NOTES AND COMMENTS

RIGHT TO ACCESS TO JUSTICE IN ETHIOPIA: AN ILLUSORY FUNDAMENTAL RIGHT? *

Abstract

The Constitution of Federal Democratic Republic of Ethiopia (1995), which emerged as a document of destiny for millions of Ethiopians after the political transformation of Ethiopia from imperial to military to democratic republic polity, guarantees numerous fundamental rights (FRs) and fundamental freedoms (FFs). These FRs and FFs, which are tuned to the international norms of human rights, occupy one-third space of the Constitution.

One of the FRs guarantees the 'right to access to justice' from a 'court of law' or 'an appropriate institution vested with judicial power'. However, the courts are neither constitutionally empowered nor institutionally strong and courageous to enforce the FRs and FFs and thereby to make the right to access justice a reality. The Ethiopian Human Rights Commission (EHRC), which is established in pursuance of a constitutional mandate, has also limited role to play in the enforcement of the FRs and FFs. In light of the constitutional scheme and spirit of the FRs and FFs and the structural and operational facets of the courts and of the EHRC, the paper argues that the constitutionally guaranteed right to access to justice turns out to be mere legalistic rather than pragmatic, and cosmetic rather than realistic. It is just an illusory fundamental right!

I Introduction

PUSHING AN about ninety decades of the imperial regime (1890-1974) with a half-decade's spills of the Italian occupation (1936-1941), and a decade-and-half's barbaric military junta (1974-1991) in the history, Ethiopia, in 1995, opted a 'democratic' way of state-governance and polity.

However, codification of laws was initiated and flourished only during the Emperor Haile Selassie I regime (1930-1974). During his reign, two constitutions, the Constitution of 1931[1] and the Revised Constitution of the Empire of Ethiopia of 1955,[2] and six basic Codes,[3] were enacted. Both the

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1. Prior to 1931, Ethiopia had a complex traditional, unwritten constitution webbed by the ideal of the monarchy. See, Fasil Nahun, *Constitution for a Nation of Nations: The Ethiopian Prospect* Ch. 1(Red Sea Press, Asmara, Eritrea, 1997).

2. Proclamation 149/1955.

3. The codes drafted during the regime are: (i) the Penal Code of 1957, (ii) the Civil Code of 1960, (iii) the Maritime Code of 1960, (iv) the Commercial Code of 1960, (v) the Criminal Procedure Code of 1961, and the Civil Procedure Code of 1965. Though some of these Codes

1931 and 1955 Constitutions, which prominently codified the unlimited and inalienable power of the Emperor on his subjects, hardly provided for any rights or freedoms. The Revised Constitution was in force till 1974 when Emperor Haile Selassie I was overthrown in a military coup, led by Major Mengistu Haile Marium. Operation of the 1955 Constitution and of key civil institutions was suspended. During the oppressive military regime, nick-named as Derg regime, Ethiopians witnessed arbitrary arrests and detentions, torture, enforced disappearances and extra-judicial execution of political opponents of the regime. Major Mengistu Haile Marium ruled the country for 17 years (1974-1991) ruthlessly in utter disregard to even basic rights of individuals. During the Derg regime, in 1987 the Constitution of the People's Democratic Republic of Ethiopia (PDRE Constitution) assuring certain basic rights and freedoms to Ethiopians, and expressing the regime's commitment to honor them, was enacted. But, as history exhibits, it was honored by the military ruler with utter disregard to, and massive violation of, the rights and freedoms.

A long civil war, led by the Ethiopian People's Revolutionary Democratic Front (EPRDF), a combined group of different ethnic democratic forces, led by Melles Zenawi, the present Prime Minister, saw the demise of the brutal Derg regime in 1991. A Transitional Government of Ethiopia (TGE), governed by the Transitional Period Charter (TPC), was established. It ruled the country for more than five years (July 1991-August 1995). The TPC proclaimed to set in motion 'a new chapter in Ethiopian history in which freedom, equal rights and self-determination of all the peoples' would be the 'governing principles of political, economic and social life'.[4]

Subsequently, under the EPDRF's provisional government, the Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution or Constitution), was adopted in 1994. It came into force in 1995.[5] The Constitution, among others, has overhauled, rather re-casted, the hitherto prevailed (imperial and military) paradigm of 'rights' and of the notion of 'justice', and the system of 'governance' and of dispensing 'justice' to Ethiopians. In the backdrop of the *Derg* regime that was characterized by brutal governance with denial of individual and group rights, the FDRE Constitution, *inter alia*, opts for the 'democratic' polity and guarantees a set of fundamental rights (FRs) and fundamental freedoms (FFs) to Ethiopians.

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are subsequently modified and revised, their basic framework remains intact and they constitute core of the laws of Ethiopia.

4 Preamble to the TPC.

5 Proclamation 1/1995. It was drafted by the Constitutional Assembly elected under the TPC prepared by the TGE. 'The Nations, Nationalities and Peoples of Ethiopia' (NN&Ps), with which all sovereign power rests, have adopted it on Dec. 8, 1994. It came into force on Aug. 21, 1995.

