

MAKING LEGAL SENSE OF HUMAN RIGHTS: The Judicial Role in Protecting Human Rights in Ethiopia*

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Introduction

Of late, there is a profuse and generous recognition of human rights in constitutions. Such recognition is accorded in Ethiopia in its 1995 Federal Democratic Republic of Ethiopia's (FDRE) Constitution. A quick glance at chapter three of the text of the Constitution will beckon us to the fact that almost all types of rights recognized in the International Bill of Rights¹ are granted a constitutional status. Such recognition is of immense significance in setting the standards and laying down the foundation for the growth of a vibrant human rights culture. It also establishes the fact that in Ethiopia any violation of human rights, if tolerable at times, is a mark of our falling short of our constitutional commitments. It signals a collective rejection of the idea

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¹ The International Bill of Rights (IBR) is a short hand for the plethora of international human rights instruments that came into existence since 1945 and has become a ubiquitous body of 'laws' that serve as the morality of governance everywhere in the contemporary world. The instruments that form the core of the IBR are: the United Nations Charter (UNC), especially its human rights provisions such as those in art 1, 55, etc.; the Universal Declaration of Human Rights (UDHR) of 1948; the International Covenant on Civil and Political Rights (ICCPR) of 1966(1976); and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966(1976). The UNC is a treaty that internationalized human rights and even served as the basis of the UDHR and subsequent human rights treaties. These instruments that make up the IBR have been magnified and multiplied in their echoes through the numerous regional human rights instruments adopted in Europe, the Americas, Asia, Africa, and the Middle East.

that one can defy human dignity with impunity. More positively, it states in explicit terms that we, as a country, are one that honours, and is constrained by, the humanist value that human dignity and worth is fundamental to our system of governance. Nevertheless, the task of concretizing these rights and converting the same into legally consumable commodities² is yet to be done. This piece seeks to raise some questions that help us think fruitfully about how to make a legal sense of human rights in Ethiopia.

In any country with democratic governance (aspirationally theoretically or immediately practically), the judiciary, as part of the *trias politica*, is one of the most important institutions of human rights protection. The judicial branch is at the forefront of the effort at discharging the protective responsibility of the state apropos of human rights. In this piece, I seek to inquire into the role of the judiciary in the effort to make a legal sense of human rights in Ethiopia.

In order to do that, I will first –in section one—discuss the concept, features, and types of human rights in general. I also dwell upon why they matter to us. In section two, I make a call for looking beyond cynicism and fundamentalism as we advocate for a better protection of human rights. This is because in the process of making a legal sense of human rights, it is important to be realistic about a number of factors that constrain our performance in relation to the promotion, protection, and fulfilment of human rights. In section three, we delve into the more concrete and practical steps, methods, and techniques needed for making a legal sense of human rights in a particular legal system. In section four, I focus on the specific roles of the judiciary with regard to the protection of human rights. That will be followed by some concluding remarks.

This study, it is important to note, is a study of the normative framework for the judicial protection of human rights in Ethiopia. The study is thus limited in scope to the analysis of the constitutional and other relevant legal texts. Consequently, this study does not make a case-based, or empirically informed, analysis of the human rights situation. Any reference to practical issues, if any, will be only tangential and is meant for the purpose of illustration. It is important to note, however, that a case-based and empirical inquiry into the matter is necessary. This study—regrettably--does not do that nonetheless.

² By this I mean rights that one can take to court to assert them as concrete legal claims, rights that can be litigated and deserving remedies when the argument in their favour has won.

1. Human Rights: What are they and why do they Matter?

1.1-Definition

The question regarding what human rights are and how they should be defined has attracted a number of thinkers who advance a diverse array of theories³ on the nature of human rights into the details of which it is not the purpose of this piece to go. At a very basic level, human rights can be defined as entitlements that all human beings assert merely because they are human. As such human rights are basic moral claims invoked for the purpose of enjoying a decent human life rooted in dignity. Often linked to the nature of human kind, they are also asserted as ‘natural’ rights.⁴ Consensus among human rights scholars reflects that they emanate from fundamental human dignity and worth.⁵ Mariek Piechowiak recognizes and reinforces the consensus when she defines human rights as rights of all human beings acknowledged independently of law.⁶ Amparo Tomas,⁷ discussing human rights in the context of his argument for human rights based approach to

³ Indeed, a number of theories can be identified on the nature of rights. Prominent among these are the *will theory*, the *interest theory*, the *claims theory*, the *entitlement theory*, and the *entitlement-plus theory*. For a crisp summary and the details of their differences from one another, see James W. Nickel, *Making Sense of Human Rights* (2nd ed). Oxford: Blackwell Publishing, 2006. An excerpt of the earlier version of the same book entitled, “Making Sense of Human Rights” (revised edition), 2004 is available at: <http://www.uio.no/studier/emner/jus/humanrights/HUMR4130/h05/undervisningsmateriale/Nickel%25sense%2014%20sept/%202004.doc>. The theories referred to herein above are available on pp. 34-46.

⁴ Tied to human nature or human reason, human rights are often, rightly, conceived as antedating government and law. Consequently, human rights are viewed not as grants from government as an expression of the charitable nature of governments but as basic standards for human treatment that all governments need to recognize. Human rights are thus not gifts from government. They are not conferred on citizens by state; they are merely guaranteed by states. Reflecting this connection of human rights to human nature, the Universal Declaration of Human Rights (UDHR), in its article 1 says that “All human beings are born free and equal in dignity and rights”.

⁵ This consensus is reflected in the UDHR both in the preamble (which recognizes “the inherent dignity” of all members of the human family) and article 1 (which stipulates that all human beings, being born free and equal, are “equal in dignity and rights”). Note that the language of the UDHR has shaped this consensus.

⁶ Mariek Piechowiak, “What are Human Rights?: The Concept of Human Rights and their Extra-legal Justification,” in Hanski, R, and Suksi, Markku (eds), *An Introduction to the International Protection of Human Rights: A Text Book*. (2nd Rev ed). Turku/Abo: Institute of Human Rights, Abo Akademi University, 1999. P.3

⁷ Amparo Tomas, “A Human Rights based Approach to Development: Primer for Development Practitioners. [NP, n. pub], 2005. P. 3.

development, defines human rights as “*universal legal guarantees that belong to all human beings and that protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity.*”⁸

1.2-Features

The most common features identified as attributes of human rights include the following: universality, inherence (in human dignity), inalienability, and equality.⁹ In a similar vein, Tomas identifies the following as attributes of human rights: a) that they are rooted in and exist for fundamental human dignity; b) that they are universal (belonging to all human beings); c) that they are legal guarantees against state actions and omissions; and d) that they protect both individuals and groups¹⁰.

A few words are in order by way of a comment on the attributes. *Universality* refers to the applicability of human rights to all people everywhere at all times. This positioning of human rights as universal is often questioned and debated upon among scholars of relativist convictions who argue that human rights are relative.¹¹ But, as Piechowiak says, often, the debate between Universalists and relativists is in the abstract. So while “universality and inherence are contested in theory”, they are “acceptable in practice”¹². As evidence, she cites state practices and the Vienna Declaration and Program of Action of 1993¹³ which states, in unequivocal terms, that

⁸ This definition also reverberates in most other UN Human Rights manuals such as *Human Rights and Law Enforcement : A Trainer’s Guide on Human Rights for the Police*. New York/Geneva: UN, 2005, p. 13.

⁹ Piechowiak, *supra* note 6, pp.5-8.

¹⁰ Tomas, *supra* note 7, pp. 2-3.

¹¹ The debate as to whether the concept of human rights is universal or particular/relative to specific cultures started early in the history of the modern human rights movement. See the American Anthropological Association’s concern with the draft of the UDHR in the statement it issued in reaction to the draft of the UDHR in 1947 (in Steiner and Alston, *International Human Rights in Context: Law, Politics, and Morals* (2nd ed). Oxford/New York: Oxford University Press, 2000, pp. 372-374). See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2002, pp. 221-233. Since then, the debate was extended to the varying conception of human rights in the West and the Muslim world. (See An-Naim, “Human Rights in the Muslim World” 3 *Harvard Human Rights Journal* 13 (1990) on Islam on/and the concept of human rights.)

¹² Piechowiak, *supra* note 6, p 5.

¹³ The Vienna Declaration and Program of Action on Human Rights [hereinafter the Vienna Declaration], although not legally binding on states, expresses the consensus

human rights are “the birth right of all human beings” and that “The universal nature of these rights and freedoms is beyond question.” Universalism rejects their particularity in essence. It also underscores the fact that they are *trans-temporal* and, as such, pre-exist laws and states.

Inherence refers to the existence of rights independently of the will of either an individual human being or a group of people. Thus, “they are neither obtained nor granted through any human action” (p.6). They exist in spite of the fact that one has the will or capacity to exercise them.

Inalienability implies that nobody can deprive anyone of these rights and nobody can renounce these rights by himself. This is because the uniqueness of being human-- the substance in which the whole idea of human rights is rooted—being, the ground for assigning dignity to each and every human being, cannot allow an infringement or outright violation. Inalienability is partly grounded in taking every human being as an end rather than as a means to further other ends¹⁴.

Equality as an attribute of human rights reminds us that everyone is entitled to rights “not as a consequence of, for example, being able to exercise free choices or to think logically” but rather because “there are no human beings which are more human than others”¹⁵. It is perhaps because of the salience of the above mentioned features of human rights that the 1993 Vienna Declaration has had to stipulate that *all human rights are universal, indivisible, interrelated and interdependent*¹⁶.

Apart from this, one does well to stress the fact that human rights tend to be emancipatory in their rhetoric. It is common place to hear any resistance movement to invoke human rights as the ‘utopia’ they aspire to enjoy subsequent to the success of their struggle while also considering their violations as the motivating and mobilizing cause behind their struggle.

As *moral claims*, human rights pose a challenge to states both internally (from within) and externally (from without). As a result, neglect or abuse of rights often provokes a pressure on a state both politically and legally. Moreover, human rights impose limits on the exercise of power by

that all human rights are equally significant: “[a]ll human rights are universal, indivisible, interdependent and interrelated. ...” Section I, Paragraph 5. (June 1993).

¹⁴ There is an established belief among philosophers that as ends, human beings cannot be used as mere tools employed to advance other goals. This belief contrasts with the idea maintained among those who assume that the advancement of economic growth requires the sacrifice of some fundamental rights of some members of the society.

¹⁵ Piechowiak, *supra* note 6, p. 6

¹⁶ The Vienna Declaration, *supra* note 13.

governments; in effect, they discipline power. Furthermore, in history, it tended to be biased towards the individual right to freedom from undue state intervention¹⁷.

1.3-Development of Human Rights Norms

Human rights laws developed in reaction to massive state abuse of human beings. The modern concept of human rights has also drawn impetus from the experiences of World War II (WWII). As such it is rooted in the experiences of 'legal lawlessness' that characterized the activities of some oppressive regimes¹⁸. In response to such lawlessness, the international human rights regime developed since WWII. The milestone in the history of the development of the international human rights system is the adoption at the United Nations General Assembly (UNGA) in 1948 of the Universal Declaration of Human Rights (UDHR).¹⁹ The adoption of the subsequent

¹⁷ In the evolution toward the modern human rights movement (which finally led to the International Bill of Rights [IBR]), the first category of rights (often referred to as civil and political rights) imposed a negative duty on state. As a result, the view that human rights are synonymous with such rights became predominant. See Danfred Titus, "The Generation of Fundamental Human Rights" in Nel and Bezuidenhout (eds), *Policing and Human Rights* (2nd ed). Lansdowne, SA: Juta & Co. Ltd, 2002, pp. 85-102) on the generational classification of human rights.

¹⁸ Developments leading up to the holocaust in Pre-War Germany are taken as examples of 'legal lawlessness' (See Tomas, *supra* note 7). In the domestic setting, the apartheid regime of South Africa is also taken as an example for such a state. See Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994*. New York: Routledge, 1995 on the route back to a human rights-sensitive system in South Africa.

