

# Legal Remedy for Violation of 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

In this paper the author devoted to reveal whether the FDRE legal system gives emphasis to its citizen's remedies for arbitrary arrest and detention including the right to claim compensation for the damage caused by unlawful deprivation of liberty. To do so, since this is doctrinal legal research I have used systematic and logical analysis of the provisions of the law. The constitution of the FDRE (1995), the Criminal Procedure Code (1961), the FDRE Criminal Code (2004) and the Civil Code of Ethiopia (1960) were the primary concern of this study. However, the UDHR, ICCPR among international human rights instruments and the ACHPR among the regional human rights instruments were used as well. The right to liberty and protection from arbitrary arrest and detention has been recognized by FDRE legal framework. Mere recognition of such rights has no effect unless an enforceable mechanism is provided by law. To this end, the law has to provide possible remedies for an individual in case when he/she is subject to arbitrary arrest or detention. Though the source of the remedies may vary, among three major types of constitutional remedies the constitution of FDRE has recognized 'declarations of invalidity'; 'prohibitory and mandatory interdicts'; but, it failed to recognize the right to be compensated by the state expense for the damage caused by the victim of unlawful deprivation of liberty.

**Keywords:** - Victim of Arbitrary Arrest or Detention, Constitutional Remedies and Right to Compensation

## 1. Introduction

Prevention and detection of crime is one of key obligations of the State as part of its duty to protect the human rights of all who have become, or may become, the victims of a crime.<sup>1</sup> In the criminal justice system the due process of law guarantees the rights during the procedures of arrest, detention, investigation, trial and appeals against actions, omissions, and decisions of the institutions involved in these proceedings. Criminal Justice System means the system of law enforcement, adjudication, & correction that is directly involved in the apprehension, prosecution, and control of those charged with criminal offenses<sup>2</sup> whilst the due process of law is considered as a set of rules and practices guaranteeing the protection of citizens' freedoms and rights from the arbitrary actions of the state institutions.<sup>3</sup> However, it happens frequently that violations of those fundamental human rights are identified during these various phases of criminal justice system even though its degree varies from country to country & even case to case within the country. Thus, unlawful deprivation of liberty is a good example of human right violations in the criminal justice system.

Hence, the first section deals with the legal framework of the right to protection from arbitrary arrest & detention and the meaning of unlawful deprivation of liberty. The second section deals with the legal remedies for infringement of the right to protection from arbitrary arrest and detention in general and particularly in Ethiopia. Section three deals with conclusion and recommendations. Lastly, I have attached the bibliography as well.

## Section One

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

The right to protection from arbitrary arrest & detention is enshrined under the Universal Declaration of Human Rights (UDHR)<sup>4</sup> and International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> as one of the fundamental

<sup>1</sup>International Rules And Standards For Policing, International Committee Of The Red Cross , Geneva, Switzerland Available At: [Shop@Icrc.Org](mailto:Shop@Icrc.Org) [www.Icrc.Org](http://www.Icrc.Org) , June 2001

<sup>2</sup> Larry J. Siegel and John L. Worrall, **Introduction to Criminal Justice, Thirteenth Edition**, 2010 Wadsworth, Cengage Learning, Printed in the United States of America 1 2 3 4 5 6 7 14 13 12 11 10, p.4

<sup>3</sup> Bojana Hajdini, the Albanian mechanism for guaranteeing the right to compensation for unjust imprisonment and wrongful convictio, in the light of obligations arising from international acts, Academicus –MMXIV, International Scientific Journal, P.227

<sup>4</sup> Universal Declaration of Human Rights (UDHR), Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, articles 3& 9, the later article states that "No one shall be subjected to arbitrary arrest, detention or exile"

<sup>5</sup> 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, article 9(1) paragraph two states that "No one shall be

human rights at international level. Such right constitutes one of the oldest and most fundamental guarantees constitutive of a free society and the rule of law.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

Furthermore, such right is also enshrined in most of the regional human rights laws such as the African Charter on Human and Peoples' Rights (ACHPR)<sup>4</sup>, European Convention on Human Rights (ECHR) under article 5(1), the American Convention on Human Rights (ACHR) under article 7 and the American Declaration on the Rights and Duties of Man under article 25.