The chapter three of the Constitution offers a comprehensive catalogue of 'Fundamental Rights and Freedoms' (articles 13-44). It further re-clusters them in two parts, *namely*, 'Part One: Human Rights' (articles 14-28], and 'Part Two: Democratic Rights' (articles 29-44). These FRs and FFs occupy one-third space of the Constitution.

The Constitution, through its article 37, also guarantees the right to access to justice from a 'court of law' or 'an appropriate institution vested with judicial power'.

The constitutional significance of the idea of 'justice' and its realization, however, depends not only on a comprehensive catalogue of progressive FRs and FFs and the right to access to justice but on the efficacy of the institutional mechanism designed for their protection and enforcement as well as the constitutional imperative attached to, and efficacy of, the right to access to justice.

The present paper addresses to, and offers a constitutional perspective of, the right to access to justice, a key fundamental right, *vis-à-vis* institutional protection and enforcement of the FRs and FFs.

II Fundamental rights and freedoms - Constitutional concern and prominence

The FDRE Constitution offers a comprehensive list of FRs and FFs. Right to life, security and liberty; right to privacy and dignity; right against arbitrary arrest and detention, inhuman treatment and torture; right to trial and equality before the law and equal protection of law; right to profess religion; among others, figure in the catalogue of the enumerated FRs. The Constitution assures Ethiopians the freedom of expression, assembly, association and movement, and freedom of religion, belief and opinion. It also incorporates in it a couple of political, economic, social and cultural rights and addresses to the right to clean & healthy environment, and the right to sustainable development. The Constitution accords status of FRs to the doctrine of double jeopardy; the rule against *ex-post facto* criminal laws, and the right against self-incrimination by putting them in the list of guaranteed FRs and FFs. The FRs and FFs correspond, both in letter and spirit, to the hitherto universally recognized core social, economic, cultural and political rights of individual as well as cardinal principles of criminal jurisprudence.

Article 13 and article 37, incorporated in chapter three, strive to make these FRs and FFs more effective and realistic. Art 13, which is applicable to both, the 'Human Rights' and 'Democratic Rights', puts 'all Federal and State legislative, executive and judicial organs at all levels' under the constitutional 'responsibility and duty to respect and enforce' these rights and freedoms.

It also offers the constitutional formulation of interpretation of these FRs and FFs. It mandates that these rights and freedoms are to be interpreted in conformity to 'the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and international instruments adopted by Ethiopia'. The FRs and FFs, thus, are tuned to international norms. Further, by virtue of article 9(4), all international human rights instruments ratified by Ethiopia become an integral part of the national law. Article 37, on the other hand, which itself is a fundamental (democratic) right, guarantees every Ethiopian 'the right to access to justice' from a 'court of law' or 'an appropriate institution vested with judicial power'. Further, article 10, falling under 'Chapter Two: Fundamental Principles of the Constitution', not only recognizes that fact that human rights and freedoms, which emanate from the nature of mankind, are inviolable and inalienable, but also states that human and democratic rights of citizens needs to be respected. None of the FRs and FFs can be altered unless all the state councils, by a majority vote, and both the parliamentary houses, *namely*, the House of Peoples' Representation (HoPR) and the House of the Federation (HoF), approve the proposed change(s) by a majority and two-third majority vote respectively.[6]

The FDRE Constitution, thus, not only guarantees a host of FRs and FFs but also accords them high constitutional prominence. It mandates the apt authorities to interpret them in conformity with the universal human rights norms. With a view to giving effect to the FRs and FFs, the Constitution also provides for the establishment of human rights institutions, such as ombudsman and the Human Rights Commission.

III Right to access to justice

Fundamental right

The FDRE Constitution, plausibly with a view to making the FRs and FFs enumerated therein more meaningful and effective, guarantees 'every person' the 'fundamental right to access to justice'. Article 37(1) of the FDRE Constitution, assuring the right to access to justice, says:

> (1) Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power. —
> (2) The decision or judgment referred to under sub-Article 1of this Article may also be sought by:

6. Art. 105(1), the FDRE Constitution.

(a) Any association representing the collective or individual interest of its members; or
(b) Any group or person who is a member of, or represents a group with similar interests.

A plain reading of article 37 reveals that a person or an association or group, on behalf of its member, is, as a matter of fundamental right, entitled to obtain a 'judgment' or 'decision' on any 'justiciable matter' from a 'court of law' or an apt authority 'with judicial power'. Undeniably, violation of any of the FFs and FFs fits into the expression 'justiciable matter' used in article 37. In other words, it is a fundamental right of an Ethiopian to get his constitutionally guaranteed FRs and FFs enforced through a 'court of law' or an appropriate body vested with 'judicial power' and thereby to seek 'justice'. The former institution, namely 'court of law', is self-explanatory. It is a judicial institution backed by the state authority. In the backdrop of the fact that the FRs and FFs are clustered as 'Human Rights' and 'Democratic Rights' in the FDRE Constitution, and the term 'human rights', defined in the Proclamation 210/2000,[7] through which the Ethiopian Human Rights Commission (EHRC) is established, includes in it the FRs and FFs, the EHRC seems to be a 'competent body with judicial power' for the enforcement of FRs and FFs.

