ruling government. For instance, *See*, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 3 September 2016)

[11] Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (2012); United Nations Human Rights Council, Opinions Adopted by Working Group on Arbitrary Detention, 66th session (2012); Ethiopia's Response to Recommendations in A/HRC/27/14 (2014), UPR, 2nd Review, Session 19.

[12] United Kingdom: Terrorism Act 2006 [United Kingdom of Great Britain and Northern Ireland], 2006 Chapter 11, 30 March 2006, available at: http://www.refworld.org/docid/46e552b52.htm [accessed 12 July 2017).

privilege of confidentiality of information and protection of source, surveillance and interception are comparatively discussed from the perspective of freedom of expression. Finally, conclusion and some recommendations are presented in the last section of the article.

II. FREEDOM OF EXPRESSION

A. The Principle

The FDRE Constitution dispenses the right to freedom of expression to everyone as follows:[13]

> ***Article 29: Right of Thought, Opinion, and Expression***
>
> *1. Everyone has the right to hold opinions without interference.*
>
> *2. Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.*
>
> *3. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:*
>
> *(a) Prohibition of any form of censorship.*
>
> *(b) Access to information of public interest.*
>
> *4. In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.*
>
> *5. Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.*
>
> *6. These rights can be limited only by laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth and the honor and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.*
>
> *7. Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.*

Article 29(1) and (2) are the verbatim copies of Article 19(1) and (2) of International Covenant on Civil and Political Rights (ICCPR) except the former as a principle provides freedom of expression *without any interference.*[14] The Constitution provides an absolute

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[13] *The Constitution of the Federal Democratic Republic of Ethiopia*, Proclamation No 1/1995, FED NEGARIT GAZZETA 1st Year No. 1, Addis Ababa 21st August 1995. (Herein after the Constitution or the FDRE Constitution).

[14] In its General Comment No 34, the Human Rights Committee recognize freedom to hold opinion as an absolute right. *Human Rights Committee General Comment No*. 34 (2011), 102nd Session, CCPR/C/GC/34, Para 9. (Hereinafter "General Comment No. 34"). This General Comment is an explanation of Article 19 of ICCPR. It elaborates the elements of freedom of expression and opinion and states' duty to protect, respect and fulfill the right as guaranteed by Article 19 of ICCPR.

protection of the right to hold opinions. Though the title of the provision includes *thought,* the main body of the article failed to incorporate it. It may be left because thought is the process of holding opinions and guaranteeing the protection of opinion necessarily protects freedom of thought. Generally, the provision enunciates both the private freedom (holding an opinion) and the public freedom (the public and social dimension of freedom of expression, which includes the right to seek, receive and impart any information or ideas).

Freedom of opinion and expression are provided in separate provisions in the Constitution of the Republic of South Africa[15] while it is part of freedom of expression in the European Convention on Human Rights. In line with ICCPR and General Comment No 34[16], the Ethiopian Constitution provides freedom of opinion as a distinct right to freedom of expression in which any interference is not allowed. There is no prohibition of interference in the exercise of freedom of opinion in the Constitution of South Africa. Nor is the right to hold opinions is recognized as a non-dergoable right in Article 37. It is not also clear from the Constitution of South Africa whether freedom of opinion is recognized as a discrete right or part of freedom of expression, and whether it is guaranteed without interference. However, it is hardly possible to suppress freedom to hold opinion due to the nature of the right itself, which is an inner activity of human being. Therefore, it is safe to conclude that the right to hold an opinion is an absolute right in South Africa as stipulated in ICCPR and underpinned by General Comment No 34.

Freedom of media (including the press) and artistic creativity are protected in the Constitutions of South Africa and Ethiopia.[17] Though artistic creativity and freedom of the press and other media are not specifically enumerated in the European Convention on Human Rights (hereinafter ECHR) with similar fashion to the two Constitutions, the right to use art and media to express an opinion is guaranteed.[18] The European Court of Human Rights has reiterated the vital role played by the media to censure and control governments and to create an informed citizenry, which is necessary for democracies.[19]

Despite the constitutional enunciation, various publishing companies are forced to be closed and a small number of private presses (that softly criticize the government), are available in the market.[20] The government also imposes restrictions on artistic works despite their roles for

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[15] *Constitution of the Republic of South Africa* No. 108, as adopted on 8 May 1996 and amended on 11 October 1996, Articles 15 and 16. (hereinafter "The Constitution of South Africa")

[16] General Comment No 34, *supra* note 14.

[17] FDRE Constitution, *supra* note 13, Article 29(3).

[18] For instance, *Sunday Times v. the UK*, Eur. Ct. H. R. Application No 6538/74 (1979), *Jersild v. Denmark*, Eur. Ct. H. R. Application No 15890/89 (1994), *Observer and Guardian v. the UK*, Eur. Ct. H. R. Application No 13585/88 (1991), *Leroy v France*, Eur. Ct. H. R. Application No 36109/09 (2009); For freedom of expression in South Africa for instance see, *Goodman Gallery v The Film and Publication Board* 8/2012 (FPB Appeal Tribunal)

[19] *Observer and Guardia, supra* note 18, para 59.

[20] Committee to Protect Journalists, Ten Most Censored Countries (2015), available at https://www.cpj.org/2015/04/10-most-censored-countries.php (accessed 8 August 2016). (hereinafter "CPJ most Censored Countries"). Magazines like *Lomi, Fact, Enqu, Jano, Addis Guday and* the newspaper *AfroTimes* have been forced to close their publication.

individuals' self-fulfillment and autonomy. The government prohibits the distribution and sale of books that it claims as they would, but without any tangible ground, incite violence.[21]

In Article 29(3), the Ethiopian Constitution protects the press from any form of censorship while the South African counterpart keeps silent. Despite the absence of explicit prohibition or otherwise of censorship in the South African Constitution, it is a permitted restriction of freedom of expression as long as it is in line with Article 36.[22] Likewise, ECHR recognizes prior restraint as a jurisprudential device to limit freedom of expression as long as it passes through the three-part test (prescribed by law, legitimate aim and necessary in a democratic society) of Article 10(2).[23] However, due to its serious implications, like a chilling effect, on freedom of expression, the European Court is of the opinion that a prior restriction needs the "most careful scrutiny."[24]

The Ethiopian Constitution gives legal protection to the press and clearly states its indispensable role in the development and functioning of a democratic society.[25] Though the Constitution prohibits censorship, Article 42 of the Freedom of the Mass Media and Access to Information Proclamation permits the public prosecutor to take an impounding measure.[26] A public prosecutor may impound periodicals if she/he has "sufficient reason" to believe that any statement expressed "leads to a clear and present grave danger." Though an impounding measure is different from censorship, both measures ultimately inhibit the right to freedom of expression. The expression may not be censored (since the Constitution prohibits so), however, its dissemination may be restricted by an impounding measure taken by a public prosecutor. Practically too, journalists are, by one way or another, forced to censor themselves or/and they

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[21] The Book vendors speak to the Voice of America Radio that they are arrested, tortured and asked to pay bribe for selling political and historical books. One of the vendor said that even he is prohibited to sell a book called *Aba Koster* (1991), which is about a young hero who battled with Fascist Italy from 1928-1935. Available at http://amharic.voanews.com/a/book-vendors-in-addis-abeba/3482161.html

[22] *Midi Television v Director of Public Prosecutor*, Case No 100/06; *Tshabalala-Msimang v Makhanya* (The High Court of South Africa, Witwatersrand Local Division Application No 18656/07), Para 35. The court pointed out "[f]reedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does meant that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish."

Article 36: Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[23] *Sunday Times v. the UK*, Eur. Ct. H. R. (1979*), Observer and Guardian v. The United Kingdom*, Eur. Ct. H. R. Application No 13585/88 (1991).

[24] *Observer and Guardian v. the United Kingdom*, *supra* note 23, Para 60.

[25] FDRE Constitution, *supra* note 13, Article 29 (4).

[26] *Freedom of the Mass Media and Access to Information Proclamation* No. 590/2008, FED. NEGARIT GAZZETA, 14th Year No. 64, Addis Ababa, 4th December, 2008 (hereinafter "Mass Media Proclamation").

encounter direct and indirect governmental censorship.[27] Even though the Ethiopian Constitution prohibits censorship of only the *press*, this prohibition should extend to other forms of expressions and should pass the "strict scrutiny test" as stipulated in the ECHR and South African jurisprudence.

Additionally, the right of the press to access information of a public interest is enshrined in Article 29(3)(b) of the Ethiopian Constitution. The South Africa's Constitution provides the right to access to information for everyone without any restriction,[28] unlike its Ethiopian counterpart that allows the press to access only information of a public interest. A public interest is not defined in Ethiopian jurisprudence and is amenable to governmental abuse. However, it can be interpreted in line with the example given by the non-governmental organization-Article XIX and endorsed by Special Rapporteur on freedom of opinion and expression. Accordingly, information of a public interest may include "operational information about how the public body functions and the content of any decision or policy affecting the public."[29] The people do have a stake in any decision passed by or information related to the function of the executive, judiciary, and legislature. Hence, everyone has the right to access such information without undue restrictions.

With regard to the right of access to information, the Constitution failed to provide the right and limitation according to the internationally accepted standards. Because at the very beginning, it rather provides a restricted right. That means information is not accessible unless it is of a public interest. However, the Constitution should have provided a wider right of the press to access information alike the South African counterpart. Then the general limitation clause will be applied. That means, the right may be limited when the restriction is provided by law, for the sake of legitimate aims (like national security or public interest), and necessary in a democratic society.[30] Moreover, it is not clear why the Ethiopian Constitution singled out the press out of the media and guaranteed the right of access to information. However, it should be interpreted that other media (broadcast and online) plays no less role than the press, and do have a protected right of access to information. Besides, Article 29(2) provides the right to seek and receive information and Article 12 (1) which obliges the conduct of the government to be transparent permit this line of interpretation.

Though the South Africa's Constitution bestows the right to information to everyone without limitation, the Protection of State Information Bill enshrines the possibility of limiting the right to access information.[31] The Bill guaranteed access to state information as a basic human right.[32] The right is also protected in the Council of Europe.[33] However, the sky is not the

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[27] Human Rights Watch, Ethiopia: Events of 2015, 42ff, available at https://www.hrw.org/world-report/2016/country-chapters/ethiopia (accessed 11 November 2016).

[28] The Constitution of South Africa, *supra* note 15, Article 32.

[29] Abid Hussain, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2000), E/CN.4/2000/63, Para 44, 15.

[30] Article XIX, *the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, International Standard Series* (1996), Principle 11. (hereinafter "The Johannesburg Principles")

[31] Republic of South Africa, *Protection of State information Bill* (B 6B 2010).

[32] *Id*, Article 6 (C)

limit for the exercise of this right. A limitation that is provided by law in a democratic society for a justified public or private interest warrants a restriction to the right of access to information in both South Africa[34] and Council of Europe.[35]

Despite its practical absence, Article 29(5) of the Ethiopian Constitution provides that state-owned and state-financed media ought to open their home for diversified opinions, including dissidents. The reality shows otherwise and state-sponsored media shut their door to critical and opposition views and work for 'hegemonizing' the "developmental state" and "revolutionary democracy" ideals of the ruling government.[36] The European Court is of the opinion that there is no democratic society without "pluralism, tolerance, and broadmindedness."[37] Media pluralism and diversified contents including critical voices are parts of freedom of expression and paramount for a democratic society. The Council of Europe in its recommendation stipulates that guaranteeing media pluralism is the positive obligation of member states.[38] Similarly speaking, reflecting a multiplicity of voice is one of the principles in the South Africa's Media Code.[39]

As stated above, the Ethiopian Constitution guarantees freedom of expression almost in line with international standards (this claim does not include the limitation clause which will be discussed below). However, following the 2005 election, the ruling party has restricted freedom of expression in various ways. Human rights groups like Human Rights Watch consider the environment of freedom of expression as suffocating.[40] The government owns accessible and strong media outlets (print and broadcast). Private media are threatened and intimidated by the mere fact of voicing dissents and they are expected to be conformists with government views. The government frequently jams transmissions from abroad, threat, arrest, convict their sources, and block foreign-based dissenting websites.[41] The situation even gets worse in the aftermath of the 2010 election when the government secured a sliding victory of 99.6% of parliamentary seats (increased to 100% seats in the 2015 election).[42] As Human Rights Watch claimed in its 2015

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[33] *Council of Europe Convention on Access to Official Documents*, 18.VI.2009.

[34] *South African Protection of State information Bill, supra note 31,* Article 6 (a), and *the Constitution of South Africa*, *supra* note 15, Article 36.

[35] *Council of Europe Convention on Access to Official Documents*, *supra* note 33, Article 3.

[36] *A Struggle to Build Developmental Democracy System and its Challenges*, July 2014 (Amharic). This government document circulated as a training manual for university teachers.

[37] *Handyside v the United Kingdom*, Eur Ct. H. R. Application No 5493/72 7 (976), Para 49.

[38] Recommendation CM/Rec (2016) 4 of The Committee of Ministers to Member States on *the Protection of Journalism and Safety of Journalists and Other Media Actors* (2016), Article 15.

[39] *Code of Ethics and Conduct for South African Print and Online Media* (2016).

[40] *Human Rights Watch, Ethiopia: Events of 2015*, available at https://www.hrw.org/world-report/2016/country-chapters/ethiopia (accessed 11 November 2016).

[41] For instance see VoA News: *US Criticizes Ethiopia for Jamming VOA Signals*, available at: https://www.voanews.com/a/ethiopia-criticized-by-us-for-jamming-voa-signals-88733542/153788.html (accessed 12 June 2017), Ethiopian Media Forum: *Association for International Broadcasting denounces Ethiopia's intentional signal jam*, available at: http://ethioforum.org/association-for-international-broadcasting-denounces-ethiopias-intentional-signal-jam/ (accessed 12 July 2017).

[42] Despite this glaring fact of monopoly, President Obama praised Ethiopia as democratic during his official visit in 2016.

country report, at least 60 journalists fled their country and more than 19 are thrown to jail.[43] The government is against critical voices and its harassment increases when an election approaches. As its preparation for the 2015 election, the government decimated private media outlets by arresting journalists (ten journalists and bloggers arrested in 2014) and opinion writers on newspapers and magazines and intimidating persons who work on printing and distributing companies.[44] In the same year, the government accused six newspapers and magazines of encouraging terrorism and resulted in 16 journalists to flee their motherland.[45] Publishing opinions and criticisms against government policy and performance may lead to a conviction for the encouragement of terrorism.[46]

Most of the journalists languishing in prison are accused/prosecuted under the Anti-Terrorism Proclamation.[47] Ethiopia is also number four in the Committee to Protect Journalists' list of the most censored nations of the world.[48] Despite the guarantee of freedom of expression by the Ethiopian Constitution, the above scenarios show how far freedom of expression is undermined. Below, the constitutional limitations on the exercise of the right to freedom of expression will be discussed.

B. Limitation on Freedom of Expression

Freedom of expression is not an absolute right in the three jurisdictions. The Ethiopian Constitution outlawed "content and effect-based restrictions" stating that an expression may not be restricted due to its content or effect.[49] However, this statement is not absolute. A speech may be limited based on its content or effect if the restriction is prescribed by law for the sake of protecting the "well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war."[50] The legitimate aims of freedom of expression enshrined in the Constitution are "vulnerable to overly broad and abusive interpretation."[51] Additionally, the "jurisprudential dearth"[52] of freedom of expression in the Ethiopian legal system exposes the right to extreme restrictions. International instruments like Universal Declaration of Human Rights (UDHR) and ICCPR do not envisage legitimate aims, like the well-being of the youth and human dignity.[53] Nor do these phrases have a clear-cut definition in the Ethiopian legal system.

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[43] Human Rights Watch, Violation of Media Freedom in Ethiopia (2015), 1, available at https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia (accessed 8 October 2016).

[44] CPJ, Most Censored Nations, *supra* note 20.

[45] *Id*.

[46] *Human Rights Watch, Ethiopia: Events of 2015*, *supra* note 27, at 61.

[47] CPJ, Most Censored Nations, *supra* note 20.

[48] *Id.*

[49] *FDRE Constitution*, *supra* note 13, Article 29 (6).

[50] *Id.*

[51] *Human Rights Watch, Ethiopia: Events of 2015*, at 56-57.

[52] Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth* (2010), 4 MIZAN LAW REVIEW 2, 201-231, 228 (2010).

[53] Article XIX, *the Legal Framework for Freedom of Expression in Ethiopia* (2003), 18-19. Article 19 opined that restriction of freedom of expression for the well-being of the youth is not necessary in a democratic society. Moreover, the expression "public expression of opinion intended to injure human dignity" is vague and not clear what it aimed to achieve. Nor does it provided in Article 19 and 20 of ICCPR. Therefore, curtailing free speech to

The terms should be interpreted narrowly so that the right to freedom of expression is not unduly restrained. In South Africa, protection of human dignity is one of the constitutional value that the post-apartheid era is founded on, and it is provided as a legitimate aim to vindicate limitations imposed on freedom of expression.[54] ECHR too invokes human dignity imperative to limit freedom of expression, for instance, in the case of hate speech.

Compared to Article 10 of ECHR and Article 19 and 20 of ICCPR, the legitimate aims envisaged by the Constitution are smaller in number. National security and public order, for instance, are not explicitly stipulated as legitimate aims to vindicate the restriction of freedom of expression. Besides, in contrast to the South Africa's Constitution and the ECtHR jurisprudence, the Ethiopian Constitution does not explicitly prohibit incitement of imminent violence through speech. In the international human rights system, national security and prevention of disorder are legitimate aims that vindicate the limits to free speech.[55] Though they are not incorporated in the Constitution, the Ethiopian government repeatedly use "public order and national security" as justification to restrain the exercise of the right. However, it is possible to incorporate these legitimate aims through interpretation despite the list of legitimate aims seems to be exhaustive. Because Chapter Three of the Ethiopian Constitution shall be interpreted "in a manner conforming" with principles of international human rights instruments that Ethiopia is a party.[56] Besides, pursuant to Article 9(4) of the Constitution, standards set by international human rights ratified by Ethiopia are part of the law of the land. Therefore, standards that recognize national security and public order as legitimate aims to restrict freedom of expression are also applicable in the domestic jurisdiction.

Moreover, unlike ECtHR and South Africa's jurisprudence, the Ethiopian Constitution does not have a test that examines whether the limit of freedom of expression is "necessary in a democratic society." The South Africa's Constitution gives a detailed account of how a right should be limited. It expounds what is commonly characterized as "necessary in a democratic society."[57] This stage is the most important stage to protect freedom of expression from excessive governmental interference. It is not easy for the judiciary to shield the right to freedom of expression without scrutinizing whether the limit is necessary and proportionate to the aim pursued. The Human Rights Committee is of the opinion that the restriction imposed on freedom of expression must be "proportionate and necessary" to the aim that the government wants to achieve.[58] The Special Rapporteur on promotion and protection of the right to freedom of

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protect human dignity is not in line with international standards, since it does not full fill the triple-test. However, even though "human dignity" and the well-being of the youth are not verbatim expressed in the international and regional human rights instrument, they may fall under "public moral" and "reputation or rights of others."

[54] *Supra* note 16, Article 1 and 36; Ryan Haigh, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression*, WASH. U. GLOBAL STUD. L. REV. 5: 187, 187-210, 195 (2006).

[55] *For instance*, Article 19 of UDHR and ICCPR, Article 10 (2) of ECHR.

[56] FDRE Constitution, s*upra* note 13, Article 13 (2). Proclamation No 590\08 cited *supra* note 26, recognizes that the right to freedom of expression may be trammeled to protect national security.

[57] The Constitution of South Africa, s*upra* note 15, Article 36.

[58] *Toonen V. Australia*, Communication No 488/1992, UN Human Rights Committee (1994), Para 8.3, *Velichkin V. Belarus*, Communication No 1022/2001, UN Human Rights Committee (2005), Para 7.3; and General Comment No 34, *supra* note 14, Para 22, 33-36.

opinion and expression noted that a restriction should be tailored to address a "pressing social need".[59] The limitation must be necessary and the least intrusive means to the exercise of the right. Additionally, the African Commission on Human and People's Rights, which monitors states' compliance with the African Charter on Human and People's Rights, to which Ethiopia is a party, uses the triple test to examine whether a restriction on freedom of expression is legitimate.[60]

Therefore, pursuant to Article 13(2) of the Constitution that requires Chapter Three (which encompasses human and democratic rights) to be interpreted in conformity with international human rights laws that Ethiopia is a State Party, and Article 9(4) that makes these laws part of the law of the land, judges should test limitations against the principles developed by such human rights instruments and authorities. Therefore, despite the explicit gap in the Constitution, limitations imposed on freedom of expression shall be *"necessary in a democratic society."*

III. COUNTER-TERRORISM LEGISLATION

The Ethiopian Anti-Terrorism Proclamation has been labeled as draconian since its drafting stage.[61] For instance, Joanne Mariner, Terrorism and Counter-Terrorism Program Director at Human Rights Watch said, "[a]s drafted, this law could encourage serious abuses against political protesters and provide legal cover for repression of free speech and due process rights."[62] Despite the fear and urge of human rights groups, the law has been promulgated without significant amendments. The law has noticeable effects on freedom of expression. Human rights groups, UN, and other countries repeatedly recommended the government to stop an abusive use of the law to arrest and prosecute dissidents, human rights advocates, journalists and opposition party members and leaders. For instance, UN experts on human rights urged the government to stop using the anti-terrorism law to stifle freedoms like freedom of expression.[63] Nevertheless, the government turn a deaf ear and give a blind eye to the recommendations that call for abrogation or amendment of the Proclamation. For example, Ethiopia defied and rejected recommendations forwarded by peer countries in the Universal Periodic Review to apply the

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[59] La Rue F, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2010), A/HRC/14/23, Para 79.

[60] *Scanlen and Holderness\ Zimbabwe*, Commission Communication Number 297\05 (African Commission on Human and People's Rights 2009); *Monim Elgak, Osman Hummeida and Amir Suliman\ Sudan*, Communication 379\09 (African Commission on Human and People's Rights 2009); *The Declaration of the Principles of Freedom of Expression in Africa*, The African Commission on Human and People's Rights (2002) Meeting at its 32nd Session, in Banjul, The Gambia.

[61] For instance: Human Rights Watch (2009*), Ethiopia: Amend Draft Terror Law*, available at https://www.hrw.org/news/2009/06/30/ethiopia-amend-draft-terror-law , Human Rights Watch (2009), *Analysis of Ethiopia's Draft Anti-terrorism law*, available at https://www.hrw.org/print/237005 (accessed 8 August 2016).

[62] *Id*.

[63] *UN Experts Urge Ethiopia to Stop Using Anti-terrorism Legislation to Curb Human Rights* (2014), available athttp://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sthash.bJQyrx2x.dpuf (Accessed 8 August 2016), OHCHR, Ethiopia, News, UN experts Disturbed at Persistent Misuse of Terrorism Law to Curb Freedom of Expression as cited by A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012).

Proclamation apolitically (The USA and Australia) and remove the vague provisions that impinge on freedom of expression (Sweden).[64]

In the following part, provisions of the Proclamation that shrink the sphere of freedom of expression will be discussed together with the standard set by the South African counter-terrorism bill and the Council of Europe including the European Court of Human Rights.