When we come to the FDRE legal system, besides ratifying the ICCPR<sup>5</sup> and ACHPR<sup>6</sup>, the Constitution of FDRE has recognized the right to protection from arbitrary arrest and detention as one of fundamental human rights.<sup>7</sup> Hence, both the ICCPR and ACHPR are become part of the national law.<sup>8</sup> Furthermore, the constitution of FDRE proclaims that "Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable."<sup>9</sup>

More importantly the constitution of the FDRE affirms the important function that international human rights standards can play as a means of interpretation because it demands that all fundamental rights & freedoms recognized therein shall be interpreted in conformity with the principles of the UDHR, International Covenants on Human Rights (ICHR) and International Human Rights Instruments (IHRI) adopted by Ethiopia.<sup>10</sup> 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.<sup>11</sup> But, the term "adoption", 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.<sup>12</sup> 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

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subjected to arbitrary arrest or detention"

<sup>1</sup> See also Manfred Nowak, UN Covenant on Civil and Political Rights – ICCPR Commentary, 2<sup>nd</sup> 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, 4<sup>th</sup> edition, Antwerpen/Oxford 2006, p. 455ff

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

<sup>3</sup>The Vienna Declaration and Programme of Action state that 'all human rights are universal, indivisible and interdependent and interrelated'.

<sup>4</sup> The African Human and Peoples' Rights charter (ACHPR), 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', article 6

<sup>5</sup> See FDRE 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, paragraph 5, p.10 and table 32, p.167, see also [http://www.article.org/Ethiopia legal frame work-htm](http://www.article.org/Ethiopia%20legal%20framework-htm), accessed on Dec 30,2015

<sup>6</sup> See the FDRE Accession to the African Human and Peoples' Rights Charter Proclamation No. 114/1998.

<sup>7</sup> 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 14 & 17

<sup>8</sup>Ibid, article 9(4) declares that "All international agreements ratified by Ethiopia are an integral part of the law of the land"

<sup>9</sup>Ibid, 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."

<sup>10</sup>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."

<sup>11</sup> 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.

<sup>12</sup>Supra note 15, article 55(12) state that "the House of Peoples Representatives (see foot note number 20 below) shall ratify international agreements concluded by the Executive."

means prime minister and the council of ministers.<sup>1</sup> Second, it should be deliberated up on and passed by the house.<sup>2</sup> Here, ‘the House’ means House of People’s Representatives (HPR).<sup>3</sup> The third step is submitting it for signature to the nation’s president.<sup>4</sup> The fourth step is the nation’s president shall publish it in the Federal Negarit Gazeta.<sup>5</sup> 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 organs<sup>6</sup> as well as any natural or juridical person shall take judicial notice of laws published therein”<sup>7</sup> 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 domestic level.<sup>8</sup> Another doubt in this junction, during interpretation, 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.<sup>9</sup> This becomes an issue when a certain right which is enshrined under the international human rights instrument adopted by FDRE 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 councilor of his/her choice is not specifically recognized under the constitution of FDRE unlike that of the ICCPR to which Ethiopia is a party. So, can Ethiopians claim the rights under ICCPR which are not recognized under the national constitution are disputable now days?

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.<sup>10</sup> To sum up, the legal frameworks of contemporary Ethiopia have recognized the citizen’s right to protection from arbitrary arrest and detention.

## 1.2. Meaning of Arbitrary Arrest and Detention

In recognition of arrest and detention as a legitimate means of the exercise of state authority in the administration of criminal justice, all the UDHR, ICCPR, ACHPR and the constitution of FDRE prohibit only arbitrary arrest or detention.<sup>11</sup> However, all of them do not define the term ‘arbitrariness’ and they do not provide an enumeration of the permissible grounds for legal arrest and detention. But, what is peculiar to the ICCPR is that it expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation.<sup>12</sup>

Except the UDHR, the ICCPR, ACHPR and the constitution of FDRE prescribe the standard of “principles of legality” to test the legality of arrest and detention.<sup>13</sup>

To be specific, the ICCPR declare that an arrest or detention shall be made in accordance with the grounds provided by law (“substantive requirement”) and the procedures provided therein (“procedural requirement”).<sup>14</sup> The UN Human Rights Committee (UNHRC) on its general comment number 35 on article 9(1) of ICCPR demonstrate 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 and procedures for carrying out legally authorized deprivation of liberty should also be established by law, and States

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<sup>1</sup>Ibid, article 72(1) which state that “The highest executive powers of the Federal Government are vested in the Prime Minister and in the Council of Ministers.”