However, realization of the constitutional right to access to justice, in ultimate analysis, depends upon the professional competency and commitment of a court of law and the EHRC, which, in turn, is linked with, and dependent on, their structural and functional autonomy.

Enforcement

Right to access to justice vis-à-vis 'a court of law'

Traditionally, a constitution that guarantees FRs and FFs explicitly declares that any law or action in violation of those rights and freedoms are *ultra vires* to the Constitution, empowers specified courts, preferably higher courts from the hierarchy of national courts, to declare the law or action violative of the FRs or FFs unconstitutional, and to redress the violation of FR and/or FF of the petitioner.

Interestingly, the FDRE Constitution, which guarantees a set of FRs and FFs and assures the right to access to justice to every Ethiopian, does provide

7. The term 'human rights', defined for the purpose of the Proclamation, refers to the FRs and FFs guaranteed under the FDRE Constitution and international agreements ratified by Ethiopia. See, art. 2(5) of the Ethiopian Human Rights Commission Establishment Proclamation 210/2000.

for unconstitutionality of a law or an action that contravenes any of the FRs or FFs. Article 9 of the Constitution, however, declares that 'any law, customary practice or decision of an organ of State or a public official in contravention of the Constitution' is 'of no effect'. It also does not specify the court(s) of law, from the three-tier 'regular'[8] court system established thereunder at the federal and regional (state) levels,[9] which is (are) to be approached for, and empowered to, enforce the FRs and FFs, including the right to access to justice and to render a 'decision' or 'judgment'.

Further, the FDRE Constitution, unlike most of the democratic constitutions, confers the power of judicial review, constitutional interpretation and adjudication of constitutional disputes not on a court of law, including the Federal Supreme Court, the 'highest court' of the land vested with 'supreme federal judicial authority', but on the House of the Federation (HoF), the Upper House of the Ethiopian bicameral Federal Parliament, assisted by the Council of Constitutional Inquiry (CCI).[10] Article 62(1) of the Constitution states that 'the House (of the Federation) has the power to interpret the Constitution'. And article 83(1) of the Constitution, with the marginal note 'Interpretation of the Constitution', reads: 'All constitutional disputes shall be decided by the House of the Federation'. The HoF is required to seek 'investigation of a constitutional dispute and contested unconstitutionality of a Federal or State law through the CCI'.[11] The constitutional scheme of non-judicial review and of interpretation of the Constitution is re-asserted and further articulated through two parliamentary proclamations, *namely*, the Council of Constitutional Inquiry Proclamation 250/2001 and the Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation 251/2001. Article 23(1) of the Proclamation 250/2001 empowers a person whose FR or FF is violated by a government institution or an official to present his case to the CCI for constitutional interpretation.

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8. The phrase 'regular', it seems, is used in art. 78(5) of the Constitution to distinguish the constitutionally established courts from the Religious Courts (*Sharia Courts*) [recognized under, and protected by, art. 34(5) of the Constitution], and Customary Courts [referred to in art. 78(5) of the Constitution].

9. The federal judicial system is comprised of: (i) the Federal First Instance Courts, (ii) the Federal High Court, and (iii) the Federal Supreme Court. A regional court system is composed of (i) State First Instance Courts (*Woreda Courts*), (ii) State High Courts (Zonal Courts), and (iii) the State Supreme Court. [See, arts. 78 & 79 of the Constitution.] The Constitution vests 'judicial power' of the Federal Government and the Regional State Governments in the Federal and the State Courts respectively. [See, arts. 79 (1) and 50(7).] The Federal Supreme Court, which is the highest court of the land, is vested with 'Supreme Federal Judicial Authority' and bestowed with the 'jurisdiction over cases arising under the Constitution'. [See, art. 78(2) of the Constitution and art 3 of the Federal Courts Proclamation 25/1996.]

10. See, art. 82(2), the FDRE Constitution.

11. *Id.*, art. 62(2).

A combined effect of provisions of the Constitution and of the Proclamations 250 & 251 of 2001 dealing with non-judicial review of the Constitution and interpretation of the Constitution is that courts in Ethiopia do not have the power of judicial review of the Constitution as well as of legislative Proclamations. They are mandated to hands-off when they are called upon or required to handle cases involving constitutional issues, disputes or controversies or to adjudge constitutionality of any legislative or executive acts. They are required to distance themselves from any sort of judicial scrutiny of, and inquiry into, constitutional issues and to refer the case to the HoF, via the CCI, for final decision.