¹⁹ The UDHR, meant to serve as "*a common standard of achievement for all nations*", is *the single most important instrument that shaped the post-war human rights movement*. Today, *it forms the core of the International Bill of Rights (IBR)*. Although it is a declaration of mere 30 articles, it embodies the list of all rights that can be viewed as first, second, and third generation of rights. The UDHR is viewed by scholars as one of the most magnificent achievement of the modern human civilization. Glendon, *supra* note 11, p. xvi) says that the UDHR "gave expression to diffuse, deep-seated longings and lent wings to movements that would soon bring down colonial empires. Its thirty concise articles inspired or influenced scores of post war and postcolonial constitutions and treaties, including the new constitutions of Germany, Japan, and Italy. It became the polestar of an army of international human rights activists, who pressure governments to live up to their pledges and train the searchlight of publicity on abuses that would have remained hidden in former times. ... It is the *parent document*, the *primary inspiration*, for most rights instruments in the world today." (Italics added.) Note also Jack Donnelly, "The Universal Declaration Model of Human Rights: A Liberal Defense"(Human Rights Working Papers) available at :

covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR) in 1966 (to come into force in 1976) was a gradual but immense stride toward completing what later came to be the regime of the International Bill of Rights (IBR). Through these and other important instruments, the UN has discharged its responsibilities to set normative standards on human rights while also working with specialized UN bodies (e.g. the United Nations High Commissioner for Human Rights [UNHCHR] and the Committees) to develop mechanisms of monitoring and better implementation of rights.

1.4-Taxonomy of Rights?

Obviously there is a diverse array of rights that human beings claim, be it by virtue of the strength of laws or of morals. The classification of these diverse rights has generated a degree of controversy among human rights law scholars. Karel Vasak²⁰, drawing from the motto of the French Revolution of 1789--which propagated the principles of *liberte, egalite, and fraternite*—developed the generational division of rights. Thus, he came up with the idea of “*First Generation*” rights of civil and political type, “*Second Generation*” rights of economic, social, and cultural type, and “*Third Generation*” rights of development, peace, environment, and others. His generational division of rights has led to the emergence of the idea of what are called *liberty rights* (i.e., civil and political rights), *equality rights* (i.e., economic and social rights), and *solidarity rights* (i.e., rights to development, environment, and peace).

Rights are also classified based on the kind of duties that they impose upon the duty-bearers (which, often, is the state). Thus, scholars identify rights that impose *negative duties* on the state, (i.e., the duty to keep away from the free exercise of rights by citizens unhindered) and those that *impose positive duties* (i.e., the duty to act to protect or promote or/and fulfil some rights)²¹. It is important to note that civil and political rights often impose

<http://www.du.edu/humanrights/workingpapers/index.html> last accessed in May 2009 where he says that “the global human rights regime is rooted in the 1948 Universal Declaration of Human Rights and its later elaborations, especially the 1966 International human Rights Covenants.” P.1.

²⁰ Karel Vasak, “Human Rights: A Thirty-year Struggle—The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights,” *UNESCO Courier* 30:11 (Nov. 1977). Paris: UNESCO, 1977.

²¹ It is important to note that there are critics who argue that rights that impose positive duties should not be legalized (constitutionally and internationally). See for instance Sunstein, “Against Positive Rights” 2/1/ *East European Constitutional Review* 35 (1993) p. 35 in Steiner and Alston *supra* note 10, pp. 280-282. Sunstein argues that

duties of the former kind while economic, social and cultural rights tend to impose duties of the latter kind. From this division come the difference between obligations to respect on the one hand and obligations to protect, promote, and fulfil on the other.²²

Depending on the nature of obligations, rights can also be classified as those which impose *obligations of result* or those which impose *obligations of conduct*.²³ Moreover, rights can be self-executing (subject to automatic and immediate exercise) or programmatic (subject to progressive realization) depending on the ease with which they can be enjoyed²⁴. Rights are also categorized into “*individual*” and “*collective*” depending on their active subjects (or beneficiaries), the latter being associative or organic groups as the case may be²⁵.

constitutionalizing economic and social rights threatens the two important values of: a) liberal rights such as “free speech, voting rights, protection against the abuse of the criminal justice system, religious liberty, barriers to invidious discrimination, property and contract rights”; and b) market economy. This is because, Sunstein seems to suggest, constitutionalizing them allows the creation of too big a government that we cannot subsequently tame.

²² Obligations to respect are obligations to refrain from doing violative acts. Obligations to protect, promote, and fulfil impose obligations to act in certain ways so that states can create conditions for a decent human living within which to exercise even civil and political rights.

²³ Obligations of result demand the delivery of particular goods and services while obligations of conduct require merely an effort towards ensuring the enjoyment of the right in a definite range of time. It is important to note that some rights (e.g. education) might impose both obligations of result and conduct. The right to free (and compulsory) elementary education imposes an obligation of result whereas the right to tertiary education (= state duty to expand higher education) is a form of obligation of conduct.

²⁴ ‘Self-executing’ rights can be exemplified by classical rights such as those to life, liberty, and security of the person (or physical integrity). ‘Programmatic’ rights are often the socio-economic rights such as the right to work, fair wage, trade union rights, adequate living standards, housing, health, education, and others. (See Titus *supra* note 16 p.88)

²⁵ Marlies Galenkamp, *Collective Rights versus Individual Rights*. Rotterdam: PhD Thesis, Erasmus University of Rotterdam, The Netherlands, 1993. Galenkamp holds that collective rights, while they can be ascriptively made legal rights—rights by consensus—cannot be moral (and hence human) rights. Reason: collectivities do not have a moral agency that individuals have. This seems to assume that all collectivities are associative groups derived from the free association of free individuals on the choice of the latter. This in turn tends to ignore involuntary associations that may be called ‘anthropological persons’ such as ethnic, racial or generally identity-based groups. For more on this, see, for example, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1995.

Writing in relation to freedoms that are necessary for development (and in a context that is different from the usual human rights discourse), Amartya Sen²⁶ makes a distinction between *constitutive freedoms* (e.g. rights to substantive freedoms such as the right to be free from want) and *instrumental freedoms* (e.g. political liberties, economic facilities, and social opportunities).

In the process of the development of the International Bill of Rights, although the Universal Declaration of Human Rights (UDHR) of 1948 had a comprehensive catalogue of rights with *no hierarchy among them*, the division between civil and political rights on the one hand, and the economic, social, and cultural rights on the other, came out to be pronounced in the international covenants that emerged subsequently bearing the names that echo the division we stated above²⁷. Hence, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²⁸

In closing this section, it is important to stress that human rights do matter because human dignity and worth matter. Human beings as an end, rather than a means, do matter. Violation of human rights thus amounts to defiance of the inherent human dignity. To violate them is in a sense to punch human dignity in the face.

2. Human Rights in Ethiopia: Looking Beyond Cynicism and Fundamentalism

There is no gainsaying that human rights are generously recognized in the contemporary constitutional system of Ethiopia. In this, the FDRE Constitution of 1995 marks a departure from the past. Ethiopia's constitutional past suggests that the concept of human rights was not developed and that the practice of human rights was not one that is a cause of legitimate pride²⁹. In the era of unwritten constitutions, i.e., in the time preceding 1931, citizens were mere subjects of the Emperors having privileges and benefits emanating from the Omni-benevolent Emperors

²⁶ Amartya Sen, *Development as Freedom*. Oxford: Oxford University Press, 1999.

²⁷ The IBR is principally a sum total of four human rights instruments namely: the UDHR, the ICESCR, the ICCPR, and the First Optional Protocol to the ICCPR. See Titus *supra* note 17, p. 89.

²⁸ It is interesting to note that the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) hints at a distinction between "Human Rights" and "Democratic Rights". See art 10 (2) and parts I and II of the Human Rights Chapter, i.e., chapter three, of the FDRE Constitution.

²⁹ Reports of massive violations of rights abound especially in the era of the Derg.

merely on their goodwill.³⁰ Citizens are not assumed to have rights in the sense of entitlement although they do assume duties towards the emperors (personally) and the government (officially).

2.1-Historical Sketch

In the era of written constitutions since 1931, this trend continued unmitigated. The 1931 Constitution being an Imperial grant (to the beloved subjects), it did not recognize human rights as such. Rather, it stressed duties while the notion of their being “entitled” to special privileges and benefits depending on the whims and conjectures of the Emperors from whom all benefits and privileges, and all justice and power, flows was maintained. The state is considered to owe no duty to the people. There was hardly any constitutional limit to state power save that which is tacitly imposed by religion and tradition (the principal sources of legitimacy in Ethiopia for centuries)³¹. As a consequence, even after Ethiopia was ushered into the era of written constitutions, the Monarchy was, at least theoretically, absolute³².

In the Revised Constitution of 1955, continuity (rather than change) was dominant. The monarchy continued to be absolute. The state (and the bureaucracy) tended to be aristocratic. In spite of the fact that there was a stride made to embrace the ideals of rudimentary democracy³³ and human rights, there was much to be desired in practice in this regard. There was recognition of a number of human rights in the constitution (including the right to assembly, association, and election, etc) but often constrained by the claw back clauses marked by the phrase such as “in accordance with the law”,

³⁰ The emperors in traditional Ethiopia are the sources of all goodness and bounties. So, rights, like the constitutions, are grants *given* to the subjects. (See the preambles to the 1931 and the revised 1955 constitutions of Imperial Ethiopia.)

³¹ Note that in Ethiopia force, religion and tradition are the triad sources of state legitimacy. See Ugo Mattei, “The New Ethiopian Constitution: First Thoughts on Ethnical Federalism”, 1995 for this. But see also the official nomenclatures of the Ethiopian emperors: “Conquering Lion [to mean mighty in force] of the Tribe of Judah [to invoke genealogy, tradition], Elect of God [marking the importance of religion], King of Kings, Emperor of Ethiopia.”

³² Practically, due to factors such as poor infrastructure, poverty, and weak bureaucracy, they hardly governed the peripheries asserting absolute power. See generally James C.N Paul and Christopher Clapham, *Ethiopian Constitutional Development: A Source Book* (Vol 2). Addis Ababa: HSIU, 1972 on the theoretical omnipotence, Omnipresence, and Omni-benevolence of the Ethiopian monarch.

³³ The lower house was constituted of members elected directly by the people although there were no political parties at the time. There was also property limitation for being a candidate. See Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*. Asmara/Lawrenceville: Red Sea Press, 1997 for details.

or “as shall be determined by law”. One of the pressing problems of the time was the lack of access, on the part of the peasants, to economic “facilities” (such as land) that undermined the economic freedoms of large proportion of the population³⁴.

In 1974, the cumulative effect of long held popular discontents, the increasing radicalization of the intelligentsia, and the progressive activism on the part of the (often underpaid) military, led to a socialist revolution³⁵ that dethroned the Emperor, suspended the constitution, dismissed the parliament, and established, eventually, a Provisional Military Administrative Council (PMAC) of a committee (*Derg* in Amharic) of junior military officials who ruled the country for about 13 years without a formal body of law one can conventionally call a constitution³⁶. During the time from 1974 to 1987, the state of human rights deteriorated both conceptually and practically. One should note however that there was an emphasis, in rhetoric at least, on the importance of respect for socio-economic and cultural rights although they are not couched in words that reflect the notion of human rights. The redistribution of land and urban houses emboldened some aspects of socio-economic rights. The secularization of the state led to the declaration of equality and non-discrimination on the basis of religion albeit much less to freedom of religion. Recognition of linguistic and cultural equality led to the denunciation of discrimination on linguistic and cultural grounds.

This trend to emphasize socio-economic and cultural rights was continued in the 1987 Constitution of the Peoples’ Democratic Republic of Ethiopia (PDRE). Nevertheless, the constitution was overtaken by the nascent liberationist struggles that started in the wake of the 1974 Revolution and mounted a pressure on the government until it fell in 1991.³⁷ While there was

³⁴ Land or its produce was owned by Land Lords. In the south, owing to the *gult* system, peasants had no rights over land. See generally, Desalegn Rahmato, *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s-2000s*. Addis Ababa: Addis Ababa University Press, 2009.

