

The Right to Protection from Arbitrary Arrest and Detention under the Legal Framework of Federal Democratic Republic of Ethiopia (FDRE)

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Abstract

Since this is a doctrinal legal research, I had used systematic analysis of statutory provisions and legal principles involved therein, or derived there from, and logical and rational ordering of the legal propositions and principles. Thus, the FDRE Constitution (1995), Criminal Procedure Law of the Empire of Ethiopia (1961) and the FDRE Criminal Law (2004) are the primary concern of this study. Both descriptive and analytical methods of research were used. Besides the constitution of FDRE, the UDHR, ICCPR and ACHPR are made part of the law of the land through ratification and this can be considered as enabling environments in the legal framework regarding the right to protection from arbitrary arrest or detention. On the other hand, lack of legally prescribed period of time to be taken to hand over the arrested person to the nearest police by private persons or other government officers empowered to arrest flagrant offenders without warrant, lack of uniform standards prescribed by law to fix the amount of money/security, bail bond, even in case when the alleged crimes are similar in type and in terms of seriousness, failure to fix the maximum round or occasions the police can claim for remand and lack of the maximum time to be taken by the investigative police to complete investigation of a single case by law. The existing laws are also silent as to whether a person ordered by the court to remain in custody by remand shall return to the same police custody or not? FDRE courts have been prohibited from interpreting the constitution & this creates another difficulty. This paper will serve as a great role for law makers and for further socio legal research in the field.

Keywords: - Human Rights and Freedoms, Arrest, Detention and Remand

1. Introduction

1.1. Historical Establishment of the Right to Protection from Arbitrary Arrest or Detention

Regarding the historical establishment of the right of freedom from arbitrary arrest and detention, the concept appeared in several early European documents long before the adoption of United nation charter such as the Magna Carta of 1215,¹ “Habeas Corpus Acts of England of 1640 and 1679, and the French Declaration of the Rights of Man and the Citizen of 1789”.² Hence, for the first time these texts provide recognition to privilege to freedom from arbitrary arrest and detention. Since the signing of the Charter of the United Nations (UN) on 26 June 1945, in recognition of the fundamental importance of securing respect for the fundamental human rights and freedoms, the international community has developed remarkable body of international and regional human rights law. Among those the UDHR³, the ICCPR⁴ and ACHPR⁵ are the most prominent ones particularly in regard to enshrining the right to protection from arbitrary arrest or detention. Thus, the right to personal liberty, that is the right not to be arbitrarily arrested or detained, constitutes one of the oldest and most fundamental guarantees constitutive of a free society and the rule of law.⁶ In recognition of arrest or detention as a legitimate means of the exercise of state authority in the administration of criminal justice, this right is not granted absolute, but both substantive and procedural safeguards have been guaranteed against arbitrary arrest or detention and unlawful deprivation of personal liberty by state authorities.⁷

Ethiopia was a member of the League of Nations⁸ and a founding member of both the United Nations

¹ Magna Carta (Eng., 1215), available at <http://www1.umn.edu/humanrts/education/magnacarta.html>.

² See Laurent Marcoux, Jr., Protection from Arbitrary Arrest and Detention Under International Law, 5 B.C.Int'l & Comp. L. Rev.345 (1982), <http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/3>, page 346

³ Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, see article 3 and 9

⁴ International Covenant on Civil and Political Rights (ICCPR), Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, was entered into force on 23, March 1976, see article 9(1)

⁵ The African Human and Peoples' Rights charter, adopted by the eighteenth conference of the heads of state and Governments of the Organization of African Unity in June 1981, sometimes called the ‘Banjul Charter’, see article 6

⁶ See also Manfred Nowak, UN Covenant on Civil and Political Rights – ICCPR Commentary, 2nd edition, Kehl/Strasbourg/Arlington 2005, p. 211ff; see also Pieter van Dijk/Fried van Hof/Arjen van Rijn/Leo Zwaak (eds.), Theory and Practice of the European Convention on Human Rights, 4th edition, Antwerpen/Oxford 2006, p. 455ff

⁷ Supra note 4 and 5

⁸ The World War I ended when after the Paris Peace Conference in 1919 produced the Versailles Treaty. Besides, the Peace Treaty also created two international organizations which proved to be important for the development of protection of human

and the Organization of African Unity (OAU).¹ Furthermore, on 11 June 1993, Ethiopia becomes party to the ICCPR² and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted 10 December 1984) on 14 March 1994,³ but still they are not translated to the working language of the country and not published or proclaimed in the official Federal Negarit Gazeta. The FDRE has also ratified the African Charter on Human and Peoples Right.⁴ Hence, aforementioned declaration and convention are made part of the law of the land of FDRE through ratification.⁵ Besides, the right of protection from arbitrary arrest and detention are enshrined under the constitution of the FDRE.⁶ Hence, like that of the UDHR, ICCPR and ACHPR, the constitution of the FDRE has recognized the right to protection from arbitrary arrest & detention as one of the fundamental human rights. Regarding the interpretation of such right, moreover, the constitution of FDRE declare that fundamental rights & freedoms enshrined under it shall be interpreted in a manner conforming to the principles of the UDHR, International Covenants on Human Rights (ICHR) and International Human Rights Instruments (IHRI) adopted by Ethiopia.⁷ To be specific, in a modern sense, the right to protection from arbitrary arrest or detention is recognized under the legal framework of FDRE since the coming in to force of the constitution of FDRE (1995).