A. Definition of Terrorism

The *chapeau* of Article 3 and its subsequent lists stipulate the types of acts that may expose an individual to be accused of and punished for committing terrorist acts as follow:

> ***Terrorist Acts***
>
> *Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional, economic, or social institutions of the country:*
>
> *1/ causes a person's death or serious bodily injury;*
>
> *2/ creates serious risk to the safety or health of the public or section of the public;*
>
> *3/ commits kidnapping or hostage taking;*
>
> *4/ causes serious damage to property;*
>
> *5/ causes damage to natural resource, environment, historical or cultural heritages;*
>
> *6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service; or*
>
> *7/ threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article;*
>
> *is punishable with rigorous imprisonment from 15 years to life or with death.*

The principle of legality is at the heart of a criminal justice system. Besides, any restriction on freedom of expression should be "prescribed by law."[65] The law that limits a right should be accessible to the public and sufficiently precise to enable individuals to behave according to the law, and reasonably predict what their actions entail.[66] However, the above definition of terrorism is criticized for being broad and vague and against the principle of criminal justice system.[67] For a vague and imprecise definition is prone to be abused by the government to muzzle dissent voices.[68]

Pursuant to the definition, a protest that aims to influence governmental decisions, seeks to advance a political, religious or ideological cause, and "causes interference or disruption of any public service" may amount to terrorism. This indicates that the definition is too vague and wide to include peaceful non\political demonstrations whereby free speech right is exercised. A peaceful demonstration with a benign motive may result in serious interference or disruption of a

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[64] *Ethiopia's Response to Recommendations in A/HRC/27/14 (2014*), UPR, 2nd Review, Session 19, 16.

[65] FDRE Constitution, *supra* note 13, Article 29 (6).

[66] General Comment No 34, *supra* note 14, para 25.

[67] Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), 21. Oakland Institute, *supra* note 8, at 12.

[68] *Id.*

public service like transportation. However, a peaceful protest that aims to channel certain grievances may be labeled as an act of terrorism.

Politicians who assembled to lobby the government for a policy change may damage properties in the course of their demonstration. Such persons may be prosecuted as terrorists. However, their action falls under the right to peaceful assembly and freedom of expression, or if it should be criminalized, it is not as serious as terrorism and should be rendered an ordinary crime that transcends the limit of the right to assembly and freedom of expression. Considering ordinary offenses as terrorism chills freedom of speech, for people will be discouraged to express themselves.

Additionally, a person who advised a protestor might be convicted as a terrorist by the broad definitional provision of Article 3 cumulatively with Article 5(1)(b).[69] Therefore, the definition of terrorism as provided by the Proclamation criminalizes a peaceful exercise of free speech right and it unwarrantedly trammeled the constitutionally guaranteed right of freedom of expression.

An individual who threatens to commit any of the acts stipulated in Article 3(1)-(6) is a terrorist. That means a person who threatens to commit a serious damage to property or to disrupt public service by way of protest may be convicted as a terrorist. However, it is far from the international standard to include threating to commit a crime against property as a terrorist act. The UN Human Rights Committee has found that such kind of broad definition of terrorism violates international human rights standards.[70] Besides, it urged that counter-terrorism laws should be formulated with sufficient precision so that the citizens are able to regulate their actions accordingly.[71]

Generally, the definition of terrorism in the Proclamation criminalizes "legitimate acts of protest and political dissent", and encompasses minor crimes that do not amount to terrorism, like property crimes or disruption of public service or a threat thereof.[72] Additionally, the definition of terrorist organizations (Article 2 (4) cumulative with Article 3) is broad to include actions that do not amount to terrorism. For instance, more than two people who conduct a political protest may be deemed as a terrorist organization and convicted as terrorists.[73] Therefore, it is safe to conclude that the broad and vague definition of terrorism in the Proclamation restricts freedom of expression.

The definitional provisions of the South African counter-terrorism legislation are broad and complex compared to the Ethiopian counterpart. However, Article 1(3) of the law has exempted

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[69] Report by Oakland Institute; *supra* note 7, at 9.

[70] Article XIX, Comment on Anti-terrorism Proclamation of Ethiopia 3 (2010), available at https://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf (accessed on 23 October 2016) at 5.

[71] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant* (2011), CCPR/C/ETH/CO/1, at 4. The Committee recommended the Ethiopian government to repeal those provisions that criminalize ordinary crimes as terrorism (like property crimes and crimes related to interference and disruption of public services) and revise laws that unduly impinge on the exercise of human rights in the name of countering terrorism.

[72] Report by Oakland Institute; *supra* note 7, at 9.

[73] Human Rights Watch (2009), *supra* note 61, at 2.

advocacy, protest, dissent or industrial action as long as the persons have no intention of committing a harm stipulated in Article (1)(a)(i –vi). That means, the exceptionally protected actions like advocacy and protest are narrowed down by the exception attached with Article 1(3), which provides that such actions are not outlawed as long as the individual "does not intend the harm contemplated in Paragraph 1(a)(i) – (v)" of the definitional provision.[74] However, despite the exceptional protection of these acts, the broadly worded exceptions attached with the provision has a negative influence on freedom of expression. For instance, a protest that restricts the physical freedom of a person (1(a)(iii)) may be considered as a terrorist activity. In addition, "a political demonstration that causes substantial property damage would not be protected by the important exemption for protests and strikes."[75]

The mental element that is incorporated in the definition of terrorism in the Ethiopian Proclamation is "intention." However, Article 1(b) of the South African law stipulate that a terrorist activity should be "intended or by its nature or consequence, can reasonably be regarded as being intended" to cause all actions stipulated in Article 1(b)(i)-(iii)[76]. This indicates that the mental element required in the South African legislation, which includes negligence,[77] is lower than the Ethiopian one that only envisages intention. According to such provision, protestors may be considered as a terrorist if they knew their action would cause a feeling of insecurity even though they did not have the intention to create such result.[78]

The Council of Europe has no definition of terrorism except endorsing and incorporating Convention offenses that focus on thematic areas.[79] All of the Conventions failed to

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[74] *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004* (2005), Article 1 (3) (hereinafter "Anti-Terrorism Act of South Africa") and Azhar Cachalia, *Counter-Terrorism and International Cooperation against Terrorism – an Elusive Goal: A South African Perspective*, 26 S. AFR. J. ON HUM. RTS. 510, 517 (2010).

[75] Kent Roach, *A Comparison of Canadian and South African Anti-Terrorism Legislation*, 18 S. AFR. J. CRIM. JUST. 2, 134 (2005).

[76] Anti-Terrorism Act of South Africa, *Supra* note 74, 1(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to- (i) threaten the unity and territorial integrity of the Republic; (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organization or body or intergovernmental organization or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organization or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic;

[77] Cachalia, *supra* note 74, at 514.

[78] Roach, *supra* note 75, at 137.

[79] Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series - No. 196, Warsaw, 16.V (2005). Article 1 of the Convention define terrorist offences as any of the offences stipulated in any of the following instruments.

1. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;
3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973;
4. International Convention against the Taking of Hostages, adopted in New York on 17 December 1979;
5. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;

comprehensively define terrorism. Of the instruments incorporated by the Council of Europe, the International Convention for the Suppression of the Financing of Terrorism attempted to define terrorism as "an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act."[80] This definition is narrower than the definition stipulated in the Ethiopian and South African legislation. An act attempted or committed against non-combatants to cause injury or death is considered as terrorism. The act should be intended and aimed to intimidate a population or to influence the behavior of the government or international body. This definition is far from undermining freedom of expression. A protest that aims to influence the government to act or not to act in a certain way may result in injury or death of civilians. However, if the suspect does not intend the result, she may not be considered as a terrorist. On the other hand, protesters or strikers knowingly and willingly may engage in an activity causing injury or death of a person while protesting against the government. In such instances, it seems unfair to render protection under the guise of freedom of expression and the act should be considered as an ordinary crime.

Generally, the thematic Convention offenses do not define terrorism and only focuses on specific acts like a hostage, and their effect on freedom of expression is less severe than that of South African and Ethiopian legislation. In addition, the Convention definition discussed above is effectively distanced from threatening freedom of expression.

B. Encouragement of Terrorism

The Special Rapporteur for Freedom of Expression and Opinion, David Kaye, and the Special Rapporteur for Peaceful Assembly and Association, Maina Kiai, have expressed their concern on the use of an anti-terrorism law to muzzle freedom of expression.[81] David Kaye said that democracy needs critical voices, and silencing media and dissidents is not apposite to preventing terrorism.[82] With an equivalent tone, human rights groups repeatedly urged the Ethiopian government not to use its counter-terrorism legislation to throttle critical voices and opposing political party members.

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6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;
9. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;
10. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.

[80] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)

[81] United Nations Human Rights Office of the High Commissioner, Continued Detention of Ethiopian Journalists Unacceptable – UN human rights experts (2015), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15890&LangID=E (accessed 29 August 2016).

[82] *Id.*

Article 6 of the Ethiopian Anti-Terrorism Proclamation punishes "direct and indirect encouragement or other inducement [s]" to the commission, preparation or instigation of terrorist acts through the publication of a statement.[83] Besides, Article 25(2)(c) provides that an entity may be labeled as a terrorist by the House of People's Representatives (HPR) if it encourages terrorism. Encouragement of terrorism as a justification to trammel human rights is outlawed by the Human Rights Committee when it has dealt with the Terrorism Act 2006 of the United Kingdom.[84] However, the Ethiopian Proclamation runs far against international standards and criminalizes "direct and indirect encouragement" to the commission, preparation, and instigation of terrorism through the publication of a statement. Besides, against the principle of legality, these terms have clear definition neither in the Proclamation nor in the jurisprudence. The Human Rights Committee and human rights groups pointed out that phrase like "in/direct encouragement and other inducements" are contrary to the international standards, for they are broad, imprecise and prone to be abused by governments like what the Ethiopian government did.[85] In its comment on the anti-terrorism law of Ethiopia, the non-governmental institution, Article XIX addressed that:

> The offenses of 'direct or indirect encouragement or other inducements' are extraordinarily broad and vague offenses that fail the limitations for restrictions on rights required under international human rights law. While 'encouragement' and 'inducement' are vague terms, 'indirect encouragement or other inducements' is so vague as to be without meaning. They create a subjective standard based on what 'some…members of the public' may understand which can be applied (or misapplied) to nearly any statement made in the media as being supporting of terrorism.[86]

The Johannesburg Principles, which have been endorsed by the Special Rapporteur on freedom of opinion and expression, dictate that freedom of expression should be trammeled for a legitimate and genuine national security threat. Accordingly, Principle 6 stipulates that the right to freedom of expression may only be restrained under the pretext of national security if it *is intended and likely to incite immediate violence*, and "there is a *direct and immediate connection* between the expression and the likelihood and the occurrence of such violence" [Emphasis added].[87] Prohibiting incitement to terrorism is compatible with human rights. However, as epitomized by the Ethiopian case, the standard of limiting speeches that incite violence is being eroded by broad and vague touchstones in the aftermath of September 11 attacks.[88] As pointed out by the joint declaration of the Special Rapporteurs, "incitement should be understood as a *direct call* to engage in terrorism, with the *intention* that this should *promote* terrorism, and in a

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[83] Anti-Terrorism Proclamation, *supra* note 3, Article 6: Encouragement of Terrorism.

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.

[84] *Concluding Observations of the Human Rights Committee, United Kingdom*, UN Doc. CCPR/C/GBR/CO/6, 21 July 2008.

[85] Article XIX; *supra* note 70, at 10 and *Id*.

[86] Article XIX, *Id*, at 9.

[87] The Johannesburg Principles, *supra* note 30.

[88] The Joint Declaration of Special Rapporteurs, *supra* note 1, at 1.

context in which the call is *directly causally responsible for increasing the actual likelihood of a terrorist act* occurring" [Emphasis added].[89] Encouragement and inducements are loose and much broader than incitement, for they do not immediately, directly and casually result in terrorist acts.

Article 6 creates difficulties in making a rational linkage between the speech and the purported act, for the provision provides a "subjective standard."[90] It is difficult to judge how much percent of the public should likely to understand the statement as in/direct encouragement or inducement to the commission, preparation or instigation of terrorism. Mesenbet said that "the law does not provide an objective assessment of the form of a speech made and the *mens rea* of the speaker but rather shifts the test in favor of the audience."[91] Besides, the English version of Article 6 does not mention the mental element required to prosecute a speaker however, the Amharic version (prevail over the English version) criminalizes both negligent and intentional act of encouragement of terrorism).[92]

As repeatedly happen, this provision results in the prosecution of journalists for reporting, and politicians for writing about individuals or groups deemed to be a terrorist.[93] For instance, all the 24 defendants in the case of '*Federal Prosecutor vs Andualem Arage and others'* are charged for in/direct encouragement and other inducements of terrorism.[94]

The application of vague and overly broad crimes without defining with sufficient precision results in prosecuting individuals who innocently exercise their free speech right. For instance, the UN Human Rights Council said that Mr. Eskinder Nega is convicted "due to the use of his free expression rights and activities as a human rights defender."[95] The UN Human Rights Committee too expressed its concern that the inclusion of vague words like "direct or indirect encouragement and other forms of inducement" may chill free speech.[96]

In its Resolution No 1624, the United Nations Security Council calls states to prohibit incitement of terrorism by legislation.[97] The Security Council makes clear that it condones penalizing glorification (*apologie*)[98] or justification of terrorism that may incite terrorist acts.[99] However, the probability of abusing provisions that criminalize remote actions, like

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[89] *Id*, at 2.

[90] Mesenbet Tadeg, *Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges' (2016), 5* Journal of Media Law and Ethics 1 / 2, 66, 93 (2016).

[91] *Id*, at 93, and Article XIX, *supra* note 70.

[92] Besides, unlike the American jurisprudence, a speech that is not "*likely to incite immediate lawless action"* is outlawed. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[93] Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), 21.

[94] *Id*. Andualem Aragie is opposition politician who has been sentenced for life based on the Anti-terrorism Proclamation.

[95] *Opinion Adopted by the Working Group on Arbitrary Detention*, A/HRC/WGAD2012/62 (2012).

[96] CCPR/C/ETH/CO/1, *supra* note 69, at 4.

[97] United Nations Security Council Resolution 1624, available at http://www.state.gov/j/ct/rls/other/un/65761.htm (accessed 15 September 2016).

[98] The Terrorism Act of UK defined glorification as "any form of praise or celebration" that helps for the commission or preparation of terrorism "in the past, in the future or generally". Articles 1 (3) and 20 (2).

[99] *United Nations Security Council Resolution 1624*, *supra* note 97.

encouragement and incitement, is high since "the commission of the crime is established without the need to show the actual resulting harm.[100] Therefore, legal provisions that criminalize such actions should be framed cautiously, narrowly and in line with criminal justice system so that they may not unduly restrain freedom of expression.[101] For instance, indirect encouragement committed negligently to the preparation of terrorism is difficult to prove in a court of law. For the encouragement is indirect, and it is recklessly which meant to make others get prepared to commit a terrorist act.

The ECtHR has a strong jurisprudence on freedom of expression. Freedom of expression may be trammeled in order to curb terrorism and maintain public order. Even though national authorities do have a "margin of appreciation", the Court plays a supervisory role of checking whether the national discretion is applied in line with the human rights standards of the Council of Europe.[102] The restriction should be prescribed by law, to safeguard national security and must be necessary in a democratic society. There must be a "pressing social need" that the government aims to meet by restraining freedom of expression.[103] The interference must be proportionate to the aim pursued and the evidence produced by domestic authorities must be "relevant and sufficient" to vindicate the restriction.[104] The "nature and severity" of the measure should also be assessed to determine whether the restriction is proportionate to the aim sought to achieve.[105]

State Parties do have a wide margin of appreciation to deal with remarks that incite violence.[106] Besides, ECtHR is of the opinion that media should not be a vehicle for the promotion of violence.[107] In *Erdoğdu case*, the Court ruled that analytical issues that do not reach to the magnitude of incitement to violence may not be inhibited no matter how they are unpalatable to the government.[108] However, the Court ruled in *Gual case* that the alleged speech does not encourage the use of violence and the government has violated Article 10 of the Convention.[109] This ruling seems that the Court tolerates to criminalize encouragement of violence. The *contrario* reading of the statement seems that Article 10 of the Convention would not have been violated had the alleged speech encouraged the use of violence.

Nevertheless, the Convention on the Prevention of Terrorism of the Council of Europe prohibits only "provocation of terrorism" as defined in Article 5. This definition is narrower than "encouragement of terrorism" as stipulated, not defined, in Article 6 of the Ethiopian Proclamation. First, it does not incorporate ambiguous phrase, as "some members of the public" but it requires the message to be distributed to the public, and it does not take the subjective element (the understanding of the public) into consideration. Second, it includes the *mens rea* of the speaker. That means the speaker should have the *intention* to incite terrorism. Thirdly, unlike

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[100] Mesenbet Tadeg, *supra* note 90, at 93.
[101] *Id*.
[102] *Gul and Others v Turkey*, Eur. Ct. H. R. Application No 4870/02 (2010), Para 36.
[103] *Id*.
[104] *Id*, Para 37.
[105] *Id*.
[106] *Erdoğdu and Ince v. Turkey*, Eur. Ct. H. R, Applications nos. *25067/94 and 25068/94* (1999), Para 50.
[107] *Id*, Para 54.
[108] *Id*, Para 52.
[109] *Gul and Others v. Turkey*, *supra* note 102, Para 44.

the Ethiopian law that criminalizes in/direct encouragement or other inducement, the Convention only prohibits incitement. Fourth, the Ethiopian law penalizes in/direct encouragement or other inducement of remote crimes like preparation or instigation of terrorist acts. In contrast, though inchoate crimes like organizing are banned, the Convention only inhibits the incitement of the commission of terrorist acts. Moreover, the Convention explicitly sets principles that must be observed while countering terrorism. The Convention sets that any measure that is meant to curb terrorism should not excessively impinge on human rights like freedom of expression.[110] It also sets out that anti-terrorism measures should pass through the three-part test and may not be arbitrary and discriminatory.[111]

Moreover, the Committee of Ministers of the Council of Europe calls the member countries not to equate journalistic reporting with supporting or encouraging terrorism, and to "adequately and clearly define" incitement of terrorism.[112] However, under the Ethiopian law, journalistic reporting about terrorists and their organizations, or censuring the anti-terrorism policies of the government may be prosecuted as advice, encouragement, or inducement of the commission, preparation or instigation of terrorism.[113] Interestingly, the South African legislation only criminalizes remarks that have the potential to incite terrorism.[114] However, this inhibition should be decided on a case-by-case basis and must pass the constitutional muster. The restriction imposed on the speaker under the pretext of inciting terrorism shall pass through the maze of tests set out under Article 36 of the South African Constitution.

C. Journalistic Privilege of Confidentiality of Information and Protection of Sources

The Ethiopian counter-terrorism law imposes an obligation on individuals and media to furnish information that is deemed relevant to the protection of terrorism, or the prosecution or the conviction of a terrorist. These provisions impede journalists to exercise their investigative, journalistic and reporting duty. Forcing journalists to disclose their sources and information inhibit the flow of information and hinder the media from playing a public watchdog role, hamper the public to make their own opinion and adversely affect the press from providing reliable and accurate information.[115] Hence, for instance, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information categorically prohibit compelling a journalist to divulge her/his information and sources to protect national security.[116]

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[110] *Council of Europe Convention of the Prevention of Terrorism*, (Warsaw, 16.V.2005) Article 12.

[111] *Id*, Article 12 (1).

[112] Council of Europe, *Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism* (2005), 2. They declared "…the mere fact of reporting on terrorism cannot be equated to supporting terrorism. It is also legitimate to engage in open dialogue and public debate about the causes of terrorism or about political issues surrounding it."

[113] The Anti-Terrorism Proclamation, *supra* note 3, Article 6 cumulative with Article 5(1)(b).

[114] Anti-Terrorism Act of South Africa, *supra* note 74, Article 14.

[115] Council of Europe, *Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information* (2000), 1. *Goodwin v. the UK*, Eur. Ct. H. R. Application No 17488/90, Para 39.

[116] The Johannesburg Principles, *supra* note 30, at 18.

There are provisions of the Ethiopian Anti-Terrorism Proclamation that raise serious issues regarding the right to freedom of expression and access to information. Article 12 of the law enshrines that failure to provide information related to terrorism will result in rigorous imprisonment from three to ten years.[117] Any media or private individual shall furnish any information that is relevant for the prevention of terrorism or the prosecution or conviction of terrorists unless she has a *reasonable cause* to act otherwise. However, the phrase *reasonable cause* is not defined in the Proclamation. Nor is it necessary to give a static definition, since it is more appropriate to define it on a case-by-case basis. Therefore, courts have the discretion to define *reasonable causes* that justify a failure to furnish terrorism-related information to the police. The journalistic privilege of confidentiality of information and protection of sources *may* be considered as *reasonable causes* that justify failure to inform the police. However, it should be backed by exceptions. The court has to define a *reasonable cause* as broadly as possible to give a wider breathing space to the right of access to information and freedom of expression. However, the privilege of journalists may not absolutely save a journalist from divulging her source or information. In the ECtHR jurisprudence, if vital public and individual interests are at stake, despite its role in a democratic society, the privilege may not be protected.[118]

Terrorism poses a threat to individual and public interests. Therefore, preventing terrorism, prosecuting or convicting a terrorist justify compelling journalists to disclose their information or/and sources. Nonetheless, the Ethiopian Anti-terrorism Proclamation does not provide conditions whereby a journalist may be compelled to disclose her information or sources. The law also failed to give the power to the court of law to assess in each case whether the compulsion of a journalist to disclose her information or sources is necessary and proportionate to prevent terrorism, prosecute and convict a terrorist.

In the Council of Europe, limitation of the non-disclosure of journalistic information and sources is not absolute. The right is subject to Article 10(2) of the Convention.[119] As it transpires from the ECtHR jurisprudence, the disclosure of information or sources should be ordered after assessing whether the measure is proportionate and necessary to the aim pursued, including the prevention of terrorism, prosecution or conviction of a terrorist.[120] The court must ascertain that the evidence produced by the police, prosecutor or anti-terrorism task force to restrict the right is "relevant and sufficient."[121]

Moreover, the Committee of Ministers of the Council of Europe is of the opinion that the principle of non-disclosure of journalistic information and sources is not only limited to

[117] Anti-Terrorism Proclamation, *supra* note 3, Article 12: Failure to Disclose Terrorist Acts. Whosoever, having information or evidence that may assist to prevent terrorist act before its commission, or having information or evidence capable to arrest or prosecute or punish a suspect who has committed or prepared to commit an act of terrorism, fails to immediately inform or give information or evidence to the police without reasonable cause, or gives false information, is punishable with rigorous imprisonment from 3 to 10 years.

[118] *Goodwin v. UK*, *supra* note 113, Para 37.

[119] Council of Europe Recommendation No. R (2000) 7, Principle 3.*supra* note 115.

[120] *Id*.