³⁵ There is a veritable body of literature (both in Amharic and English) that show that all the student and other ethno nationalist movements of the time drew inspiration from socialist icons such as Marx, Lenin, Stalin, Mao Ze Dong, etc. Kiflu Tadesse *That Generation* (Amharic) (2 vols) 1997, 1998 and Andargatchew Assegid, *Long Journey Cut Short* (Amharic, translation mine) (2000) are only examples.

³⁶ For 13 years, although there was no constitution, there were a number of fundamental public law legislations that served the role of a constitution. See generally Fasil, *supra* note 33.

³⁷ The Eritrean People’s Liberation Front (EPLF), the Tigray People’s Liberation Front (TPLF), the Oromo Liberation Front (OLF), the Ethiopian Peoples’ Democratic

a protectionist state³⁸ that put a high premium on the importance and primacy of economic, social, and cultural rights, there hardly was the concept of human rights as entitlement, especially among the populace. As a result, there was hardly a vibrant human rights culture that specially fostered the assertion of civil and political rights.

After the fall of the *Derg* in 1991, the new regime promulgated a Transitional Charter which served as the interim constitution of Ethiopia for the time of the inter-regnum³⁹. The Charter, although a terse document that was primarily viewed as a pact⁴⁰ among various liberationist movements that toppled the *Derg*⁴¹, extended guarantee to a host of rights as recognized by the UDHR and other international instruments⁴². The accent was on Civil and Political rights. And yet the practice left much to be desired even in these times.⁴³

2.2-The FDRE Constitution

After a prolonged transition⁴⁴, a Federal Democratic Constitution was adopted in 1994 to come into force in 1995. This constitution was dubbed the constitution of the Federal Democratic Republic of Ethiopia (FDRE). The FDRE Constitution is a compact document with an admirable degree of clarity and conciseness. It has 106 articles packed in 11 chapters. In its chapter three (the chapter that can qualify for being the Ethiopian Bill of

Movement (EPDM) which later changed itself into Amhara National Democratic Movement (ANDM), etc were some of those ethno-nationalist movements.

³⁸ The *Derg* regime had run a tightly controlled economic system that is typically of a command type. Important resources such as land were owned by state.

³⁹ The Charter being “the supreme law of the land” was the de facto constitution of the time.

⁴⁰ A pact is an agreement among warring factions. Such agreements are often viewed as peace instruments.

⁴¹ Almost all of them (except, for example, the trade unions, and the university and others) were representatives of ethno-nationalist groups.

⁴² The preamble and article 2 invoke the UDHR as the basis on which all human rights are guaranteed. Political rights of association, assembly, demonstrations constituted the list of rights that dominated the early provisions of the Charter.

⁴³ There were frequent prohibitions of demonstrations and meetings. There were imprisonments without due process, for example, in relation to the cases of the alleged perpetrators of the Red Terror.

⁴⁴ As per the Transitional Charter, the transition was to be complete in two years. The transitional times were brought to a closure in 1995, two years later than promised. See Terrence Lyons, “Closing the Transition: The May 1995 Elections in Ethiopia,” *Journal of Modern African Studies*, Vol. 34, No. 1 (1996), pp. 121-142 on the transition.

Rights), it offers a long list of rights that are divided into two categories, namely that of 'Human Rights' and 'Democratic Rights'.⁴⁵

In its *Preamble*, it embodies the principles of self-determination of collectivities, rule of law, democracy, development, fundamental rights and freedoms (of individuals and peoples), equality and non-discrimination, peace, affirmative action, etc. In its chapter two, the chapter stipulating the jural postulates⁴⁶ of the new dispensation, the chapter on the "Fundamental Principles", five principles namely, the principles of sovereignty of the Nations, Nationalities, and Peoples of Ethiopia (art 8); constitutionalism and constitutional supremacy (art 9); sanctity of human rights (art 10); secularism (art 11); and accountability and transparency of government (art 12) were recognized.

By virtue of the *principle of popular sovereignty*, the principle of democracy⁴⁷ (the power to make, run, and even break one's own government) was recognized. The perusal of art 8 gives the impression that direct, indirect, and participatory democracy is anticipated⁴⁸. The *principle of constitutionalism* enshrined in art 9, stresses that there shall be no ascent to, and exercise of, power except in accordance with the constitution⁴⁹. In this, it spelled a departure from Ethiopia's constitutional past in which *force, religion, and tradition, not law as such*, were the sources of legitimacy⁵⁰. Art 9 also enshrined the *principle of constitutional supremacy* thereby superimposing the constitution on all other competing forms of law or practice. Consequently, all laws, decisions, and practices that were incompatible with the constitution are rendered of no effect⁵¹. Rather curiously, this article also recognizes the fact that international treaties

⁴⁵ Arts 13-44 are devoted to "Fundamental Rights and Freedoms" in general. Arts 14-28 are dubbed "Human Rights" while arts 29-44 are dubbed "Democratic Rights".

⁴⁶ "Jural Postulates" are the self-evident basic legal axioms underpinning the system. See Heinrich Scholler (2005).

⁴⁷ The constitution uses the term "nations, nationalities, and peoples" to refer to ethnic groups that it ascribes sovereignty to. (See arts 39(5) cum art 8).

⁴⁸ Art 8(3) says: "[The] sovereignty of [nations, nationalities, and peoples] is expressed through their *representatives* elected in accordance with this constitution and through their *direct democratic participation*." thereby sanctioning representative (or indirect) and participatory democracy although the latter is done directly by the people. The provision seems to lump direct and participatory democracy together although the two are not quite the same.

⁴⁹ Art 9(3).

⁵⁰ Mattei, *supra* note 31, says that sources of state legitimacy in historic Ethiopia are force, tradition, and religion.

⁵¹ Art 9(1)

adopted by Ethiopia are part and parcel of the legal system thereby suggesting the idea that Ethiopia's is an open constitutional system⁵². But the status of such treaties in the hierarchy of laws is not clearly enunciated as a result of which the issue remains unresolved to date⁵³.

The *principle of sanctity of human rights* (art 10)--the principle that is most pertinent to the discussion in this paper--stipulates the inviolability and inalienability of fundamental rights and freedoms of 'mankind'. It is this principle that, in a compact way, establishes the idea of inherence, universality, indivisibility, and inviolability of human rights. Hence, the term 'sanctity of human rights'⁵⁴.

The *principle of secularism* (art. 10) establishes that state and religion are separate, that there is no religion particularly favoured by the state, and that the two realms are mutually exclusive in the sense that one does not interfere in the business of the other. The separation of state and religion and the abolition of state religion is a remarkable departure from Ethiopia's past (which ennobled the Ethiopian orthodox faith as the state religion). It also ushered in the era of inter-religious equality. The principle of mutual non-interference of the secular in the sacred and of the sacred in the secular is also another remarkable departure from the past in which state action depended, to a large extent, on religion for its legitimacy⁵⁵.

The *principle of accountability and transparency of government* (art 12) establishes that government must be both responsible and responsive to the electorate while also making its operations public, open, and accessible to citizens⁵⁶. The notion of making government responsible for its misdeeds, which was alien to Ethiopia's constitutional past, goes a long way in helping

⁵² Art 9(4)

⁵³ The issue of the *status* of international treaties is controversial because the constitution does not say whether they are as supreme as the constitution. The term 'law' in art 9(4) can also be taken to mean "proclamation, regulations, or directives" as a consequence of which treaties take the position of an ordinary law if and when ratified by the parliament. But it is also important to note that art 13(2) stresses the need to interpret human rights provisions in conformity to international instruments ratified by Ethiopia. At this juncture, one asks if international (human rights) instruments are even superior to the constitution's human rights chapter.

⁵⁴ Art 10

⁵⁵ The Ethiopian Constitution seems to favour the *strict separation model* as distinct from the *established church model*, or the *free exercise and non-established church model* of the relation between state and religion. But a closer reading of the Constitution shows the existence of elements of the latter as well. But of course the practice is far more vague and blurred than this.

⁵⁶ Art 12 (1-3).

Ethiopians to take a financial, power/mandate, and time audit of the government. It also forces the government to prove itself in crisis management by being responsive to the demands and needs of the people during “its season in office”. The transparency flank of this principle requires that the state officials and offices be accessible to citizens and that their manner of operation be open, thereby requiring that they make information available to the public on demand (or otherwise). This helps: a) to facilitate the principle of good administration by fostering rational legitimacy to state action; and b) to empower citizens who, having been informed of the operation of government, will know that they are in control of their matters thereby preventing helplessness and the consequent despair.

The cumulative effect of these five fundamental principles is that they create a congenial environment for a better protection of human rights in Ethiopia. One notes that these principles shape, influence, and control the behaviour of legal and political actors in the public life of Ethiopia as they provide a framework of understanding the system. It is within this context that the detailed rules (or provisions) of the constitution make sense. This is also true of the efforts to make sense of the human rights norms in the Constitution.

The foundational principle that undergirds the normative structure of human rights in Ethiopia is the principle of sanctity of human rights enshrined under Article 10 of the FDRE Constitution which reads as follows: (1) “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable. (2) Human and democratic rights of citizens and peoples shall be respected.” This article enunciates the principle of sanctity of human rights in unequivocal terms. A closer examination of the words of the article suggests that: a) human rights are *inherent* in the nature of human kind (although the word used to refer to human kind is the narrower “mankind”); b) they are universal (i.e. applicable to every human); c) they cannot be subject to any legitimate violation; and d) they are indivisible. One can thus note that the principle at once spells a host of significant prescriptions about human rights. Thus one notes that they are, in essence, at once *inherent, universal, indivisible, and even absolute*. This gives the moral force that shapes and influences laws, decisions, practices, and actions taken in the public life of a society.

Rather curiously, the second sub-article of article 10 seems to reinforce the inviolability principle when it said that they “shall be respected”. If it is there merely to reinforce the inviolability principle, one would surmise, then it is superfluous. But one suspects the existence of something more to it than the emphasis and reinforcement of the principle. The phrase “human and democratic rights” seems to make a distinction between the two thereby

pointing to the classification of the list of rights in chapter three into two parts named “Human Rights” (Arts 14-28) and “Democratic Rights” (Arts 29-44).⁵⁷ The important thing about this provision of principle, however, is that all categories of rights are coequally to be respected without one having any superior claim to the other in terms of being prioritized or subordinated. However, one remains wondering as to the wisdom of dividing the list of rights into these two broad categories when there is no prescribed mode of differential treatment of the two categories of rights and especially when one notices the fact that the classification used is not congruent with some of the traditionally accepted classifications. Is the distinction of mere descriptive significance, or does it have a prescriptive value? We do well to leave this question open for now.

Apropos of the *institutional structure*, the primary institutions responsible for the protection, promotion, and enforcement of human rights in Ethiopia are: the *legislature* (both the House of Peoples’ Representatives [HPR] and the House of Federation [HoF]), the *executive* (especially those institutions such as the police, prosecution, prisons who administer civil and political rights and those who are in charge of providing public goods and services such as education, health, social welfare, clean environment, clean water, etc), and the *judiciary* (which includes the institutions with the responsibility to adjudicate cases over constitutional disputes such as the Council of Constitutional Inquiry [CCI] and HoF)⁵⁸. Thus, one can note that the primary institutions that are custodians of the human rights norms in Ethiopia are the mainstream institutions in charge of rights administration. The consequence of this is that any attempt at strengthening the institutional framework for the better protection of human rights must start with strengthening these mainstream institutions.⁵⁹

⁵⁷ The minutes of the discussion over the draft constitution and at the Transitional Council of Representatives indicate that human rights are those one is entitled to because he or she is merely human whereas ‘democratic rights’ are those one asserts only if and/or because he/she is a citizen. See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994 (Amharic).