In the absence of a clear stipulation in the Constitution of a court of law that is vested with the responsibility of the enforcement of FRs and FFs coupled with the explicit provisions conferring the power of judicial review and interpretation of the Constitution, via the CCI, on the HoF, more than fifty-percent of the judges at the federal and regional levels, including judges of the federal and regional supreme courts, believe that they have little or no role to play in the interpretation of the FRs and FFs and their enforcement.[12] Their feeling, it seems, is seemingly justified on the fact that a court of law, whenever it is called upon to enforce any of the FRs or FFs, is invariably required to delve into the constitutional contour of the contested FR or FF for its enforcement and thereby to engage itself in the 'interpretation of the constitution' or settlement of a 'constitutional controversy', the domain that constitutionally belongs to the CCI/HoF.

However, the feeling of the judges, in the backdrop of the constitutional spirit of the FRs and FFs and the prominence given to them in the Constitution, seems to be premised on a weak premise. The FRs and FFs are not merely distinct from ordinary statutory rights but also occupy higher status in the hierarchy of rights and operate as limitations on the state power. They, as stipulated in the Constitution, need to be interpreted in accordance with universal norms. They, as per one of the fundamental principles of the Constitution, need to be respected by all individuals, state organs and officials. In fact, all federal and state legislative, executive and judicial organs are under the constitutional 'responsibility and duty' to 'respect and enforce' the FRs and FFs. However, the responsibility and duty of the judiciary becomes significant when the legislative and executive organs of the state, advertently or inadvertently, fail, on political considerations or otherwise, to comply with their constitutional obligation of respecting FRs and FFs of individuals. A court

12. See, Assefa Fiseha and Solomon Niguse, *Report on the Needs for in Service Training of Judges and Prosecutors* (Unpublished, 2008), cited in Assefa Fiseha, "Some Reflections on the Judiciary in Ethiopia" in *Recht in Afrika* 1 at 13 (2011).

of law, obviously, can discharge its 'constitutional responsibility and duty' of 'respecting' the FRs and FFs *only* by 'enforcing' them when they are violated or abridged by the other two organs of the state or individuals. Article 13, thus, imposes a 'constitutional duty' on the courts to 'enforce' the FRs and FFs enumerated in chapter three and article 37 of the Constitution creates a corresponding 'constitutional right' in favor of an Ethiopian to obtain, as a matter of fundamental right, to seek an apt 'judgment' or 'order' from a court of law. A view that a court of law has limited or no role to play in the enforcement of FRs and FFs merely because judicial scrutiny of the scope of the contested fundamental right or freedom as well as of the act claimed to be violative thereof amounts to 'interpretation of the Constitution' seems to be unconvincing and not in tune with the spirit of the fundamental rights and freedoms. Such a view not only diminishes the constitutional imperative of the chapter three but also turns the FRs and FFs enumerated therein to mere constitutional cosmetics and symbolic. Further, it obviously leads to an inevitable proposition that acts of legislative and executive branches of the state contrary to, or taking away, the FRs and FFs are beyond the purview of judicial scrutiny. Compliance or non-compliance of the FRs and FFs, therefore, is left to their sweet-will. Such a proposition not merely appears to be illogical but also makes all the FRs and FFs, including the right to access to justice, a mere illusion.

Effective protection and enforcement of the FRs and FFs, which indeed operate as constitutional limits on the state-power, by the HoF, which is primarily comprised of politicians and most of whom represent the executive branch of the regional states, cannot be assured. The HoF is politically proximate to the executive wing of the state. Its role in interpretation of the contested fundamental right or freedom, therefore, will invariably be clouded by reasonable suspicion of partiality. There will always be a room to suspect that determination of the HoF/CCI is premised on, or motivated by, some political considerations, rather than on certain sound legal principles. Decision of the HoF/CCI can hardly be impartial and free from political considerations even though the contested act is ostensibly contrary to the FRs or FFs guaranteed under the Constitution. Approach of the HoF/CCI in the current decade to two politically sensitive cases (decided in 2001 & 2005) that involved violation of FRs and the right to access to justice of the petitioners lends support to the proposition. In 2001, a court of law allowed Ato Siye Abraha, the former Chief Military-General, accused of corruption, to go on bail. Subsequently, the Parliament enacted the Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation (239/2001) to nullify the judicial decision in favor of Ato Siye Abraha and to stall his release on bail.

The proclamation, with retrospective effect, disqualifies a person accused of corruption for seeking bail. Ato Siye Abraha, along with other persons accused of corruption, contested the constitutional *vires* of the Proclamation on the ground that it violated article 22 of the Constitution that prohibits non-retroactive operation of criminal law. The trial court, believing that the case involved constitutional interpretation, referred it to the CCI for inquiry. The CCI recommended to the HoF to reject the petition as the Proclamation was not violative of article 22 of the Constitution.[13] In 2005, after the May 2005 Parliamentary election, supporters of the Coalition for Unity and Democracy (CUD), the leading coalition of four opposition political parties of Ethiopia, journalists, civil society activists, lawyers, academicians and university students held demonstrations protesting the alleged tampering with the election results by the EPRDF, the ruling coalition of political parties led by the present Prime Minister. Thousands of supporters of the CUD, including the newly elected Mayor of Addis Ababa, parliamentarians, journalists and civil society activists and students, were arrested and imprisoned. The Prime Minister, to curb the erupting demonstrations, issued an order banning public demonstrations in Addis Ababa and its vicinity. Demonstrations, in spite of the order, continued.[14] The CUD, in the Federal Court of First Instance contested the constitutional *vires* of the Prime Minister's order on the ground that it was violative of the constitutional right of assembly and demonstration (guaranteed under article 30) and asserted that the right to access to justice (guaranteed under article 37) be upheld. The trial court ruled that the dispute required constitutional interpretation and referred it to the CCI for inquiry. The CCI remanded the matter to the trial court with a ruling that no constitutional interpretation was required as the Prime Minister, while issuing the order, had not overstepped his constitutional authority. The First Instance Court, giving its ruling on the lines of CCI's dictum, ruled that no fundamental right, including the right to access to justice, was violated.[15] The Federal High Court, on appeal by the CUD, approved dictum of the court of first instance.