[121] *Goodwin v. the UK*, *supra* note 115, Para 40.

journalists.[122] However, it also applies to those persons who get access to the journalistic information due to their professional linkage with journalists, like editors.[123]

Confidentiality of journalistic information and sources has no statutory protection in South Africa. The counter-terrorism legislation imposes on any person an obligation to give information about a person who intended to commit or has committed a terrorist act or a place where she hides.[124] Section 189 and 205 of the Criminal Procedure Act underpin such provision. These provisions oblige a person, including a journalist, to be subpoenaed, appear before a court and give testimony of the fact that she knows or reveals any physical evidence in her possession under the pain of punishment of contempt of court if she failed to appear without a "just cause".[125] The Criminal Procedure Code of South Africa and the anti-terrorism legislation of Ethiopia exempted those who do have reasonable cause from reporting duty. On the contrary, the duty to report in the anti-terrorism legislation of South Africa is formulated without exception. The counter-terrorism legislation should be interpreted in line with the South Africa's Constitution that guarantees media freedom. Effective protection of freedom of expression requires the confidentiality of journalistic information and sources. Therefore, journalists should not be denied a privilege, nor they should be granted an absolute protection from revealing their information and sources. An absolute denial of the privilege will unnecessarily hamper the media from playing its informative, reporting, critiquing and public watchdog role. An absolute guarantee of the right of journalists' to confidentiality of information and protection of sources will be detrimental to the interest of the public. The qualified privilege of journalists to the confidentiality of information and protection of sources will let the court weigh competing interests of a journalist and the public. Therefore, the exception of "just cause" set out in the Criminal Procedure Code should play a role while implementing the counter-terrorism legislation. The "just cause" exception ought to be interpreted on a case-by-case basis and compatibly with Article 36 of the South African Constitution.

Additionally, the Ethiopian law imposes a duty on any person or institution to disclose any information that a police "reasonably believes could assist to prevent or investigate terrorism cases."[126] This imposition does not take into consideration the international standard of the protection of journalists' sources and confidentiality of information, which are indispensable for the free flow of information, protection of whistleblowers and existence of a democratic society. Nor does the law obliged the police to request a court warrant to access information and documents.

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[122] "The term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." Committee of Ministers Recommendation No. R (2000) 7, *supra* note 115, at 2.

[123] *Id*, at 3. *Principle 2 (Right of non-disclosure of other persons):* Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established [in the recommendation that sets protection for journalists from any compulsion of disclosing journalistic sources].

[124] Anti-Terrorism Law of South Africa, *supra* note 74, Art 12.

[125] South African Criminal Procedure Act N0 51 (1977).

[126] Anti-Terrorism Proclamation, *supra* note 3, Article 22; Article XIX, *supra* note 70.

As highlighted above, the journalistic privilege of confidentiality of information and protection of sources is recognized internationally.[127] And it may only be trammeled with exceptional circumstances. For instance, the Declaration of Principles on Freedom of Expression in Africa issued by the African Commission on Human and People's Rights provides that confidential journalists' sources and information may only be disclosed provided that:

> the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defense of a person accused of a criminal offense; the information or similar information leading to the same result cannot be obtained elsewhere; the public interest in disclosure outweighs the harm to freedom of expression; Disclosure has been ordered by a court, after a full hearing.[128]

Moreover, The UN Special Rapporteur on Human Rights and Counter-Terrorism has found that confidential information and sources may be divulged when the "need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature and the necessity of the disclosure is identified as responding to a pressing social need."[129]

Likewise, the Special Rapporteur on Freedom of Expression and Access to Information of African Commission on Human and Peoples' Rights, along with her fellows of the UN, OAS, and OSCE has said that confidential information and sources may only be divulged in exceptional circumstances.[130] The joint declaration states that a journalist may be forced to disclose confidential information or sources if it is decided by the court that it is "necessary to protect the public interest or private rights that cannot be protected by other means."[131] Therefore, a journalist may only be forced when the court as a last resort order the disclosure of confidential information or sources. Besides, the court should enjoin to disclose information if it is necessary and proportionate to protect individual and public interest.

D. Surveillance and Interception

Surveillance and interception of communication are relevant to prevent terrorism or to prosecute and convict terrorists. However, unfettered executive power for conducting surveillance or intercepting communications divests an individual of freedom. As the UN Special Rapporteur

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[127] Silencing Sources: *An International Survey of Protections and Threats to Journalists' Sources* (Privacy International, November 2007). Available at http://www.privacyinternational.org/sources ; *Legal Protections on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States* (PI and OSCE, May 2007), available at http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf (accessed 8 October 2016).

[128] The Declaration of the Principles of Freedom of Expression in Africa, *supra* note 60.

[129] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Doc. A/HRC/13/37, 28 December 2009.

[130] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 9 December 2008. Available at www.osce.org/documents/rfm/2008/12/35705_en.pdf (accessed 5 November 2016); *Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism* (2005), *supra* note 112.

[131] *Id.*

pointed out, surveillance and interception should be "case-specific interference, on the basis of a warrant issued by a judge on showing of probable cause or reasonable grounds."[132]

Article 14 of the Ethiopian Proclamation bestows to the National Intelligence and Security Service (NISS) a right to intercept any means of communication and conduct surveillance on any person. Obviously, this executive privilege undermines human rights like the right to privacy and freedom of expression. The Committee of Ministers of the Council of Europe has declared that surveillance without effective safeguards has "a chilling effect on citizen participation in the social, cultural and political life and, in the longer term, could have damaging effects on democracy."[133]

Though the Ethiopian National Intelligence and Security Service (NISS) practically intercept and conduct surveillance without court authorization, the law stipulates that this responsibility should be undertaken after securing a court warrant. When the court is requested to give a warrant to intercept communications or conduct surveillance against individuals, it should reasonably be convinced that the action is sufficient and necessary to advance the prevention of terrorism, the prosecution or conviction of a terrorist. It should also make sure that the acts of the executive, NISS for that matter, do not excessively restrict human rights.

The ECtHR is of the opinion that a mere existence of a law that permits surveillance runs against the right to privacy and the right to freedom of expression.[134] However, this interference may only be justified if it is in accordance with a law, meant for protecting a legitimate aim and it is necessary in a democratic society.[135] The Court accentuated that "surveillance of citizens… are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."[136] Besides, surveillance and interception must be "strictly necessary… for the obtaining of vital intelligence in an individual operation."[137]

Though judicial authorization is required to conduct surveillance and interception in Ethiopia, the Proclamation does not set out any safeguards to minimize the misuse of surveillance power. In contrast, the European Court of Human Rights has developed minimum safeguards that must be incorporated in law to prevent abuse of surveillance power. Besides, in the Ethiopian law, interception or surveillance may be conducted against any suspect of terrorism. However, the Committee of Ministers of the Council of Europe recommends that "special investigation techniques", like surveillance and interception, "should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared,

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[132] Report of the Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms While Countering Terrorism, A/HRC/13/37 (2009), 9.

[133] Declaration of the Committee of Ministers on Risks to Fundamental Rights Stemming from Digital Tracking and other Surveillance Technologies (Adopted by the Committee of Ministers on 11 June 2013 at the 1173rd meeting of the Ministers' Deputies).

[134] *Szabo and Vissy v Hungary*, Eur. Ct. H. R. Application no. 37138/14 (2016) and *Klass and Other v Germany*, Eur. Ct. H. R. Application No 5029/71 (1978), *Weber and Saravia v. Germany*, Eur. Ct. H. R. Application No. 54934/00 29 (2006)

[135] European Convention on Human Rights (1950), Article 8 (2) and 10 (2).

[136] *Szabo and Vissy v Hungary*, *supra note 132*, Para 54 and *Klass v Germany, supra note 134*, Para 42.

[137] *Szabo and Vissy v Hungary*, *Id*, Para 73.

or is being prepared."[138] The Committee appreciates the intrusive nature of the "special investigation techniques" against freedoms and recommends using them restrictively in exceptional circumstances where it is necessary to prevent a serious crime or to prosecute or convict a dangerous criminal, like a terrorist. The ECtHR too is of the opinion that the law that permits surveillance should also address:

> the nature of offences which may give rise to an interception order; the definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.[139]

Surveillance and interception are allowed in the Ethiopian Proclamation to prevent and control terrorist acts. A person who is suspected of terrorism is liable to have been surveilled or their communications intercepted. However, as it has been discussed in Section III (A) and (B), the broad and vague definition of terrorism may pose a problem to set out clearly the categories of people who are liable for such kind of measures. The procedure how and the time limit when a surveillance is conducted are not provided. Nor circumstances of communicating the data to the third party or how they will be destroyed or retained are detailed (except that Article 14(2) says information obtained through interception remain secret). However, since the Proclamation envisages judicial authorization of surveillance and interception measures, courts may not rubber-stamp executive requests. Rather, it should be satisfied that adequate safeguards are provided and must give a direction on how the measures should be undertaken without unduly violating individual freedoms.[140]

The ambit of this article only extends to discussing the anti-terrorism laws of Ethiopia, South Africa, and Council of Europe. It narrowly focuses on those rules that impact freedom of expression of individuals. Therefore, though South Africa has laws that allow and regulate surveillance[141], it is not purported to be discussed all here, for they rest out of the scope of this piece. On the other hand, the counter-terrorism act of South Africa (Protection of Constitutional Democracy against Terrorist and Related Activities Act 33) does not include provisions that

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[138] Council of Europe Committee of Ministers, Recommendation Rec(2005)10 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism, Article 4.

[139] *Szabo and Vissy, supra* note 134, Para 56.

[140] In *Szabo and Vissy v. Hungary*, the Court expressed its views that it "must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society." Para. 57.

[141] The Regulation of Interception of Communications and Provision of Communications Related Information Act (Act 70 of 2002) (RICA); The Protection of Personal Information Act (Act 4 of 2013) (POPI) ; The Financial Intelligence Central Act of (Act 38 of 2001) (FICA); The Intelligence Services Oversight Act (Act 40 of 1994) (ISOA); The Cyber Crimes and Cyber Security Bill (2015) (CAC); The Electronic Communications and Transactions Act (Act 25 of 2002) (ECTA); The General Intelligence Laws Amendment Act (act 11 of 2013) (GILAB); The Criminal Procedure Act (Act 51 of 1977) (CPA); The Films and Publications Act (Act 65 of 1996) (FPA)

allow surveillance and interceptions. However, it is apt to make a passing remark with regard to the Regulation of Interception of Communications and Provision of Communications-Related Information Act of South Africa (RICA). Unlike the Ethiopian Proclamation but in line with what is envisaged by the ECHR as discussed above, the South African RICA has detail procedures that dictate what should be fulfilled to permit interception. Interception may only be permitted for a designated purpose like foiling terrorism. Prior to granting a warrant to intercept communications, the court should be satisfied that the interception is helpful for the furtherance of the prevention of terrorism. Interception should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful, or will result in unnecessary risk.[142]

IV. CONCLUSION AND RECOMMENDATIONS

This article has discussed the provisions of the Ethiopian Anti-Terrorism Proclamation that shrink the ambit of freedom of expression comparatively with the standards adopted in South Africa and Council of Europe, including the case law of the European Court of Human Rights.

Despite its practical absence, the right to freedom of expression of individuals is guaranteed in Ethiopia by a constitutional dispensation. Content and effect based restrictions are not allowed except if they are in accordance with the law for the protection of the "well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war." Despite repeated claims of the government, national security, and prevention of disorder and crime are not included in the Constitution as legitimate imperatives to limit freedom of expression. However, the Constitution guides to interpret human and democratic rights in conformity with principles of international human rights laws that Ethiopia has ratified. Moreover, according to Article 9 (4) of the Constitution, all international agreements that Ethiopia has ratified are part of the domestic law. Therefore, it is possible to incorporate national security and prevention of disorder and crime in the jurisprudence as legitimate aims of restricting freedom of expression.

Unlike South Africa and Council of Europe, the Ethiopian Constitution has failed to narrowly restrict the limitations on freedom of expression. The only limitations that are envisaged by the Constitution are "prescribed by law" and a limited number of "legitimate aims" (well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war). It does not prescribe that the limitation be "necessary in a democratic society", which requires a "pressing social need" and the limitation to be "necessary and proportionate" to the aim pursued. Without such limitation, freedom of expression would be restricted excessively. This is the limitation that entails the evidence adduced by state officials to be "sufficient and relevant". This criterion tests the magnitude of the limitation. However, the Ethiopian Constitution failed to devise a mechanism to limit the limitation clause itself.

Though prevention of terrorism or protection of national security is not among the legitimate aims provided by the Constitution to limit freedom of expression, the government frequently

[142] Anti-Terrorism Proclamation, *supra* note 3, Article 16(5) (V).

invokes them. The Anti-Terrorism Proclamation has some limitations that run against the international and regional standards of the protection of freedom of expression. The definitional provision of the Proclamation has some vague and broad phrases that are open to abuse against freedom of expression. For example, a protest with a benign motive that restricts public transport or damage property may be labeled as terrorism. However, these acts fall under the ambit of the right to assembly and freedom of expression. If these actions should be prosecuted (if they transcend the limit), they have to be categorized as less serious crimes than terrorism. Considering ordinary offenses as terrorist acts has a chilling effect on freedom of expression.

Additionally, it criminalizes as terrorism acts that interfere in or disrupt public service during a protest, or threatening to damage property if public demands are not answered. Such kind of acts are far from being conisered as terrorism in South Africa and the Council of Europe. The definition of South Africa's counter-terrorism act attempted to leave a leeway for some justifiable exercise of the right to freedom of expression, like protest and strike. On the other hand, the Ethiopian Proclamation envisages intention of the wrongdoer, which is stricter than its South African counterpart that criminalizes negligence too.

The Ethiopian Proclamation falls short of the standards provided by the Council of Europe and South Africa's counter-terrorism law. Both prohibit incitement to the commission of terrorism, but the Proclamation went further to criminalize "in/direct encouragement of the commission, preparation and instigation of a terrorist act" committed through a negligent or intentional publication of a statement. The Human Rights Committee has outlawed criminalizing encouragement of terrorism which is far from inciting an immediate lawless action. The criminalization of in/direct encouragement of terrorist acts has repercussion on freedom of expression. This is evident from the fact that many journalists and politicians are prosecuted and convicted for transgressing this vague provision. The English version of Article 6 of the Proclamation that criminalizes in/direct encouragement of terrorist acts does not have a reference to the mental element of the speaker. However, negligent and intentional acts of encouragement of terrorism are punishable under the Amharic version (the binding version of the law). Therefore, a person may be prosecuted for his innocent report or criticism under the guise of indirect encouragement of terrorism, even though she does not intend the action. It is too far to create a rational linkage between a terrorist act and a speech claiming that the expression is an indirect encouragement which is committed negligently. Moreover, rather than evaluating the speech in itself, the law includes a subjective element, which is the audience's ability of understanding the speech as an encouragement.

The media effectively undertake its informative, reporting, critiquing and public watchdog role if and only if the confidentiality of their information and sources is guaranteed. However, the Ethiopian Proclamation obliges any individual, including media or a journalist, to provide the police with any information relevant to the prevention of terrorism or the prosecution or conviction of terrorists. The law does not insulate journalists and whistleblowers from the obligation of divulging their sources and information. The law has a leeway that allows an individual not to be forced to disclose her information if she does have a good cause. Though a court is not empowered to give the warrant to force a journalist to disclose her information or

sources, it may *post factum* consider journalistic privilege as a good cause. However, this privilege must be tested against the public interest. Unlike, South Africa and Council of Europe, Ethiopia has failed to provide how a balance may be struck between these two interests, which are a journalistic privilege and a public interest. Nonetheless, it is apt to leave the discretion to courts to decide on a case-by-case basis.

The right to privacy is necessary for the exercise of the right to hold opinion and freedom of expression. The Ethiopian Proclamation permits the conduct of surveillance and interception of communications of individuals who are suspected of terrorism. The mere existence of laws that allow surveillance and interception violate the right of individuals. However, the right to freedom of expression is not an absolute right. Even though the law keeps silent regarding what type of issues should be examined by the court before permitting interception or surveillance, it is evident from other jurisdictions that the measures should be tailored to safeguard democratic institutions and access vital intelligence. The lack of safeguards to minimize misuse of executive power may be compensated by mandatory requirements that the court should consider before issuing a court warrant. Prior to granting a warrant to intercept communications or conduct surveillance, the court should be satisfied that the measure is helpful for the furtherance of the prevention of terrorism. Interception or surveillance should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful or result in unnecessary risks.

Taking into cognizant the role that diversified views play for societal development and building and sustaining a democratic society, the Ethiopian government should start to live up to its constitutional promises. Human rights should not only be abstract ideals but concrete realities and every right holder should benefit from their constitutional dispensation. The government should change its policy of muzzling every critical voice and stop throwing dissidents into jail. The Ethiopian government should also be committed to ensuring the exercise of the right to freedom of expression. It may not involve in outrightly denying shadow reports, statements made by human rights groups, and recommendations provided by international and regional human rights authorities and peer states. Rather, it should evaluate its human rights performances against the tests set by international human rights standards. And, it should endeavor to improve its human rights track records, including freedom of expression. The government should also engage in reviewing the Proclamation and its anti-terrorism practices so that individuals can fully exercise their right to freedom of expression.

Domestic courts should draw upon the experiences and interpretation of the scope of freedom of expression and its limitations in South Africa and the Council of Europe including EtCHR. For instance, despite the absence of "necessary in a democratic society" test in the Constitution, it ought to be incorporated by courts since it is an accepted standard by international and regional human rights instruments that Ethiopia is a party and human rights authorities that the country assented for and endorsed their establishment. Besides, the test is practically proved effective in regions that are praised for their human rights protection. Moreover, Article 9 (4) and 13 (2) of the Constitution open a way for courts to resort to international and regional standards of human rights protection. Building a democratic system

will remain to be a mere rhetoric that is meant for soliciting aid and political support unless the government is truly committed to respect and protect the right to freedom of expression.

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ADMISSIBILITY OF HEARSAY EVIDENCE IN CRIMINAL TRIALS: AN APPRAISAL OF THE ETHIOPIAN LEGAL FRAMEWORK

Gashaw Sisay Zenebe*

Abstract

Despite Ethiopia following a common law approach regarding evidentiary principles, rules and procedural safeguards in criminal trials, the country does not have a codified and compiled evidence law. This problem might partly be attributable to the difficulty of concepts involved in evidences such as hearsay. Because of inadequacy in the legal framework and absence of explicit provision, there was no clear standing as to the status and admissibility of hearsay. Recently, the FDRE Supreme Court Cassation Bench rules hearsay is regulated in the law and makes it always admissible. However, the plausibility of the court's decision is questionable starting from the very existence of hearsay as a rule or an exception, and its constitutionality as well. In this article, an attempt is made to appraise admissibility of hearsay evidence in criminal trials in the Ethiopian legal framework. Accordingly, the following vexing issues will be addressed: Pertaining to the legal tradition it has been adopted, what would be the fate of admissibility of hearsay evidence in the country? Does the term "indirect knowledge" under Article 137(1) of the Criminal Procedure Code (CPC) have something to do with admissibility of hearsay evidence? In light of CPC provisions, what conditions former testimony, preliminary inquiry and confession must meet to escape the ban under the hearsay rule? What significance the confrontation clause of Ethiopian Constitution can offer to the admissibility of hearsay evidence and in solving the thorny issue of permissibility as a rule or as an exception? Finally, in contrast to ordinary crimes, hearsay is clearly admissible in crimes of terrorism in the Ethiopian law, why is this so? And the potential risks will be highlighted.

Keywords: Admissibility, confrontation clause, hearsay evidence, indirect knowledge, hearsay exceptions

I. INTRODUCTION

In the law of evidence, there is no jurisprudence that has given rise to a rule known mostly by its plethora of exceptions, which has nearly become *de facto* rule, as hearsay. Hearsay rule has a common law origin, and its admissibility is justified mainly with the exceptions as an exemption from the general prohibition. Though the rule is considered an indispensable condition of trial processes in determination of the truth, a recent restriction of the exclusionary effect opens broader admissibility. Admissibility whether it is broader or narrower is determined by exceptions, rationales for or against hearsay, and the predominant legal tradition practiced in a

*Lecturer in Law at University of Gondar, LL.B, LL.M in Criminal Justice and Human Rights Law, Knowledge/Technology Transfer Coordinator. I am grateful to the internal and external anonymous assessors who provided me invaluable comments for the enhancement of this work. The author can be reached at <gashaw.sisay@yahoo.com> or <gashaw.sisayz@uog.edu.et>.

given country. Accordingly, section one of the article examine the domain and rationales in the admissibility of hearsay evidence, and compares its status in different legal traditions.

Ethiopia adopts the rule from common law jurisdictions without putting ways to make it compatible with part of the ingredients found in the country's continental character. In Ethiopia, the problem starts with the non-existence of a compiled evidence law. Attempts were made to draft evidentiary rules beginning from the Draft Evidence Rules to the recent FDRE Draft Law of Evidence. Partly, this problem arises due to the difficulty of concepts involved in evidences including hearsay. Whatever other virtues it may possess, any attempt to enact such law is still unsuccessful. The drafts were undermined for their failure of providing clear and precise definition of the basic concept of hearsay, and properly integrating the concept with existing concepts of the procedural code (e.g. confessions). The problem is also manifested in the writings of scholars where some say hearsay is not mentioned in any law while others argue that hearsay is dealt within the laws. The debate continues. For one or another reason if we agree on its existence, still the law in itself poses another challenge: whether hearsay is admissible as an exception or a rule.

Admissibility of hearsay evidence in form of its various dimensions and confrontation rights in particular has been provided in the Criminal Procedure Code (CPC) and the 1995 FDRE Constitution respectively. Despite the clear recognition of confrontation right under Art. 20(4) of the FDRE constitution, it is too hard to find explicitly regulated hearsay related provisions in Ethiopia. Owing to this, there are many debatable and unsettled issues relating to the admissibility of hearsay evidence. But still, it is possible to anticipate that, the hearsay rule with its many exceptions as enshrined in the FDRE Second Draft Evidence Law [hereafter Draft Evidence Law] will bring lasting solutions albeit it lacks a binding nature at this level.

The debatable issues include: is the Ethiopian legal system continental or common law type or is it a hybrid of the two major systems? Pertaining to this, what would be the fate of admissibility of hearsay evidence in the country? The other quandary is that the CPC does not explicitly provide for admissibility of hearsay evidence either as a rule or as an exception. In an attempt to determine such admissibility or inadmissibility, scholars rely only and exclusively on Article 137(1) of the CPC's phrase - "indirect knowledge". Does the term "indirect knowledge" have something to do with admissibility of hearsay evidence?

The dimension of hearsay evidence is too broad involving various conceptions ranging from the constitutional value of confrontation right, to former testimony and confession. In the Ethiopian context, does former testimony broadly include a statement given before the police, deposition taken in a preliminary inquiry, or any statement recorded at the same or different trial? And what criteria the law sets to make it admissible? Although unavailability is mentioned clearly under Article 144(1) of the CPC as one criterion, the scope of unavailability in the law is not free from obscurity. Hearsay is also highly attached to confession. Accused persons may give a confession voluntarily or involuntarily. What sorts of acts are considered coercion within the meaning of Article 19(5) of the Constitution so that individuals would be protected against such improper methods (of obtaining evidence) under the hearsay rule?