1.2. The Meaning of Arrest, Detention and Arbitrariness in General

A. Definition of Arrest

The term “arrest” means the seizing & detaining of a person by lawful authority.⁸ Furthermore, United Nations Committee (UNC) on the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (United Nations Committee) has provided us with the primary functional meanings of the concepts “arrest”. Accordingly, “arrest” means the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.”⁹ According to this definition, the manner in which the arresting authority effects the restraint on personal liberty, and the length of time for which a suspect may be held in custody on the basis of the arrest are the two vital elements of the definition. Besides, “Arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.¹⁰ UN Human Rights Committee on human rights in its general comment on Art.9 of ICCPR state that the term “arrest” refers to any apprehension of a person that commences a deprivation of liberty.¹¹ When we come to FDRE, the constitution of FDRE, the Criminal Code of FDRE (2004) and the Criminal Procedure of the Empire of Ethiopia (1961) does not define the term arrest.

B. Definition of Detention

The term “detention” means the deprivation of liberty that begins with the arrest, and that continues in time from apprehension until release.¹² Furthermore, “detention” means “the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities”¹³ Thus, the real meaning of “detention” according to this definition is confinement and deprivation of personal liberty. Moreover, “Detained person” means any

rights: the League of Nations as predecessor of the United Nations, and the International Labor Office as predecessor of the International Labor Organization.

¹ See also Federal Democratic Republic of Ethiopia Combined Report (Initial and Four Periodic Reports) to the African Commission on Human and Peoples’ Rights Implementation of the African Charter on Human and Peoples’ Rights, 2008, table 32, p.167

² Ibid, paragraph 5, p.10

³ Ibid

⁴ See the FDRE Accession to the African Human and Peoples' Rights Charter Proclamation No. 114/1998.

⁵ Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Proclamation No. 1/1995, which has come into full force and effect as of the 21 day of August, 1995, see article 9(4) which declare that “All international agreements ratified by Ethiopia are an integral part of the law of the land”

⁶ Ibid, article 17

⁷ Ibid, article 13(2) state that “The fundamental rights and freedoms specified in this Chapter (i.e. chapter three of the constitution itself) 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.”

⁸ ROBERT M. BOHN and KEITH N. HALEY, Introduction to Criminal Justice, Fourth Edition, Published by McGraw-Hill, 2005, p.8

⁹ see United Nations Committee, Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No.8) at 5, U.N. Doc. E/CN.4/826/Rev. I (1964)

¹⁰ See the preamble of the Body Principles on the Protection of all Persons under any Form of Detention or Imprisonment (“Body of Principles”), UN Doc. A/Res/43/173 (9 December 1988)].

¹¹ UN Human Rights Committee General comment No. 35 on article 9 of ICCPR, paragraph 13

¹² Ibid

¹³ Supra note 17

person deprived of personal liberty except as a result of conviction for an offence while as “detention” means the condition of detained persons.¹

C. Definition of Arbitrariness

Even if all the UDHR, ICCPR, ACHPR and the constitution of FDRE have recognized the fact that the right to liberty to persons is not an absolute right by prohibiting only arbitrary arrest or detention, all of them failed to specifically define the phrase “arbitrariness”. Arrest or Detention shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose² To this end, the ICCPR declare that no one shall be deprived of his liberty except substantively ‘on such grounds’ and procedurally in ‘accordance with such procedure’ as are established by law.³ In this point, the UN Human Rights Committee on its general comment on article 9(1) of ICCPR state that any substantive grounds for arrest or detention must be prescribed by law, and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.⁴ Likewise, the HRC demonstrate that article 9(1) of ICCPR requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law, and States parties should ensure compliance with their legally prescribed procedures.⁵ Furthermore, the committee state that “An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality.⁶

On the other hand, the ACHPR state that “No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”⁷ Here an arrest or detention to be considered as arbitrary, two things must be satisfied. Those are there must be prior law enacted by the law maker which prescribes the reasons & conditions of arrest or detention, and a person must be arrested or detained against those reasons & conditions.

Like that of the ICCPR and ACHPR, the constitution of the FDRE prescribes the standard of “principle of legality” as pre-condition to consider the arrest or detention of a person legal or justifiable. To be specific, it declares that “no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law⁸. Additionally, it proclaims that no person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him.⁹ With regard to detention, the constitution FDRE is more restrict than that of either the ICCPR or ACHPR in that it demands a charge or conviction made against the person as pre-condition to detain such person.¹⁰ Here, for a detention to be considered as arbitrary, a person should be detained in the absence of a charge or conviction made against him. Therefore, according to the constitution of the FDRE in order to say an arrest is arbitrary there must be prior enacted law which laid down the grounds and procedures of arrest and an arrest should be made in violation of those grounds and procedures.

The notion of arbitrariness varies to a certain extent depending on the type of detention involved. Thus, the European Court of Human Rights (ECHR) has indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted; where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied on and the detention in question.¹¹

To sum up, the concept of arbitrariness applies to both the law under which the person is arrested or detained and the application of the law itself. Here, a fair law while enacted may become arbitrary applied by the criminal justice actors. Therefore, the term arbitrary has to be interpreted to mean an arrest or detention includes elements of inappropriateness, injustice and lack of predictability. Therefore, the author suppose that in simplest term, arbitrariness means against the grounds and procedures provided by law. Hence, if an arrest or detention of a person is made without fulfilling the legal grounds and without following the prescribed procedure by law,

¹ Supra note 18

² Ibid, principle 2

³ Supra note 4

⁴Supra note 20, paragraph 22

⁵ Ibid, paragraph 23

⁶ Ibid, paragraph 12

⁷ Supra note 5

⁸ Supra note 15, article 17(1)

⁹ Ibid, article 17(2)

¹⁰ Ibid,

¹¹ For a detailed overview of the key principles see *James, Wells and Lee v. the United Kingdom*, §§ 191-95; and *Saadi v. the United Kingdom* [GC], §§ 68-74). www.echr.coe.int (Case-Law - Case-Law Analysis – Case-Law Guides).