⁵⁸ The *Legislature* can make protective laws. Through its budgetary and control powers, it can also press the Executive into deference for negative rights and facilitation of the enjoyment of positive rights. The *Executive*, on its part, has the role of respecting human rights and preventing violations by others. The *Judiciary* enforces rights by determining entitlements, punishing violators, and by redressing the victims. Usually courts are viewed as the *custodians of human rights*. In Ethiopia, because of their limited role in constitutional interpretation, this role is undermined.

⁵⁹ Strengthening law enforcement institutions and courts will go a long distance in the effort to better human rights protection.

In addition to the above mentioned institutions, one can refer to the *Ethiopian Human Rights Commission (EHRC)*, the *Institution of the Ombudsperson*, and some similar institutions as *special bodies* that serve as ‘patrons’ of the human right norms in Ethiopia. It is important to stress that these institutions have a *secondary role* compared to the role of the mainstream rights administration institutions⁶⁰. The EHRC, for instance, is an institution whose promotional task looms larger than its protection and remedial tasks⁶¹. Besides, one notes--based on the law promulgated to establish the Commission, Proclamation No. 210/2000--that it attends to a systemic problem rather than specific cases which might be taken as aberrations. Moreover, it is crucial to note that the sanction that the HRC (or the Institution of the Ombudsperson) has at its disposal is *the mobilization of shame on institutions that perpetrate abuse (or neglect) of rights through publicizing a report while also doing the best it can to liaison with institutions working towards securing relief to specific victims of abuse*. Considering these factors, it is only safe to conclude that these institutions serve as *consciences of the system prodding the system into doing more* towards a better protection of human rights in Ethiopia. They serve as *lubricants* to the system that might run coarse as a result of being overworked and/or mindlessness emanating from being bogged down by the routine of government machinery.

This said, we should not neglect the important role of *non-governmental organizations (NGOs)* and their immense contributions towards the betterment of human rights situations⁶². These institutions help in fostering the human rights culture (through training, education, and dissemination of information—although universities and higher educational institutions also share this responsibilities), in invigorating the state commitment to the human rights values (through technical assistance and capacity building schemes), and in making interventions to facilitate the enjoyment of some rights by the

⁶⁰ We should always keep in mind that these institutions cannot replace the mainstream institutions such as the courts; they can only complement the work of these institutions.

⁶¹ See Frans Viljoen, “Mechanisms for Realising Rights under the Bill of Rights” in Nel and Bezuidenhout (eds), *Policing and Human Rights* (2nd ed). Lansdowne: Juta &Co, 2002. Pp. 75-83 for a discussion of the various mechanisms used for realizing human rights under the South African Constitution.

⁶² This is in addition to non-judicial institutions such as the office of the Public Defender, other commissions (e.g. the Federal Ethics and Anti-Corruption Commission), etc. See also Viljoen, *supra* note 57 p. 79 on the role of civil societies (e.g. Trade Unions, Newspapers, churches) and NGOs, etc.

public (such as through counselling and legal aid services to victims, through conducting policy research and lobbying, etc)⁶³.

As has been hinted at earlier on, the constitution seems to distinguish between two “classes” or clusters of rights, namely “Human” and “Democratic”. Most civil and political rights such as the right to life (arts 14 and 15), liberty (arts 14 and 17), security of the person (arts 14 and 16), rights against torture, slavery, forced labour and related vices (art 18), rights of arrested (art 19), accused (art 20) , and detained (art 21) persons, rights against retroactive laws (art 22), double jeopardy(art 23), rights to honour and reputation (art 24), equality (art. 25), privacy (art 26), religion, belief, and opinion (art 27), and rights against crimes against humanity (art 28) are all enumerated in “part one” which is a category of “Human Rights”.

Other rights such as those to thought, opinion, and expression (art. 29), assembly, demonstration, and petition (art 30), association (art 31), movement (art 32), nationality [alias citizenship] (art 33), marital, personal, and family rights (art 34), access to justice (art 37), vote and be voted for (art 38), property (art 40), economic, social, and cultural rights (art. 41), dignified labour (art 42), development (art 43), environment (Art 44), rights of women (art.35), children (art 36), and nations, nationalities, and peoples [*alias* organic collectivities] (art 39) are enumerated under “Part Two”, the part rubricated as “Democratic Rights”.

Considering the list of rights in the two parts of chapter three, one quickly notices the fact that traditional civil and political rights are rampant in both parts although most economic, social, and cultural rights are found in part two. So, it seems that there is not much of a method into the classification. (The ‘received’ wisdom with regard to the rationale behind the division is that while ‘human’ rights are entitlements bestowed on us by virtue of our being human, ‘democratic’ rights are rights we claim only as a consequence of our being members of a political community (i.e., citizens). Of interest to us is the fact that no matter where a right is placed, there hardly is any consequence flowing from it as there is no hierarchy among rights.

2.3-Twin Pitfalls: *Cynicism and Fundamentalism*

Having noted the normative and institutional framework for human rights in Ethiopia, it is important to underscore the need to avoid the twin mistakes often made in relation to the call for a more robust implementation of human rights laws (or lack thereof), namely that of fundamentalism and cynicism.

⁶³ A host of NGOs involve in these kinds of tasks (e.g. counselling, legal aid, and mostly training).

Human rights fundamentalism, poised as it is to view human rights as religion, tends to manifest a mood that breeds dogmatism. Human rights cynicism, poised as it is to view human rights as mere rhetoric and politics, tends to manifest a mood of despair. We need to avoid both⁶⁴. We need to be optimistic enough to keep doing what we can to respect, protect, promote, and fulfil all human rights always. But we also need to be realistic enough to expect neglect and abuse of human rights in an imperfect world that suffers from constraints of diverse sorts. In particular, we need to note that in their exercise human rights are bound to be limited, especially by governmental bodies. But so doing must always be done in accordance with a law promulgated as necessary in a democratic society, guided by the need to protect the rights and freedoms of others and to promote the general welfare within the context of peace, order, safety and security.

3. Making Legal Sense of Human Rights

3.1- Human Rights: From Political Rhetoric to Legal Reality

In order to make a legal sense of human rights, it is imperative that we move away from the platitudes of political rhetoric to the vagaries of legal reality.

⁶⁴ These two pitfalls seem to be part of David Kennedy's "two related dangers of human rights work," namely "the tendency toward *idolatry*, toward enchanting the tools and norms of practitioners of human rights" and "the tendency toward *pragmatism*," the preoccupation with the "tools of policy analysis, instrumental reason and savvy evaluation of the costs and benefits of human rights initiatives." Kennedy prescribes pragmatism for the dangers of idolatry and "a return to ethics"—idolatry—for an excessive pragmatism. See his, "Two Sides of the Coin: Human Rights Pragmatism and Idolatry" (Keynote Address at the Interdisciplinary Conference on Human Rights of the London School of Economics, 24 March 2006) (italics mine), available at: <http://www.lse.ac.uk> last accessed in July 2009. See also Michael Ignatieff who seems to be sensitive to these two pitfalls when he speaks of human rights "as politics and idolatry" arguing for a more modest agenda for human rights. He argues that human rights must not become idolatry, and that we should balance our idealism with a sense of practical reality. See his, *Human Rights as Politics and Idolatry* (Amy Gutmann, ed). Princeton: Princeton University, 2001, chs 2, and 3. In a call for what Anthony Dworkin called "a human rights realism", Ignatieff admonished us not to regard human rights "as a secular religion" which tends to be morally self-righteous and rhetorically over-reaching. See Dworkin, "Human Rights Realism: A Review of Michael Ignatieff's Recent Book, *Human Rights as Politics and Idolatry*," available at: http://writ.news.findlaw.com/books/reviews/20011019_dworkin.html, last accessed in August 2009. This realism that Ignatieff calls for come out increasingly more strongly and forcefully in his more recent books such as *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton University Press, 2005 and *American Exceptionalism and Human Rights* (Michael Ignatieff, ed). Princeton: Princeton University Press, 2005.

For this, we have to identify specific measures that need to be taken at the various steps in the process of realizing a particular right. These measures may vary from those that help legalize human rights (i.e., press what are essentially moral rights into legal ones) to those that help actually make them exercisable by litigating them in court.

3.1.1-Steps in Making Sense of Human Rights

Converting moral claims into legal rights requires a process of concretization of rights so that first and foremost the rights secure a *constitutional guarantee* in the legal system. Assuming that the constitution is the supreme law of the land, such incorporation in the constitution helps entrench human rights so that they are granted an elevated but also a foundational position in the legal system. The constitutional position helps impose a specific obligation on the state. In their best, they form a set of ideals that limit the power of government. Once constitutional guarantee is secured, it is important that for their protection, *legislative framework* is designed. Both horizontal and vertical violations can be put to account only if there is a legislative protection. The process of concretization becomes more robust when it is backed by *judicial application* especially in the face of violation. The concretization becomes complete when there is a possibility that, once a judicial pronouncement is made on the legitimacy, content, and scope of the right, there is a sanction entailed to violation through *executive implementation*. When there is a commitment and will often on the part of law enforcement officials to see to it that violators are penalized and victims are provided with the commensurate remedy, then we say the process towards making legal sense of human rights is set and on course. Then, of course, we also say we have come to see all the steps in concretization: from constitutional guarantee to legislative protection to judicial application, and finally, to executive implementation.

In the course of protecting human rights in a domestic setting, the tasks that are involved can thus be summarized as follows: a) constitutional guarantee; b) legislative protection; c) judicial application; and d) executive implementation. These tasks entail a process of *concretization* of the principle of sanctity of human rights. One can also call it a process of progressive legitimation of interests in a legal system⁶⁵. Constitutional guarantee is about extending recognition to a particular right in the most fundamental law of a

⁶⁵ Tsegaye Regassa, "Courts and the Human Rights Norm in Ethiopia" in Tsegaye Regassa and Assefa Fiseha (eds), *Courts and the Constitution: Proceedings of a Symposium on Courts and the Enforcement of the Constitution, June 2000*. Addis Ababa: Ethiopian Civil Service College, 2001.

polity. This helps to grant a more elevated status to the right as a consequence of which restriction, suspension, or deviation from it becomes difficult, if not totally impossible. Legislative protection ensures that no (horizontal or even vertical) violation can occur with impunity. Thus, this task of state usually incurs the duty to proscribe any act or omission that poses a threat to rights. Judicial application gives an assurance that in cases of violations, there is a possible remedy (or redress) by taking one's cases to courts. Executive implementation relates to the certainty that all judicial injunctions and orders that vindicate one's rights are to be heeded to thereby leading to an actual redress for the victim and a real sanction on the perpetrator of the violation or abuse. *All these tasks are inter-related and interdependent one on the other.* From the above, one can see that the task of any state that takes human rights seriously is a stupendous one.

3.1.2-Making Legal Sense of Human Rights: Levels of Protection

Protection of human rights is done at various levels requiring various tasks and involving various steps. The *levels* of "protection" are often expressed in terms familiar in the fields of international human rights law such as the *duty to respect, protect, promote and fulfil*. The duty to *respect* requires that we do not abuse rights or act to prohibit or deny the right in anyway. In other words, the duty to respect entails an ethic of non-interference. The duty to *protect* requires that we act in order to prevent violation or abuse of rights by others in the society. This duty might entail the duty to act at the legislative, executive, and judicial level in a state. This duty involves the power to proscribe abusive or violative acts or omissions. On occasions, it might also involve the provision of (judicial, administrative, or other) remedies in the face of violations although providing remedies is mainly in the realm of enforcing rights.

The duty to *promote* entails the responsibility to propagate the notion of rights (and the sanctity thereof) to the wider society. It includes the responsibility to translate human rights instruments into local vernaculars; publication and dissemination of such instruments; organizing sensitization programs; running awareness trainings; expanding (formal and informal) human rights education; conducting researches on specific areas of concern; advocating advancement of the human rights cause in the public sphere; networking with communities, civil society organizations, academics, activists, and local, national, regional, and international actors; identification of "pathological" spots where rights deficits are visible with a view to preparing necessary legal instruments (or bills); working in collaboration with diverse institutions of the state thereby offering assistance in the area of capacity building both technical and infrastructural); cooperation with business institutions to encourage them to care for human rights as they go

about investing and trading; and others. In short, at this level, massification of the knowledge of human rights is done.