Normally, unrestricted admissibility of hearsay is prohibited both in ordinary and serious crimes. But in Ethiopia admission of hearsay is legalized in a serious crime of terrorism. This article tries to show how free admissibility of hearsay affects and poses potential risks to human rights, particularly in terrorism crimes proceedings.

The aim of this article is, therefore, to appraise the Ethiopian legal framework on these various conceptions and their relation to admissibility of hearsay evidence and intertwinements of dimensional factors with that of the hearsay rule.[1] Section two does this business. In order to shed light on issues to which the FDRE Constitution and CPC is not clear, an attempt has been made to cite the experiences of foreign jurisdictions that contribute to an understanding of admissibility of hearsay evidence in the Ethiopian criminal justice system.

The work basically uses a doctrinal research strategy with a view to clarify the laws on hearsay by analyzing authoritative sources such as FDRE Constitution, proclamations, and also cases decided by courts, particularly the cassation bench of Federal Supreme Court. Also, with the view to clarifying future developments and perspectives, the draft evidence laws are referred. On the other hand, secondary sources like articles, textbooks, and experiences of other countries have been consulted by comparison.

II. HEARSAY EVIDENCE IN CRIMINAL TRIALS

A. Definition and Scope of Hearsay

It is clear that in most of the legal doctrines definition of a certain concept necessarily determines the scope. Thus, definition and scope are inextricably linked. In the coming discussions, the definition of hearsay is analyzed together with its dimensions that fall within the concept.

Bronstein gives a precise definition and essential elements thereof. Accordingly, hearsay is defined in pertinent part as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' In turn, the term "statement" is defined to include "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.[2]At least two people are necessary for a hearsay evidence to exist. The person who made the out-of-court statement - the declarant -and the person on the witness stand telling the court what the declarant has said. Hearsay is oral, written, or nonverbal conduct of a person intended as a statement, and who has not seen, or known of the fact by himself/herself, but who has heard that statement and later testified what he/she has heard to the court.[3]

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[1]Here, since the problem is that confession, former testimony, and preliminary inquiry are not considered hearsay among the justice organs and domestic literature do not explicate them in the discourse or context of hearsay, this article will show how conceptually they fall in hearsay by interpreting the Ethiopian Criminal Procedure Code and suggests a thorough application of such provisions or evidences.

[2]BRONSTEIN DANIEL, LAW FOR THE EXPERT WITNESS, 2nd edition, CRC press, (1999), at 138.

[3] Chang Ming-woei, *Adoption of the Common Law Hearsay Rule in a Civil Law Jurisdiction: a Comparative Study of the Hearsay Rule in Taiwan and the United States*, ELECTRONIC JOURNAL OF COMPARATIVE LAW, Vol. 10 No.2 October 2006),at 20.

There are two types of definitions of hearsay: assertion-centered and declarant-centered. Under an assertion-centered definition, an out-of-court statement is hearsay when it is offered in evidence to prove the truth of the matter asserted.[4] Under a declarant-centered definition, an out-of-court statement is hearsay when it depends for value upon the credibility of the declarant.[5] This implicates that statement is a fact that the declarant intended to communicate orally, in writing, or with nonverbal conduct. In order for an utterance to fall within the scope of hearsay, first it must be capable of constituting a statement and then it must be asserted as a truth. Many utterances do not amount to statement at all in that the words carry no descriptive content capable of being true or false.[6] Utterances such as "Hello" or "what is your favorite color" or "Gosh!" do not fall within the scope of the hearsay rule as nothing capable of being considered true has been said.[7] Chang gives an example that "If Fred did not tell Mary that Joe stabbed Bill, but instead Mary tells the court that she overheard Fred asking Joe why he stabbed Bill, is Mary's evidence hearsay? Fred's question is not a statement and so, logically, cannot be hearsay."[8]

The crucial point is any non-descriptive utterance which is incapable of being either true or false cannot fall directly within the scope of the hearsay rule and may, if relevant, be admissible as original evidence. Raymond claims that "hearsay is any out-of-court proceedings statement tendered to prove the truth of the matter, and a statement is any representation of fact or opinion made by a person by whatever means (including any representation made in a sketch, photofit or other pictorial form)."[9] Sometimes, a statement is offered into evidence for some reason other than to prove the truth of the matter asserted therein. In instances where a statement is significant merely because of the fact that it was made, it is not considered to be hearsay because it is not being offered to prove the truth of the assertion contained within the statement.[10] Where there is no need to test its truth, it is not hearsay.[11]Thus, the concept or scope of hearsay is limited to those statements that are made to prove the truth of the matter asserted there in.

Generally, hearsay is any form of statement generated out of the court by a person who is not produced in court as a witness, and where it is presented as a testimony to prove the truth of

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[4]*Id*.

[5]*Id*.

[6]REAY ROSAMUND, EVIDENCE, Old Bailey Press, 2001, 3rd edition, at 111.

[7]*Id*.

[8]Supra note 3.Hearsay is any out-of-court statement (oral or otherwise) made by a person and tendered into court to prove the truth of its contents. Emphasizing any out-of court statement to be hearsay, in strict terms, hearsay statements may also be made in a certain court. Hence, a statement previously made in one court if it is considered as evidence before another court or in other trials, it shall be taken as hearsay. Here, credibility of the documentary evidence is not the determinant factor; in so far as it was offered to prove the truth of its contents, it is hearsay. Any out-of-court verbal statement made by a witness other than an accused is hearsay. Unless otherwise provided by law, any out-of-court verbal statement derivative from anyone other than the defendant himself shall be inadmissible, this clearly delimits inadmissible hearsay in principle. Under this concept, out-of-court statements made by co-defendants or victims are inadmissible hearsay. Only out-of-court statements made by the defendant himself are not hearsay.

[9]EMSON RAYMOND, EVIDENCE,Palgrave Macmillan, 4th Edition Replika Press Pvt Ltd, 2006 and reprinted 2008.),at 105.

[10]*Id*.

[11]ROSAMUND,*supra note* 6, at 130-131.

the facts which have been asserted.[12]In spite of this, it is not always easy to draw a distinction between statements that fall within the ambit of the rule and those that fall outside it. This is especially so in the context of the distinction between original evidence and hearsay. Byrne makes a distinction between original evidence and hearsay evidence as follows:

> It is a long-established rule in the law of evidence that original evidence of a statement is admissible not to prove that the statement is true but to prove that it was made. A statement may be admissible as original evidence because it is *itself a fact in issue or the statement is relevant to a fact in issue (emphasis added)* in the proceedings. If the evidence is adduced for either purpose, the fact that a statement is made out of court does not render it hearsay. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely as assertions to evidence the truth of the matter asserted.[13]

It is well-established that the essence of hearsay encompasses not merely oral statements but also written and documentary statements depending on the purpose for which they are adduced in evidence. Conduct also amounts to hearsay in so far as those gestures amount to 'verbal' assertions, that is, statements equivalent to words.[14]It is generally accepted that conduct falls within the scope of hearsay where it is intended to be communicative or to the extent that it asserts some fact.[15]The exclusionary hearsay rule is also applicable to signs, drawings, charts and photographs as they're identifiable as being hearsay in nature.[16]The reason why most documents fall within the ambit of hearsay is not only because the persons who had originally created the documents were not available to be cross-examined in court but also due to the fact that documentary records, almost all the time, are introduced to prove their contents.[17] Thus, the essence of hearsay extends to statements purposively communicated in writing or in any other manner.

A statement purposively communicated by way of a physical gesture is similarly defined to be hearsay.[18]

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[12]Law Reform Commission, *Consultation Paper: hearsay in civil and criminal cases*, March 2010, at 31.Available at www.lawreform.ie.A witness will, therefore, not be prevented from giving evidence about an out-of-court statement if it is being introduced into proceedings merely to confirm that the statement was made or if its making is relevant to an issue in the proceedings.

[13]*Id*, at 28-29.

[14]Donnelly Roy, *The Hearsay Rule and the Uniform Evidence Act*, UNIVERSITY OF TASMANIA LAW REVIEW, Vol. 25, No. 1 (2006), at 85.

[15]*Id.*

[16]*Id*. A representation is defined to include those made orally, in writing or by conduct; it also includes express or implied representations, but excludes those made by incompetent witnesses other than certain contemporaneous representations. Representations once admitted for another relevant purpose, do not come within the concept of hearsay and they can be used as evidence of the truth of the assertion they contain because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. If the assertion was intended, then the risk of intentional deception exists and therefore it should be excluded under the rule as it comes in the concept of hearsay. Unintended assertions on the other hand do not carry the same risk of intentional deception and are therefore not caught by the rule. Assertions are hearsay only if they are intended to be asserted by the declarant; See also Donnelly Roy, *supra note 14.*

[17] RAYMOND, *supra note 9.*

[18] *Id*, at 117-118.

> A women who had had her throat cut could respond to questions by nodding her head or making other signs; and the privy council held that the deceased's nod of assent to a question put to her amounted to a hearsay statement and it was reasoned that the women was incapable of speaking, she was in the same position as someone who was dumb to whom sign language would be verbal communication.[19]

Reay Rosamund correctly argues that in principle there is no reason why evidence of conduct which implies something is not also hearsay.[20] A person stating those facts mentioned above to someone either orally or by writing them down on a piece of paper have no distinction with the person nodding his/her head if someone asks him/her whether they have occurred.

B. Hearsay Evidence in Common Law and Continental Law Jurisdictions

Formerly, it was generally accepted that hearsay was inadmissible except in corroboration of other evidence, a doctrine which emphasizes comparative value rather than admissibility.[21]When the Anglo-Norman inquisitorial system of litigation transformed into the adversarial system, the rule rejecting hearsay was also adopted. What makes inquisitorial system quite distinct from adversarial is that witness's answer to the court's question is allowed to be free-flowing and lengthy, uninterrupted by evidentiary objections from opposing counsel, and hence much evidence that otherwise might be prohibited is aired in open court.[22] In essence, the inquisitorial type is a generalized description of criminal proceedings which prevailed in continental European countries where judicial investigation of cases is the hallmark.[23]When inquisitorial system is compared with adversarial, the role of the parties to a criminal proceeding such as the prosecutor, witnesses and the defendant is very minimal. The following is a summary of a typical inquisitorial system:

> The investigator determines whether the crime had in fact been committed and the identity of the primary suspect, the defendant was incarcerated, both he/she and the witnesses were examined *exparte* and required to answer questions under oath; responses to all questions were put in writing; until the investigation reached its final stages, the defendant was rather vaguely informed about the precise nature of the crime being investigated and the incriminating evidence.[24]

This system emphasizes on the screening stage with the view to protect the innocent as early as possible when compared with the adversarial system. Soon after the completion of all investigatory activities, the investigator would send the file (dossier) of the case to a court for decision. A judge looks for the truth at his own exertions and proceeds on the basis of documents

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[19] RASAMUND, *supra note* 6, at 128.

[20] *Id*.

[21] Morgan Edmund, *Hearsay Dangers and the Application of the Hearsay Concept,* HARVARD LAW REVIEW Vol. 62 No. 2 (December, 1948), at 181.

[22] GLENDON, CAROZZA, AND PICKER, COMPARATIVE LEGAL TRADITIONS, (West Publishing Co., 3rd ed., 1982), at 252-253 [hereafter GLENDON et al]

[23] Damaska Mirjan, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* Vol. 121, No. 3 (Jan., 1973), at 556.

[24] *Id*, at 555-557.

contained in the dossier, and in many countries would never see the defendant.[25]It seems that the investigator works representing the interest of both the defendant and the state (victims). Public prosecutors, even where they existed, were not necessary for the proceedings to commence, develop, or terminate. Furthermore, in many instances the defendant had no right to assistance of counsel.[26]

Common law jury trial presents the prosecutor with more evidentiary obstacles than does the continental criminal trial. Put in other words, in common law there is no freedom of evidence and parties must produce as regulated in the law unlike in the continental where there is freedom to introduce any evidence. Continental law is similar to common law in a sense that witnesses are required to give testimony under oath and its accompanying sanctions; it sometimes requires confrontation. It has, however, retained the essential features of an inquisitorial system and has not adopted the adversarial theory of litigation.[27] And it does not reject hearsay evidence. Continental judges' active role include examination of witnesses that in effect substitute the task of adverse parties in the cross-examination of witnesses of the other party, that is why even the accused could call no witnesses on his own behalf.[28]

The hearsay rule has long been understood as a distinguishing mark of common-law trials, one of the key features setting those trials apart from their counterparts in civil-law jurisdictions. Often the hearsay rule has also been tied to another distinguishing feature of common-law trials, the jury system. It is that lay jurors [in contrast to professional judges] are ill-equipped to evaluate second-hand testimony, the common-law jury trial has thus served both to explain the hearsay rule and to justify it.[29] In so far as it is relevant evidence, most continental law jurisdictions freely admit hearsay, unlike the common-law. However, recently**,** differences in the treatment of hearsay in common-law and civil-law jurisdictions are in practice not that great.

As cited by Sklansky, Richard Lempert mentioned the following grounds for increasingly coming to commonality:

> This "convergence" is partially due to the many exceptions to the hearsay ban in Anglo-American law, and to the fact that "even where exceptions do not neatly fit statements offered," Anglo-American trial judges will often find some way to admit hearsay that they think is reliable. There is convergence from the other side as well: Continental systems . . . often treat hearsay with suspicion, discounting it when it is not corroborated with other evidence, and in one Continental system, Italy, theoretical barriers to admitting hearsay appear similar to what they are in the United States and England.*[30]*

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[25] *Id*, at 557. See also McEwan JENNY, EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW, 2nd edition, Hart Publishing, 1998, Oxford, UK.

[26] Carpzov B.,*Practica Nova ImperialisSaxonica Rerum Criminalum*, Pars III, questio 115 nos. 74-75 lipsiae (Leipzig) 1739 cited in DamaskaMirjan, at 556-557.

[27] GLENDON *et al, supra note* 22.

[28] *Id*.

[29] Richard Lempert, cited in Sklansky David, *Hearsay's Last Hurrah*, THE SUPREME COURT REVIEW, The University of Chicago Press, Vol. 2009, No. 1 (2009), at 31.

[30]*Id*, at 32.

A characteristic feature of court proceedings in Ireland, as a common law state, is that much evidence is delivered orally by witnesses with relevant firsthand knowledge of the matters in issue.[31] A common justification for the system of giving evidence by oral testimony, including the hearsay rule, is that seeing the demeanor and hearing the evidence of a witness in the witness box is the best means of getting at the truth.[32] Likewise, in the UK, the Privy Council stated that without the witness being present in court to give an account of his evidence, the light which his demeanor would throw on his testimony is lost.[33]

It is axiomatic that the Anglo-American (common law) and Continental (civil law) legal systems have different general approaches to trial procedure. More specifically, their perspectives on evidentiary rules, and especially the hearsay principle, differ substantially on the eyes of their respective laws but with a compromise of extremist practical sides. It should be noted, however, that both systems are coming closer and closer to each other. In the common law, hearsay is ostensibly disallowed. Practically, however, with proliferating exceptions, the rule is administered flexibly and not in the strictest manner. The "rule" excluding hearsay testimony is often characterized as an overgrown, "unintelligible thicket," intricate to navigate, replete with at least arguably logical exceptions, difficult to understand and equally difficult to expound.[34] Hearsay is freely admissible in civil law. In reality, however, reliability matters. So, magnitude of either divergence or convergence of the two systems depends on interpretations of the laws into the practical reality by the courts.

Although some sort of similarity as regards hearsay rule emerges to develop between the two systems particularly in modern days, owing to their historical differences and the tendency to remain intact with their long-existing cultures, there is still divergences regarding admissibility of hearsay evidences. This in turn influences the practical situation of the present day courts of the two systems. Thus, the exclusion of hearsay remains a typical feature or staple of Anglo-American evidentiary procedure.[35]

C. Arguments for and against hearsay evidence

There are tough arguments among scholars to the admissibility or otherwise of hearsay evidence. Hearsay is both academic and practical issue because courts often encountered with the necessity

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[31] Law Reform Commission, *supra note* 12, at 18.

[32] *Id*.

[33] *Id*.

[34] Blumenthal Jeremy, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective,* PACE INTERNATIONAL LAW REVIEW, Volume 13 Issue 1, (Spring, 2001), at 93-94.

[35] *Id*, at 94. In a characteristically hyperbolic statement, Wigmore called the hearsay rule "next to jury-trial, the greatest contribution of the common law system to the world's jurisprudence of procedure"; See John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV.437, 458 (1904). In the Continental system, however, hearsay evidence is, again broadly speaking, admissible. Because of the crucial importance of the dossier the public hearing is often much more a verification of its contents, the results of the pre-trial investigation, than the culmination of a contest. Hearsay evidence, being not regarded as fundamentally unreliable, is generally accepted …….. Second, because witnesses are called and, for the most part, questioned only by the court, they do not have the patina of partiality that is possible if they were called by a particular party. Accordingly, their testimony is likely seen as "less contrived as well as less partisan," and thus, even when they do report hearsay testimony, it may appear more reliable. See also Blumenthal, *supra note* 34, at 98.

of determining hearsay admissibility. Generally, in inquisitorial system, the approach to hearsay is undisputed that it is more or less admissible in all circumstances but in common law unless it is justified by grounds, it is not admissible; and this is the point where an argument in favor or against hearsay evidence comes into the picture.

1. Argument in Favor of Hearsay Evidence

Scholars arguing in favor of hearsay raise points of reliability, relevancy, necessity and easier availability of the evidence for its admissibility.

A. Reliability: Here, argument in favor of admissibility is justified only in the existence of clear reliability. The following are instances with such nature of highest reliability even better than any other evidence. Because unplanned statements of a person are naturally uttered out of sincerity, statements deemed as spontaneous would be admitted in the absence of oath and cross-examination if the declaration is closely associated with the present mental or physical condition.[36] Bernard further notes that "The theory of admitting spontaneous utterances and declarations of mental or physical condition of an unavailable declarant is that the assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources."[37]

Any relevant evidence, including hearsay, has at least some absolute reliability because the existence of infirmities and uncertainties of a piece of evidence only justifies discounting the weight given to the evidence rather than ignoring the evidence through exclusion.[38]

B. Necessity: The principle of necessity addresses the need for the specific evidence in a given case. This includes both consideration of other means of proving the issue on which the evidence is probative and determination of the importance of that issue to the case as a whole.[39] Necessity circumstances obliged courts to refrain from excluding not just material evidence to the criminal proceeding but also the reliable one. In contrast to antagonist approach of admissibility, "the argument of free admission has its greatest force when the hearsay declarant is unavailable, and the choice is between admitting the hearsay declaration and having nothing at all."[40] In such circumstances, the proponents of free admission argue that doubts about the reliability of hearsay should go to its weight, not to its admissibility, and the trier of fact should be trusted to give the evidence its proper value.[41]

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[36] Jefferson Bernard, *Declarations against Interest: An Exception to the Hearsay Rule,* HARVARD LAW REVIEW, Vol. 58, No. 1 (Nov., 1944), at 6.

[37] *Id.*

[38] _____ *The Theoretical Foundation of the Hearsay Rules*, HARVARD LAW REVIEW, Vol. 93, No. 8 (Jun., 1980), at 1788. With respect to hearsay, the existence of bias may be uncertain because there is no opportunity to cross-examine the declarant; yet, exclusion of such evidence would be inappropriate since the effect is to discount the evidence even more than if we were certain that the witness was biased.

[39] *Id*, at 1800.

[40] *Id*.

[41] *Id*. Even when the declarant is available, however, use of hearsay may be the most convenient method of producing testimony, and the opportunity of the opponent to call the declarant for cross-examination gives the opponent a means of ensuring that the facts are adequately explored.

C. Availability: Hearsay's easier accessibility in the ordinary course of life makes it less difficult for the criminal parties to dispose, explain, and remember what was happened. In terms of its probative value, sometimes, hearsay may be the best evidence than any other evidence; or even if it is not the best evidence, it would be the only and best available evidence.[42] For instance, the judge might encounter a difficulty of choosing hearsay evidence or none at all, such as may be the case where the victim made statements explaining how he or she sustained harms before his/her death or the original source of the information cannot be located.

D. Relevancy: The exclusionary rule imposes upon court to pronounce hearsay evidence inadmissible unless there is reason to suppose that the interests of justice require admission.[43]The interests of justice should be considered by weighing the disadvantages of excluding relevant evidence against the benefits of exclusion.[44]

For those who advocate abolishing the hearsay rule, relevancy is sufficient. Recently, US courts have shown leniency toward the hearsay doctrine and have admitted such evidence through much flexibility. With the promotion of judicial discretion that enables hearsay evidence of probative value to be admitted, stringent conditions put to some traditional exceptions are relaxed, new exceptions recognized, and open-ended residual exceptions created. American evidence scholars are now discussing seriously the question of whether there has been a *de facto* abolition of the hearsay rule.[45]

2. Argument against hearsay evidence

A. Lesser credibility:[46] Hock Lai claims that exclusion of hearsay evidence is founded "on two assumptions: that the members of the jury are not competent at evaluating hearsay evidence, and the statement of a person who has not been cross-examined is not reliable."[47] Generally, the hearsay rule is usually considered from an external point of view: that is, the effect the rule has

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[42] Law Reform Commission, *supra note* 12, at 32. An obvious example is a statement made by a person now dead that we aren't going to get better evidence than hearsay. There will also be circumstances where the only evidence available on some point at issue is the statement of a three-year-old child. Where the original is lost or has been destroyed, hearsay may be the best evidence – in the sense of the best that is available.

[43] Zwick Crittendon, *Exceptions to the Hearsay Rule Expanding the Limits of Admissibility*, LOUISIANA LAW REVIEW, Vol. 36, (1975-1976), at 447.

[44] *Ibid*. The principal benefit of excluding hearsay is to avoid the risk that the trier of fact will make an error in assessing the value of the evidence in the absence of cross-examination. Especially in criminal cases, where we require a high degree of accuracy to prevent the conviction of the innocent, the court should carefully assess this risk. Where, however, it is better to have some evidence than none at all, even though its weight is not great, or where cross-examination would have made little difference, or where the risk of error is negligible, it would be disadvantageous to exclude a relevant evidence.

[45] Edward J.Imwinkelried, A Comparativist Critique of the Interface between Hearsay and Expert Opinion in American Evidence Law, BOSTON COLLEGE LAW REVIEW, VOL. XXXIII, No. 1 (December, 1991), at 31.

[46] [Different] group of hearsay exceptions are justified by specific attributes of the out-of-court act or utterance which are thought to reduce the [infirmity] weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence." However, this may not be applicable to all types of hearsay evidence; See Laurence Tribe, *Triangulating Hearsay*, HARVARD LAW REVIEW, Vol. 87, No. 5 (Mar., 1974), at 964-965.