then it amounts to arbitrary arrest or detention

2. Discussion

2.1. The Right to Protection from Arbitrary Arrest and Detention under the Legal Framework of Federal Democratic Republic of Ethiopia (FDRE)

First of all, fundamental rights and freedoms are universal. Universality is rooted in the inherent dignity of human beings and in the fact that human rights are inherent. By inherent, it is meant that human rights exist independently of the will of anyone. They are neither obtained, nor granted through any human action.¹ Secondly, these rights are also inalienable, in that they cannot be taken away by anyone, including the state, or that nobody can renounce them by her/himself. Pursuant to this approach, legal norms do not establish human rights but only recognize them and determine the ways of their realization. Thirdly, human rights are indivisible, in that none of the rights that is considered to be fundamental human right is more important than any of the others and, more specifically, that they are inter-related. The universality, indivisibility and interdependence of human rights were further confirmed during the World Conference on Human Rights in 1993 in Vienna by the world community.² When we come to the FDRE legal system, besides ratifying the ICCPR and ACHPR, the Constitution of FDRE has recognized the right to protection from arbitrary arrest and detention as one of fundamental human rights and it further imposes up on the legislature to enact prior law which prescribes the grounds and procedures of arrest and detention.³ Furthermore, the constitution of FDRE proclaims that “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.”⁴

More importantly the constitution of the FDRE affirms the important function that international human rights standards can play as a means of interpretation.⁵ This does not only enable the courts to give clarity to and expand national legislation in line with the principles of international human rights standards, but also to fill the gaps in the domestic law that have an adverse impact on the enjoyment of human rights.⁶ But, the term “adoption by FDRE”, which is used as a pre-requisite to use international human rights standards according to article 13(2) the constitution of the FDRE, is not specifically defined. However, from the reading of different provisions of the constitution of FDRE and other laws international or regional human rights instruments are considered adopted by FDRE, if it shall pass the following steps. First, it has to be concluded by the executive body of the government.⁷ Here, it is the executive branch of the federal government which is empowered to take the role of initiation to enact international human rights laws. Executive means prime minister and the council of ministers.⁸ Second, it should be deliberated up on and passed by the house.⁹ Here, ‘the House’ means House of People’s Representatives (HPR).¹⁰ The third step is submitting it for signature to the nation’s president.¹¹ The fourth step is the nation’s president shall publish it in the Federal Negarit Gazeta.¹² This is because “all laws of the Federal Government are required to be published in the Federal Negarit Gazeta and then all Federal or Regional legislative, executive and judicial organs¹³ as well as any natural or juridical person shall take judicial notice of laws published therein”¹⁴ Accordingly FDRE could be classified as dualist nation as national legislation needs to be promulgated in order for the provisions of international instruments to be implemented at the

¹ Marek Peichowiak What are Human Rights? The Concept of Human Rights and their Extra-Legal Justification pp.3-14 in Raija Hanski and Markku Suksi (Eds.) An Introduction to the International Protection of Human Rights A Textbook (2nd Edition) Institute for Human Rights, Åbo Akademi University (1999), p.5-6

²The Vienna Declaration and Programme of Action state that ‘all human rights are universal, indivisible and interdependent and interrelated’.

³ See supra note 29 and 30

⁴Supra note 31, article 10 states that “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable. Human and democratic rights of citizens and peoples shall be respected.”

⁵ Supra note 15

⁶ See also Francesco Francioni the Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience p.30 in Benedetto Conforti and Francesco Francioni (Eds.) Enforcing International Human Rights in Domestic Courts Martinus Nijhoff Publishers (1997) pp.15 – 34.

⁷Ibid, article 55(12)

⁸ Ibid, article 72(1) ; see also article 50(2)

⁹Supra note 35, see article 57

¹⁰Ibid, article 50(3) which state that “The House of Peoples' Representatives is the highest authority of the Federal Government. The House is responsible to the People.” Furthermore, the House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction as per article 55(1) of the same.

¹¹ Supra note 39

¹²Ibid, article 71(2)

¹³Ibid, article 50 (1-2) state that “The Federal democratic Republic of Ethiopia comprises the Federal Government and the State members. The Federal Government and the States shall have legislative, executive and judicial powers.”

¹⁴Federal Negarit Gazeta Establishment Proclamation No.3/1995, article 2(2-3)

domestic level.¹ Another doubt in this junction is that the status of those international human rights instruments adopted by FDRE in the hierarchy of laws under the FDRE legal system particularly in relation to the provisions of the constitution of the FDRE dealing with fundamental rights & freedoms is not clear due to the supremacy clause in the constitution.² This becomes an issue when a certain right which is enshrined under the international human rights instrument is either narrowly recognized or not recognized at all in the FDRE constitution. For instant, the right to claim compensation against the perpetrator who has committed unlawful arrest or detention and arrested person's right to consult the legal counselor of his/her choice is not specifically recognized under the constitution.

According to the constitution of FDRE, all the federal and state legislative, executive and judicial organs are under duty to respect and enforce the right to protection from arbitrary arrest and detention,³ but it preclude judiciary from interpreting the constitution.⁴ Since the main role of court is interpreting the law, prohibiting them from interpreting the provisions of the constitution may create difficulty for courts to discharge their responsibility & duty to enforce the fundamental rights and provisions enshrined therein. In discharge of its aforementioned duty legislature of the FDRE has already criminalized committing arbitrary arrest or detention against the other under the new criminal code (2004). Hence, according to the criminal code of FDRE (2004) unlawful arrest or detention is punishable with rigorous imprisonment not exceeding ten years and fine if the perpetrator is public servant.⁵ Furthermore, it declares that "whosoever commits illegal restraint against the other is punishable with simple imprisonment not exceeding three years. In such case, the punishment shall be rigorous imprisonment not exceeding five years where: the crime is committed on the false pretext of mental illness or dangerous condition of the victim; or the crime persists for more than five days. Where it is committed to compel the government, an international organization, a natural or a juridical person to do or to abstain from doing an act, by carrying out threats of endangering the life, person or liberty of the detainee or of prolonging his detention, the punishment shall be rigorous imprisonment from five years to ten years. Where such crime is committed by a public servant or official, article 423 of the same code shall apply."⁶