The *duty to enforce* imposes responsibilities much like the ones that the duty to protect entails. It involves the need to redress the victim as much as to punish the violator. This duty often requires *strong administrative, judicial, and law enforcement organs* that can impartially and efficiently work towards redressing the victim and penalizing the violator. Strong, effective and non-corrupt police and security force; strong, impartial judiciary⁶⁶; and efficient and neutral civil service and administration are the *sine qua non* of the duty to enforce human rights.

With regard to economic, social and cultural rights (and development-related rights in general), the levels at which to protect human rights are generally similar but with a slight difference, especially with regard to the duty to fulfil. To respect, for example, development related rights, the duty-bearer should not interfere with all the “instrumental freedoms” that facilitate the generation and preservation, for instance, of means of livelihood. Thus the duty-bearer does well not to restrict liberty, movement, privacy, expression, assembly, association, private property, free choice of work, etc. To protect, the duty-bearer is expected to come up with a legal and policy framework that facilitates access to “economic facilities” [alias resources such as land, market, etc; regulate quality, adequacy, and prices, etc] and “social facilities” [alias education, health, and others]; etc⁶⁷. To promote such rights, the duty-bearer does whatever it would do to promote other human rights. To fulfil, the duty-bearer undertakes the task of financing the provision of the rights.

3.2- Steps in Making Judicial Sense of Human Rights: Procedural Matters, Substantive Matters, Remedial Matters

For lawyers, the steps towards enforcement of human rights via litigation in a judicial institution require that they first deal with procedural steps in which they settle issues relating to *jurisdiction* (question of whether the court has competence), *standing* (question of whether the party has a vested interest), and *justiciability* (whether the matter is adjudicable in court). Secondly, once

⁶⁶ The UN admonishes us in this regard through its *Basic Principles on the Independence of the Judiciary* (UNHCHR, 1985), adopted by the 7th Congress on the Prevention of Crime and Treatment of Offenders, Milan, 26 August-6 September 1985, and endorsed by the General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of December 1985. These principles set the standards for independence of judiciary, although they are merely hortatory in their consequences.

⁶⁷ Terms such as “instrumental freedoms”, “economic”, and “social” “facilities” are all borrowed from Sen, *supra* note 26.

they have overcome the challenges of procedural matters, they deal with interpretation (trying to settle issues related to the establishment of the content and scope of the right). Thirdly, they deal with matters related to remedies.⁶⁸ A brief set of comments is in order on each step.

Procedural Steps: at this stage, the litigant tries to establish, inter alia, the *jurisdiction* of the tribunal over his/her case. The *standing* of the parties (i.e., whether they have a cause of action, or a vested interest) is assessed and determined at this stage. The issue of *justiciability* is also settled at this stage of the proceedings. At this stage, the lawyer does well to make sure that the right is *ripe* (i.e., not too early) and *not moot* (i.e., *not so late as to become merely academic or inconsequential*) and that the right is process-able in court.

Substance: Determining the Content and Scope of Rights: This is the stage where the content and scope of the right is determined. It is at this stage that we make an *interpretation* of the text that embodies the right trying to determine the scope of the right along with its limitations, if it entails any. It is also at this stage that the usual subject-object-addressee analysis is done with a view to fleshing out the exact meaning of the right and the duties it entails.

Remedy Matters: After establishing the content and scope of a right, then comes the stage where we have to decide on the remedy or relief sought by the victim of the abuse. At this stage, it is decided that abuses or violations be discontinued, violative laws, decisions, acts, and practices be annulled, redress (be it in the form of compensation or in the form of a free exercise of the rights) be enforced.

It is important to note that when we worked our way through these stages, then we can rightly say that we have taken the necessary steps towards making a judicial sense of human rights in order for citizens to realize the rights that are constitutionally promised to them.

3.3-Application of Human Rights Provisions: Direct and Indirect

Normally, in order to make human rights justiciable, a clause is inserted to the effect that it is resolved as to how the human rights chapter is to be applied in the legal system. Thus, constitutions predetermine if the human rights chapter

⁶⁸ These are more or less the steps taken in systems where human rights are rendered constitutionally justiciable and entrenched in a legal system. South Africa is a shining example of this kind of system. See, for example, De Waal, J., Currie, I., and Erasmus, G., *The Bill of Rights: Handbook* (4th ed). Landowne: Juta & Co. Ltd, 2001.

is going to have a *direct application*, i.e. to be directly applied to cases in court proceedings as a special regime of law entailing a special regime of remedies. The more frequent practice is that the constitutions allow an *indirect application*, i.e., application of the human rights chapter not directly to cases that are presented before a court but rather as tools that indirectly influence laws, decisions, actions, and practices. In situations where indirect application is opted for, the human rights chapter permeates the system from behind. It impacts the laws, decisions, policies, actions, and practices in such a way that they take account of the sanctity of human rights. Thus the human rights chapter serves as *a framework of understanding, a tool of interpretation, a guide to public decision-making, and a threshold for public behaviour*. In other words, it serves as the spirit that propels the system in the direction of better sensitivity to human rights. Thus, in practice, the human rights chapter serves as the standard against which the propriety (i.e., the constitutionality) of laws, decisions, actions, and practices are measured. They serve as one of the grounds based on which we annul a certain law, decision, action or practice for unconstitutionality. It is important to note that in the case of indirect application, the human rights chapter will get implemented through the instrumentality of other laws or decisions made in tune with the ethos of human rights.

In the FDRE Constitution, the issue of application is dealt with under art 13 (1) which reads as follows: “All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter.” One can see from this article that it spells out the principal duty bearers to be the state organs⁶⁹. But it does not tell us about whether we go for direct or indirect application. But since not all organs of government are involved in the task of adjudication, there obviously is no chance for them to directly apply chapter three to resolve a dispute. It is thus safe to conclude that while courts might be expected to face the challenge of direct application, much less is expected of the other two organs. Nevertheless, it is clear that by virtue of indirect application, all organs are expected to be mindful of human rights in all their decisions and actions as they go about discharging their daily responsibilities.

⁶⁹ Indeed, one can say that article 13(1) is merely a statement of the reach of application of the provisions of chapter three, i.e. a statement as to who is bound by the obligations emanating from the chapter. Consequently, from a strict reading of the provision, one quickly notes that non-state actors are not so bound. But note the argument from art 9(2) which, by assigning the responsibility to obey and ensure observance of the constitution (including chapter three) to “all citizens, organs of state, political organizations, other associations as well as their officials”, tends to extend the reach to state and non-state actors alike.

3.4- Determining the Content and Scope of Rights: Towards a Subject-Object-Addressee Analysis

Determining the content and scope of rights requires the making of a subject-object-addressee analysis. In order to make a successful subject-object-addressee analysis of any right, the core questions we ought to ask are the following:

- a) Who is the *subject* of right, i.e., who is the *beneficiary*?
- b) What is the *content and scope* of the rights? What is it that the beneficiary can rightfully claim? What is the substance of the entitlement sought? (Conversely, what is the demand that rights impose on the body responsible for their protection?) What is the *limit*, if any, to the exercise of a particular right or set of rights? In other words, what is *the object* of the right? Associated with these set of questions is also the question regarding remedies. Thus we ask: “What can a beneficiary do in the face of neglect or abuse of his/her rights? What *remedies* can be sought? And how”
- c) Who is the duty- bearer? To whom are they addressed? From whom can one claim the right? Against whom can we assert the rights? In short, who is the *addressee*?

These questions help to make a subject-object-addressee analysis of any human rights we seek to exercise. The subjects (i.e. the beneficiaries) are identified by the universality-marking words such as words “Everyone...”, “Every person,” “No one shall be...,” “All persons...” or particularity-marking words such as “Every citizen...”, “Persons arrested...”, “Accused persons...”, “Women...”, “Every child...”, “Every nation, nationality, and people in Ethiopia”, “Ethiopian farmers and pastoralists”, “Workers...”, etc. The addressee is easily identifying by referring mainly to the application clause namely art 13(1). The object (the content and scope of the right) is understood from a close reading of each rights provision which, subject to variation from right to right, imposes a duty to respect, protect, or enforce and/or fulfil. This kind of analysis in turn helps to turn human rights from mere rhetoric to legally consumable commodities. In short, it enhances their justiciability and enforceability. These questions need to be asked in a more pointed manner especially in relation to the right to economic, social and cultural rights and the right to development as they help to overcome the ambiguity associated with them.

3.5-Limitations on the Exercise of Human Rights

In spite of the claim to universality and inalienability, human rights are not exercised in an absolute manner⁷⁰. There is a limitation imposed on the exercise of rights for the sake of making an optimal “utilization” or enjoyment of rights⁷¹. But “What are limitations? Why are they imposed? When? What forms do they take? And how are they imposed?” are all questions that need to be answered in order to clarify our view of human rights further.

Limitations are *lawful infringements* of rights⁷². They are acceptable or ‘justifiable’ violations. They are deviations from the standard manner of dealing with rights imposed primarily to facilitate optimal use or exercise of rights in a context of scarce public resources, space, and time. Societies need to impose limits (not as a matter of luxury but as a matter of necessity) to overcome constraints imposed primarily by scarcity. Sometimes one has to limit the exercise of rights in order to overcome the excesses produced by the conflictive nature of rights as between themselves⁷³. Thus limitations can also be viewed as harmonization schemes⁷⁴, mechanisms through which we mediate between competing rights of different types or intended to be exercised by different beneficiaries.

Limitations become especially necessary when disaster strikes as a consequence of natural catastrophe, war, and epidemic, general breakdown in the provision of public goods and services, breakdown of law and order, civil strife, or terrorist attacks, and others. These circumstances put a strain on the

⁷⁰ Gordon Hollamby, “The Limitation Clause” in Nel, F. and Bezuidenhout (eds), *Policing and Human Rights* (2nd ed). Lansdowne: Juta & Co. Ltd, 2002, pp 103-118. Here, Hollamby says, “Human rights are not absolute: they can be limited or circumscribed.” He also says, “it is trite that virtually no right, whether entrenched or not, can be absolute: its boundaries must be set by the rights and freedoms and the interests of others.” I would argue otherwise as follows: while human rights can be absolute in essence, their exercise and/or enjoyment cannot be as absolute given the fact that we live in a world burdened with scarcity of resources (e.g. space, time, finances, etc). Hollamby’s positioning of human rights as non-absolute makes the inviolability claim vulnerable.

⁷¹ *Ibid.*

⁷² Only the legality makes limitations different from outright violations.

⁷³ Rights tend to compete with, and confront, each other. The state does the balancing through limitative laws.

⁷⁴ Hollamby, *supra* note 70.

modes of exercise of rights as a consequence of which limitations of a special type, i.e., derogation and suspension, become necessary⁷⁵.

Limitations can take various *forms* such as restriction, suspension, or derogation from. Each of these forms affects the exercise of rights in different ways and to a varying degree. Thus *restrictions* circumscribe the manner, or place, and the extent to which rights can be enjoyed or exercised in a particular set of circumstances, often in normal times. *Suspension* leads to the temporary non-application of one or more rights because of an unusual difficulty in which a state finds itself. *Derogation* refers to the possibility of acting in a manner deviating from the accepted standards of behaviour vis-a-vis rights. It entails acting like there are no human rights at all⁷⁶. The latter two come into play in extra-normal situations.

But there are *limits to limits*. Limitations imposed on the exercise of rights are not without limits⁷⁷. How are they imposed? When are they imposed? The answers to these questions clarify the fact that, in a rational society⁷⁸, limits cannot be imposed arbitrarily. Thus it is often underscored that limitations should meet the requirements of the principles of: a) legality; b) necessity; c) rationality; d) proportionality; and e) sanctity of life, dignity, and equality.