[47]HO HOCK LAI, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH,(Oxford University Press, Oxford, 2008) in Mason Stephen, Book Reviews, International and Comparative Law Quarterly, available at http://journals.cambridge.org, retrieved on 18 May 2012.

on the capacity to reach a correct verdict.[48]The common risks associated with hearsay evidence include: faulty perception (the risk that the declarant may have inaccurately perceived the events at issue in his/her statement); and faulty memory (the risk that the declarant does not accurately recall the details of the events at issue in his/her statement).[49]

B. Social acceptance excluding hearsay: From the perspective of securing legitimacy, stronger argument for the rejection of hearsay is portrayed as follows:

> First, the hearsay rules shield the system from possible embarrassment. Admitting hearsay generally creates the possibility that the declarant might later come forward to reveal that injustice resulted from the trier of fact's reliance on such evidence, second, hearsay is distinctive in that its deficiencies can be observed readily by anyone outside the system. These two considerations indicate how a rule against hearsay enhances social acceptance by excluding evidence.[50]

Yet, extensive exclusion of hearsay may itself diminish acceptance since we like to believe that the trier considers all relevant information in reaching its decision. Therefore, maximizing social acceptance implies that hearsay exceptions are appropriate where the danger of exposing error is less.[51]

C. Possibility of deception: The argument against hearsay even goes to public records or professional statements in situations where there is no guarantee to check whether the statement was made due to an influence of fabrication. An expert report, for instance, prepared with the intention to use it at trial apparently lacks impartial objectivity [which renders the statement hearsay], and any person(s) other than on whose behalf the records are kept and the acts are done is going to be disadvantaged by the inability to cross-examine the expert in a witnesses' box unless confrontation right is safeguarded.[52] So, the judge should be permitted to view the demeanor of the maker being subjected to confrontation under the constitution in order to measure the credibility or assessing whether the maker has entered in a calculated deceptive conducts. Otherwise it remained to be hearsay.

D. Constitutional Confrontation: The exclusionary rule is justified because any one or more of three guarantees of trustworthiness may be lacking: 1) the administration of an oath; 2) the opportunity to cross-examine; and 3) the opportunity for the trier of fact to observe the

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[48] *Id*.

[49] Nicolas Peter, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW, 2010 at 1153.

[50] _____*The Theoretical Foundation of the Hearsay Rules*, HARVARD LAW REVIEW, Vol. 93, No. 8 (Jun., 1980), at 1808.

[51] Tushnet Mark and Tribe Laurence, *the Supreme Court, 1998 Term: the New Constitutional Order and Chastening of Constitutional Aspiration*, HARVARD LAW REVIEW, Vol. 113, No. 1 (Nov., 1999), at 240-241. Again, evidence simply that it falls within the firmly rooted exceptions doesn't have the effect of immediate admissibility. Even though evidence satisfies one of the enumerated hearsay exceptions, it is not automatically admissible, because it may be rejected if its probative value is outweighed by the risk of prejudice. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the judges, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[52] Bronstein, *supra note* 2, at 147.

demeanor of the declarant if hearsay evidence is used.[53] A person who gives testimonial hearsay is not required to enter into any lengthy and detailed questioning so as to solve difficulties, reconcile contradictions, remove ambiguities and explain obscurities: he/she retreats by a simple assertion that he was told so.[54] Here, the court is forced to hold back the ambit of cross-examination.

E. Demeanor: Another persuasive key reason in the argument against hearsay is attached with the personal appearance of the declarant. The judge or the jury doesn't see the speaker or declarant in person, and can't weigh qualities like demeanor. Other drawbacks of hearsay may be remedied easily but demeanor cannot be solved. The judge is denied an opportunity to assess that person's demeanor in the witness box. In conclusion, the free admissibility approach (that is the complete abolition of the hearsay rule) was rejected for the traditional reasons of confrontation rights and because of the likelihood that much superfluous evidence would be rendered admissible.[55]

III. ADMISSIBILITY OF HEARSAY EVIDENCE IN ETHIOPIAN CRIMINAL TRIALS

A. The Ethiopian Approach to Hearsay Evidence: General Overview

We have seen that evidence rules particularly in common law jurisdictions are exhaustively regulated under a separate and independent law. However, the Evidence Law in Ethiopia is scattered and is found both in substantive and procedural laws. Since the substantive law is taken from continental countries particularly French, evidence related provisions are incorporated. On the other hand, the procedural laws are adopted from the common law countries, and production of evidence is regulated as per this system. And hence, for more than forty years, the practice of Ethiopian courts in deciding relevancy, admissibility, and exclusion of evidences is highly influenced by the common law rules.[56]

Despite Ethiopia doesn't have a well-articulated set of rules which govern the production of evidence in a trial, there are evidence related provisions being scattered in different codes, when taken collectively, meant to cover some areas of evidence. Even with some ingredients or a number of inputs from the common law legal tradition, the entire legal system is more of civil law legal tradition. Within this general feature of our legal system, the Ethiopian law of evidence is highly influenced by both the continental and common law evidence rules.

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[53] Norman Garland & Donald Snow, *The Co-conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements,* THE JOURNAL OF CRIMINAL AND CRIMINOLOGY, Vol.63, No.1, (Mar, 1972), at 3.

[54] Coleman v. Southwick, 9 Johns. 45, 50 (N.Y. Sup. Ct. 1812) cited in Park Roger, *A subject Matter Approach to Hearsay Reform*, MICHIGAN LAW REVIEW, Vol. 86, No. 1 (Oct., 1987), at 58. The danger that the trier of fact will give too much weight to the evidence is not the only reason for excluding hearsay. Bar groups and others have advanced a variety of additional concerns and they have repeatedly expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase. A party couldn't have the means to know what evidence the other may bring.

[55] RASAMUND, *supra note* 6, at 128.

[56] Elaboration for FDRE Law of Evidence (second draft), Justice and Legal Systems Research Institute (JLSRI), Addis Ababa (August, 1996), at 3 [translation mine]. JLSRI is established by Council of Ministers Regulations No. 22/1997, an autonomous institution having its own legal personality and is accountable to the Prime Minister.

For instance, the highest value attached to administering of an oath and cross-examination makes the process adversarial in its nature. Impeachment of witnesses by the adversary party, objection to and admissibility of evidence are also common law features. Traditionally and practically the mode of litigation in Ethiopia is adversarial in its nature and was dependent up on the party presentation of case. On the other hand, like that of inquisitorial system, Ethiopian judges are permitted to raise repetitious of questions and actively lead the whole criminal proceeding. This gives the Ethiopian system a hybrid flavor. The writer opined that, in view of high illiteracy rate in the country and inadequate counsel assistance, active involvement of judges is justifiable, indeed, particularly for the sake of balancing justice to the indigent.

There are different out looks regarding the admissibility of hearsay evidences in Ethiopia. Both Article 137(1) of CPC and Article 263(1) of Civil Procedure Code in the same wording provide that "[q]uestions put in examination in chief shall only relate to facts which are relevant to the issue to be decided and to such facts only of which the witness has direct or indirect knowledge''.[57] Here, some argued that the phrase "*indirect knowledge"* in the above provisions include 'hearsay evidence'. Thus, they asserted that, in Ethiopia hearsay evidence is admissible as a rule, not as an exception.[58] While, others argue that the phrase '*indirect knowledge'* implies the circumstantial evidences rather than hearsay evidence. They provide that since admitting hearsay evidence as a rule is against the constitutional rights of the accused to confront his accusers as provided under Article 20(4) of the FDRE Constitution, we have to admit hearsay evidence only in exceptional circumstances as that of common law countries.[59] When we see the practice of our courts, the confusion on admissibility of hearsay evidence is apparent. There is no uniform application of the rule; some judges admit it while others do not. The practice has been that some courts regard hearsay evidence inadmissible, while others either accept it fully, or consider it as collaborative evidence.

> Federal Supreme Court, in a crime of rape, ruled that in so far as hearsay evidence validates assertion of the truth, it should be made admissible. As per the ruling, the victim who appeared before the court and gave a testimony of her sufferings by the crime ensures reliability of the evidence given by other witnesses who claimed that the victim told them about the situation; likewise, in crime of homicide case between Public Prosecutor v. Mihret Teshome, Addis Ababa High Court renders decision unambiguously approving admissibility of hearsay evidence. In sharp contrast to this, courts have been seen passing a verdict with the effect that hearsay is inadmissible in all circumstances let alone in criminal

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[57] Criminal Procedure Code of Ethiopia, 1961, Art.137 (1), Proc. No.185/1961, NEGARIT GAZETA, Year 32 [Hereinafter Criminal Procedure Code of Ethiopia].

[58] Menbere Tsehay Tadesse, *The law and Aspects of justice in Ethiopia*, (Addis Ababa, 1999), at 111 -112 [translation mine]; see also Evidence Law Training Module, Federal Justice Organs Professionals' Training Center, at 11. Retrieved from https://chilot.files.wordpress.com/2011/07/module-on-the-law-of-evidence.pdf Evidence is said to be indirect into two situations. The first when evidence is produced to prove the fact in issue when the evidence in question has make use of another source of evidence or it comes to know from another. Hearsay evidence is indirect as it explains a given issue not in a source of direct knowledge or reading content. The second type of indirect knowledge is circumstantial evidence.

[59] Kahsay Debesu and Andualem Eshetu, Law of Evidence: Teaching Material, Justice and Legal System Research Institute, 2009, [unpublished], at 146.

> cases but even in civil cases where standard of evidence is less stringent when compared with criminal cases.[60]

The cassation bench unambiguously confirmed its stand in a very recent case between Enat Hunachew v. Prosecutor, and interpreted Article 137(1) of CPC as having the effect of including hearsay.[61]It hold that the spirit and purpose of the law under Article 137(1) is to make admissible statements where the witness has given about general circumstances of what he/she has observed or heard of someone saying. The practice of courts making hearsay inadmissible, according to Menbere Tsehay, is a contravention of clear provision of the law. He moves on to say that in the continental systems it is permissible for a witness to testify not only facts he came to know in his direct experience but also facts known indirectly.[62] He raised the following argument in upholding the view that hearsay must be admissible automatically in the Ethiopian criminal justice system:

> There is no law out rightly preclude evidence on the ground of its directness or indirectness and what is advisable is to focus on its probative value. By admissibility of hearsay evidence, however, it doesn't mean equal weight has to be given for each sorts of evidence. Admissibility of evidence is completely different from weighing of evidence and caution must be taken not to mix the two concepts because failure to identify them would cause a problem of exclusion against a valuable fact inherently existed in hearsay. Even in other jurisdictions directness goes to weighing of evidence not to admissibility.[63]

Here, the question worth considering is that "does *indirect knowledge* of Article 137 (1) mean hearsay evidence? What is direct knowledge and how is it distinct from indirect one?" A witness may have direct knowledge in a sense that he/she perceived the fact by any of his/her sense organ at the occurrence of the fact. Such may be perceived by a person who directly saw the happening of the fact, who directly heard it. On the other hand, what if an offender already had successfully committed the crime and no one observed him. In such case unless we opt to look for circumstantial evidence, we failed to identify who has acted against the law, and we could not reach at what happened. Thus, the main events will have to be reconstructed with the help of circumstances before and after the commission of the crime. The happening of such facts should be perceived by sense organ. But the problem is that there is no direct evidence to prove the fact in issue. In this case there is indirect evidence as to the facts of the case.

Admissible testimony is limited to matters of which the witness has acquired personal knowledge through any of his/her own senses. The requirement of personal knowledge is closely related to the inadmissibility of hearsay. If a witness testifying to an event acknowledges that the

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[60] See Public Prosecutor v. Mihret Teshome, Addis Ababa High Court, Crime Record No.306/81 [unpublished].See also, ኩልማኒት አድሪያኖ v. ገብረመድህን በኩረ፣ የጠቅላይ ፍ/ቤት የፍ/ብ/ይ/መ/ቁጥር 201/77፤ የፍርዶች መጽሐፍ፣ (1986 ዓ.ም.) ይህም አስተያየቱን የልዩአዋቂ የሙያ ውጤት ሳይሆን ወደ ይመስላል ያዘነበለ የሰሚሰሚ (hearsay) ማስረጃ ውጤት ያደርገዋል በማለት ማስረጃውን ውድቅ አድርጎታል። ከዚህ ውሳኔ የምንገነዘበው ቁምነገር የሰሚሰሚ ማስረጃ ቅቡልነት የሌለው መሆኑን ነው። በሌላ በኩል የፌዴራል ሰበር ችሎቱ በአስገድዶ መድፈር በቀረበው ጉዳይ ላይ የዚህ ዓይነቱ ማስረጃ ሲል የሰሚሰሚ ማስረጃንም የሚያጠቃልል በመሆኑ ተቀብሎታል. See Tesfaye Abate, የስሚስሚ ማስረጃ (Hearsay Evidence), MIZAN LAW REVIEW, Vol. 6 No.1, (June 2012), at 142-143 [translation mine].

[61]Amhara National Regional State Prosecutor v. Enat Hunachew et al., FEDARAL SUPREME COURT CASSATION BENCH, Cassation Record No. 113464, Vol. 19, [August, 2016], Addis Ababa [translation mine].

[62] MenbereTsehayTadesse, *supra note* 58, at 111 -112 [translation mine].

[63] *Id.*

time was getting dark and is somehow difficult to identify who has caused it, the proper objection could be lack of knowledge. But if he/she testifies that some other person has told him/her of the events, he/she is considered not having personal and direct knowledge, making the proper objection to be hearsay. In many situations where it is clear that the witness is relying upon the statements of others although not specifically so stating the objection of hearsay generally suffices. A witness testifying to an extrajudicial statement which is defined as not hearsay or is admissible under an exception to the hearsay rule, is not, however, required to have direct personal knowledge of the matter related in the matter.[64]

Well, still circumstantial evidence covers any admissible evidence from which it would be possible to draw an inference going some way towards proving or disproving the fact in issue.[65]An item of circumstantial evidence is an evidentiary fact from which an inference may be drawn rendering the existence or non-existence of a fact in issue more probable. The fact in issue is not proved directly by a witness relating what he himself/ she herself perceived, so circumstantial evidence is used to prove facts in issue indirectly.[66] Hence, Article 137 seem to refer to circumstantial evidence because it is indirect knowledge of the witness himself/herself that may prove the fact in issue indirectly. Let's assume W observed D bought a gun, planned to go to a distant area, and performed other preparatory acts; and D shot X. Here at the time when the alleged crime was committed W knows D was not in his home and he knows D's preparatory act. W has no direct knowledge as to the actual commission of the crime but he has indirect knowledge from the circumstances he heard and observed, and therefore, in the opinion of the author, indirect knowledge is about circumstantial evidence.

But other writers have a different interpretation.[67] The point made by these writers is a confusion of indirect knowledge mistaken for hearsay evidence. Generally, there is an argument representing the majority of opinions that the term indirect knowledge refers to hearsay evidence. Based on this line of interpretation, Article 137(1) of the CPC and Article 263 (1) of the Civil Procedure Code can be interpreted to permit admissibility of hearsay as a matter of evidence. In the Ethiopian approach, the predominant thinking is, therefore, hearsay is permissible as a rule and not as an exception and courts can freely admit such evidences.

By way of invoking as one important rationale in clarifying the dilemma, type of system, adversarial or inquisitorial, that Ethiopia follows and its relation to the admissibility of hearsay evidence needs to be considered. In the absence of a clear provision of law regulating admissibility in Ethiopia, it is quite logical to resort to what is the predominant legal tradition the country has been adopting in an attempt to determine whether hearsay is admissible as a matter

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[64] GRAHAM MICHAEL, FEDERAL RULES OF EVIDENCE IN A NUTSHELL, (5th ed., West publishing Co.) 2001,at 192.

[65] RAYMOND, *supra note* 9, at 10.

[66] *Id*, at 9-10.

[67] It is argued the rule in examination-in-chief is that questions to be asked should relate to facts of which the witness has direct or indirect knowledge; direct knowledge is acquired by that witness through personal observation; and depending on the nature of the fact, the witness should observe the fact in any of or combination of the five sense organs. See, for instance, Aderajew Teklu and Kedir Mohammed, *the Ethiopian Criminal Procedure*: *Teaching Material*, Justice and Legal System Research Institute, (March 2009), Addis Ababa, at 268 [unpublished]. But it also relate to facts of which the witness has indirect knowledge, a witness is said to have indirect knowledge where he has heard about the fact from another person who has observed the fact and does not personally observe it.

of rule or exception. As Robert Allen Sedler pointed it out, no matter how the substantive codes in Ethiopia are based on the continental model, the country follows the common-law approach to procedure.[68] Accordingly, the 1961 CPC is primarily "a common-law type code."[69]Under the CPC, the "prosecution is adversary rather than inquisitorial, and the traditional safeguards and guarantees of the criminal accused which form an integral part of common- law criminal procedure exist in Ethiopia."[70] That is, the CPC manifests the features of common-law procedure. Strict approaches to hearsay evidence, as has been discussed earlier, are rooted in common law countries which adopt adversarial system that require an exploration of much evidence from the oral testimony of witnesses with relevant firsthand knowledge of the matters in issue, unlike inquisitorial system. Thus, by way of conclusion, Ethiopia's adversarial nature of law seems to require admitting hearsay exceptionally.[71]

Even though, the provisions of our procedural laws are not clear as to whether hearsay evidences are admitted as a rule or as an exception, the draft law of evidence considered hearsay evidences as an exception. Article 14 of FDRE Draft Evidence Law has made the controversy clear by providing that unless expressly provided under the law as an exception, hearsay evidence is inadmissible.[72] Thus, in principle hearsay evidence is inadmissible though it is relevant; but when the statutory provision allows, hearsay evidence is admissible. This provision of the draft evidence law interestingly acknowledged Ethiopia's affiliation to common law origin where hearsay is admissible under strict requirements. Again, the draft law didn't distinguish civil proceeding from that of a criminal proceeding as in the former there is often no restriction of admissibility merely on the ground that it is hearsay (the author is not interested to scrutiny this issue further for it can go beyond the scope or of avoiding astray).

This draft law has enumerated a number of exceptions, and since the lists are exhaustive that do not leave room to courts, the rule is that all hearsay is inadmissible. Moreover, the Ethiopian approach does not allow judicial creation of hearsay exceptions for the interest of justice or high credit of reliability. Declarations against interest including the penal interest, dying declaration,

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[68] Robert Sedler, The Development of Legal Systems: The Ethiopian Experience, IOWA LAW REVIEW, Vol. 53, 562-635(1967), at 576, retrieved from <www.abyssinialaw.com> [Accessed on 23 June, 2015]. See also the reasons why Ethiopia has adopted the common-law approach towards procedures despite the fact the substantive laws are anchored in the continental model.

[69]*See* Stanley Fisher, *Some Aspects of Ethiopian Arrest Law*, 3 J. ETH. L.463, 464 n.6, 1966 cited in Sedler, *supra note* 65, at 624.

[70] Sedler, *supra note* 68, at 622.

[71] Since Ethiopia follows the adversarial system of criminal proceedings and hearsay rule is a notably traditional safeguard of common law, arguably it can be stated that hearsay evidence is admissible only in exceptional circumstances and not as a principle. Due to acute shortage of technologically assisted evidences, there is and has been a traditional and excessive dependency on eyewitness testimony; in fact, it is the sole source of evidence in the Ethiopian courts in most of the occasions. And there is a difficulty in counterbalancing abused testimonies. If that is the case admitting hearsay in exceptional situations is also justifiable from social policy perspective in the sense that it would discourage bias and abuse of witnesses by producing a hearsay evidence in jeopardy of an opponent party.

[72] Evidence Law of the Federal Democratic Republic of Ethiopia (Second Draft), Art. 14 of Chapter Two, August, 2004, Justice and Legal Systems Research Institute (JLSRI), [translation mine]., Addis Ababa [hereafter FDRE Draft Evidence Law]. JLSRI is established by Council of Ministers Regulations No. 22/1997, an autonomous institution having its own legal personality and is accountable to the Prime Minister.

public documents, former testimony, family history and a number of other exceptions are dealt in the law exactly in the same way as the common law approach.

B. Admissibility of Hearsay Evidence vis-à-vis the Right to Confrontation

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the judge to weigh the demeanor of the witness. The confrontation right operates to restrict the range of admissible hearsay and face-to-face accusation to ensure the defendant with an effective means to test adverse evidence.[73]

The confrontation clause of the Ethiopian constitution under Article 20(4) stipulates that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Nevertheless, the language of the constitution does not provide clear guidance about hearsay issues. It is susceptible to a variety of plausible interpretations. In the experience of US with the same constitutional issue, there are mainly two interpretations. In the first interpretation, all hearsay declarants whose statements are offered by the prosecution would be considered "witnesses against" the defendant, and therefore the Constitution would require that the defendant be confronted with them at trial by producing in person the witnesses whose statements is to be used against him.[74] This interpretation would lead to the exclusion of all hearsay. Alternatively, one could interpret the amendment to require merely that the defendant be confronted with whatever witnesses the prosecution chose to produce at trial:

> [Under this interpretation], trial witnesses could testify about hearsay declarations, and the confrontation clause would impose no limits upon the creation of new hearsay exceptions. It would merely require the presence of the defendant when evidence was presented to the trier of fact. The amendment could also be construed so that "witnesses against" the defendant referred only to persons who were available to testify. Under this interpretation, the prosecution would be required to produce declarants for cross-examination when possible, but the statements of unavailable declarants could be freely admitted.[75]

In our constitution the defendant is entitled to confront witnesses in the same wording as the US constitution. The FDRE constitution under Article 20(4) provides "[a]ccused persons have the right to full access to any evidence presented against them, to examine witnesses testifying

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[73] "Courtroom witnesses testify under oath, in the presence of the trier, and subject to cross-examination. Hearsay declarants avoid these courtroom safeguards, which both encourage witnesses to be accurate and expose defects in their credibility. In particular, cross-examination is valuable for testing reliability because it explores weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Thus, hearsay's fundamental evidentiary flaw is the absence of an opportunity to reveal an out-of-court declarant's weaknesses through cross-examination. The exclusion of hearsay evidence is not grounded upon its lack of probative value … rather hearsay is excluded because of potential infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination." See Westen Peter, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* HARVARD LAW REVIEW, Vol. 91, No. 3 (Jan., 1978), at 569-570.

[74] *Id,*at 582.

[75] *Id.*

against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance and examination of witnesses on their behalf before the court."[76]

This constitutional right of the accused is a great challenge to the blind admissibility of hearsay evidence. The constitution renders the accused with an opportunity of cross-examination to challenge the veracity of the witness who may testify against the accused. If the accused has used this opportunity of constitutional confrontation right, it would inevitably require the witness to have a direct or personal knowledge of the facts asserted. At this point, therefore, there might be a clash between the constitution and hearsay evidence because of the difficulty to cross-examine. But we should not focus on the letters of the law by neglecting the real sense of the provisions. Instead, the most important point is to look for the spirit of the law of Article 20(4) that put the various requirements enabling to acquire and test the quality of truth. The availability of cross-examination as in the form indicated in the procedure code has primarily focused on the discovery of truth, or reliable evidence.

Similarly, the constitution practically requires admissibility of evidence that carries only the indicia of reliability and trustworthiness. This is because the aim of the law is to enable the accused to defend his case successfully by the help of cross-examination, an instrument to extract the truth. Successful defense as indicated in the constitution presupposes the right to confrontation with witnesses. Hence, the main objective of cross-examination as per Article 20(4) of the constitution is to find trustworthy and reliable evidence. If this is the case, the exceptions which are statutorily recognized contain exactly the same objective, and justification given to them is clearly on the basis of necessity and circumstantial probability of trustworthiness which render them reliable evidences. In other words, in so far as the evidence to be adduced is reliable in itself, there is no any confrontation right to be negatively affected. At this juncture, the exceptions to hearsay rule would meet the same road and they can go together same journeys with what the constitution has previously pursued. This has a clear implication that the confrontation right of the accused and the firmly rooted exceptions recognized on the basis of necessity, particularized probability of trustworthiness stem from the same core value. Hence, what the constitution practically requires as an end outcome is truthfulness.