<sup>2</sup>Ibid, article 57

<sup>3</sup>Ibid, 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.

<sup>4</sup>Supra note 19

<sup>5</sup>Ibid, article 71(2)

<sup>6</sup>Ibid, 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.”

<sup>7</sup>Federal Negarit Gazeta Establishment Proclamation No.3/1995, article 2(2-3)

<sup>8</sup>Ibid and see also Rakeb Messele (Human Rights and Gender Consultant), Research Subcontracted by Action Professionals’ Association for the People (APAP), 31 August 2002, p.16.[unpublished]

<sup>9</sup>Supra note 23, 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.”

<sup>10</sup>Supra note 12

<sup>11</sup>Supra note 4, 5, 9 and 27

<sup>12</sup>Supra note 5, article 11 states “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation”

<sup>13</sup>Supra note 5, 7 and 27

<sup>14</sup>Supra note 29, article 9, paragraph three

parties to ICCPR should ensure compliance with their legally prescribed procedures”.<sup>1</sup> According to the committee 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.<sup>2</sup> Therefore, “Arbitrariness” has been defined to include all those elements. On the other hand, according to UNHRC “deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12 of ICCPR. Examples of deprivations of liberty include “police custody”, “arraigo”, “remand detention”, “imprisonment after conviction”, “house arrest”, “administrative detention”, “involuntary hospitalization”, “institutional custody of children”, and “confinement to a restricted area of an airport”, and also include being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or physical restraining devices. During a period of military service, restrictions that would amount to deprivations of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned.”<sup>3</sup> Deprivation of personal liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.<sup>4</sup> Therefore, since the term arbitrariness is not defined in any of the national laws of FDRE we shall make use of the aforementioned definition according to article 13(2) of the constitution of the FDRE.<sup>5</sup>

According to the UN Body Principles, 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 purpose.<sup>6</sup> Hence, it is logical to conclude that there is arbitrary arrest and detention if a person is arrested or detained against the provisions of the law and not by the competent official or persons authorized for that purpose.

The notion of arbitrariness varies to a certain extent depending on the type of detention involved. To be illustrative, the European Court of Human Rights (ECtHR) 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.<sup>7</sup>

When we come to FDRE, to be specific, the constitution of the FDRE 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 law”.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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, beside violation of laws concerning the same.

To sum up, the right to protection from arbitrary arrest and detention should include not only protection from ‘unlawful arrest or detention’, but also protection from ‘arbitrary laws’ and ‘unlawful acts’. Hence, two conditions must be fulfilled to say there is arbitrary arrest and detention even in the legal frame work of FDRE as well. Those are there must be prior enacted law, that is fair by itself, which prescribes the grounds and procedures of arrest and detention and the authority empowered to affect them, then a person must be arrested or detained against those laws.

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<sup>1</sup>United Nation Human Rights Committee General comment No. 35 on article 9 of ICCPR, paragraph 22

<sup>2</sup> Ibid

<sup>3</sup> Ibid, paragraph 5

<sup>4</sup> Ibid, paragraph 6

<sup>5</sup> Supra note 15

<sup>6</sup>The UN 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 preamble and principle 2

<sup>7</sup> 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).

<sup>8</sup> Supra note 36, article 17(1)

<sup>9</sup> Ibid, article 17(2)