Consequently, the constitution of FDRE has already recognized the fact that the right to protection from arbitrary arrest and detention is not absolute right like that of any other fundamental human rights by empowering the state to arrest or detain a person through following the procedures prescribed by law while those grounds of arrest or detention mentioned therein are met.⁷ Even in such case the constitution entitle certain rights of arrested person, however, it fail to include the right to consult the legal advisor of his/her own choice which is one of an essential human rights of an arrested person.⁸

To sum up, the legal frameworks of contemporary Ethiopia have recognized the citizen's right to protection from arbitrary arrest or detention.

2.2. Justifiable Grounds of Arrest or Detention Under the Legal Framework of Federal Democratic Republic of Ethiopia

One of the significant dimensions of the right to liberty of a person is the right to protection from arbitrary arrest

¹Rakeb Messele (Human Rights and Gender Consultant), Research Subcontracted by Action Professionals' Association for the People (APAP), 31 August 2002, p.16.[unpublished]

²Supra note 45, article 9(1) state that "the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

³ Ibid, article 13(1) state that 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 the Chapter three of the constitution of FDRE, which are dealing with Fundamental Rights and Freedoms.

⁴ Ibid, article 62(1) declares that "The House of the Federation (HF) has the power to interpret the constitution". HF is composed of representatives of Nations, Nationalities and Peoples [see article 61(1) of the same]

⁵ Criminal Code of the Federal Democratic Republic of Ethiopia (2004), article 423 under the caption "Unlawful Arrest or Detention" declare that any public servant who, contrary to law or in disregard of the forms and safeguards prescribed by law, arrests, detains or otherwise deprives another of his freedom, is punishable with rigorous imprisonment not exceeding ten years and fine.

⁶Ibid, article 585(4) under the caption 'Illegal Restraint' state that "whoever, contrary to law or without lawful order, arrests, confines or detains or otherwise restrains the freedom of another is punishable with simple imprisonment not exceeding three years. In such case, the punishment shall be rigorous imprisonment not exceeding five years where: the crime is committed on the false pretext of mental illness or dangerous condition of the victim; or the crime persists for more than five days. Where the crime is committed to compel the government, an international organization, a natural or a juridical person to do or to abstain from doing an act, by carrying out threats of endangering the life, person or liberty of the detainee or of prolonging his detention, the punishment shall be rigorous imprisonment from five years to ten years. Where the crime under sub-article (1) or (2) of article 585 of the criminal code of FDRE is committed by a public servant or official, the special provision of this Code (Art. 423) shall apply."

⁷ Supra note 36

⁸ Ibid, see article 19

and detention. But, such right is not an absolute right. This is because rights may be limited by the rights of others and interests of the society. General interests of the society, such as public order, safety, health and democratic values are considered as justified limitation of rights. However, infringement of rights will only be justified as reasonable limitation only if there is a strong purpose, which is valid in a democratic society based on human dignity, equality and freedom. First other alternatives that could fulfill the purpose without any infringement of rights should be considered. Moreover, the mere benefits of others and general welfare should not be enough to justify an infringement as limitation of rights. Thus, there is inevitable possibility of arresting or detention of an individual according to the law of the land. That means sometimes deprivation of liberty can be justifiable, for instant, while enforcing criminal law of the nation. In support of this argument, UN Human Rights Committee in its general comment on article 9 of the ICCPR demonstrate that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary.¹

Like that of the ICCPR and the ACHPR, the constitution of FDRE declares the “principles of legality” to be satisfied in order to take lawful restrictive measures against the right to liberty of a person. Accordingly, an arrest or detention of an individual person is only justifiable if it has been made when the grounds provided by prior enacted law (“substantive requirement”) are satisfied and by strictly following the procedures provided therein (“procedural requirement”). Moreover, our law seems more stringent with regard to ‘detention of a person’ because it proclaims that no person may be detained without a charge or conviction against him. However, the main problem in this junction is that, like that of the UDHR, ICCPR and ACHPR, the constitution of FDRE does not provide an enumeration of the permissible grounds for arrest and detention. However, the ICCPR is different in this regard because at least it proclaims that a person cannot be arrested or detained for failure to perform his/her own contractual obligation.² Even if the constitution of the FDRE lacks specific provision like that of the ICCPR regarding whether failure to discharge ones contractual obligation can be taken as ground of arrest and detention or not, we can make use of article 11 of ICCPR through interpretation according to article 13(2) of the constitution of the FDRE.³ But, from the reading of the different provisions of constitution of the FDRE⁴ and the criminal procedure code of Ethiopia,⁵ it is logical to conclude that the FDRE legal system have recognized the fact that an individual may be arrested or detained on the ground of criminal charge or conviction in an amicable manner. That means a person can be arrested or detained when he/she has made criminal act.⁶ Hence, only criminal cases (not contractual cases) can be taken as ground of legal arrest or detention.