The procedural code provides the defendant with an opportunity to challenge the accuracy of the witness testimony by cross-examining his understanding, memory, and narration. In stipulating "[q]uestions put in cross-examination shall tend to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in-chief" under Article 137(3), we understand that the main objective of cross-examination is to find trustworthy and reliable evidence. If this is the point, the message to be conveyed under Articles 20(4) of the constitution and 137(3) of the CPC in light with the constitutional purpose seems to allow admissibility with respect only to exceptions to the hearsay rule. Reading the two laws together signifies that if certain evidence is found to be erroneous or doubtful because of insincerity, ambiguity, and lack of memory that may risk reliability, then it is inadmissible because it is untrue and hence all

[76] Constitution of Federal Democratic Republic of Ethiopia, 1995, Art.20 (4), FEDERAL NEGARIT GAZETA, Proc. No.1/1995, 1st year, No.1.

hearsay evidence cannot freely be admitted. Since questions posed in cross-examination are basically meant to test erroneous, doubtful facts pursuant to Article 137(3), the main objective of the right to confrontation is to find trustworthy and reliable evidence by the help of a device called cross-examination. Therefore, the argument is persuasive that there are firmly rooted exceptions that are capable of achieving the same purpose of reliability even without cross-examination.

Azuibuike argues that confrontation does not ensure that evidence is reliable, but merely exposes the sources of unreliability and provides a basis for evaluating testimony and determining how reliable it is, and cross-examination in itself does not justify exclusion of hearsay.[77] From this one may reach to a valid conclusion that unless other justifications are added, cross-examination alone is not a ground for the exclusion of hearsay.

Nonetheless, there is no doubt that cross examination is an important safeguard. But the point, the author would like to raise is, if we apply hearsay properly, reliability of evidence will be an effective substitute for cross-examination. As such statements of the unavailable person who declares an assertive truth would not be altered whether we employ confrontation to the present witness or not. This implies that confrontation may not necessarily be the sole safeguard. The purpose of furnishing the safeguard of cross-examination, therefore, is not to aid the parties to suppress the truth, but to enable them to avoid the risk that the trier will be misled into mistaking the false for the true. Reliability, therefore, is the primary factor in determining whether hearsay is admissible under our law.

C. Admissibility of Hearsay Evidence in Ordinary Crimes

1. Admissibility of previous disposition of witnesses

Former testimony is a common hearsay exception that satisfies the demands of the confrontation clause and thus provides a means of admitting testimonial hearsay statements. The right to confront the witness who gave testimony in a preliminary inquiry may be met by proving his/her unavailability and the accused's prior opportunity to cross-examine him/her.

A testimony recorded in another court and statements kept in a police report are hearsay if it is produced as evidence to prove the asserted truth. But in the practice of our courts it is made admissible without any limitation. This is a serious problem that deserves closer attention so as to save a person from incriminating himself/herself through perjury crimes. In the Ethiopian courts there are abundant cases that a witness has changed testimonial words given in the police record, and evidence presented to this effect is usually what the police officer has recorded and is compared with what has been said in the court. But the problem is that courts have not considered perjury cases in the context of hearsay and the issue of admissibility is totally

[77]Azubuike Lawrence, *Prohibition against Hearsay Evidence in the USA and Nigeria*, JOURNAL OF AFRICAN LAW (2011), at 250-251.

ignored. When it comes to the experience of other countries, however, police report involving witnesses' statement is rejected unless read and signed by the witness himself/herself.[78]

The CPC Articles 144 and 145 require the prosecution to provide notice to the defendant of its intent to use preliminary inquiry or police reports as evidence at trial. The defendant is then given a period of time in which he may be allowed to object to the admission of the evidence where the live appearance of the statement maker at trial is absent.

Article 144 provides that "[t]he deposition of a witness taken at a preliminary inquiry may be read and put in evidence before the High Court where the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent from the Empire." Thus, deposition given by the witness at the preliminary inquiry may be offered by the prosecutor against the same criminal defendant if the witness becomes unavailable. The strictest requirement of unavailability, as per the above provision, represents a strong preference for the personal appearance of the witness as an aid in assessing his depositions though the demeanor of the witness that was not and normally will not be observed by the judge in the High Court. Apart from unavailability, there are still some conditions that need to be fulfilled. The exception for such deposition is admissible only where it was administered by or taken under oath and subject to cross-examination. Such an interpretation is obtained from reading Article 88 in cross reference to Article 147(1) and (3) of the Criminal Procedure Code which talks about recording evidences given in a preliminary inquiry. In other words, if the defendant had been afforded a full and fair opportunity to conduct a meaningful cross-examination of the witness, the preliminary inquiry is admissible.

Article88 prescribes that "[e]vidence shall be recorded in accordance with Article147 and the evidence of each witness shall be recorded on separate sheets of paper." Article 147(1) states that "[t]he evidence of every witness shall start with his name, address, occupation and age and *an indication that he has been sworn or affirmed."* Moreover, Article 147(3) stipulates that "[t]he evidence shall be divided into evidence-in-chief, *cross-examination* and re-examination with a note as to where the cross-examination and re-examination begin and end." Here, we can see that depositions were recorded subject to cross-examination and on taking of oath. Since testimony is given with safeguards of oath and cross-examination in the previous court, there is no any violation of a confrontation right and is admissible legally as an exception to hearsay because of unavailability.

Despite the fact that such testimony is typically given under oath and the witness is subject to cross- examination, it is treated as hearsay because one of the three advantages of live testimony the opportunity for the judge in the current proceeding to observe the witness's demeanor is absent. Although one of the qualities of live testimony, i.e. demeanor is lacking, what makes Article 145 admissible as an exception to the hearsay rule is because unavailability

[78] Nicolas Peter, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW (2010), at 1158. Since Ethiopian courts consider police reports are automatically admissible, witnesses are forced to face prosecution for altering their words in a trial court. Ethiopian courts pass verdicts without checking whether the police has read to the witness and obtain his/her signature in which case the police report might be admissible as exception to hearsay.

of the declarant constitutes a situation of necessity that enables the court to refer to the asserted truth therein. What constitutes unavailability is expressed in the procedure code exactly in the same way as the FDRE Draft Evidence Law. Rule No. 15(4) of the same says where attendance of a witness is not feasible due to death or physical or mental incapacity, it is deemed the witness lacks competency to testify. Rule No. 16(b)(1) states that absence of a declarant as a witness could not make it hearsay if the statement was made at the same or different trial process or a legally consistent written statement given at the same or different trial where the opportunity to cross-examine had given.

In both laws we see that various conditions of unavailability are enumerated. Among these 'death' is mentioned as one of the compelling reasons. Death, of course, is the clearest case of unavailability necessitating the admissibility of hearsay evidence. On principle, it would seem equally clear that other forms of unavailability should satisfy the necessity principle. The court may admit the hearsay declarations of a living declarant who was old and had lost his power of speech or memory, due to the assumption that the person would not be better than a dead man, in sof ar as the production of his testimony is concerned.[79]Hence, the words of the Draft Evidence Law "mental incapacity" in rule 15(4) can be interpreted broadly to include circumstances of senility which can meet both requirements of unavailability and principle of necessity.

As per Article 144(1) of the CPC, insanity may make a person incompetent as a witness, and hence unavailable. Insanity can be considered as intellectual death particularly in situations where the person will not recover; and this would seem to satisfy the reason of the rule of necessity since the witness is incapable of testifying and being produced as a competent witness as per Article 16(a)(4). Incompetency to testify is defined as inability to recollect, recall as a result of death, physical and mental distortion including illness. Thus, a person's statement could be referred by the court if it is proved that the person is sick, physically or mentally incapable.

Under Article 144(1) persons who left Ethiopia and went abroad or live in foreign jurisdictions are considered unavailable for the purpose of the present law. Upon the request of the prosecutor or the defendant, the High Court may consider the evidence if it is satisfied that the witness no longer exists in Ethiopia. In this Article, what conditions constitute "cannot be found" is open to interpretations. Is it an addition to the lists or is it simply elaborating them? It can be argued that the government or a party must show reasonable steps or efforts to secure the attendance of the witness in which it cannot be made possible in any way. When compared with individual persons, the government is structurally, professionally and financially powerful for which reason the government must shoulder the burden of looking for and finding witnesses. A witness is deemed unavailable by constitutional standards only when physical, jurisdictional, or testimonial impediments prevent him from giving evidence in person.

[79]If a witness cannot be produced in court, his declarations must be admitted, if at all, without the usual safeguards of the oath and cross-examination, no matter what the cause of the nonproduction of the witness may be. However, A defendant wrongfully caused the absence of a prosecution witness to prevent that witness from testifying at his trial, cannot object to the admission of that witness's extrajudicial statements because inherently his confrontation objection to that evidence has been extinguished as a result of his wrongful conduct.

To sum up, the admissibility of testimonial hearsay evidence under the confrontation right is determined by whether the witness is unavailable and the accused had a prior opportunity for cross-examination. Reading Article 144 in the spirit of Article 20(4) of the FDRE constitution prohibits the admission of testimonial hearsay statements of an absent declarant unless he/she is unavailable - defined as being dead, insane, left Ethiopia, sick, unable to travel - and the defendant had a prior opportunity to cross-examine him/her.

2. Admissibility of Confession and the Hearsay Rule

A confession is an admission made by a defendant in criminal proceedings.[80] In the Ethiopian constitution confession is evidence proving ones guilty.[81]It must be noted that a statement made by the accused is considered to be a 'confession' only if it was adverse to him/her at the time he/she made it. Straightforwardly, a statement made adverse to one's personal interest is admissible. However, what if another person enters a confession in respect of the suspect who pleads not guilty? A better comparative explanation, therefore, is that a confession made by the accused is admissible against him/her, for a combination of two reasons:

> First, the principal objection to the admissibility of hearsay evidence – that the declarant is unavailable for the cross-examination – doesn't apply if an out-of-court proceedings statement has been made by a party to the proceedings; after all, a party who has volunteered admission can hardly complain that he/she is unavailable for cross-examination. Secondly, a strong justification is the statement which is inculpatory (self-incriminating) is far more likely to be truthful than one which is exculpatory (self-serving).[82]

This rationale is reflected in the Ethiopian CPC and a defendant may not enter confession against his co-defendant. Besides, our courts practically ruled that defendant's confession would not be considered if the defendant had made damaging remarks against his/her co-defendant.[83] The FDRE Draft Evidence Law No. 16(b)(3) rejects admissibility when an out of court statement made by the accused which is wholly exculpatory in relation to the offence charged is offered at the trial for that offence. Moreover, according to the FDRE Draft Evidence Law No. 16(b)(3), a statement made with a view to expose criminal liability upon another and having the implication that the defendant is innocent would not be admissible unless such statement is corroborated with another evidence.

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[80] Negatu Tesfaye, Materials for the Study of Ethiopian Criminal Procedure (in Amharic), Addis Ababa University, 1991.

[81] FDRE CONSTITUTION, Art. 19(2) stated that "any statement they make may be used as evidence against them in court".

[82] RASAMUND, *supra note* 6, at 164.

[83]Admissibility of confession may also be determined taking into account different circumstances of the case. Take for instance: "If the accused made a neutral or wholly exculpatory statement before the trial (for example, I was elsewhere, playing golf) which subsequently became adverse to him because it was shown to be false, his statement is not hearsay because it is not tendered to prove the truth of what was stated (even though it may be possible to infer from the accused's lie that he was conscious of his guilt, which could be regarded as an implied admission of guilt)."As it has been argued "not every exculpatory comment will be admissible hearsay just because the accused also made a trivial admission; the admission must be significant in the sense that it is capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt taking into consideration the extent of reliance on it as compared to other evidence." See RASAMUND, *supra note* 6.

What if the accused has made a statement which is partly inculpatory and partly exculpatory? This is what the Ethiopian courts commonly encounter. Assume defendant D1 admits committing homicide but claim that he was acting in self-defense. Clearly the whole of any such mixed statement may be given in evidence by virtue of Article 27(3*)* of the CPC stating that "[a]ny statement which may be made shall be recorded". This is because the content of confession should be taken in the wording of the accused and what should be focused is the content as a whole and nothing else. There are limits to the admissibility of mixed statements as an exception to hearsay rule. One instance is where there is no other evidence in support of the exculpatory part of a mixed statement, its weight is likely to be minimal. Here, the draft evidence law requires corroboration as to the exculpatory statements.

With respect to test of reliability, a truthful confession may be the best evidence for the prosecution, and in some cases the only evidence against the accused. Confession is more likely be true because the confessor who falls under reasonable suspicion of the police seeks to get rid of the stress developed as a result of guilty conscience. The constitution, as will be seen herein below, requires that confessions should not be made in circumstances which might cast doubt on their reliability as truthful assertions of fact. In line with this the rules of preclusion to all forms inducement indicated under Article 31 of the CPC intended to impose duties and govern the conduct of the police not to extract both truthful and falsified assertions alike. Statements acquired in repugnant to this law are excluded as the risk of unreliability is apparent.

The primary reason why involuntary confessions are excluded from evidence is that they are unreliable indices of truth: people have been known to admit crimes of which they are innocent, simply to escape the pain of torture or to obtain an irresistible benefit.[84] Failure to fulfill the requirements mentioned under the above article means confession is not qualified to be one of the exceptions to the hearsay rule: and without a justification still confession is inadmissible as hearsay evidence.

Under Article 31(1) of CPC inducement, threat, promise or any other improper methods cause loss of indicia of reliability and particularized trustworthiness which make it remain hearsay and hence inadmissible. Article 19(5) of the FDRE constitution stipulates that "[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible." Confession obtained in comport with the constitution is free and voluntary and is admissible. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it

[84] McInvale Anne, *Evidence- Can Admissibility of Co-Defendants Confessions under the Hearsay Rules Serve as a Minimum Standard for Admissibility under the Confrontation clause?* MISSISSIPPI COLLEGE LAW REVIEW, Vol.8:33, (1987-1988), at 40-41. However, it should be borne in mind that reliability is not the only consideration because confession may still be held inadmissible if it is obtained without giving due attention to the accused's privilege against self-incrimination or Miranda rights. A person should not be compelled to testify against himself/herself. He/she must be warned prior to any questioning that he/she has the right to remain silent, that anything he/she says can be used as evidence against him/her in a court of law. Besides, the suspect must be told that he/she has the right to be with his/her lawyer starting from the pre- detention stage.

refers. The general rule is that a confession is admissible evidence against the person who made it, despite the confession being technically hearsay.

The issue of hearsay pertaining to confession arises when it is particularly received by the police officer without the lawful limits. Interrogation by the police is conducted with a view to use the statement as evidence before the court and any document presented in such a way to prove or disprove the contents asserted there in becomes hearsay. This problem of police interrogation blessed with the nature of hearsay cannot easily be remedied unless we subscribe to the strategies suggested by scholars. Yoseph argued that amendment must be made to Article 27 of the CPC that prevents the police from undertaking interrogation and making Article 35 of the CPC remain and workable as it is.[85] Pursuant to Article 35 of the CPC, even if a statement of confession is recorded by a certain court, the rules that the court shall record the statement in full, read over to the person making the confession and allowing him/her to sign it rectifies characters of hearsay as the statements are now considered his/her own, and hence it can be used by any other court. Even with confession given in the courts, additional rules are required that regulate covert influences and threats used by the police against the suspect before his appearance in the court. Unlike Article 35, therefore, confessions obtained under conditions of Article 27 are hearsay.

Obviously, as it has been stated elsewhere, one of the challenges to the admissibility of hearsay is absence of cross-examination. Confession or police witness reports are hearsay for they are susceptible to fabrication readily by the misconduct practices of the police, involves even layered evidence, and constitutional confrontation is absent. Yet, it must be noted that there are two alternatives to address the problem of absence of cross-examination in a confession. One is that the investigating police officer shall read and obtain the signature of the confessor, and the other is the police officer himself can be cross-examined. Obtaining signature would let the witness adopt police records as his testimony, and then it has become by adoption witness's own statement and can be made admissible in the court.

D. Admissibility of Hearsay Evidence in Crimes of Terrorism

Free admissibility of hearsay is prohibited in ordinary crimes; it is admitted only in definite strict conditions. For a stronger reason in more serious crimes, admissibility should be subjected even to more stringent requirements. The following is a discussion of how hearsay evidence is treated in a serious crime of terrorism by the Ethiopian law.

1. Tool to Stifling Dissent or Bringing Unfair Surprise

Azuibuike says litigation is a gamble.[86] The role of rules in hearsay is to reduce arbitrariness, uncertainty and unpredictability associated with it. If hearsay were freely admissible, it would become difficult to prepare cases. A party would not know what evidences the other had. It is possible, through discovery and deposition, to have notice of the evidence an

[85] Yoseph G/Egziabher, *Involuntary Confession: Comments on Criminal Appeal R/No. 4/71,* Addis Ababa University, Faculty of Law in collaboration with Ministry of Justice, JOURNAL OF ETHIOPIAN LAW, Vol. 12 (1982), Addis Ababa, at 93.

[86] Azubuike, *supra note* 77, at 254-255.

opponent plans to use, however, where hearsay may be admissible, uncertainty remains and one party may thereby spring a surprise on the other.[87] The hearsay rule operates to avoid such unfair surprise.

But Article 23 of Ethiopian Anti-terrorism Proclamation,[88] under its heading of "Admissible Evidences", enumerates category of indirect evidences which would expose the suspect at a great difficulty of impeaching their credibility. Article 23(1) makes intelligence reports prepared in relation to terrorism admissible even if the report does not disclose the source or how it was gathered. If the law admits intelligence reports without further scrutiny into the method of collection thereof, how would the court come to a conclusion that the evidence was obtained legally and fulfilling the criteria of reliability, for instance, absence of coercion-a base for an admissible hearsay exception. In fact, unnoticed intelligence reports in a felony crime of terrorism would make the offender helpless and hopeless in exercising his constitutional right to defense. Similarly, Article 23(2) allows the prosecutor to adduce hearsay or indirect evidences freely and this would create unfair surprise particularly to the accused who had no pre information and notice of evidence, such as, in an unnoticed intelligence reports, previous disposition, and anonymous statements. Thus, the potential risk of unrestricted admission characterizes full of uncertain and unpredictable criminal proceeding.

All over the world, anti-terrorism laws sustained strong criticisms due to the fact that they might inappropriately be used to punish political dissent.[89] Likewise, the Ethiopian Anti-Terrorism proclamation has been criticized by international human right activists and the domestic opposition and private media for its susceptibility to be used for the purpose of stifling political dissent.[90]

2. Does Admissibility of Hearsay Impact Human Rights and the Criminal Justice System?

In the opinion of the author, free admission of hearsay destabilizes the criminal justice process. This is because one of the rationales to the exclusion of hearsay is the need for stability of verdicts and avoiding repudiation by witnesses. Lawyers who need to spend much time and resources for serving justice may discriminate and neglect suspects in a terrorism crime and focus on other ordinary crimes so as to retain their competitive advantage in the trial process. Meanwhile, terrorism suspects would remain without any help of legal counsel.

Ethiopian Anti-terrorism Proclamation allows detention for long periods, and authorities are explicitly permitted to use force to obtain evidence from the accused.[91] Anything said within this long detention might be produced as evidence before the court and still production of such

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[87] Ibid

[88] Ethiopian Anti- Terrorism Proclamation No. 652/2009, FEDERAL NEGARIT GAZETA, 15th Year No. 57, Addis Ababa, (28th August, 2009), Art. 23(1).

[89] See for example Ben Saul, *Defending 'terrorism': Justifications and Excuses for Terrorism in International Criminal Law*, AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW, Vol. 25, (2006), at 20.

[90] See for example, Human Rights Watch, Analysis of Ethiopia's Draft Anti-Terrorism proclamation, (March 9, 2009), at 3.

[91] Ethiopian Anti- Terrorism ProclamationNo.652/2009, Arts 20(3) and Art 21.

evidence is against hearsay rule. Plentiful causes of abuse exist for the state and there will be punishment for hearsay evidence in general and coercive confessions in particular as the law fails to take into account the necessity of trustworthiness. Without qualifying test of trustworthiness, anonymous intelligence reports containing anonymous statements are admissible just like all confessions (both voluntary and involuntary) and hearsay evidences.

Indeed, an effective response to terrorism requires a review of existing procedural law and evidentiary requirements, in order to empower the criminal justice system to fulfil its security and social protection duties.[92] For instance, admissibility of unnoticed intelligence reports may be justified because of sensitive security issues. Besides, witnesses may be granted anonymity in order to prevent risk to the witness.[93] Nevertheless, the European Court of Human Rights has set some limits on the use of anonymous testimony as it affects human rights of defendants, for instance, access to a fair trial:

> The judge must know the identity of the witness and have heard the witness's testimony under oath and determined that it is credible and must have considered the reasons for the request of anonymity; the interests of the defence must be weighed against those of the witnesses, and the defendants and their counsel must have an opportunity to ask the witness questions through an audio link with a voice transformer; conviction should not be exclusively or substantially based on anonymous testimony.[94]

That is why some states came up with the law requiring corroboration of the testimony of an anonymous witness in order for it to be considered valid. It is necessary to be cautious that substantial modification of criminal procedure is likely to affect protection of individual rights, the safeguarding of the rule of law and the integrity and the fairness of the criminal justice process. Even under compelling circumstances, it is important to design safeguards to prevent any potential abuses.

The reason why the FDRE constitution put evidence related rights under the heading of fundamental human rights and freedoms arises out of the basic need to lead the criminal litigation process fairly in a way to ensure justice. To this effect, the purpose of any law which is subordinate to the constitution should be framed to further the constitutional cause and this can be done by effectively screening the guilty from the innocent. Thus, cross examination, exercising the right to defense, and the right to have witnesses to testify on accused's behalf would help any person to prove his innocence. However**,** the new proclamation does not have methods for better achievement of confrontation rights. Rather, it entirely neglects the interest of innocent people by exacerbating the likelihood of wrongful convictions. Innocent people who might have been subjected to pass in the criminal process would have no other safeguards to defend themselves if hearsay is made to be admissible without any restriction.

Constitutional principles of exclusion of evidence obtained by torture could be violated with admissibility of evidences that do not disclose their sources or methods. Also, an issue of

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[92] UN, HANDBOOK ON CRIMINAL JUSTICE: RESPONSES TO TERRORISM, UNs Office on Drugs and Crime, Criminal Justice Handbook Series, New York (2009), at 41.

[93] *Id*, at 45-46.

[94] Id.

legitimacy may arise if the executive is allowed to produce any kind of evidence; and if admissibility is decided somewhere out of the court-room, the government is losing legitimacy by polluting its good-will.