In other words, in order to fulfil the requirements of *legality*, all limitations need to be imposed through the instrumentality of a law that is procedurally and substantively legitimate. Also, the law issued must be *necessary* in a democratic (i.e., open and tolerant) society. It is said necessary when the existence of a country is likely to be shaken to the core, or the system is so destabilized as to lead to a crisis in governance. Thus, limitative laws are said to be necessary if the exercise of the right is a threat to public order, public morals, public health, public peace, safety and security, or to the

⁷⁵ Note that although they are of the same species, limitations in the strict sense are not the same as derogations and suspensions. The word "limitation" can be used as a generic name that, within it, has *restrictions*, *suspensions*, and *derogations* as species of limitation. While they are similar to this extent, they are not the same. Limitations are often those imposed in normal times, whereas suspensions and derogations are those imposed in emergency situations. See Hollamby, *Ibid*, p.106.

⁷⁶ Acting as if human rights do not exist, or no bill of rights exists, because the exigencies of the time force them to act the way they do.

⁷⁷ One cannot be arbitrary in imposing limits. One needs to be reasonable, justified, effective (i.e., giving effect to the nature and purport of the right), and proportionate.

⁷⁸ A rational society, being a democratic society, operates on the basis of the doctrine of the Rule of Law where, among other things, citizens have the right to written reasons. See De Waal, Currie, and Erasmus, *supra* note 63 on this right in South Africa.

rights and freedoms of others⁷⁹. Moreover, in order to fulfil the requirements of *rationality*, one must establish the existence of a cause-effect relationship between the exercise of the right and the impending harm, and/or between the limitative action and the impending harm intended to be prevented by such action. The requirement of *proportionality* is met through comparing the impending harm intended to be prevented on the one hand and the gravity of the limitative action or decision on the other⁸⁰. The length of time during which the limitation stays in force, the physical area within the bounds of which limitation is imposed, the kind of rights that are restricted, suspended or derogated from, etc should be considered to in order to weigh proportionality. And ALWAYS, limitations cannot be imposed to defy *the sanctity of life, dignity, and equality of all human beings*. One can limit rights without subjecting a person to humiliating and degrading treatment or punishment, or without discriminating against them arbitrarily, or without taking their lives without due process of law.⁸¹

In Ethiopia, there is no separate provision in the Constitution dealing with limitations that can be imposed on the exercise of human rights and the manner in which these limits can be imposed. The absence of such a general 'limitation' clause might, at first blush, give the impression that human rights are not subject to limitation in Ethiopia. But it is important to note that the absence might also lead to the arbitrary imposition of limitations giving the right holder no recourse to ensure that the limitation is a justified and reasonable one.

Nevertheless, there are specific limitations built into the provisions recognizing the rights. These limitation clauses are often known as claw-back phrases. And so, some rights such as the right to freedom of religion (art 27), expression (art.29), or assembly (art 30) are subject to a specific variety of limitations. While the existence of these provisions clarify matters as to how, what kind of limitations can be imposed upon the exercise of a particular right, there was no way of weighing the legitimacy (or not) of any limitative law, measure, decision, or actions.

In what looks like a basic guideline as to how limitations (i.e., derogations and suspensions in this context) are imposed, art 93 of the FDRE

⁷⁹ See Syracuse, Principles on interpreting of limitation clauses; see also the 1996 Constitution of the Republic of South Africa, Section 36.

⁸⁰ Note that weighing proportionality is about balancing divergent interests based on a rights claim.

⁸¹ In most countries death penalty is abolished because it is contrary to the right to life; Optional Protocol II of the ICCPR is also about banning death penalty. Note that Ethiopia has not yet signed this Protocol.

Constitution, regulating the manner of declaration of emergency, stipulates the principles of necessity and proportionality (art 93(4)a) as essential in times of suspension and derogation of rights. It is remarkable that in the same article (93(4) c)), rights that are not subject to any limitation (be it suspension or derogation) are listed. These rights are the right against cruel, inhumane and degrading treatment or punishment (art 18), right to equality (art 25), and self-determination (art 39(1) and 39(2)). The other provision that is not subject to suspension or derogation is the provision regarding the name of the country (art 1). One notes the conspicuous absence of the right to life from among this list of rights⁸².

3.6- Interpreting Human Rights Clauses

Like all laws, laws on human rights (whether they be international instruments or domestic constitutions and legislations) are bound to need interpretation at one time or another in the course of being utilized. Interpretation is one of the most vital steps towards making sense of human rights. But “what is interpretation? When do we need to do it, and how?” are important questions to address as we discuss interpretation.

Defined in simple terms—and at the risk of oversimplification—interpretation can be viewed as the art of determining the meaning (or constructing a meaning out) of a text. We need interpretation when texts (or provisions) are not clear.⁸³ Texts are said to be unclear when they are ambiguous, silent, apparently inconsistent, or even absurd. In all other cases, i.e., when a text’s meaning is clear beyond any disagreement or debate, then we proceed to apply it. Apparently, interpretation or construction results (and benefits) from disagreement.

From traditional rules or canons of interpretation⁸⁴, one notes that when a text is ambiguous, i.e., when it is riddled with equivocation that leads to more

⁸² It is interesting to note that some of the state constitutions (e.g. SNNPRS, Oromia, Amhara, and Tigray, etc) extend non-derogability to the right of life, security of persons; freedom of thought, conscience, and beliefs; the right of detainees and prisoners to dignity; the right of every human person to recognition as such; and even the right to one’s honor and reputation.

⁸³ The idea is that when texts are clear, the interpreter applies the text to the facts of the case. But one quickly notes the difficulty of resolving the issue of how—and by whom— we determine whether a particular text is clear or not. This issue invites a meta-interpretive (pre-interpretive) discourse which is inevitable whether we tackle it explicitly or tacitly.

⁸⁴ See, for example, V.H.Patil, “General Rules of Statutory Interpretation,” *IT Review* (July 2001) for a discussion in the context of India. See also Avitar Singh, *Introduction*

than one meaning to be ascribed to it, we use various techniques to overcome the ambiguity. In principle, literal interpretation⁸⁵ is taken. Thus we look for the literal meaning of the word or phrase that is ambiguous. For this etymological definition⁸⁶ and dictionary definitions⁸⁷ might help so that we can define the ambiguous term as an ordinary person would understand it. When literal interpretation is not helping to overcome the ambiguity, we proceed to use contextual interpretation, i.e., interpretation by looking at the words or phrases or provisions or sections or texts that come before and after (the antecedents and subsequents of) the ambiguous word. When textual context fails, we look into historical, social, or political, context (as the case may be) so that we can embellish the word and make sense out of it. If the context fails us, then we proceed to give effect to the meaning intended by the makers of the document. To find 'legislative intent' as it is often termed, we are advised to read the minutes of the meetings, the debates, the preliminary drafts, etc. When the ambiguity sticks even after this, we resort to a purposive interpretation, i.e., interpretation to give effect to the general poise of the law. The latter is also associated with purposive (teleological) interpretation.⁸⁸ When a law is silent, analogical interpretation is employed to fill the gap left open by the silence.

When a law is absurd, or contrary to the demands of reason, common sense and human justice, then we resort to reason, natural justice, and equity. More importantly, we look into the spirit of the law (the motive that inspired the law in the first place) so that the literal application of the law might not end up in being self-defeating. It is in these circumstances that teleological interpretation might also be resorted to.

When a law is inconsistent, first we need to determine the nature of inconsistency. If it is inter-temporal, then we go for the more recent law.⁸⁹ If

to Interpretation of Statutes (Reprint Ed). Agra/Delhi: Wadhwa and Co., 2007 for an extended discussion of interpretation, albeit chiefly from an Indian perspective.

⁸⁵ Literal interpretation demands strict fidelity to the letter of the law.

⁸⁶ Etymological definition is definition by resorting to the origin and/or root of the word.

⁸⁷ Dictionary definitions normally give us meanings of words in the way they are understood by lay people. But professional dictionaries can give us more technical uses of terms.

⁸⁸ Purposive interpretation is used to give effect to the purpose of the provision. Teleological interpretation relates to the attempt to obtain meaning by resorting to the end (*telos*) of a rule (or a right).

⁸⁹ Inter-temporal conflict among laws is conflict between old and new laws. In such instances, the new prevails over the old. Hence, the principle *lex posteriori derogate lex priori*.

it is inter-legal, then we go for the hierarchically superior law.⁹⁰ If the inconsistency is intra-legal, then we go for the special provision,⁹¹ unless it is violative of the most sacred of principles therein.

If, having considered all these techniques of interpretation, we still remain with doubts as to how to go about doing it, then we adhere to the dictum, *in dubio, pro libertate*, i.e., in case of doubt decide in favour of liberty⁹².

Anyone acquainted with interpretation of texts is familiar with the idea that much of the interpretive task is coloured by the identity of the interpreter.⁹³ As a result, there is a debate on who has to interpret constitution,⁹⁴ at what level, and following what modes. Owing to the extensive, intensive and intractable nature of that debate even in Ethiopia,⁹⁵ I opt to omit the discussion of that debate in this article.

In international human rights law, interpretation is advised to be done in such a way that no interpretation is contrary to the effective utilization of the right recognized in various instruments⁹⁶. In this regard, it suffices to note, for

⁹⁰ Inter-legal conflict exists when there is conflict between laws of varying status. In such cases, we give effect to the hierarchically superior law.

⁹¹ Intra-legal conflict is that which exists between laws of the same status but varying degree of generality or specificity. In these situations, the special prevails over the general. Hence, the principle *lex specialis derogat lex generalibus*.

⁹² This is often termed as liberal interpretation, liberal because it is in favour of rights/liberties.

⁹³ Partly this is because interpretation involves construction not only in line with the context of the intent of the author but also with the perspective and context of the reader.

⁹⁴ The debate gets expression in relation to whether, and to what extent, a state should adopt judicial review.

⁹⁵ The debate in Ethiopia is as to whether and to what extent the ordinary courts are left with the power to interpret the constitutional provisions on human rights given the textual fact (as per art 62 of the FDRE Constitution) that one of the tasks of the House of Federation (HoF) is constitutional interpretation. This debate has been part of the 2000 symposium at ECSC on courts and human rights. See Tsegaye Regassa and Assefa Fiseha *supra* note 60. See arts 62, 82-84 of the FDRE constitution. See also Proclamations No. 250 and 251 of 2001. For an interesting recent discussion on this, see Yonatan Tesfaye, "Whose Power is it anyway?" *Journal of Ethiopian Law*, Vol. 22, No 1(2008). For a more trenchant discussion on the debate regarding interpretation of human rights provisions, see Tsegaye Regassa, "What does it Mean, Who Says it, and Why does it Matter?: Interpreting Human Rights Provisions of the Ethiopian Constitution"(forthcoming 2009).

⁹⁶ Art 30 of the UDHR maintains that "Nothing in this Declaration may be interpreted as implying for any state, group, or person any right to engage in any activity or to

example, art 30 of the UDHR which stresses the need to do interpretation in a way that is not subversive of any of the rights recognized therein.

As has been hinted at repeatedly, interpretation of the human rights chapter is key to an effective protection and enforcement of human rights. This is mainly because it is through interpretation that we determine the content, scope, and limitation of a particular human right. The questions as to what interpretation is, when we need it, and how do we do it, are very crucial in the discussion on interpretation of a human rights text. These questions prefigured in the more lengthy discussion above regarding interpretation in general. We now turn to a discussion of the Ethiopian scenario.