Hence, one of the situations where the right of liberty of the person can be restricted is pre-trial detention which is a vital and susceptible step in the criminal justice process. In this phase conducting effective investigation, securing all existing evidence and preventing collusion and interference with witnesses are essential for the effective administration of criminal justice. To do so, the investigative police or other authorities empowered to do the same, has to secure the suspect under detention. But, on the other side, the suspect has the inviolable and inalienable right to liberty and a privilege against arbitrary detention, a right to protection from undue interferences by the investigating authorities particularly because he/she has the right to be presumed innocence until proved guilty by independent, impartial, competent and regular court established by law and such right is enshrined in article 11(2) of the UDHR, article 14 (2) ICCPR and article 20(3) of the constitution of FDRE. Thus, this right represents a corner stone of the rule of law and is essential to respecting and protecting the human dignity and integrity of persons subject to pre-trial detention.

Therefore, every national laws and practices regarding the grounds of arrest and detention of person must conform to the standard and scope provided under international human rights standard.

2.3. Procedure of Making Lawful Arrest or Detention Under the Legal Framework of Federal Democratic Republic of Ethiopia

Those institutions legally empowered to involve in the administration of criminal justice are collectively named as Criminal Justice System (CJS). Thus, in most of the contemporary world CJS consists of the police, the courts and corrections even though it may differ from one state to other state. Thus, in contemporary FDRE, CJS include the department of peace and security which incorporate the police, ministry of justice which incorporate public prosecutors, the judiciary which refers to the courts and the prison administration. All of those institutions

¹Supra note 27

²Supra note 4 , article 11 state that “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation”

³ Supra note 15

⁴ Supra note 54, 55 and see also article 20

⁵Criminal Procedure Code of the Empire of Ethiopia (CRM.PROC.C.) of 1961, Negarit Gazeta Extraordinary Issue No.1 of 1961, article 59 and 61

⁶Supra note 52, article 23(1) states that a crime is an act which is prohibited and made punishable by law. In this Code, an act consists of the commission of what is prohibited or the omission of what is prescribed by law.

are under duty to discharge their own specific powers, duties, plans and targets or goals but having similar objective, i.e. ensuring the prevalence of rule of law, safeguarding peace and security, respect for the human rights of the citizens and inhabitants, the interests of both the state and the nation, nationalities and peoples of FDRE. Besides, their own institutional respective duties what makes them different is that the national armed force and the judiciary is precluded from any partisan ship to any political organization¹ and the rests are remain the sub units of the executive government branch.

Thus, the next question to be answered in this session is that when the criminal justice become in motion in FDRE? In this regard, in case of flagrant offence, criminal proceedings may be instituted without an accusation or complaint being lodged, unless the offence cannot be prosecuted except op on a formal complaint.² To be illustrative, in the case when an alleged offence is the one which is punishable only up on formal complaint by the victim or his legal representative³ criminal proceeding may not be instituted until an accusation or complaint being lodged. But, in the case of non-flagrant offences, criminal proceeding shall be instituted only after an accusation or complaint is made. Since the authors main concern in this particular topic is to reveal the procedure how either an arrest or detention is made under the legal frame work of FDRE, let us give emphasis to it.

2.3.1.1. Arrest

Thus, an arrest of the accused or the suspect can be made through without arrest warrant or with arrest warrant issued by court. Here, the word “Arrest” means the seizing and detaining of the offender by lawful authority (i.e. by any private person or member of the police or other government officers as the case may be)⁴ and “Arrest warrant” means a written order issued by the court empowering the law enforcement officers (i.e. usually the police) to arrest an accused or the suspect of an alleged crime at the request of the investigating police officer or by the motion of the court itself.⁵ Let us see those procedures one by one.

I. Arrest Without Warrant

The 1961 criminal procedure code (Crm.Pro.C.) of the empire of Ethiopia which is now in force, defines flagrant offences, quasi-flagrant and assimilated cases and prescribes the manner how setting justice in motion in those cases. Consequently, where the offender is found committing the offence, attempting to commit the offence or has just committed the offence or when the police are immediately called to the place where the offence has been committed or a cry for help has been raised from the place where the offence is being or has been committed, then the offence shall be deemed to be flagrant while as after the offence has been committed, if the offender who has escaped is chased by witnesses or by members of the public or when a hue and cry has been raised, then the offence shall be deemed to be quasi-flagrant.⁶

In case of flagrant offence, an arrest without warrant may be made where the offence is punishable with simple imprisonment for not less than three months.⁷ Furthermore, the Criminal Procedure Code of Ethiopia provides circumstances where any member of the police may arrest without warrant.⁸

In the case when any private person had made an arrest of the offender without warrant he/she shall without unnecessary delay hand over the person so arrested to the nearest police station.⁹ Here, the law is strict only to preclude “unnecessary delay” rather it is still subject to further interpretation. To be specific, to what extent the law tolerates it as necessarily delayed. As to me this has to be interpreted very narrowly for the best interest of the arrested person. Thus, the time to be taken to hand over the arrested person to the nearest police shall not exceed the time prescribed by the law to bring him/her before the nearest court by the police according to article 29(1) of Criminal Procedure Code and article 19(3) of the constitution of FDRE, i.e. within 48 hours of arrest without taking into consideration a reasonable time taken for a journey to the police.

II. Arrest With Warrant

In the case of non-flagrant offences, where the investigative police officer has reason to believe that a person has committed an offence, he may by written summons require such person to appear before him.¹⁰ Then after if the accused or the suspect has not been arrested and the offence is such as to justify arrest or where the person summoned fails to appears, the investigative police officer shall take such steps as are necessary to effect his/her arrest.¹¹ But, this provision is somehow vague. However, it has to be interpreted to the effect that the

¹ Ibid, articles 87(5) and 79 (2-3)

² See supra note 59, article 21(1)

³ see supra note 60, article 213

⁴ Supra note 62, articles 50 to 51

⁵ Ibid, article 53 to 55, 124 and 160(2) respectively

⁶ Ibid, article 19-21

⁷ Ibid, article 50

⁸ Ibid, article 51(1)

⁹ Ibid, article 58(1)