By making hearsay and indirect evidences, or intelligence reports admissible in court, the law effectively allows production of evidences obtained under torture.[95] Confession admissible without a restriction on the use of statements made under torture is clearly hearsay evidence due to the fact that pain is inflicted on a person with a view to obtain statements. It deprives defendant's constitutional right to be presumed innocent, and of protections against use of evidence obtained through threat, inducement or torture.

In addition, the admissibility of hearsay and indirect evidence and confessions of suspects of terrorism (Article23), use of anonymous witnesses (Article32) and other procedural provisions under the Anti-terrorism Proclamation will undermine defense rights of the accused. Anonymous accusations as per Article12 of the CPC can be disclosed for the purpose of further police investigation and not for automatic admission. But, in the Anti-Terrorism Proclamation, anonymous testimony which is made to be admissible in court can constitute charge independently of other evidences.

Article 14 of the ICCPR expressly entitles everyone with a fair trial and the right to examine witnesses produced against him/her. Ethiopia being a signatory to this instrument and, in fact, has become integral law of the land, it is mandatory to consider whether the production of hearsay evidence in terrorism crimes is compatible with the convention. In line with this any measure taken by the government must be directed towards a legitimate objective (one of those may be convicting those who have actually committed crimes), and is a proportionate way of achieving that objective. The Anti-terrorism Proclamation, however, is not compatible with the provisions of the ICCPR due to its insufficient safeguard to the accused if not it is a total ignorance.[96] It seems for the author that admitting hearsay evidence under all circumstances without supporting it by justifiable grounds would be a violation of human rights because it tampered with the enjoyment of most rights.

Hearsay is another best instrument for the government to abuse its power and to discriminate those who are believed to hold opposite political views. "[For political purposes, therefore, t]he maker could have fabricated the evidence or been mistaken and, 'yet he/she is unavailable for cross-examination on his/her statements. This will prevent the accused to defend himself/herself and it is a violation a fundamental tenet of natural justice."[97]In general, in criminal cases there are compelling conventional reasons for excluding hearsay and to apply them thoroughly, and

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[95] Salisbury Abigail, *Human Rights and the War on Terror in Ethiopia*, Jurist-Forum, (August 2, 2011), available at http://jurist.org/forum/2011/08/abigail-salisbury-ethiopia-terror.php, last visited on August 10, 2015.

[96] Denying terrorism suspects' the right to fair trial is a violation of international human right instruments. Fair trial is the one that lets the suspect exercise guaranteed rights those indicated by Ethiopian constitution under Art. 20(4) which stipulate accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them. Due to confrontation rights it can be argued admitting hearsay evidence violates constitutional rights.

[97] RASAMUND, *supra note* 6, at 108.

the hearsay rules serve the additional function of shielding the accused against misuse of governmental power.

The government says existing laws don't ban hearsay evidence and the proclamation complies with the existing laws and admissibility of hearsay was done taking the very complicated nature of terrorism acts and operations in to consideration.[98] The justification on part of the government seems that admitting hearsay is not a new phenomenon by invoking Article137 of the CPC. But the laws stipulation that says witnesses can testify their direct and indirect knowledge rather opens door for argument; in fact, the law doesn't allow hearsay evidence since indirect evidences are naturally related with the alleged commission of the crime and is that knowledge which is allowed by law not hearsay.

In conclusion, in the Ethiopian criminal justice system, hearsay admission is legalized in a serious crime of terrorism while it is prohibited in ordinary crimes. It can be said admissibility of hearsay to the crime of terrorism is violation of human rights because it enables the government to bring charges against any person who is suspected of committing an offence.

III. CONCLUDING REMARKS

Laws on hearsay are inadequate in Ethiopia. In an attempt to determine admissibility or inadmissibility, scholars and practitioners rely exclusively on Article 137(1) of the CPC's phrase: "indirect knowledge". Generally, there is an argument representing the majority of opinions that the term indirect knowledge refers to hearsay evidence. Based on this line of interpretation, Article 137(1) of CPC can be interpreted to permit admissibility of hearsay as a matter of evidence. In the Ethiopian approach, therefore, the predominant thinking is hearsay is permissible as a rule and not as an exception and courts can freely admit such evidences. Until the Cassation had settled the issue recently, the problem with the absence of explicit legal provision seems to have caused a disparity of court practices on the admissibility of hearsay evidences. Yet, the court came up with wrong decision that equalizes the natures of circumstantial evidence with that of hearsay evidence, albeit the ruling might bring consistency of practices.

Indeed, concluding that hearsay is always admissible is completely inconsistent with the constitution, in particular, to confrontational rights, and overlooks Ethiopia's adversarial type approach, in particular, to procedural codes. Although at the draft stage, the forthcoming Draft Evidence Law of Ethiopia has come up with impressive ideas and legal philosophies anticipating to ending the debate once and for all. Accordingly, Article 14 of the Draft Evidence Law solved the controversy by stipulating that hearsay evidence is admissible only where the law expressly provides so. Hence, only those exceptions which are reconcilable with the confrontation clause in passing through the litmus test of reliability are admissible.

In the Ethiopian context, former testimony includes a statement given before the police, deposition taken in a preliminary inquiry, or any statement recorded at the same or different trial.

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[98] *Salisbury, supra note 95, see also n*ew Ethiopian bill violates international human rights treaties available at www.ethiopianreview.com visited on June 27, 2017.

Admissibility of former testimony is conditional upon two criteria: unavailability and the opportunity of cross-examination. Since the law is illustrative in invoking grounds of unavailability, its scope is not limited only to jurisdictional and personal unavailability. For instance, under the Ethiopian CPC and in practice hearsay may be made admissible against one party when the other party wrongfully causes the declarant's unavailability. Hence, discounting its weight is believed to rectify incongruities of an otherwise inadmissible evidence.

Ethiopia's anti-terrorism law that was enacted in 2009 provides unprecedented enormous powers and permit to adduce anonymous and hearsay evidences. If the prosecutor's terrorism case depends wholly or substantially on the hearsay statement of a witness whose credibility is in real doubt, the accused would inevitably be handicapped by the inability to cross-examine. And punishing the accused with evidence below the acceptable criminal standard for an offence entailing a rigorous imprisonment for life and death penalty is a breach of constitutional right.

The effect the rule has on the capacity to reach a correct verdict is compromised under the Anti-terrorism Proclamation. Thus, admissibility of hearsay evidence exacerbates wrongful convictions, and may be used as a tool to stifle dissent opposition voices. Finally, this would violate a number of human rights including freedom of opinion, and due process, defense and fair trial rights.

Confrontational right should be interpreted to make a distinction between testimonial capacities for which there are circumstantial guarantees of trustworthiness and those capacities for which there are not such guarantees. Since all exceptions do not have the same character of sincerity, it demands a careful analysis in weighing them so differently. In jurisdictions like US, the limit to the admissibility of hearsay is expanding. In the Ethiopian approach, admissibility is limited to categorical exceptions. However, it doesn't suffice to put enumerated list of exceptions. Whenever a need arises, it is advisable to admit numerous extrajudicial assertions by allowing them to escape the general ban against hearsay evidence such as under residual exceptions. Or some form of judicial discretion has to be retained, for instance, by the forthcoming law, that enables inclusion of hearsay evidence which go beyond the recognized exceptions, when it is deemed necessary to the interests of justice, and, when the circumstances generally assure reliability.

Despite confession or police witness reports being hearsay for they are susceptible to fabrication by police misconduct, the Ethiopian courts automatically admit it. The author's proposal involves that in order to eliminate these layered hearsay and constitutional confrontation problems, the police must develop protections by having let the witness adopt the records as his/her testimony by reading it over and signing it. Then it has become by adoption his/her own statement and can be made admissible in the court.

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NOTE ON:

LAWS REGULATING FRANCHISE BUSINESS IN DIFFERENT JURISDICTIONS

Eshetu Yadeta Temesgen[*]

Abstract

In franchise business the franchisor allows the franchisee to use its trade mark, trade name, logos, industrial designs, symbols, emblems and designations in return for royalty related payments. In this rapidly expanding form of doing business, different jurisdictions regulate it differently: by enacting franchise specific regulations; developing court practices or through general contracts provision that protect. Such regulations are primarily meant to protect the franchisee from the information asymmetry and financial and technical power of franchisor. Franchise business regulations and general contract provisions jointly regulate contemporary national and international franchise business.

Keywords: Business, contract, franchise**,** royal,

I. INTRODUCTION

Franchise is "a marketing channel, business structure, legal relationships and the form of governance of business between the franchisor and the franchise".[1] It is national and international strategy for doing business. In this system of doing business franchisor allows the franchisee to use its trade mark, trade name, logos, industrial designs, symbols, emblems and designations. The franchisee in return pays royal fees and other fees based on their agreements. It is a rapidly expanding form of doing business in the international trade.

This mode of business is formally developed in 1950s in US from the lived experience. Later on, it has expanded to the other parts of the world. Nowadays, business franchise has significant contribution to the development of international business since companies can easily franchise their products and services in foreign markets through forming business channel. In relation to regulation of franchise business, there were no specific regulations before 1970s. However, after 1970s, since there were significant problems between the franchisor and franchisee which cannot be resolved by the conventional agreement of the parties, legislations and court actions which regulate the circumstances were developed. In this regard, more than 30 countries have enacted franchise specific regulations to regulate franchise relations. In addition to this, some countries regulate franchise relations by consumer protection laws, competition laws, commercial laws, and general contract laws while other states regulate it simply through court practices of interdisciplinary application and interpretation of laws. Currently, there is no

[*] LL.B (Bahir Dar University), LL.M in International Business and Economic Law (Haramaya University College of Law) The author can be reached at yadetaeshetu@gmail.com

[1] ELIZABETH CRAWFORD SPENCER, THE REGULATION OF FRANCHISING IN THE NEW GLOBAL Economy (Edward Elgar Publishing) 47 (2010).

binding international franchise law. However, international model franchise laws, tax conventions, bilateral trade agreements, investment treaties etc. actually affect business franchise internationally.

In Ethiopia, there is no specific law that regulates franchise business. However, franchise business is technically regulated by general contract law, commercial law, competition law, investment law, intellectual property law, commercial registration and business license laws. This note provides a review of laws in different jurisdictions, more specifically US, Poland, South Africa and Model Law. The selection was made taking in to account the approaches that the states follow in the regulation of business franchising, the strength of the jurisdiction and similarity of the character that the states have with Ethiopia in government structure, development policy, and legal system. Besides, the approach followed by the UNIDROIT model laws are also selected for discussion.

II. CHARACTERISTICS OF FRANCHISE BUSINESS VIS-A-VIS GENERAL CONTRACTS

Franchise business has certain similarities and differences with general contracts. It had basically developed from general contracts. General contract refers to a negotiation in which two parties having capacity and equal bargaining power come together to conclude binding agreement. However, franchise business refers to an agreement by which franchisor grants the franchisee the right to carry out business under his/her marketing system. In case of business franchise, the franchisor and the franchisee have no equal power to make negotiation.[2] The franchisor's offer is take or leave type in which the franchisee have no negotiating power and the franchisor have the power to dominate the negotiation. The unequal power of the franchisor and the franchisee affects the fairness of the contract among themselves. Franchise business also includes a wide range of agreement which is very much complicated.[3] In franchise business, the franchisor has asymmetric power over the franchisee mainly to bring product uniformity.[4] Such uniformity of quality of products have great place in franchise relationship.

Franchise business had been regulated by the general contract law in the past in different jurisdictions. However, nowadays, in most countries where franchise business is well developed, it is regulated by the government regulatory laws in addition to the contract of the parties. In countries that have franchise specific regulations, the regulation of franchise business is not something which is entirely left for freedom of contract of the parties unlike in the case of countries that regulate their franchise business by general contract. In general contract law, the contracting parties have freedom to negotiate and fix terms of contract as long as it does not violate the laws of the state and public morals.[5] Likewise, under franchise business regulations, there are things that parties are necessarily required to do and not to do.

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[2] Mark Abell & Victoria Hobbs, *The Duty of Good Faith in Franchise Agreements: A Comparative Study of the Civil and Common Law Approaches in the EU*, 11 (X) INTERNATIONAL JOURNAL OF FRANCHISING LAW 2-5, (2013), p.2-5

[3] LARRY A. DIMATTEO, THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS (2003), 90-93

[4] *Id*.

[5] Civil Code of the Empire of Ethiopia, Proc. No. 165/1960, Negarit Gazeta, *Gazzet Extraordinary*, 19th Year No. 3, Addis Ababa, 5th May, 1960, Art.1678.

In franchise business relationship, the franchisor and the franchisee are institutionally independent. The franchisor and the franchisee operate their own capital, labor, and administration. However, the two institutions provide uniform service or products under the control of the franchisor.[6] Further, the two institutions run their business under the same trademark, brand and business plan of the franchisor. Besides, they share common trade secret, promotion advantage etc. That means they are independent institutions on one hand and interdependent on the other hand. The franchisor and the franchisee do business in coordinated way. In such case, the franchisor who owns the already successful business allows the franchisee to use his/her trade mark, trade name and products in return for payment of royalty fee.

In this nature of relationship, the problem emanates from information asymmetry and financial and technical power of franchisor. Franchisor can dominate the negotiation between the two due to his/her financial and technical advantages. As a result, governments play the regulatory role by intervening in franchise business relations to protect the interest of franchisees-the weaker party in the transaction.

The way governments approach the regulation of franchise business may differ from jurisdiction to jurisdiction. Some countries have regulated franchise business by enacting franchise specific regulations; some have developed franchise regulations from court practices and some others have regulated the franchise business in their general contracts law by having provisions which protect parties which have no equal bargaining power during negotiation of contract. The development of contemporary franchise specific regulations is primarily aimed at restricting the power of the franchisor, the grandfather of the relationship. Once again, even if the regulation intervenes or limits freedom of contract of the parties, it has left some issues for the agreement of the parties.

Franchise business regulations and general contract provisions jointly regulate contemporary national and international franchise business. Franchise specific regulations require effective general contracts laws to fully regulate franchise business. In the absence of general contracts law, franchise business cannot be solely regulated by franchise specific regulations. In this regard, the two are mutually interdependent. Even in countries where franchise specific regulations are available, the rights and obligations of franchisors and franchisees emanate from both franchise specific laws and contracts. Moreover, general contract law has great contribution in regulating franchise business particularly in jurisdictions where franchise specific regulations are missing.

III. ADVANTAGES AND DISADVANTAGES OF FRANCHISE BUSINESS

Franchise business has both advantages and disadvantages for both the franchisee and the franchisor.[7] To start with its advantages, currently, franchise business are used as a tool for

[6] Rajiv P. Dant, Marko Grünhagen and Josef Windsperger, *Franchising Research Frontiers for the Twenty-First Century*, 87 (3) JOURNAL OF RETAILING 253-268 (2011).

[7] David E. Holmes, The Advantages and Disadvantages of Franchising, Southern California Office, at 2, available at; http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf (accessed on October 2016).

promoting development particularly in Africa.[8] Franchise business contributes for economic development by facilitating technology transfer and know-how as the franchisor usually provides training for the franchisee.[9]

The franchisee among other things starts business with already tested and successful products. This drives him/her to the advantage of access to existing brand and operating systems.[10] The customers' prior awareness of brand has its own positive value for franchisee. Besides, the centrally organized marketing and brand promotions have advantage for the franchisee.[11] Moreover, the ongoing advice, guidance, support, consultations and training offered by the franchisor are also the advantage that franchisee can get.[12] Franchise business is especially beneficial for small and medium scale business institutions that want to expand their products and services. Moreover, the franchisee will exercise individual ownership of businesses, get reduced risk of running new business, easily enter in to the business, and even get reduced burden of opening business.[13]

From franchisor point of view, franchise business has advantages of spreading capital costs for products and services, rapid market expansion and easily developing trademarks. Moreover, it facilitates the distribution of services, maintaining quality control and it brings overall economic efficiency for the franchisor. Similarly, it enables international business franchises to easily penetrate their goods and services in the foreign markets. They can expand their markets in foreign markets without having challenge with the legal requirements, licensing, construction costs etc in foreign states. This facilitates international business by reducing transaction costs.

On the contrary, franchise business has its own disadvantages.[14] The disadvantages start with the existing power balance between franchisor and franchisee.[15]Because franchisor and franchisee have no equal bargaining power, franchisors may abuse their powers. The abuses, the overreaching and the opportunistic behavior of franchisor can be taken as the disadvantages of franchise business.[16] Not only this but also franchise business might have disadvantages from trade competition perspective. The existence of fair trade competition ultimately benefits consumers. The existence of strong trade competition promotes consumer wellbeing. Since there is no trade competition between franchisor and franchise, it avoids the benefits that consumers can derive from competition. The other disadvantage of franchise is that franchise business does not encourage creativity and innovation. Franchisees have no independence to create new

[8] The African Development Bank Group, Enhancing Development in Africa: Franchising Report, at, 1-3 available at; https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/003_FRANCHISING.pdf (accessed on September 2016)

[9] *Id*.

[10] *Id*. at 5-8.

[11] *Id*.

[12] *Id*.

[13] *Id*, at 3-5.

[14] Ibid. See also Griffith University-Asia Pacific Center for Franchising Excellence, Advantages and Disadvantages of Franchising, available at; https://www.griffith.edu.au/__data/assets/pdf_file/0011/599627/Advantages-and-Disadvantages-of-Franchising.pdf?bustCache=52013702 (accessed on September 2016).

[15] *Id*.

[16] *Id*.

products or services. Franchisees have to act under the strict guidance of franchisor. This has the effect of discouraging creativity and innovation.[17] Besides, franchise business is limited by time. Franchisors allow franchisees to use their franchised trademarks or brands for a limited period of time. This can also be the other disadvantage of the franchise business as its age may be shortened irrespective of its profitability.[18] Finally, franchisee's obligation to pay franchise fees to the franchisor can also be considered as disadvantage.[19]

IV. TYPES OF FRANCHISE BUSINESS

Depending on the circumstances franchise business can be divided into different categories. As mentioned above, historically, there were two different types of franchise business; traditional franchise business and formal business franchise.[20] Traditional franchise business as the name implies is informal franchise business that was the prevailing before 1950s.[21] On the other hand, formal business franchise is the formal and broader form of business franchising which has developed after 1950s.[22]

The other category of business franchising is the product or trade mark franchising and business format franchising.[23] These are the two primary forms of business franchising. This category depends on the type and scope of rights that franchisors give the franchisees. The product or trade mark franchising is the simple form of business franchising.[24] In product/trade name franchising, a franchisor owns the right to the name or trademark and sells that right to a franchisees.[25] In this type of business franchising, only a single or limited number of intellectual property rights are used. It is most often seen in the soft drink or automotive industry, where a product is sold or distributed through a franchisee. However, business format franchising is broader than the product/trade mark franchising. In this type of franchising, the franchisor and franchisee have an ongoing relationship, and the franchisor provides a full range of services, including site selection, training, product supply, marketing plans, and even assistance in obtaining financing.[26]

Further, franchise business can be divided into masters franchising and direct franchising based on the relationship between the franchisor and the franchisee.[27] In master franchise business, the franchisor makes contract with the sub-franchisor or the master franchisor and

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[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] Tamara Milenkovic Kerkovic, *The Main Directions in Comparative Franchising Regulation – UNIDROIT Initiative and its Influence*, 13 (1) EUROPEAN RESEARCH STUDIES 105-109 (2010)
[21] *Id*.
[22] *Id*. See also UNIDROIT, Model Franchise Disclosure Law, (Rome) 13(2002). Available at http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf (Accessed on September 2016).
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] UNIDROIT, UNIDROIT Franchising Guide, (Rome, Italy, 2nd ed., UNIDROIT), 300-301, available at; http://www.unidroit.org/english/guides/2007franchising/franchising2007-guide-2nd-e.pdf (Accessed on April 2017).

licenses the master franchisor to further franchise the business to the sub-franchise.[28] In master franchising, there is contractual relationship between three parties, the franchisor, master franchisor and sub-franchisee. The franchisors have contractual relationship only with the master franchisors. In this complicated type of franchising, the master franchisor controls the franchisee (sub-franchisee). This type of business franchise is applicable especially in international franchises. However, in case of direct franchise the franchisor directly makes franchise agreement with the franchisee.

V. NATIONAL AND INTERNATIONAL FRANCHISE BUSINESS

Franchise business can be done at national or international level. National franchise as the name implies is the franchise which is conducted in a single country's political territory between the franchisor and the franchisee. It is governed solely by the domestic laws of the country. In federal set up like the USA, the national franchising is regulated by the laws of the specific states in which the business is operated subject to compliance with the federal franchise laws. Further, if the franchise companies run their business in different states, it is regulated by the law of the franchisor state or by the federal franchise disclosure law. All in all, the business franchising is regulated by the national laws at the national level.

International business franchising implies the franchising business that is extra territorial. In this type of franchising, the franchisor and the franchisee live in different states. Currently, this type of business franchise is becoming one mode of penetrating or investing in a certain foreign markets.[29] There are a number of international business franchises in the world. The international business franchise can be direct unit franchising or the master franchising based on the agreement of the parties.[30] However, master franchising is the best type of franchising as it can easily facilitate the administration, market promotion, and protection of brand for the companies. Regarding the regulation of international business franchising, there is no international law which regulate this type of business. Even if there were some initiatives to have international business franchise laws, there was no success owing to countries reluctance to endorse it. In practice international franchise business is basically governed by the laws of the franchisors states.[31] Besides, different laws of the franchisee states also have an indirect impact on the regulation of the franchise business.[32]

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[28] Id. See also Héctor R. Lozada, J. Hunter, Jr.,Gary H. Kritz, *Master Franchising as an Entry strategy: Marketing and Legal Implications*, 4 (1) THE COASTAL BUSINESS JOURNAL 16-18 (2012).

[29] LARRY A. DIMATTEO (2000). THE LAW OF INTERNATIONAL CONTRACTING, (Kluwer Law International) 360 (2000).

[30] *Id.*

[31] *Id*. See also http://whoswholegal.com/news/features/article/28705/regulation-international-franchising (Accessed on May 2017).

[32] UNIDROIT, Guidelines to International Master Franchise Arrangements, (Rome, 2nd ed.) (2007).

VI. LAWS GOVERNING FRANCHISES IN DIFFERENT JURISDICTIONS

Laws governing franchise business are different in different countries, and follows different approaches.[33] Some countries have pure franchise specific regulations which govern the business relationship between the franchisor and the franchisee. In these countries, the regulations specifically focus on the areas of potential abuse in franchising such as pre-contractual disclosure and the inter-relationship between the franchisor and franchisees. These are generally symptomatic of more developed markets and are found in the USA, Australia, Canada, Brazil, Taiwan, Georgia, Mexico, France, Spain, Italy, Belgium and Sweden. Some of the laws in these countries are developed from the consumers' protection laws and competition laws. Currently, literatures show that there are around 30 states that have franchise specific laws in the world.[34]

On the other hand, some countries have franchise specific regulations in the form of foreign trade/investment regulations. These types of regulations have protectionist economic policy or other political aims, such as the distribution of wealth. These are found in developing countries like China, Indonesia, South Korea, Malaysia, Moldova, Russia, Ukraine, Belarus, Barbados, South Africa and Vietnam.[35] Some other countries have no franchise specific regulations which govern the franchise business but they govern the relation by the general commercial law, contract laws and antitrust regulations that are aimed at preventing restraint of trade and generally focus on competition laws. These types of laws are found in Poland, German[36] and Japan.[37] In these countries, the courts apply general legal concepts and laws dealing with other forms of inter party relationship in the regulation of business franchising.