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13. See, Chi Mgbako, Sarah Braasch, *et al.* Silencing the Ethiopian Courts: Non-judicial Constitutional Review and its Impact on Human Rights, 32(1) *Fordham International Law Journal* 259 (294).

14. About 9,000 supporters of the CUD were arrested. Ethiopian Security Forces shot and killed 42 people and wounded 200 during demonstration in Addis Ababa in November 2005. More than one-hundred demonstrators, including the CUD activists, were slapped with the charges of conspiracy, armed uprising, treason, genocide, and outrages against the Constitution. See, Amnesty International, *Ethiopia: Prisoners of Conscience Prepare to Face Trial* (AI, 2006). Also see, Amnesty International, *Ethiopia: Country Reports of Human Rights Practices for 2005* (AI, 2005).

15. See, *Coalition for Unity and Democracy* v. *Prime Minister Meles Zenawi Asre*, Federal First Instance Court, File 54024, ruling of June 3, 2005.

Further, the power of interpretation of the Constitution and determination of constitutional disputes by the HoF/CCI has serious consequences on the protection and enforcement of the FRs and FFs. The HoF does not assure the aggrieved party his right to be heard before it makes its decision. An aggrieved party also does not have a right to appeal against decision of the HoF as decision of the HoF is final.[16]

Roots of the judges' belief can be traced in, or linked with, the constitutional design of the judiciary and its functional autonomy.

Constitutional outlay of a court of law - a design for a structurally weak court?

The FDRE Constitution provides for a parallel three-tier judicial system at the federal and regional levels. It, *inter alia*, lays down common rules with respect to the appointment, transfer[17] and removal of judges.[18] It empowers the Prime Minister, through the HoPR, and the chief executive of the regional state, through the state council, to appoint the President and Vice-President of the Federal Supreme Court and the State Supreme Court respectively. The federal and the state judicial administration councils[19] are entrusted with the primary responsibility of selecting other judges, respectively, for the federal and state courts. The candidates selected by the Federal Judicial Administration Council (FJAC), on submission of their names by the Prime Minister, are appointed as judges of the federal courts. Similarly, the candidates selected by a State Judicial Administration Council (SJAC), after seeking opinions of the FJCA on its nominees, are forwarded to the state chief executive, who in turn places them in the state council for appointment as state judges.

JACs at both the levels are armed with extensive powers to:(i) recommend candidates to fill-up judicial positions; (ii) issue and enforce disciplinary and ethical standards, (iii) investigate disciplinary complaints, and (iv) decide issues pertaining to salary, allowance, transfer, suspension and termination of judges.

16. See, arts. 5(1) & 11(1), the Proclamation 251/2001.

17. Art. 81, the FDRE Constitution.

18. *Id.*, art. 79(4).

19. The FJAC, in pursuance of the Constitution, is formally established by the Proclamation 24/1996, *inter alia*, to select judges and to discharge other obligations contemplated under the Constitution. The FJAC is composed of nine members: the President and the Vice-President of the Federal Supreme Court, the most senior judges of the Federal Supreme Court, the President of the Federal High Court, the most senior judge of the Federal High Court, the President of the Federal First Instance Court, and three members of the HoPR. The President of the Federal Supreme Court is Chairman of the FJAC. All the regional states have followed the suit of the Federal Government in establishing their own (State) Judicial Administration Council (SJACs) on the lines of the FJAC and entrusting them the task of selecting judges, except the President and the Vice-President of the State Supreme Court, for the State Courts. [See, art. 4, the Proclamation 24/1996.]