<sup>10</sup> Ibid,

## Section Two

### 2.2. Legal Remedies for Violation of the Right to Protection from Arbitrary Arrest and Detention in General

Mere recognition of right has no effect unless an enforceable mechanism is provided by law. To this end, the law has to provide possible remedies for an individual in case when he/she is subject to arbitrary arrest or detention. In support of this, the UDHR proclaims that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>1</sup> Accordingly, every member state to UDHR has to recognize either in its constitution or other legislation an effective remedy for violation of human rights. Since, Ethiopia is a signatory member of UDHR and the constitution of FDRE has already recognized that fundamental rights and freedoms enshrined therein has to be interpreted in conformity with standards of UDHR,<sup>2</sup> the FDRE government is under duty to enact laws providing effective remedy for human rights violation. Furthermore, the ICCPR proclaims that each State Party to it undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without discrimination of any kind.<sup>3</sup> To this end, at the primary level, member states to ICCPR must refrain from directly infringing human rights. This corresponds more closely to the traditional conservative view, which argues that the obligation of the State is to abstain from arbitrary intervention on the freedom and autonomy of the individual.<sup>4</sup> This level provides a safeguard for citizens from unjust interferences by political authorities. At a secondary level, the State is required to protect or ensure citizens’ rights from unjust interferences from others. This includes the obligation to enact legislation and create the framework to prevent violations of rights and enable citizens enjoy their protected rights without the interference from others.<sup>5</sup> At a tertiary level, the State has the obligation to fulfill by positively intervening and assisting, especially those who are in a vulnerable position to make better use of their rights. At this level, the duty involves active measures by the political authority necessary for guaranteeing for each individual to access the entitlements of his/her rights, which cannot be secured through exclusively personal efforts.<sup>6</sup>

Moreover, the ICCPR also proclaims that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.<sup>7</sup> The UN Human Rights Committee in its general comment number 35 on article 9 of ICCPR state that the remedy must not exist merely in theory, but must operate effectively and make payment within a reasonable period of time.<sup>8</sup> Therefore, member states to the ICCPR not only recognize in their national laws the right to claim compensation for the damage caused due to arbitrary arrest and detention, but also there must be an effective enforcement mechanism within reasonable period of time. Hence, the FDRE is party to the ICCPR<sup>9</sup> the government of FDRE is under duty to discharge aforementioned responsibility.

Similar to ICCPR, among the regional human rights instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), of November 4<sup>th</sup>, 1950, guarantees the right to compensation of a person arrested or imprisoned contrary to the guarantees set forth by the Convention<sup>10</sup> provided that to be entitled to an award of compensation under such provision the victim may be required to show damage resulting from the breach.<sup>11</sup> Furthermore, the American Convention on Human Rights/ACHR/ recognized the right to compensation for persons who are unlawfully deprived of their liberty.<sup>12</sup> However, the

<sup>1</sup>Supra note 4, article 8

<sup>2</sup> Supra note 36

<sup>3</sup>Supra note 31, see article 2(1) which state that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ‘

<sup>4</sup> Pierre de Vos Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution pp.67-101 (1997) 13 SAJHR p.80.

<sup>5</sup> *Ibid*, p.83.

<sup>6</sup> *Scott Lekie The Right to Housing pp.107 – 123 in Eide A., Krause C. and Rosas A. (Eds)., p.115.*

<sup>7</sup> Supra note 44, see article 9(5) which proclaim that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

<sup>8</sup> Supra note 35, paragraph 50

<sup>9</sup> Supra note 10 and 13

<sup>10</sup>ECHR, Article 5, paragraph 5 states: “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

<sup>11</sup> ECtHR, *Wassink v. The Netherlands* (App No 12535/86) (1990), at para. 38.

<sup>12</sup> American Convention on Human Rights/ACHR, article 7, paragraph six states that “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another

ACHPR fail to recognize the same right. But, the principles and guidelines on the right to fair trial and legal assistance in Africa which was endorsed by the African Commission on Human and Peoples Rights under article 1(h) and 2(j) entitle the victims of unlawful arrest or detention to claim compensation against the wrong doer and impose up on member states to enact national legislation recognizing the same right.<sup>1</sup>

The source of constitutional remedies is, in general, found in the Constitution itself, and in rare circumstances in legislation, while remedies for private or state conduct are often found in ordinary legislation.<sup>2</sup> Though the source of the remedies may vary, there are only three major types of constitutional remedies: declarations of invalidity; prohibitory and mandatory interdicts; and awards of constitutional damages.<sup>3</sup> Constitutional remedies aim to stop a harm caused on the society at large and to vindicate the right. In general, constitutional remedies are thus forward-looking, community oriented and structural rather than backward looking, individualistic and retributive.<sup>4</sup> Since those remedies guarantee the full enjoyment of human rights the national laws, mainly the constitution, shall provide effective and enforceable remedies for human rights violation, particularly for violation of the right to protection from arbitrary arrest and detention.