In addition to the above mentioned laws, the International Institute for Unification of Private Laws (UNIDROIT) has prepared franchise specific model laws. UNIDROIT has prepared two model laws for regulation of franchise business; the guide to the master franchising and model franchise disclosure law.

The franchising laws of the USA, Poland, South Korea, South Africa and the UNIDROIT Model Law are briefly discussed below.

A. United States

United States is considered as the creator of the modern franchises business. In USA, there are a number of franchise business (both national and international) which are regulated by franchise specific legislation.[38] As the USA is a federal state, franchise business is regulated by

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[33] John Sotos, *Recent Trends In Franchise Relationship Laws, paper presented by the International Franchising Committee at the IBA Annual Conference in Dubai on 30 October 2011 to 4 November 2011, 3-6*

[34] *Id.*

[35] *Id.*, see also http://whoswholegal.com/news/features/article/28705/regulation-international-franchising (Accessed on April 2017).

[36] Article, 101 of the Treaty on the Functioning of the European Union (TFEU) and the Vertical Restraints Block Exemption.

[37] Japan Fair Trade Commission Guidelines (2002) – These provide for disclosure and offer guidance on vertical restraints, see also *Mark Abell, The Regulation of Franchising Around the World,* INTERNATIONAL JOURNAL OF FRANCHISING LAW VOLUME 9 - *Issue 3 – 2011, Claerhout Publishing Lt, p.1*

[38] Lafontaine and Fiona Scott Morton, *Markets State Franchise Laws, Dealer Terminations, and the Auto Crisis Francine*, 24 (3) JOURNAL OF ECONOMIC PERSPECTIVES *233–250 (2010)*; Douglas D. Smith, Ryan D. Smith, Bradley

both the federal government and the states governments.[39] At the federal level, the Federal Trade Commission (here after FTC) is an organ that has the mandate to govern business franchise. This organ has enacted rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures in 1979 to regulate the information that franchisors are required to supply the prospective franchisees. Later on, the rule was amended again in 2007. The main reason for the amendment was to take notice from the past experience and to provide more protection for the interests of the franchisee. Like the 1979 franchise rule, the 2007 FTC franchise rule allows the state regulators to impose additional protection for franchisee such as registration and strict disclosure requirements.

Regarding the scope of application, the FTC rule is applicable all over the country. In US, since the federal laws are superior to state laws, the federal franchise rule overrides the states franchise laws if there is conflict between the two. But the federal franchise rule provides minimum requirements for the regulation of business franchise. Hence, states cannot provide a protection less than the minimum protection stipulated under the federal franchise rule. But they can provide better protection for the franchisee.

The FTC rule only deals with the disclosure laws. It has detailed information that the franchisor has to provide the franchisee before conclusion of franchise agreement. It does not provide any registration requirement and also does not govern the relationship issue. Similarly, it does not require registration, filing and approval of the disclosure document. At the federal level, the FTC rule only provides the pre-sale disclosure law. It has made pre-sale disclosure mandatory requirement. At the federal level, the relationship issue is not regulated. However, the two federal statutes regulate the relationship issue in specific industries. The Automobiles Dealer Franchise Act[40] and Petroleum Marketing practices Act[41] require the franchisor to act in good faith during termination, cancellation and renewal of franchise contract. If franchisors fail to comply with these principles, the acts impose civil liability on them.

Equally important, the FTC has the power to investigate whether the franchisors are complied with the franchise rule or not and to take measures on the violation of franchise rule. When the franchisors are found to violate the rule, the FTC may issue cease-and-desist orders;[42] bring suit in federal court for preliminary and temporary injunctions and restraining orders;[43] seek and obtain permanent injunctions; and seek civil penalties of up to $10,000 for each act or practice found to be unfair or deceptive if the defendant had actual knowledge that the act or practice was unfair or deceptive.[44] In addition to this, it can also seek criminal penalties for the

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D. Smith, Government Regulation of Franchises , Available at http://www.franchisesmith.com/site/1040fran/Franchise-Government-Regulation-of-Franchises.pdf (Accessed on May 2017).

[39] Susan Grueneberg, *Entering the US Franchise Market: A Summary of Legal Considerations*, 11 (3) INTERNATIONAL JOURNAL OF FRANCHISING LAW 12-15 (2013).

[40] Douglas, *supra* note 38. See also 15 USC §§1221–1225.

[41] *Id*. see also 15 USC §§2801–2806.

[42] *Id*. see also (15 USC §45(b)).

[43] *Id*. see also (15 U.S.C. §53).

[44] *Id*. see also 15 USC §45(m) (1)(B).

violation of the rules. The federal franchise rule does not provide private remedies for violation of the FTC rule. It is only the FTC who can bring action for the violation of the rule.

Further, "non-US franchisors or international franchisor that want to enter in to US market must investigate and comply with anti-terrorism and other similar laws especially if they form a US entity to conduct business in the United States".[45]

Regarding the regulation of franchise business at states level, the states provide more protection to the franchisee than the federal rule. At the states level, franchise issue is regulated by different agencies. Most states regulate franchise business by the federal franchise rule. However, dozens of states have franchise disclosure requirements. Most of the states use franchise disclosure format guidelines. This guideline is the amended version of Uniform Franchise Offering Circular which was formerly adopted by the North American Securities Administrators Association.[46] This guideline is acceptable in all states that have registration requirements. The guidelines include detailed information that the franchisor should disclose for the prospective franchisee before conclusion of franchise contracts. The registration requirement issues are provided in various state laws even if it is not provided under the FTC rule.

The other key point is the remedies for violation of the disclosure requirements, the registration requirements and the relationship issues under states franchise regulations. State franchise laws often provide franchisees the civil remedies when the franchisors violate the franchise regulation in relation to disclosure laws, relationship laws and the registration laws. It provides two major remedies for the franchisees rescission and damages.[47] In many states, principal officers and directors for violating franchisors may be severally and jointly liable. States laws often provide criminal penalties for willful violation of franchise laws up to $100,000 and one-year imprisonment.[48] Further, under states laws franchisees are allowed to bring class action if they have common question of law and common question of facts.[49] In short, compared to the FTC rule, the states' franchise regulations have provided better protection for the franchisees.

B. Poland

Poland has no specific laws dealing with business franchises.[50] Hence, parties conclude franchise contract based on the principle of freedom of contract. The only limitation to freedom of contract of the parties is the parties cannot make agreement contrary to law, morality and the principle of good faith. The franchise system is developed by court judgments in Poland.[51] The

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[45] Susan, *supra* note 39, at 46.

[46] UNIDROIT, UNIDROIT Franchising Guide available at; *http://www.unidroit.org/english/guides/2007franchising/franchising2007-guide-2nd-e.pdf (accessed on October 2016).*

[47] Douglas, *supra note* 38.

[48] *Id.*

[49] *Id.*

[50] Krzysztof Kazmierczyk & FilipKijowski, Enforcement of contracts in Poland, in STEFAN MESSMANN & TIBOR TAJTI (EDS), THE CASE LAW OF CENTRAL AND EASTERN EUROPE – ENFORCEMENT OF CONTRACTS (European University Press, Bochum, 2009), at 654-659.

[51] *Id.*

Polish Court of Appeal in Katowice on 4 March 1998, 1Aca 636/98 take the asymmetric and an innominate nature of contract between the franchisor and the franchisee into account and finally concluded that the franchise contract has to be treated differently from the other ordinary contracts.[52]

In the case of Family Frost – Polska Sp. Z o. O as franchisor and two businessmen as franchisees entered in to agreement on 24 June 1993.[53] In this agreement, they agreed for distribution of ice cream by using mobile sales points. However, the franchise business became unprofitable for the businessmen. Due to this, the franchisor terminated the contract and required payment of the balance. The franchisee brought suit against the franchisor requiring the court to declare the franchise contract was void for several reasons. First, they argued that the obligations under the contract were impossible to perform for several reasons of economic nature. Secondly, they claimed the contract violated the nature of legal relationship since it allocated the risks and responsibility only to one party. They raised the high degree of subordination of the franchisees and severe limitation of their freedom to make business decisions. Thirdly, they argued that the contract was null and void because it violated good morals. The franchisees argued for return of the initial license fees arguing that it was contrary to good morals; there was no equivalency of performance to be rendered by each party.

The franchisor on his part claimed the payment of the unpaid balance of PLN 497,242.52. In response to the franchisees argument, he argued that the contract concluded between them was franchise contract and in such type of contract subordination is natural. He further argued that the economic effects of an undertaking cannot be associated with good morals and as a result it cannot be a defense. The appellate court ordered the franchisor to return the initial license fee. The court recognized the subordination, the obligation of franchisor and the nature of the franchise business in its reasoning.

As mentioned above, Poland had no specific laws regulating franchising. Hence, franchisors are not required to make disclosure, to register with government offices and also not subject to any laws dealing with the relations between the franchisor and the franchisee. Franchise contract is totally left for the contractual freedom of the parties. That means franchise contract is innominate contract which needs no government intervention. However, the general principles of contract law in the civil code, principles of good faith on pre-contractual negotiations, formations, terminations, and cancellations of contracts and Poland competition law of 2003 indirectly regulates franchise business.[54] This shows that even if the Polish laws require no pre-contractual disclosure requirements, it requires pre-contractual good faith negotiations.

[52] *Id*.

[53] *Id*. See also MAGDALENA KARPIŃSKA, COMMENTARY ON POLISH FRANCHISE LAW. Dentons Rondo ONZ 100-124 Warsaw, Poland, at 5.

[54] *Id*, at 6.

C. South Africa

In South Africa, business franchise is the rapidly growing form of doing business. South Africa is becoming a major franchising country[55] in that franchise contributes to about 12% of the country's gross domestic product (GDP).[56] To regulate the growing economic influence of franchising, the South African government has enacted the Consumer Protection Act on 24 April 2009.

The South African Consumer Protection Act has taken in to account the country's history of apartheid system that leads in to unfair distribution of resources and unequal educational opportunities between the white and the black.[57] The act is aimed at protecting the consumers. The act considered franchisees as consumers when the franchise agreement is offered. Being considered as consumers, franchisees are given a bundle of rights designed to promote social and economic welfare of the consumers.[58] Accordingly, franchise agreement has to be made in writing especially in plain language that can be easily understood by average literate populations.[59]

The other key feature of franchise business in South Africa is the compulsory cooling off period provided for the franchisee.[60] Under the South African Consumer Protection Act, the franchisee has the right to cancel franchise agreement within 10 days after franchise agreement was signed without paying damage or any penalty. The franchisee is only expected to notify the franchisor in writing. The franchisors have no chance of claiming the losses they incurred due to cancellation of the franchise agreement.[61] This aspect of the law is criticized as the future threat to sustainability of the business.

The other feature of South Africans consumer act is its prohibition of the use of physical force against consumer, the prohibition of coercion, pressure, duress, and undue influence.[62] this regard, if physical force is used against the franchisee, the agreement will be *void ab initio*. These rules are applicable especially during marketing, negotiation, execution and enforcement of the franchise agreements. Some commentators say this rule is the extension of the principles of good faith that requires the parties to act in good faith.

D. Model Laws

The International Institute for Unification of Private Law (UNIDROIT) has developed two model laws on the regulation of franchise business with a view to bring harmonization and unification of private laws. These laws are the Guide to International Master Franchising

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[55] Robert W. Emerson, *Franchisees as Consumers: The South African Example*, 37 FORDHAM INTERNATIONAL LAW JOURNAL 456 (2015).

[56] *Id.* See also Kendal H. Tyre, Courtney L. Lindsay II, and Jessica Gallinaro (2013) *Africa Alert: Recent Development in Cross Boarder Legal Issues,* A Publication of Nexon Peabody LLP.

[57] *Id*, at 1.

[58] *Id.*

[59] Robert, s*upra* note 55, at 463.

[60] *Id*, at 466.

[61] *Id*, at 467.

[62] *Id*, at 464.

Arrangement which was passed in 1998 and later revised in 2007, and the Model Franchising Disclosure Law which was enacted in 2002. Besides, it has also prepared the explanatory note which explains the details of the Model law and how it should be interpreted.[63]

The model franchise disclosure law deals with the franchisors duty to disclose detailed information before the conclusion of franchise agreement and payment of the fees.[64] This model law is not prepared for adoption by the states. It is rather made as a model from which states can take notice or experience, as the law that the state legislators can consult or refer to when they want to enact their own national laws. The law is flexible in that it permits the states to make their own modification with their practical situations. The definition of franchising under this model law includes different types of franchising such as unit franchising, master franchising and area development franchising.[65] The model franchising is applicable for both national and international franchising.[66] However, the model disclosure law does not regulate the relation between franchisor and franchisee. But, it has provided some issues such as the conditions for the renewal, terminations, and limitation to the territory in franchise.[67] The model law intends to bring development of franchise business by taking in to account its advantage to the economic development. It requires the franchisor to provide necessary information for the franchisee in the offer to form franchise agreement. Under the model law, in principle, the disclosure document is not required to follow a certain format. However, the disclosure document has to be in writing even though there are certain exceptions. Regarding the receipt of disclosure document, it has to be acknowledged by the franchisee. Further, the model law has provided that the waiver by the franchisee of rights given under the law is void.[68]

The other key issue provided in the model law is that in master franchise agreement, the master franchisor has the duty to disclose material information for the sub franchisee.[69] Further, master franchisor has duty to inform sub franchisee the destiny of master franchisor in case of termination of master franchisor.[70] Moreover, it provided remedies for the violation of disclosure requirement by the franchisor: the franchisee can terminate the agreement and ask for payment of damage from the franchisor.[71]

VII. CONCLUSIONS

Franchise business is a rapidly expanding form of doing business in international trade. Nowadays, it is one means of reducing poverty, creating job opportunities and bringing economic development. However, it can only smoothly function if there are effective

[63] UNIDOIT Guide to Master Franchising, Model Franchise Disclosure Law and Explanatory Report, Available at http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf. (Accessed on October 2016).
[64] UNIDROIT Model Franchise Disclosure Law, Art 6(1-3).
[65] *Id*, Art 2.
[66] *Id*, at 13 (the explanatory report part).
[67] *Id*, Art 6(2).
[68] *Id*, Art 10.
[69] *Id*, Art 6(3) & at 40 (the explanatory report part).
[70] *Id.*
[71] *Id*, Art 8 & at 40-42 (the explanatory report part).

government regulatory laws which regulate the abusive and opportunistic behavior of the franchisor.

In this regard, governments follow three different approaches in regulating franchise business. The first approach to regulation of franchise business is having pure franchise specific laws. Countries that have pure franchise laws regulate the business franchise in coordinated way. In these countries there are organs which specifically regulate the franchise business in addition to effective franchise law. The laws in these countries regulate the disclosure requirements, the relationship issue and the registration requirements. This is the most effective and developed approach to regulating business franchise since it regulates the overall process of the franchise business. The second approach is by having different laws such as competition laws, consumer's laws, intellectual property law, investment laws and commercial laws. Countries that follow this approach also have the organs that regulate franchise business in the form of consumer protection authority, Fair Trade Commission, and the like. The third approach is through the courts interpretation of the general principles of contract law, the commercial laws and the like, especially good faith principles. In this approach there are no franchise specific laws, nor are there organs or authorities that regulate business franchise.

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1. This is Heading 3

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Article 33

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1. HLR does not charge any one for manuscript submission nor for processing.
2. Haramaya University, from its own fund or sponsors, covers all Journal processing and printing costs.

Article 34

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ANNEX I: SAMPLE CITATIONS FOR HARAMAYA LAW REVIEW

GENERAL

All contributions to the Haramaya Law Review should follow this rules of citation. All citations should be in the style of **'The Bluebook: A Uniform System of Citation'**. If you've doubts as to how to cite a particular source, provide enough information to allow an editor to easily locate the document.

1. Books

- Full Author Name, Title of the Book, Publisher, (edition number – if any, Year of Publication)
- European/foreign names should appear in their natural order (family names followed by given names) and Ethiopian names in their natural order too beginning with given name.
- Works by two authors are cited using both names separated by "&".
- If the book has more than two author or editor, the names of all should be provided.
- If the book contains contributions by several authors, the name of the editor(s) should appear in place of an author and the fact that she/he is the editor should be indicated in parentheses.
- If the book has more than one volumes, it should be given in Arabic numerals in the manner illustrated below.

Examples

DEBORAH L. RHODE, JUSTICE AND GENDER 56-59 (1989).

CHARLES DICKENS, BLEAK HOUSE 49-55 (Norman Page ed., Penguin Books 1971) (1853).

WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.4 (2d ed. 1986).

BAHRU ZEWDE & DIEGFRIED PAUSEWANG (EDS), ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW (United Printers, Addis Ababa, Ethiopia) (2006), at 17-18.

ABERRA JEMBERRE, LEGAL HISTORY OF ETHIOPIA – 1434 – 1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS (Rotterdam: Erasmus Universiteit and Leiden: Afrika-Srudiecentrum) (1998).

PHILIP KYLE, PEOPLE AND PLACES, (Dante Press, Vol. 5, 2003).

Works in a Collection or Book Chapter:

- Book chapter or work in collection should indicate name of the author(s) and title of the chapter followed by the word '*in'* Vol # (if any), title of the book, page at with the chapter begins and referred pages, if any. Editors, translators, publisher and date appears at the end in parenthesis form.

John Adams, Argument and Report, *in* 2 LEGAL PAPERS OF JOHN ADAMS 285, 322-35 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

Institutional Authors

ENVIRONMENTAL PROTECTION AUTHORITY, ENVIRONMENTAL POLICY OF ETHIOPIA (1997).

2. Law Review Articles

- Should include author(s) full name, Title of the article, Volume (Issue) number, JOURNAL TITLE, page on which article begins, year of publication, specific page(s) cited
- If the article is co-authored by more than two authors, all co-authors should be listed.

Examples

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737-38 (1964).

Justice Richard J. Goldstone, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa*, 31 FORDHAM INT'L L.J. 285 (2007).

Fekadu Petros, *Underlying Distinctions between Alternative Dispute Resolutions (ADR), Shimglina and Arbitration*, 3(1) MIZAN LAW REVIEW 105-133 (2009).

Mulugeta Getu, *The Ethiopian Environmental Regime Versus International Standards: Policy, Legal, and Institutional Frameworks,* 1(1) HARAMAYA LAW REVIEW 43, (2012).

3. Magazines or Newspapers:

- Should contain Name of the author(s), Title of the Article or piece referred, Name of the Newspaper (Magazine), Date when the newspaper (magazine) was published, Page where the specific reference could be found.

Examples

Robert J. Samuelson, *A Slow Fix for the Banks*, NEWSWEEK, Feb. 18, 1991, at 55.

Damages for a Deadly Cloud: The Bhopal Tragedy, TIME, Feb. 27, 1989, at 53.

Habtamu Bazeze, *The Necessary Evils*, THE REPORTER, Dec. 28, 2014, at 10.

4. Treaties

- Include name of the document, date of signing and document number

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (hereinafter African Charter), Art. 27(2).

5. Cases and Decisions:

- This at least should contain Case name (in most cases this would be the name of the parties to the case), Country and Court Name, Case number or file number, Date of the

decision (in parenthesis), Name of the case report or journal, Page where specific reference might be found.

Examples

W/t Tsedale Demissie Vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol. 5, at 188.

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

Kampanis v. Greece, 318 Eur. Ct. H. R. 29, 35 (1995).

6. Ethiopian Laws:

- Should include name of the legislation, legislation number, gazette name, number and year of publication.

Examples

CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) [when it appears for the first time], and then FDRE Constitution, Art. 40(3) subsequently.

The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, FED. NEGARIT GAZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa [here after CIVIL CODE].

Electoral Law of Ethiopia (as Amended) Proclamation No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54, 2007.

7. Online Publications and Internet Sources:

- It should at least indicate Author(s) Name, Title of the Manuscript, url address and last date it was retrieved.

Example

Heidi Goldberg, Center on Budget & Policy Priorities, State Supported Health Care 15 (2007), *available at* http://www.cbpp.org/11-8-01wel.pdf/ (Accessed on 23rd of January, 2013)

8. Unpublished Reports and Manuscripts

- References to unpublished manuscript of any type shall contain Author's name, Title of the manuscript, Date when the work was completed, The word "unpublished" (in parenthesis), Place of the work may be found (in parenthesis), Page referred to

Example

Tarekegn Tafesse, Effects of Traditional Family Arbitration and Legal Divorce on Divorcees and Their Children: The Case of Boloso Sore Wereda, Wolaita Zone, Southern Ethiopia, (Unpublished, MA Thesis in Social Works, Addis Ababa University, June 2015).

9. Interviews

- Reference to materials obtained in an interview should contain the phrase "interview with", Full name of the person interviewed, Position of the person interviewed, Date of the interview.

Example

(Telephone) Interview with Ato Regassa Dedefo, Director of Foreign Trade Alignment, Ministry of Trade, on 20th of July 2014.

10. Short citations:

- Use '*id.*' when referring to the immediately preceding citation/authority. Note also that "*id.*" is always *italicized* and followed by a period.
- Use '*supra'* when an authority has been fully cited previously but not the immediate preceding one. Note that '*supra'* is also italicized.
- Use 'hereinafter' for authorities/citations that would be cumbersome to cite with '*supra'* or *'id.',* or shortened form may be established.
- Use 'et al' when referring to the previously cited material with more than two authors.

Examples:

(same as immediately previous citation) → *Id.*

(same as immediately previous source, but different page) → *Id.* at 53.

(same as citation earlier in article) → (Author's given/last name), *supra* note 12 [the footnote # where the authority appeared for the first time]; e.g. Tarekegn, *supra* note 13.

(same as citation earlier in article, but different page) → (Author's given/last name), *supra* note 12, at 23-26; e.g. Reich et al, *supra* note 54, at 78.

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ANNEX III: AUTHOR DECLARATION FORM

AUTHOR DECLARATION FORM

I, _____, the author (co-author) of the paper entitled _____ _____ submit my (our) manuscript to be published at Haramaya Law Review (HLR) and

(1) Confirm that I have read, understood and agreed to the submission guidelines, policies and submission declaration of the Journal, and transfer the copyright of the manuscript to HLR;

(2) Declare that it is my (our) original work, free from data manipulation and isn't plagiarized;

(3) Declare that it has neither been published (even its excerpts) anywhere else electronically or in print nor has been submitted elsewhere for publication in a Journal, book chapter or any similar form;

(4) Guarantee that the authorship of this article will not be contested by anyone whose names are not listed by me as co-authors;

(5) Declare that the manuscript contains no defamatory, abusive, deceitful elements or other unlawful statement, and does not contain any personal or property rights of any other person or institution;

(6) Shall bear full responsibility for the submission on behalf of all co-authors; and

(7) Agree not to withdraw the manuscript without prior consent of the Journal.

We also agree to the authorship of the paper in the following sequence:

Authors Name in Sequence	Institutional Affiliation	Email	Cell phone	Signature

Sincerely,

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