There is hardly any clear and consistent legal or conventional mandate for judicial appointments in Ethiopia. JACs are merely guided by very vague and subjective criteria for selecting judges. Any Ethiopian, who is not below 25 years of age and is not a member of legislative or executive branch of the government or a political organization, can be appointed as a federal judge if he: (i) is loyal to the Constitution, (ii) has legal training or acquired adequate legal skill through experience, and (iii) has a good reputation for his diligence, sense of justice and good conduct.[20] None of these three constitutional criteria is objectively measurable. The requirement of 'loyalty to the Constitution', which is in practice confused with 'loyalty to the ruling party', is difficult to measure. A law degree or professional examination is not required to become a judge at any level, including the federal and regional Supreme Court. A person holding a diploma in law or having some legal skill acquired through experience sans law degree or diploma qualifies him to be a judge even of the highest court.[21] Similarly, the requirement of 'good reputation' for 'diligence, sense of justice and good conduct' is difficult to measure objectively. In the absence of set procedure and criteria, judicial appointments become unpredictable. No judicial vacancies are advertised. The initiative and recruitment process of judicial appointments are marred with secrecy, arbitrariness and favoritism. Judiciary on the whole, as a cumulative consequence, lacks judges with sound legal qualifications, judicial skills and maturity. Courts are equipped with professionally low competent judges. Judicial promotions, disciplinary actions, and removal of judges are equally arbitrary and motivated by non-judicial considerations.

However, in reality the JACs are either not effective or are dominated by the executive. Their role in the appointment, promotion and transfer of judges is very minimal. There are a number of instances from the regional states wherein judges are appointed and removed in contravention of the constitutional

20. Art. 8 of the FDRE Constitution. Reasons for the constitutional criteria, however, could be traced to certain historical facts. During the overthrow of the *Derg*, members of legal profession, who were seen as an integral part of the oppressive military junta, were targeted for retribution. Most of the then sitting experienced judges were killed, imprisoned, fled or compelled to retire. When the FDRE Constitution introduced a new three-tier judicial system at the federal and regional levels, the then existing pool of legally trained judges, who were unconnected with the *Derg* regime, was utterly insufficient to sit on the newly created courts.

21. Amongst the sitting judges, only a few are degree holders, a majority have only diploma, and a fair number of judges have barely three to six months of legal training certificate after graduating from high school. See, Canadian International Development Agency, (CIDA), *Independence, Transparency and Accountability in the Judiciary of Ethiopia (A Draft for Consultation)* (Unpublished, August 2008) 89, and Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report* (Justice Reform Program, Ministry of Capacity Building, Federal Democratic Republic of Ethiopia, PrimaveraQuint, Amsterdam, the Netherlands, 2005) 59.

provisions. A few prominent among them are: (i) in Oromia Regional State, for example, in 2002, sixty judges were appointed for Supreme, High and Woreda Courts by the President of the Supreme Court, (ii) in Oromia Regional State, in 1995, three hundred eighteen judges were dismissed by the Regional State Council without the involvement of the JAC and without following any of the relevant provisions of the Federal and the Regional constitutions, (iii) in 2000, the Oromia Regional Council, without the knowledge of the JAC, dismissed thirteen judges, including the Supreme Court's President, (iv) in 1997, in Gambela Regional State, three Supreme Court judges were arrested and later, without following any procedure, dismissed by the regional government for releasing a suspect on bail, and (v) in Jinka and Gambela many judges were detained illegally in 1994 and 2001 for a court decision which the local administration disliked.[22]

These and similar instances of actions in contravention of the Constitution, consciously or unconsciously, significantly affect judicial courage and sense of impartiality of a judge to decide a case at hand solely on the basis of law. He may be unwilling to take a risk of inviting consequences that are likely to put his professional career and personal reputation at stake by rendering, in his quest for justice, a fair and just decision. Such a lurking fear is bound to hamper his decisional independence and professional ability to dispense justice according to law. It may make him professionally weak and meek. Obviously, a decision given under such a fear is unfair, unjust and contrary to his sense of justice and law.

The judicial paradigm drawn in the Constitution for selection, appointment, promotion, and dismissal of judges allows unskilled, incompetent and unmotivated individuals to invade the bench, which, in turn, does not operate as efficient justice-delivery institution. The quality of justice obviously depends directly upon quality and professional competence and commitment of judges.[23] The Constitution, thus, envisages a structurally weak, functionally crippled, and professionally timid court of law.

Judicial independence- a mere constitutional assertion?

The FDRE Constitution categorically states that the judiciary established in the country is independent.[24] However, the composition of the JACs, their role in the appointment of judges as well as in the matters of judicial behavior,

22. See, Assefa Fiseha, "Some Reflections on the Judiciary in Ethiopia" *supra* note 12 at 22-24.

23. Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report, supra* note 21 at 161.

24. The FDRE Constitution asserts judicial independence in more than one provision and in different tones. Art. 78(1) stipulates that the judiciary established under the Constitution is

and the murky procedure followed by them while making judicial appointments and promotions and taking disciplinary actions, among other things, leave room for the executive to influence the structural and functional facets of the judiciary. Many judges think that the appointment and promotion of judges is made clandestinely by the executive and the JAC has no choice but to put its seal of approval. Such a constitutional permissiveness not only goes against the accepted canons of the doctrine of separation of powers but also mars the idea of judicial independence. These procedures lead to the forces that have significantly influenced the judicial behavior of the judges and their decision-making power. The Netherlands-based the Center for International Legal Cooperation (CILC), which was asked by the Government of Ethiopia (GOE) to review the Ethiopian justice system, after an instructive analysis of legal instruments and provisions dealing with selection, appointment and promotion of judges, and professional skill, aptitude, commitment, and accountability of judges, has observed:[25]

> One of the most prominent threats to the consolidation of a fully independent Judiciary is the continuing influence of the executive and/or the legislative in the administration of the Judiciary and in the selection, promotion, and disciplining of judges. — [T]here is an observable tendency for the executive and/or the legislative to try to retain or reclaim powers through appointments, influence on the composition of judicial oversight bodies —. As a matter of fact, article 81 of the Constitution that deals with the appointment of judges, serves as a poignant example.