## **2.1. Legal Remedies for Violation of the Right to Protection from Arbitrary Arrest and Detention under the Legal Framework of Federal Democratic Republic of Ethiopia**

When we come to FDRE, our bill of right is the constitution of FDRE, which is the supreme law of the land,<sup>5</sup> only at national level. Hence, it has to provide constitutional remedy. Thus, the constitutional remedies available in our FDRE are as follow;

### **I. Prohibitory and Mandatory Interdicts**

Among the constitutional remedies prescribed under the constitution of the FDRE the first one is “prohibitory and mandatory interdicts” such as the constitution of FDRE declare that all the branch of the government both Federal and State level are under the responsibility to respect and enforce the fundamental rights and freedoms enshrined under chapter three of the constitution.<sup>6</sup> Accordingly, those organs are not only under duty bound not to violate those rights, but also they are responsible for protecting infringement of those rights by others. Hence, the state of FDRE must preclude from violating human rights and it has to protect the citizens from human right violations by third parties. When we come to the topic at hand, besides, the constitution FDRE prescribes the principle of legality as a standard to be met to make arrest or detention legal.<sup>7</sup> Accordingly, the legislature is required to enact laws which specifically provide the grounds and the procedures in which an arrest or detention of an individual person can be effected and such law also should not be unfair by itself. Then an arrest or detention of a person must be made while the grounds provided therein are satisfied and the procedures provided therein must be strictly followed. To strengthen this, the legislature has already criminalized under the Criminal Code (CC) of FDRE (2004) “Unlawful Arrest or Detention”<sup>8</sup> and ‘Illegal Restraint’ as criminal act.<sup>9</sup> To sum up, the legislator under the FDRE should be precluded from enacting arbitrary laws making people subject to arbitrary arrest and detention, and the executive should also abstain from arbitrary applying such law while implementing it. Another fundamental human right enshrined under the constitution of the FDRE is presumption

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person in his behalf is entitled to seek these remedies.”

<sup>1</sup> <http://www.achpr.org/principles> and guidelines on the right to fair trial and legal assistance in Africa, accessed on Dec 20, 2015

<sup>2</sup> See supra note 25

<sup>3</sup> Ibid

<sup>4</sup> Johan de Waal, Iain Currie and Gerhard Erasmus *The Bill of Rights: Handbook* (3rd Edition) In association with Lawyers for Human Rights and Law Society of South Africa (2000) pp.161

<sup>5</sup> Supra note 26

<sup>6</sup> Ibid, see article 13(1) which 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 this Chapter (chapter three of the constitution of FDRE).”

<sup>7</sup> Supra note 39-40

<sup>8</sup> 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.

<sup>9</sup> Ibid, 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.”

of innocent until proved guilty.<sup>1</sup> Hence, during pre-trial investigation and during proceedings the suspect shall be presumed innocent until proved guilty. Moreover, during those stages the arrested and accused persons have the right not to be compelled to testify against themselves and not to be compelled to make confessions or admissions respectively.<sup>2</sup> Any practice against those rights are considered improper and use of such improper method is already declared crime under the new criminal code of FDRE (2004),<sup>3</sup> besides the constitution of FDRE has already declared that any evidence obtained under coercion is not admissible.<sup>4</sup> Prohibition of retroactivity of Criminal Law is also another important feature.<sup>5</sup> Therefore, aforementioned constitutional rights of citizens can be considered as constitutional remedies for violation of the right to protection from arbitrary arrest and detention.

## II. Declaration of Invalidity

The second constitutional remedy available is “declaration of invalidity” of certain actions violating citizen’s right to protection from arbitrary arrest and detention. In this regard, the supremacy provision of the constitution of FDRE automatically makes any law, customary practice or decision of an organ of state or a public official of no effect when they are inconsistent with the constitution.<sup>6</sup> Hence, if the legislature enacts unfair law concerning the grounds and procedures of arrest and detention or if a fair law while enacted become arbitrarily applied by the executive, then those things can be challenged unconstitutional. However, one of the fundamental problems in this junction is that the regular courts are precluded from interpreting the constitution and it is the House of Federation (HoF)<sup>7</sup> empowered to interpret the constitution of the FDRE.<sup>8</sup> Hence, whether or not a certain law, customary practice or decision of an organ of state or a public official is inconsistent with the constitution of FDRE is going to be decided by HoF. To do so, the HoF shall organize the Council of Constitutional Inquiry<sup>9</sup> which assists it.<sup>10</sup> Any court or interested party can submit any dispute requiring constitutional interpretation to the council of constitutional inquiry.<sup>11</sup> Then the council either remands the case<sup>12</sup> or submits its recommendations to the House of the Federation for a final decision if it believes there is a need for constitutional interpretation.<sup>13</sup> In the former case the party dissatisfied with the decision of the council can appeal against the decision before the HoF.<sup>14</sup>