¹⁰ Ibid, article 25

¹¹ Ibid, article 26(1)

investigative police shall apply to the court for a warrant of arrest.¹

In the case where the arrest cannot be made without warrant or where a warrant is required by law to be issued by a court before a person is arrested,² the investigative police officer shall apply to the court for a warrant of arrest. In case of urgency such application may be made by telephone or telegraph in which it shall be confirmed in within 24 hours.³ The court to which such application made shall issue a warrant of arrest only where the attendance of the wanted person before the court is absolutely necessary and cannot otherwise be obtained,⁴ but how can the court prove this and in which circumstances? To be illustrative, the court has to determine if the alleged crime/offence is of the type in which trying the accused in his absence is legally prohibited.⁵ In view of this provision, the accused may be tried in his absence only if he/she is charged with an offence punishable with rigorous imprisonment for not less than twelve years or an offence punishable with rigorous imprisonment or fine exceeding five thousand dollars.

Another instant when the court shall issue a warrant of arrest is where the accused does not appear on the date fixed for the trial and no representative appears satisfactorily to explain his/her absence irrespective of whether the prosecution is public or private. Later on if such warrant cannot be executed, the court shall consider trying the accused in his absence when ever this is allowed by law.⁶

Furthermore, where an accused person who has been duly summoned and there is proof of service of such summons, has failed to appear as required, the court may issue a bench warrant and such accused person shall be brought before the court by the police.⁷ Here, we should know that there the difference between arrest warrant and bench warrant. The later may be issued by the court at its own motion.

2.3.1.2. Detention

The constitution of FDRE prescribes that "...no person may be detained without a charge or conviction against him"⁸ Thus, it demands that a person can be detained only when a charge or conviction is made against him. To this end, it stipulate that only where the 'interest of justice' requires, the court may order the arrested person to remain in custody or remand him for a time strictly required to carry out the necessary investigation⁹ This is another legal ground that empowers the court to order the arrested person to remain in custody even in case when the investigating police officer has not petitioned for remand of the same person. But, the conditions where "the interest of justice requires" is not specifically provided therein, and this may be subject to abuse through interpretation. Thus, our court should take due care in this regard otherwise this will create another problem that will come up with arbitrary arrest or detention according to my view. The court here is to mean that impartial and independent regular court established according to the constitution itself.¹⁰ On the other hand, the constitution entitles the person arrested to be released on bail.¹¹ Accordingly, it is only in exceptional grounds provided by law the court may deny bail right¹² or demand adequate guarantee for conditional release of an arrested person.¹³

When the court orders the arrested person to remain in custody or remand him, the law is silent as to whether such person shall return to the police custody or not? Neither the FDRE constitution (1995) nor the Criminal Procedure Code of Ethiopia (1961) is clear with this point. But, the later prescribes that any arrested person shall be detained on the conditions prescribed by the law relating to prisons¹⁴ and the former state that all persons held in custody have the right to treatments respecting their human dignity.¹⁵ Can we conclude that such person has to be sent to prison since the caption as well as the provision itself deals with the rights of convicted prisoners?¹⁶ Regarding this issue, the United Nation HRC demonstrate that detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detainee can be more easily mitigated.¹⁷ Hence, it is better if we make use of the UNHRC

¹ Ibid, article 26(2)

² Ibid and see article 52(1)

³ Ibid, article 55

⁴ Ibid, article 54

⁵ Ibid, article 161(2)

⁶ Ibid, article 160

⁷ Ibid, article 125

⁸ Supra note 31

⁹Supra note 54, sub- article 4

¹⁰ Ibid, articles 78-81

¹¹ Ibid, article 19(6)

¹² Supra note 78 , article 63(1 & 3)

¹³ Ibid, articles 63(2), 69 & 72

¹⁴ Ibid, article 60

¹⁵ Supra note 82, article 21(1)

¹⁶ Ibid

¹⁷ Supra note 55, paragraph 36

interpretation for the best interest of the detained person and such person should be sent to prison administration.

Another vital problem is the maximum time that the court will decide that the arrested person to remain in custody according to article 19(4) of the FDRE constitution is also not prescribed by law. Regarding the total time for remand, however, the court itself is not free to determine the maximum time of remand as it wishes. Because, no remand shall be granted for more than fourteen days on each occasion¹ and the court is responsible to ensure that the responsible law enforcement authority (i.e. mostly the investigating police in our case) carry out the investigation in respecting the accused person's right to a speedy trial while determining the remand period.² At this juncture, the author demonstrates that lack of legally prescribed limitation on extent of occasion against right to request for remand of an arrested person by investigating police³ and lack of legally prescribed range of time in which an investigative police officer is obliged to complete investigation of a single criminal case⁴ are critical problems that will endanger the arrested person's right to a speedy trial and that will cause long term pre-trial detention of the arrested person.

3. Conclusion and Recommendations

3.1. Conclusion

The concept of the right to protection from arbitrary arrest and detention has been enshrined by Article 9 of the UDHR, article 9(1) of the ICCPR and article 6 of the ACHPR. All of the aforementioned human right declarations were made part of the law of the land of FDRE, through ratification. Although the Magna Carta, the Habeas Corpus Acts of England and the French Declaration of the Rights of Man and the Citizen attempted to protect against "unlawful" arrest or detention, those documents did not afford protection against "arbitrary laws." Hence, particularly, the principle of legality as a standard to prove the legality of arrest or detention established by the ICCPR, ACHPR and the constitution of FDRE not only includes, but also goes beyond, protection from "unlawful" arrest or detention. They encompass protection of individuals against arbitrary arrest and detention laws in addition to protection against unlawful acts, arbitrary arrest or detention.