A scholar of the Ethiopian constitutional law, has observed:[26]

> The political branches have more blatantly interfered with the administration of justice. They can fire judges, dictate their decisions, reduce salaries, and fail to enforce decisions. Judges could be forced to

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'independent'. Art. 79(2) asserts that the courts at all levels are required to be 'free from any interference of influence of any governmental body, government official or from any other source'. And art. 79(3) mandates a judge to exercise his functions in 'full independence' and to be 'directed solely by the law'. With this spirit, art. 79(4) assures a judge of full tenure of service and provides him a constitutional safeguard against arbitrary removal. No judge can be removed from his office before he reaches the retirement age. He can only be removed by the JAC for proved violation of disciplinary rules, gross incompetence, inefficiency, illness that prevents him from carrying out his duties.

25. Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report, supra* note 21at 160. For a similar observation of the World Bank see, World Bank, *Ethiopia: Legal and Judicial Sector Assessment* 20-21 (The World Bank, Washington DC, USA, 2004).

26. Assefa Fiseha, "Some Reflections on the Judiciary in Ethiopia" *supra* note 12 at 23.

rotate and be transferred to undesirable posts if they issue unpopular decisions.

The constitutional design for non-judicial review and adjudication of constitutional issues by the HoF/CCI, mentioned earlier, gives another blow to the judicial independence. It, in ultimate analysis, doubts professional ability and credibility of the Ethiopian courts in handling constitutional matters and issues, including the FRs and FFs.

However, it is pertinent to note that limited judicial autonomy of the contemporary courts in Ethiopia stems from the past judicial tradition as well as certain constraints, legal and pragmatic, in vogue. Historically, courts in Ethiopia were, structurally as well as functionally, proximate to the executive wing of the government. During the imperial as well as *Derg* regimes judiciary was considered a part of the executive. It, in one way or another, was under the control of the executive arm of the government. The long history of justice dispensed at the King's Court, Majesty's *Chilot* or *Zufan Chilot*,[27] without a judiciary during the imperial era and the emergence of judiciary as an insignificant institution during the military junta have created a mind-set in the succeeding generations of Ethiopians that the executive is the most important or sole institution of the government.[28]

Judges, plausibly due to institutional in-built weaknesses and lack of judicial courage, are reluctant to assert their (even limited) judicial power and independence to delve into the enforcement of the FRs and FFs, which invariably are asserted against the government of the day.[29]

'Institution with judicial power' - Ethiopian Human Rights Commission *vis-à-vis* right to access to justice

In pursuance of article 55(14) of the FDRE Constitution, the Federal Parliament, recalling the constitutional responsibility and duty of all the federal

27. *Zufan Chilot* remained at the apex of the Ethiopian judicial system until the Monarchy lasted (1974) in Ethiopia.

28. Canadian International Development Agency, (CIDA), *Independence, Transparency and Accountability in the Judiciary of Ethiopia (A Draft for Consultation), supra* note 21 at 99. Also see, Ato Mandefrot Belay, Justice System Reform: Preliminary Reform Profile, Program Contents and Objectives, in Justice System Reform Program, *Justice System Reform in Ethiopia* (Ministry of Capacity Building, Addis Ababa, May 2002) 35, and Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report, supra* note 21at 77- 90 & 159 -178.

29. For example, in the treason trial of political opponents belonging to the CUD, the trial judges have shown little concern for the defendants' procedural and constitutional rights and ignored their claims of serious mistreatment by prison authorities during their detention. The judges allowed police protracted periods to investigate for evidence that might support the charges brought by the prosecution; in the meantime, the defendants remain jailed without an opportunity for release on bail. See, Human Rights Watch, *World Report 2008 - Ethiopia* (Human Rights Watch, 2008). Also see, Human Rights Watch, *World Report 2007-Ethiopia* (Human Rights Watch, 2007).

and regional government organs to respect and enforce the FRs and FFs, and realizing that the institution of human rights plays a significant major role in enforcing these FRS and FFs, through the Proclamation 210/2000, as mentioned earlier, established the EHRC. It, therefore, can be perceived as an 'institution with judicial power', referred to in article 37 of the FDRE Constitution, and an additional institutional means of strengthening the FRs and FFs, including the right to access to justice.