Moreover, the constitution of the FDRE proclaims that arrested person has the right to petition before the court to challenge the legality of his/her arrest and request for an order of his/her physical release.<sup>15</sup> Besides, in the case when the person under arrest has given admission or confession under coercion to the investigative police or other officer in charge of the same duty, he/she can petition before the court for an order of such evidence inadmissible.<sup>16</sup> Following this if he/she is dissatisfied with the decision of the subordinate court, he/she

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<sup>1</sup>Supra note 57, article 20(3) state that “During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.”

<sup>2</sup>Ibid and see also article 19(5) of the same which state that “Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.”

<sup>3</sup>Supra note 62, article 424 sub-article one and two state that “Any public servant charged with the arrest ... or interrogation of a person who is under ..., under arrest, ..., detained ... who, in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar end, or to make him give a testimony in a favourable manner, is punishable with simple imprisonment or fine, or, in serious cases, with rigorous imprisonment not exceeding ten years and fine. Nothing in this Article shall affect the concurrent application of the relevant provision where the act constitutes an additional crime. Where the crime is committed by the order of an official, such official shall be punished with rigorous imprisonment not exceeding fifteen years and fine.”

<sup>4</sup> Supra note 64, article 19[5] paragraph two

<sup>5</sup> Ibid, article 22 and supra note 65, article 5

<sup>6</sup> Supra note 55

<sup>7</sup>Ibid, see article 61(1) and (2) paragraph one which state that “The House of the Federation is composed of representatives of Nations, Nationalities and Peoples. Each Nation, Nationality and People shall be represented in the House of the Federation by at least one member.”

<sup>8</sup>Ibid, see article 62(1) state that “The House has the power to interpret the Constitution.”

<sup>9</sup> Ibid, article 62(2)

<sup>10</sup> Ibid, see article 83(2) and 84

<sup>11</sup> Ibid, see article 84(2)

<sup>12</sup> Ibid, see article 84[3(a)]

<sup>13</sup> Ibid, see article 84[(b)]

<sup>14</sup> Supra note 66

<sup>15</sup> Ibid, article 19(4) paragraph one state that “All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest.”

<sup>16</sup> Supra note 63

has right to appeal against such decision.<sup>1</sup> A person who is wrongfully convicted by subordinate court as a result of miscarriage of justice can appeal against the decision before the appellate court and if he/she can prove that his/her innocence, then he/she will be acquitted.<sup>2</sup> Thus, aforementioned rights can be considered remedies for unlawful deprivation of liberty.

### III. Award of Constitutional Damage

A person who has incurred damage as a result of arbitrary arrest or detention shall be compensated. On the other hand, a person who made unlawful arrest and detention shall make good the damage he caused to such person. Having this into consideration, the ICCPR among international human rights instruments and ECHR and ACHR among regional human right laws have already recognized the right to compensation in case of unlawful deprivation of liberty of a person charged for committing a criminal offence without having a final court decision on it.<sup>3</sup> However, neither the ACHPR nor the constitution of FDRE has recognized the same right. But, the fact that there is no specific provision in the constitution of FDRE entitling such right does not mean that these persons who are the victim of unlawful deprivation of liberty are deprived of the right to claim compensation against the wrong doer. This is because since ‘unlawful arrest and detention’ is already declared crime<sup>4</sup>, the injured party is entitled to claim compensation against the criminal according to the new Criminal Code (CC) of the FDRE (2004).<sup>5</sup>