Since FDRE has no separate bill of rights, such right is enshrined under the constitution of FDRE (1995). Even if the existing legal framework has recognized the fact that such right is not an absolute right like that of any other human rights, it has prescribed both substantive and procedural guarantees, i.e. the principle of legality, to avoid not only arbitrary arrest and detention, but also arbitrary acts and arbitrary arrest or detention laws as well. To this end, the law also guarantees an arrested or detained person the right to claim review of the legality of the arrest or detention made against him/her before the court and to order his/her physical release. Besides, the right to be presumed innocent and the right to be released through bail is also safeguarded by law. Moreover, the arbitrary arrest or detention was criminalized under the FDRE criminal law (2004). However, irrespective of the fact that the legal framework of FDRE has the above mentioned positive things, the investigator through this research has discovered the following lacunas in the legal framework of FDRE having the potential to create an enabling environment to arbitrary arrest or detention and the author provides his own recommendations in the following section.

3.2. Recommendations

1) Lack of legally prescribed specified period of time to be taken to hand over the arrested person to the nearest police by private persons or other government officers empowered by law to arrest flagrant offenders without warrant is one problem in the field. This is because, the law only prescribes "forthwith" clause⁵ or "without unnecessary delay" clause⁶ in this regard. Thus, the law should be amended so that it shall prescribe the minimum and maximum range of time to be taken having regard to the circumstances of the case such as distance between the place where the person is arrested and the nearest police station, lack of access of the transport, etc. However, such time should not be more than the legally prescribed time, 48 hours, to be taken by the police to make the arrested person before the court.⁷

2) The existing legal framework of FDRE fails to fix the maximum time to be taken by the investigative police to complete investigation of a single case,⁸ having regard to the nature and the complexity of the case. Here, the law shall be amended and should expressly provide the minimum and the maximum range of time to

¹ Supra note 85, article 59(3)

² Supra note 80

³ Ibid

⁴ Supra note 89, article 37(1) which states that "every police investigation shall be completed without unnecessary delay"

⁵ Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960, article 2042(2) states that "The person interfering with the liberty of another shall be liable where he fails to hand over forthwith the person under his constraint to the police"

⁶ Supra note 92, article 58(1) which states that "where an arrest is made the person making the arrest shall without unnecessary delay hand over the person so arrested to the nearest police station"

⁷ Ibid, article 29(1) and see also supra note 91, article 19(3)

⁸ Supra note 92

be taken for investigation of a case to be completed having regard to the nature and complexity of the case.

3) The existing legal framework of FDRE fail to fix the maximum round or occasion that the police can apply for remand of the arrested person and the law seems against the interest of the arrested person in this regard.¹ Thus, the law has to be amended to the effect that it shall fix the maximum reasonable round or occasion that the investigative police can request for remand for all kind of crimes having regard to the nature and complexity of the case. On the other hand, the grounds and conditions justifying prolonged arrest or detention are not clearly defined or prescribed by any of the domestic laws. Hence, the new law should incorporate such things.

4) The constitution of FDRE, the supreme law of the land,² does not specifically entitle the arrested person to be represented by the legal consultant of his/her choice as one of the fundamental human right unlike that of the criminal procedure code of Ethiopia which warrant that any person detained on arrest or remand to call and interview his advocate up on permission.³ This creates ambiguity because the constitution of FDRE is the only bill of right, is the substantive law in this regard and the later law as well in terms of time of enactment, absence of specific provision dealing with such right therein may lead to conclude that its intention is to deny such right and the criminal procedure code, which is the procedural law & the former law as well, shall not have effective in this regard through the doctrine of interpretation. For example, in the absence of such right it is very difficult for the arrested or detained person to exercise his/her constitutional right to petition before the court for review of the legality of his/her arrest or detention and to order his/her physical release.⁴ Therefore, the constitution shall be amended so that it has to include the arrested & detained person's right to be represented by the legal consultant of their own choice.

5) Even if the legal frame work of FDRE has proclaimed the right to be released through bail for both the arrested or detained persons in case when the law entitles bail right for the alleged crime,⁵ there is lack of uniform standards prescribed by law to fix the amount of money/security, bail bond, even in case when the alleged crimes are similar in type and in terms of seriousness. This will create enabling environment to discriminate among the arrested or detailed persons by imposing maximum amount of bail bond mostly against the poor sections of the community. Hence, the law should fix at least the minimum and maximum limit of the amount of surety to be satisfied by the suspect for similar crimes in terms of nature & seriousness so that it will minimize the problem.

6) The courts are prohibited from interpreting the provisions of the constitution of FDRE. But, on the other hand, the constitution itself under article 13(1) demands the Judicial organs at all levels (whether regional or federal one) shall have the responsibility and duty to respect and enforce the provisions of the constitution particularly dealing with fundamental rights and freedoms. The constitution shall be amended to the effect that it should empower the regular courts at least to interpret the provisions of the constitution dealing with the fundamental rights and freedoms.

7) Even if the FDRE has become the signatory member of the ICCPR⁶ but still the procedures of ratification prescribed by the constitution of FDRE are not completed. Because according to the constitution ratification procedure involves:⁷ (i) it has to be concluded by the executive body of the government; (ii) deliberation up on and passed by the HPR and (iii) submitting it for signature to the nation's president (seems not mandatory step) and to be published in the Negarit Gazeta as well; (iv) publication in the official Federal Negarit Gazeta. However, still the ICCPR has not passed the steps from ii-iv above. Even if our courts are rarely using ICCPR in rendering cases, some courts are resisting its use by raising the above drawbacks. As a result the issue whether the ICCPR is part of the law of the land is now controversial. Therefore, the FDRE state should comply with those steps so that it enhances uniform applicability, awareness, etc