In Ethiopia, the supposedly interpretation clause of art 13(2) does not say much as to the who, the when, and the how of interpretation of chapter three. Art 13(2) says: “The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.” Apart from telling us the need to ensure our interpretations are in conformity with the principles of the International Bill of Rights (IBR), this article does not tell us as to whose responsibility it is to interpret, when we need interpretation, how (based on what principles and techniques) we should interpret it, etc. The result is that we are still in a state of confusion as to the proper mode, method, principle, and technique of interpretation of not only the human rights chapter but also the entire constitution in Ethiopia. This problem is accentuated especially because there is no comprehensive rule of (statutory) interpretation in the legal system—which has resulted in lack of consistency in ordinary legal interpretation in the legal system. (In recent times, partly out of the concern for this interpretive fragmentation, a law is issued to make the decisions of the Cassation Division of the Federal Supreme Court binding on other similar cases on matters of legal interpretation.⁹⁷)

So, the question remains: how do we interpret the provisions of chapter three? But first: who interprets it? This is a very difficult question bound to raise a lot of controversies. The reason it is so wedded into controversies is because of the atypical mode of constitutional interpretation in Ethiopia: The House of the Federation (HoF) is in charge of adjudicating *all constitutional disputes* (art.62 cum 83 of the FDRE constitution and Proc. 251/2001). The Constitutional Inquiry Council (CCI) looks into and examines cases and

perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

⁹⁷ See Proclamation No. 457/2005.

presents its recommendations to the HoF for a final decision (art 84). One can thus argue that the human rights chapter of the constitution is also to be interpreted by none but the HoF (of course with the advisory support of the CCI). One can also argue for a judicial interpretation of the provisions of chapter three on the basis of an argument that takes the following format: a) interpretation of laws, including the constitution, is the cardinal task of the courts; b) the constitution in general and the human rights chapter in particular is a law that is subject to judicial interpretation unless it is explicitly provided otherwise; c) there is no explicit prohibition of judicial interpretation although there is the explicit recognition of the mandate of the HoF in this regard⁹⁸.

In practice, courts do interpret the provisions of chapter three that pertain to criminal procedural rights that are found in the Criminal Code and Criminal Procedure Code (often without making any reference to the constitution).⁹⁹ But the courts do not have a principled, consciously designed, and directed, manner of going about the task of interpretation. Whoever interprets the Constitution and, by extension, the human rights chapter, there are some widely applicable techniques of (legal) interpretation that one must heed to.¹⁰⁰ These are:

- a) That it must be established that there is a degree of unclarity (caused by ambiguity, inconsistency, silence and/or absurdity) that invites interpretation;
- b) That when the cause is ambiguity, a literal (textual, contextual) interpretation is made often by also considering the legislative intent, purpose (*teleos*), and spirit;
- c) That when the cause is inconsistency, first we establish the nature of inconsistency (whether it is inter-legal or inter-temporal); and when the conflict is between hierarchically related laws, then we decide in favour

⁹⁸ This kind of argument helps to judicialize the interpretive task.

⁹⁹ Apparently so doing is merely legal interpretation or application, rather than constitutional interpretation.

¹⁰⁰ In the business of interpretation, the first thing to do is to establish that there is unclarity in the law. The second thing to do is to identify the cause of unclarity. Thirdly, we must carefully choose the principles, theories, methods, canons, and/or techniques that are appropriate to help solve the problem of unclarity. Fourthly, we need to apply the principles, theories, methods, canons, and/or techniques of interpretation chosen to be applicable in step three to the facts in the case at hand. Finally, we need to write out the judgement, the decisions, and the orders--as the case may be--in a manner that discloses the reasons for the chosen steps and formulae of interpretation.

of the superior law; when the conflict is between general and specific types of laws, the specific law prevails; if the conflict is between old laws and new laws, the new laws, the more recent laws, prevails over the old laws;

- d) That when the law is silent, we construct the existing law in such a way that it is made to cover the new situation (through what is traditionally called analogical interpretation);
- e) That when the law is absurd, we interpret the law through recourse to reason, equity, and natural justice to give a positive effect to the spirit and end (teleos) of law; and
- f) That if, after all is said and done, the unclarity still persists, then we decide in favour of the right (in accord with the dictum: *in dubio, pro libertate*¹⁰¹!).

3.7- Entrenchment of Human Rights

Entrenchment has to do with the difficulty associated with amending the human rights provisions of an instrument. Often such documents are made to be difficult to amend. The reason is because human rights are viewed to have enduring value owing to their trans-temporality. As a consequence of their enduring value, often the human rights chapters (otherwise known as the Bill of Rights Chapters) of constitutions are made hard to amend. The mode of formal amendment¹⁰² and the procedures thereof are so stringent that no ordinary legislature can have its way if it makes an inroad to the list or the scope of the rights that are already recognized. Meeting the requirements of the procedures for amending ordinary statutes does not suffice to amend a constitutional provision apropos of human rights. Thus, often approval of the proposed amendment in the legislatures of the constituent units of a federation (if the polity is a federation) and a qualified majority of the joint or both houses of the national (or federal) legislature is sought in order to effect such an amendment.¹⁰³ In some cases, approval in a referendum might also be

¹⁰¹ To mean: in case of doubt, decide in favour of liberty (or freedom=rights).

¹⁰² Formal amendment is amendment done by the body assigned the task of amendment sitting for the specific purpose of amending the constitution with the conscious, deliberate and intentional effort towards effecting amendment in accordance with the procedures constitutionally set for it. See S. N. Ray, *Modern Comparative Politics: Approaches, Methods, and Issues*. New Delhi: Prentice Hall of India, 2003 pp.116-129. It is often contrasted with informal amendment, one in which various organs of government effect amendment in the course of discharging their daily responsibilities (such as law-making, implementing, or interpreting.)

¹⁰³ See Arts. 104 and 105 of the FDRE Constitution for instance, especially 105 (1).

required.¹⁰⁴ All this, it is presumed, is in deference to the trans-temporality and the universality of human rights.

A human rights provision is said to be entrenched when the procedure for its amendment is stringent. In Ethiopia, according to Art 105(1), amendment to the provisions of chapter three is effected when the following requirements are met:

- a) When the proposed amendment is approved by a majority vote of the legislatures of all the nine states;
- b) When the federal legislature approves the proposal by a two-thirds majority vote; and
- c) When the HoF approves the proposal by a two-thirds majority vote.

This shows the degree to which the amendment of the “bill of rights” is difficult, thereby rendering the constitution one of the most rigid constitutions in the world. From this, one can conclude that human rights are fairly entrenched in Ethiopia¹⁰⁵. It needs to be underscored at this juncture that this entrenchment marks the fact that human rights are taken seriously in the Ethiopian legal system.

4. The Role of the Judiciary in Protecting Human Rights

The role of the judiciary in the protection of human rights is so immense that it cannot be exaggerated. Often, they are rightly presented as “the bulwark against abusive governmental practices”.¹⁰⁶ In most jurisdictions, they are the primary bodies to which victims of human rights violations look to obtain formal redress. That is perhaps the reason it is often said that “undoubtedly, the protection of constitutional rights and freedoms is the objective of all courts.”¹⁰⁷ Of course one cannot deny that the courts do have shortcomings in this role. All its shortcomings notwithstanding, the court’s role in the

¹⁰⁴ This is the case for example in Australia. See generally Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*. New York: Foundation, 1999 on various modes of constitutional amendment.

¹⁰⁵ This rigidity, while it is preservative of the list of rights now recognized and is as such a good thing, might have a negative consequence in keeping out new set of rights which society might deem so important as to deserve inclusion in the constitution. So, entrenchment might, in effect, make constitutionalization of new rights difficult.

¹⁰⁶ Lawrence Friedman, “Turning to the Courts: Human Rights before the Bench” (Book Review), *Harvard Human Rights Journal*, Vol. 13 (2000), p. 316.

¹⁰⁷ Khalnar Hajiyev, “The Role of the Constitutional Court and Ordinary Courts in the Protection of Human Rights” (Paper presented on a conference on “Human Rights Protection Systems”, Bishkek , 21-22 November 2002), p. 3.

protection of human rights can never be over stated. In the sections that follow, we try to shed light on some of the key roles of the courts in this regard by trying to posit its role in the context of the state responsibility regarding human rights in general.

4.1-State Role Regarding Human Rights

It has already been hinted at the fact that state role can be classified into three categories, namely that of respect, protect, and fulfil. The *duty to respect* requires that the state does nothing to adversely affect the free exercise and enjoyment of rights by citizens. The *duty to protect* requires making protective laws, setting up protective institutions, employing qualified protective professional actors, allocating the necessary wherewithal (noting that rights are very expensive), and procuring the necessary logistical and infrastructural facilities. The *duty to fulfil* requires the state to go beyond the call of ordinary duties to ensure that citizens are capacitated to enjoy their rights. It calls for compassion of the highest order (the kind which says *I am my brother's keeper, I am my sister's keeper*) from the part of the state to make sure that especially the more unfortunate sections of our societies are brought to the level where they can enjoy a *decent life of dignity*. The state must thus plan and strategize to make sure that citizens are *free from want*¹⁰⁸ by working towards eradicating such social ills as poverty and illiteracy, and by combating those factors that negatively impact their environment and peace.

The judiciary as part of the three major organs of the state, the *trias politica*, is one of those institutions that have these triune duties to respect, to protect, and to fulfil the exercise and enjoyment of human rights. In the Ethiopian constitution, the courts are identified as one of the three organs of the state that have “the responsibility to respect and enforce the provisions of this [i.e., the Human rights] chapter.”¹⁰⁹ The major brunt of the duty to protect, as we shall see shortly, rests on the judiciary.

¹⁰⁸ The phrase “free from want” evokes the memory of the Four Freedoms speech of Franklin Delano Roosevelt in 1941 in which he postulated his vision of the world that ensures the exercise of freedom of expression and worship and freedom from fear and want for all citizens everywhere.

¹⁰⁹ Art 13 (1), the provision regarding state duty for human rights, reads as follows: “All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter.”

4.2-The Judiciary and its Roles in General

The judiciary, being staffed with judges who are viewed as the oracles of the law, is primarily the protector of the weak from the strong, the poor from the wealthy, and the powerless from the powerful. The protection of “the worst and the weakest amongst us” is one of the cardinal duties of the judiciary. In a case decided in the Constitutional Court, Justice P. Chaskalson of South Africa is noted to have said the following regarding the eminent role courts play in this regard:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislations in the courts, was *to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process*. Those who are entitled to claim this protection include *the social outcasts and marginalized people of our society*. It is only if there is willingness *to protect the worst and weakest amongst us* that all of us can be secure that our on rights will be protected¹¹⁰. (Italics added)

In a similar vein, Justice Jerome Frank is reported to have said that “the test of the moral quality of a civilization is its treatment of the weak and the powerless”¹¹¹. The judiciary’s primary task is to “to pursue justice”¹¹². The courts have it in their tradition to do justice without fear, favour, or prejudice. That is one of the reasons that courts need to be independent. Doing justice in the words of one of the prophets of old requires that we “administer true justice; show mercy and compassion to one another. Do not oppress the widow or the fatherless, the alien or the poor.”¹¹³ This pricks our attention to the causes of social justice that the instruments on socio-economic and cultural rights seek to advance. Needless to say, while the court needs to be objective, neutral, and dispassionate in as much as it can, in all its dealings it must also side with the truth (of facts) and the soundness of the interpretation of the law invoked. The need to be dispassionate should not blunt the need for it to be compassionate to the oppressed.

¹¹⁰ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC)

¹¹¹ In what echoes Frank’s statement, Justice Hugo Black is also reported to have said, “The worst citizen no less than the best is entitled to equal protection of the laws of his state and of his nation” in *Bell v Maryland*, 378 U.S. 226 (1964) AT 328.

¹¹² This is also often claimed by professional associations of lawyers e.g. the American Bar Association, as their slogan. In deed all lawyers have it in their role to advance the horizons of freedom and to aspire toward the ideal of justice.

¹¹³ Zechariah 3: 9-10, *Holy Bible* (New International Version). Zondervan: Grand Rapids, 1973/2001 (Rev), p. 525. It is of course noted that to demand the active engagement of courts for the cause of social justice is to demand more judicial activism which is not equally tolerated in all jurisdictions.