The Chief-Commissioner and Commissioners on the EHRC are appointed through nominations by the 'Nomination Committee' constituted under the Proclamation and approved by two-thirds vote of the HoPR. The Chief Commissioner is accountable to the HoPR.[30] However, the qualifications prescribed in the Proclamations for the Commissioners are as vague and subjective as that are prescribed for judges under the FDRE Constitution. An Ethiopian, who is above thirty-five years of age and of 'enough good health', can be appointed as commissioner if he: (i) is loyal to the Constitution, (ii) upholds respect for human rights, (iii) is trained in law or other relevant discipline or has acquired extensive knowledge through experience, and (iv) is reputed for his diligence, honesty and good conduct.[31]

The EHRC, *inter alia*, is entrusted with the task of ensuring that: (i) human rights are respected by citizens, state organs and officials, and political organizations, and (ii) laws, regulations and directives as well as government decisions and orders do not contravene the constitutionally guaranteed human rights.[32] The EHRC, with this purpose, is empowered to investigate, on complaint or on its own, human rights violations.[33] The EHRC is required to make every effort at its command to settle the complaint amicably between the parties.[34] After inquiry, the commission is required to submit its findings, with appropriate remedy or measure, to the departmental head of the organ or body which has allegedly violated the indicated human rights and to the complainant.[35] Failure, without good cause or reasons, to comply with the measure(s), suggestion(s) or recommendation(s) of the EHRC, within three months from receipt of the report, attracts an imprisonment for a term from 3 to 5 years or a fine of Ethiopian Birr 6,000 to 10,000 or both, or the severe penalty provided under the penal law.[36]

The mechanism designed under the Proclamation 210/2000 for safeguarding

30. Arts. 10-13, the Proclamation 210/2000.
31. *Id.*, art. 12.
32. *Id.*, art. 6(1) & (2).
33. *Id.*, arts. 6(4) & 25.
34. *Id.*, art. 26(1).
35. *Id.*, art. 26(2).
36. *Id.*, art. 41(2).

and enforcing the FRs and FFs through the EHRC is, however, premised on the relatively narrow jurisdictional paradigm. It is precluded from receiving and investigating a complaint of violations of FRs and FFs, under the guise of human rights violations, when the matter is seized by the HoPR, the HoF, a regional council, or a court of law.[37]

IV Conclusion

The FRs and FFs guaranteed under the FDRE Constitution are impressive and tuned to international norms. The constitutional prominence given to them is equally impressive.

The institutional mechanism designed under the Constitution for their protection and enforcement, however, does not match either ideologically or operationally with the constitutional status and prominence of the FRs and FFs. A court of law, by design, is made structurally weak and functionally crippled when it comes to the protection and enforcement of FRs and FFs. The power of the HoF, via CCI, to interpret the Constitution and to settle constitutional controversies has made judges to believe that they do not have any role to play in the protection and enforcement of the constitutionally guaranteed FRs and FFs. Even when they are called upon to give relief to the individuals whose rights and freedoms are violated, courts, on extraneous considerations, have shown their reluctance to give them relief.

The EHRC is also made, structurally as well as functionally, lesser effective as an institution of human rights defender. It does not have either effective investigatory or enforcement powers. The task assigned to it under the proclamation is more of mediatory and educative in nature. The EHRC, in its own way, has potential to strengthen the right to access to justice, but it needs to gain 'autonomy' to emerge as an effective 'protector' of human rights, including the FRs and FFs, of Ethiopians.

The impressive and progressive FRs and FFs enumerated in the FDRE Constitution and the prominence given to them in the Constitution become meaningless as they are not fully protected and effectively enforced through an independent, impartial and efficient institutional mechanism. The FRs and FFs, in fact, shed their constitutional character when they are hardly enforceable through a competent, impartial and professional institution. They are reduced to mere hallow constitutional assurances. Similarly, the constitutional 'responsibility and duty' imposed on 'all Federal and State legislative, executive and judicial organs at all levels' in Ethiopia 'to respect and enforce' the FRs and FFs becomes a mere empty constitutional slogan. The right to access

37. *Id.*, art. 7.

to justice, guaranteed under the Constitution, in fact, turns out to be mere legalistic rather than pragmatic, and cosmetic rather than realistic. To make the right to access to justice a reality, it becomes necessary to make the courts professionally competent and upright, and functionally independent and free from any political interference. The judicial reference by a court to the HoF, via CCI or otherwise, be done away with, at least, when it comes to the protection and enforcement of the constitutionally cherished FRs and FFs.

In view of the abject poverty and mass illiteracy among the Ethiopians, it, indeed, becomes a constitutional and social more for the GOE to see that the FRs and FFs of Ethiopians are protected, enforced and realized in an effective manner. The state governance, apart from its ongoing efforts to improve the judicial system, has, with utmost sincerity, to remove the stumbling blocks by apt legislative fiat accompanied with self-restraint of non-interference in the administration of justice to make the constitutional right to access to justice a reality and the FRs and FFs more meaningful.

If FRs and FFs of individuals are placed out of reach of the courts, and within purview of the HoF/ICC, the rights and freedoms enumerated in the FDRE Constitution, howsoever they are comprehensive, impressive and progressive, the right to access to justice, guaranteed under the Constitution, becomes a mere illusory fundamental right.

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