8) Article 13(2) of the constitution FDRE declare the fundamental rights and freedoms specified in the chapter three of the constitution to be interpreted in a manner "conforming" to the principles of the UDHR, ICHR and International Instruments adopted by Ethiopia.⁸ However, their status in the hierarchy of laws of the land, particularly in reference to the provisions of chapter three of the constitution of FDRE which deals with fundamental rights and freedoms is still disputable. Is this provision entitles us to make use of a right which is incorporated under those international human rights laws but which has not been recognized under the

¹ Ibid, see article 59(2) which states that "where the police investigation is not completed, the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed"

² supra note 48

³Supra note 97, article 61 states that "any person detained on arrest or on remand shall be permitted forthwith to call & interview his advocate and shall, if he so request, be provided with the means to write"

⁴ Supra note 91

⁵ See supra note 82-84

⁶ Supra note 10

⁷ Supra note 39-46

⁸ Supra note 57

constitution of FDRE is also doubtful? Thus, even if these draw backs concerning the ratification procedure of ICCPR do not exist, this debate continued to exist. On the other hand, the constitution declares that all international agreements ratified by Ethiopia are an integral part of the law of the land.¹ To this end, shall we consider the former provision, i.e. article 13(2), an exception to the later, i.e. article 9 (4), since the former provision specifically deals with the scope and interpretation of fundamental human rights & freedoms enshrined in the constitution, and the later deals with the status of all ratified international treaties in the hierarchy of laws in the legal framework of FDRE. Likewise, as one of its fundamental principle, the constitution of the FDRE proclaims that Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable and shall be respected.² Following this, the author advocate that article 13(2) of the constitution of FDRE should be interpreted to the effect that the principles of international human rights instruments are part of the chapter three of the constitution. Hence, I suppose this way of interpretation enable us to give clarity to and expand national legislation in line with the principles of international human rights standards, to fill the gaps in the rules of domestic law that have an impact on the enjoyment of human rights and to meet the international standard of universality of fundamental human rights and freedoms. Otherwise interpretation will not be successful to achieve those things. Furthermore the author advocates that this line of interpretation does not contradict with the constitution since the principle of supremacy of the constitution concerns the supremacy of each particular provisions of the constitution, if we agree in this point, it is one of the provisions of the constitution having such status on the bases of which the above line of interpretation has been logically developed. Thus, the constitution of FDRE has to be amended to avoid this vagueness.

Competing interest

The author declare that he has no competing interest

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Authors Contribution

Awol Alemayehu is a sole author of this article. He has he took the principal role in the conception of idea, development of methodology, analysis and write up of the manuscript. Finally he has read and approved the final version.

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4. References

I. National Laws and FDRE Government Reports

- Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Proclamation No. 1/1995, which has come into full force and effect as of the 21 day of August, 1995
- The FDRE Accession to the African Human and Peoples' Rights Charter Proclamation No. 1141/1998
- Criminal Procedure Code of the Empire of Ethiopia (CRM.PROC.C.) of 1961, Negarit Gazeta Extraordinary Issue No.1 of 1961, article 59 and 61
- Criminal Code of the Federal Democratic Republic of Ethiopia (2004),
- Federal Negarit Gazeta Establishment Proclamation No.3/1995, article 2(2-3)
- Federal Democratic Republic of Ethiopia Combined Report (Initial and Four Periodic Reports) to the African Commission on Human and Peoples' Rights Implementation of the African Charter on Human and Peoples' Rights, 2008,

II. International and Regional Human Rights Laws

- Universal Declaration of Human Rights (UDHR), Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948
- International Covenant on Civil and Political Rights (ICCPR), Adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966, was entered into force on 23, March 1976
- The African Human and Peoples' Rights charter, adopted by the eighteenth conference of the heads of state and Governments of the Organization of African Unity in June 1981, sometimes called the

¹ Supra note 13

² Supra note 35

- ‘Banjul Charter.
- United Nation Human Rights Committee General comment No. 35 on article 9 of ICCPR
- United Nations Committee, Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No.8) at 5, U.N. Doc. E/CN.4/826/Rev. I (1964)
- The Body Principles on the Protection of all Persons under any Form of Detention or Imprisonment (“Body of Principles”), UN Doc. A/Res/43/173 (9 December 1988)].
- The Vienna Declaration and Programme of Action At the World Conference on Human Rights held in Vienna, Austria, in 1993,

III. Publications and Books

- Laurent Marcoux, Jr., Protection from Arbitrary Arrest and Detention Under International Law, 5 B.C.Int'l & Comp. L. Rev.345 (1982), <http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/3>, page 346
- Manfred Nowak, UN Covenant on Civil and Political Rights – ICCPR Commentary, 2nd edition, Kehl/Strasbourg/Arlington 2005, p. 211ff;
- Pieter van Dijk/Fried van Hof/Arjen van Rijn/Leo Zwaak (eds.), Theory and Practice of the European Convention on Human Rights, 4th edition, Antwerpen/Oxford 2006, p. 455ff
- Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.
- Marek Peichowiak, What are Human Rights? The Concept of Human Rights and their Extra-Legal Justification pp.3-14
- ROBERT M. BOHN and KEITH N. HALEY, Introduction to Criminal Justice, Fourth Edition, Published by McGraw-Hill, 2005, p.8
- Raija Hanski and Markku Suksi (Eds.) An Introduction to the International Protection of Human Rights A Textbook (2nd Edition) Institute for Human Rights, Åbo Akadem University (1999), p.5-6
- Francesco Francioni The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience p.30
- Benedetto Conforti and Francesco Francioni (Eds.) Enforcing International Human Rights in Domestic Courts Martinus Nijhoff Publishers (1997) pp.15 – 34.
- Rakeb Messele (Human Rights and Gender Consultant), Research Subcontracted by Action Professionals’ Association for the People (APAP), 31 August 2002, p.16,[unpublished]