In the *trias politica*, the court's symbol is that of the scales, the scales of justice and fairness. It is often contrasted to the legislature, which commands the purse, and the executive, which commands the sword. Because it commands neither the sword nor the purse, it is said to be the weakest organ of state. Its weakness is taken as its strength and often it is given the task of watchdog over the powers of the more powerful institutions of the state. As Hamilton said in those inimitable words:

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. ... The judiciary, ..., has no influence over the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.¹¹⁴

One of the chief tasks of the judiciary is to normalize politics and bring balance to it. In this capacity, it tends to preserve the health of the political machine in a polity. It does so by protecting the integrity of the rule of the game of politics, i.e., the constitution.¹¹⁵ In most systems, the court serves as “the arbiter of what is and what is not legal or constitutional.” The courts are often viewed as indispensable to a vibrant democracy. They act as a check to politics especially when the latter goes awry. They are the voice of reason, the voice of conscience, in a democratic politics that tends to be blinded by the voice of passion of the majority. In this, it establishes sanity on the excesses of majoritarian democracy. They are custodians of the principle of rule of law. In a constitutionalist system that recognizes judicial review, they act as the guardians of the values of the constitution, the custodians of the ideals of the founding fathers. In this, they have the potential to serve redemptively as the voice that calls us back to the ideals the constitutions has set for us.

Cardinal to the success of their work is their independence (both institutionally as a court and personally as judges). This is reinforced by the UN *Basic Principles on the Independence of the Judiciary*.¹¹⁶ The Basic

¹¹⁴ See these timeless words of Alexander Hamilton in the Federalist Papers No 78. Hamilton, Madison, and Jay, *The Federalist Papers* (Charles R. Kesler and Clinton Rossiter, eds). New York: Mentor, 1969/1999, p. 433.

¹¹⁵ See Michael Gallagher, Michael Laver, and Peter Mair, *Representative Government in Modern Europe: Institutions, Parties, and Governments* (4th ed). Boston: McGraw-Hill, 2006, p.86.

¹¹⁶ UNHCHR, *Basic Principles on the Independence of the Judiciary* (1985). UNGA Res 40/32 and 40/146 of 1985. The principles represent a global consensus on what

Principles describe the seven key components necessary for judicial independence as follows: a) guaranteed term of office; b) finality of decisions; c) exclusive authority; d) ban against exceptional or military courts; e) fiscal autonomy; f) separation of powers; and g) enumerated qualifications (e.g. academic qualification, ability, integrity, efficiency, etc).¹¹⁷ Indeed, the judiciary's role as an institution of effective remedy lies in its independence. In order to ensure independence, improper influences on judges should be prohibited; care must be taken in the proper qualification, training and selection of judges; tenure and conditions of service must be provided; immunity must be guaranteed; disciplinary measures need to be taken only in accordance with the law¹¹⁸. It is also to be noted that the technical competence of the judges and the degree to which they bring about professionalism and sophistication to the practice of human rights is important for the effective protection of rights through the instrumentality of the courts.

4.3- The Judiciary and its Roles in Ethiopia

The judiciary in Ethiopia has no less important task than the one outlined for courts elsewhere. The constitution (in its arts 78-81) recognizes the establishment of a three-tiered independent judiciary which is vested with all judicial power. Owing to the federal nature of the polity, the establishment of state judicial bodies is envisaged by the constitution. Consequently, the states have constitutionally established a three-tiered court in their jurisdictions. In most states, there are also social courts that are increasingly granted a constitutional recognition although they have a dubious position in the judicial hierarchy. The federal supreme court has a cassation division whose decisions have an authority and precedential value over lower courts in the hierarchy (as of 2005). The state Supreme courts, too, have their own cassation divisions whose decisions, however, do not have a similar authority over lower courts in the states.

One of the major features of the Ethiopian judiciary is that it does not have the ultimate say on the meaning of the constitution. Nor does it have the power to rule over constitutionality of laws. This power is granted to the House of Federation cum the CCI (arts 62 cum 82-84). But the courts can decide on an issue in which constitutionality of a law is contested without its

judicial independence is and should be. See Linda C. Keith, "Judicial Independence and Human Rights Protection in the World" *Judicature* Vol 85, No 4 (2002) p. 196.

¹¹⁷ Keith, *supra* note 107, pp.196-197.

¹¹⁸ On this, see, for example, OSCE, "Protection and Promotion of Human Rights" (Supplementary Human Dimension Meeting, 12-13 July 2007, Vienna.)

decision having the effect of annulling the law as unconstitutional. The perception among most judges and lawyers (as well as the politicians and the lay public), however, is that the constitution is beyond the reach of the ordinary courts¹¹⁹. But this is simply counter-intuitive because: a) the courts have judicial power (art 79(1)); b) judicial power includes the power to find and declare the law; c) a law that is repugnant to the constitution is of no effect (art 9(1)); d) thus the courts can, in their day-to-day business of resolving disputes, can enforce constitutionality without the need to take the platform of constitutional interpretation and the need to ban an unconstitutional law. This is particularly important in the area of human rights law which, although emanations of the constitution, are presented to courts couched in the languages of procedural laws (especially that of criminal procedure).

While the significance of the judicial power in the process of normalizing politics is less and while its position as the guardian of the constitutional values is even less, the courts in Ethiopia, like everywhere else, have the important responsibility of doing justice without fear, favour, or prejudice. They have the responsibility of making themselves accessible (financially, physically, and culturally/procedurally). They also need to respect the human rights of citizens that, as parties or otherwise, find themselves in their sessions. More importantly, they must enforce the rights of citizens against violations (horizontal or vertical). These being the basics of the judicial task, they cannot do anything less.

4.4- The Judiciary and its Role of Protection of Human Rights: From whom and How?

It is by now clear that the judiciary must protect human rights. But protect from whom? First and foremost, they need to protect it *from themselves*. The courts have the responsibility to respect human rights. They are thus expected to respect, for instance, the rights to fair hearing, bail, due process, appeal, expression, representation by a counsel, etc. By so doing, i.e. through extending respect, they protect human rights from themselves. Secondly, the courts have the responsibility to protect human rights *from vertical violators, i.e., governmental bodies who administer rights*. Such are the police, the prosecution, the correction and rehabilitation centers, or administrative agencies, etc. To protect citizens from governmental actors is not easy

¹¹⁹ This observation is not made based on an opinion survey. The general frame of discussion on the matter with legal professionals, law students, judges, and officials in the HoF on diverse occasions and pieces on weeklies (e.g *The Reporter, Addis Neger*, etc) seem to suggest this.

because the courts depend on the selfsame executive bodies for the enforcement of their judgements (or orders, or decrees). The judges are expected to be very innovative in designing mechanisms by which they can make the executive accountable for their violations of the rights of citizens who are under their custody (such as that of arrested, detained, accused, and sentenced persons). They must also use a rigorous scrutiny into the activities of the executive, especially the law enforcement officials, when ruling on matters pertaining to arrest, bail, investigation, remand, detention, and imprisonment. But they also must seek and earn understanding, respect, and cooperation from these bodies.

One of the things that the judges have to do in this regard is to bring demonstrable professionalism and technical competence in the area of human rights. In particular, they need to know the steps, techniques and methods by which human rights are concretized. In particular, they need to have a principled approach to the interpretation of legal texts that embody or implicate human rights. They need to bear in mind that rights clauses must always be interpreted liberally whereas power clauses must be interpreted more literally and strictly. They need to manifest dexterity in fleshing out the content and scope of a right by making a subject-object-addressee analysis. They also need to be efficient in determining reasonable limitations that can be imposed (or not) on the exercise of rights. They need to master the nuances and subtleties of the practical implications of the enforcement of rights. They must realize that “human rights protection is ultimately a practical exercise.”¹²⁰ They must also understand the limits of their powers in this regard.

The third category of persons from whom the courts must protect human rights is *other people*. Other people do what is often termed ‘horizontal violation of human rights’. This can be done of course if there is first a legislative framework that protects rights from other individuals or non-state actors. Here, often, the task is to penalize the violator and to redress the victim of the violation.

4.5-The Limits of Judicial Power to Protect Human Rights

By far the greatest limitation of the courts in their endeavour to protect human rights is that they depend on the sword of the executive and the purse of the legislature, although much less the latter. In Ethiopia, the fact that they are

¹²⁰ John McMillan, “The Role of the Ombudsman in Protecting Human Rights” (paper presented on a conference on ‘Legislatures and the Protection of Human Rights’ at the University of Melbourne, 21 July 2006), p. 9.

not the ultimate arbiters on constitutional matters might undermine their position vis-à-vis the other organs in the *trias politica* to act in defense of constitutional human rights.¹²¹ Even if (and when) this second limitation is overcome, the fact that the country's public resources are patently meagre make it difficult for the courts to order this or that kind of remedy for human rights violation. But one quickly notes that governments will never *have* resources for human rights; they *make* resources available for them because our constitutional and international commitments demand no less than that. After all, human rights are not luxuries as many people would assume; they are basic necessities for a decent human existence.

Conclusions

The aim of this piece was to explore the mechanisms through which we can make a legal sense of human rights. It aimed at raising some questions concerning the task of making human rights a set of legally consumable commodities. It sought to make a call to look beyond human rights fundamentalism and cynicism which legislate utopian dogmatism and political despair respectively. It sought to challenge us to take steps to move from political rhetoric (centred on the constitution) to legal reality (centred mainly on the judiciary). Noting that human rights are moral entitlements that all human beings claim as such, we sought to see ways through which we can concretize them by making a legal and judicial sense of human rights. The key features of human rights—inherence, inalienability, inviolability, universality, trans-temporality—were identified. The various ways in which we can classify them is also discussed. Why they matter to us is also stressed.

The position of human rights in the past and present constitutions of Ethiopia was also briefly explored. The fact that the past of the Ethiopian public law has little to commend about human rights is noted. The fact that in the contemporary constitutional law of Ethiopia human rights (both the

¹²¹ The lack of conceptual clarity about the judicial role in a legal system that generally leans to the civilian tradition of continental Europe—whether the judges are neutral umpires in a proceeding or active agents of public policy enforcement—also contributes to the limited role courts play in taking a more robust stance with regard to the protection and enforcement of human rights. One notes that if one conceives his/her role as one of the former, then there tends to be little for the court to do in any type of case, whereas if he/she conceives of his/her role as one of the former, then there is the likelihood that they will take it as their responsibility to look after human rights in their judicial role. For the difference in the role of judges in the two traditions, see generally Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to Legal Process* (2nd ed). New Haven, Yale University Press, 1991.

principle and the details) loom large is also noted. The fact that a wide range of rights recognized in the IBR are incorporated in the Ethiopian Bill of Rights is underscored. The reach and application, the interpretation, the limitations, and the entrenchment of the provisions of chapter three, and some of the specific rights embodied in the chapter are discussed along with the institutional framework for their protection.

In an attempt to make a legal sense of human rights, we looked at the options we have in order to move from mere political rhetoric to actual legal reality. The steps of concretization—from constitutional guarantee-to legislative protection-to judicial application-to executive implementation – and the levels of protection (the duty to respect, protect, and fulfil) are all explored. In an attempt to flesh out the steps toward making a judicial sense of human rights, we examined the procedural, substantive and remedial steps we might need to undergo in human rights litigation. Issues related to the reach (state or non state actors?) and application (direct or indirect?), determination of the content of the rights through making a subject-object-addressee analysis, determination of legitimate limitations that can be imposed on the exercise of human rights, interpretation of human rights clauses, the entrenchment of rights clauses that results from their trans-temporality are all examined one after the other.

Against this background, the role of the judiciary in the protection of human rights is discussed. The role of the judiciary in the *trias politica* as the institution that does justice without fear, favour, or prejudice is stressed. The state's role in the protection of human rights in general (responsibility to respect, protect, and fulfil) and the judiciary's take on that is noted. Its role as the voice of reason, the normalizer of politics, the protector of the weak from the strong, the poor from the rich, and the powerless from the powerful is also underscored. The courts' role to protect human rights from the judiciary itself, from vertical and horizontal violators is also put in perspective. Some of the limits of the judicial power in its endeavour to protect human rights are also noted. These thoughts, it is hoped, will contribute to clarity of our conception of how to make legal sense of human rights in Ethiopia and to our vision of the court's role in this regard. ■