Moreover, under the Civil Code of Ethiopia (1960) ‘Interference with the liberty of another’ is declared an offence.<sup>6</sup> Thus, a person whose liberty is interfered accordingly can claim compensation against the offender because the offender is under duty to make good the damage he/she caused to the other according to the civil code of Ethiopia.<sup>7</sup> However, “no offence shall be deemed to have been committed where the person who has interfered with the liberty of another had good reason to believe that the latter had committed a criminal offence. But, 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.”<sup>8</sup>

Regarding state liability to pay compensation for the victim of unlawful deprivation of liberty, the civil code clearly declare that the employer is jointly and severally liable for the damage caused by its employee.<sup>9</sup> Thus, in case when the offender is public servant<sup>10</sup>, it is obvious that the state is liable except where the fault made by the employee is a personal one.

With regard to the type of compensation that the victim can claim, the civil code entitle that she/he can claim compensation for both material (i.e. actual and future damage) and moral damage,<sup>11</sup> but the amount of moral damage prescribed by the law is still 1000.00/one thousand Ethiopian birr/ which is insignificant.<sup>12</sup> With respect to the manner how the victim can enforce such claim, the law is vague. That is the law does not impose the duty up on the public prosecutor to file the civil suit jointly with the public prosecution against the offender and as result of this the offender is forced to incur extra costs.

Therefore, based up on the above arguments the author advocate that FDRE legal framework has given due emphasis to the right to liberty of a person and the right to protection from arbitrary arrest or detention by providing legal remedies.

## Section Three

### Conclusion and Recommendation

The concept of the right to protection from arbitrary arrest and detention has been enshrined by Article 9 of the

<sup>1</sup> Ibid, article 20(6) which state that “All persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case.”

<sup>2</sup> Ibid, and see Criminal Procedure Code of the Empire of Ethiopia (CRM.PROC.C.) of 1961, Negarit Gazeta Extraordinary Issue No.1 of 1961, article 195[2(b)]

<sup>3</sup> Supra note 49, 51 and 53

<sup>4</sup> Supra note 61

<sup>5</sup> Ibid, article 101 paragraph one state that “Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation.”

<sup>6</sup> Civil Code of the Empire of Ethiopia Proclamation No. 165 OF J960, article 2040(1-3) state that “In Principle a person commits an offence where, without due legal authority, he interferes with the liberty of another person, even for a short time, and prevents him from moving about as he is entitled to do. In such a case, an offence shall be deemed to have been committed notwithstanding that no injury is done to the plaintiff's person. It shall be sufficient for the plaintiff to have been compelled to behave in a certain manner by the threat of a danger of which he could not be unaware.”

<sup>7</sup> Ibid, article 2027(1) and 2028

<sup>8</sup> Ibid, article 2042

<sup>9</sup> Ibid, article 2027(3), 2126(2), 2130 and 2155

<sup>10</sup> Supra note 62 and 65

<sup>11</sup> Ibid, articles 2090-2092 and 2108

<sup>12</sup> Ibid, see article 2116(3)



UDHR, article 9(1) of the ICCPR and article 6 of the ACHPR. All of 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 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 and detention.

The constitution of FDRE also guarantees an arrested or detained person the right to claim review of the legality of the arrest and detention made against him/her before the court and to order his/her physical release. Besides, the right to be presumed innocent until proved guilty, the right to be released through bail, prohibition of retroactivity of Criminal Law, prohibition of coercion during interrogation, is some of important human rights safeguarded by the constitution of FDRE as a remedy with regard to protection from infringement of human rights. Moreover, the arbitrary arrest or detention was criminalized under the FDRE criminal law (2004) and the person who is unlawfully arrested or detained is entitled to claim compensation for the damage caused to him against the wrong doer. Above all, the constitution demands the state to respect and enforce the fundamental rights and freedoms enshrined under the constitution. 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 frame work of FDRE to be improved.

I. Even if the FDRE has become the signatory member of the ICCPR 23 years back on 11 June 1993, still the procedures of ratification prescribed by the constitution of FDRE, the supreme law of the land, are not completed. Because ratification procedure in FDRE legal system involves the following steps<sup>1</sup>: (i) it has to be concluded by the executive body of the government; (ii) deliberation up on and passed by the HPR<sup>2</sup> 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. Hence, as long as a certain international treaty not ratified by following the above steps then we cannot consider it is adopted by FDRE. FDRE is a dualist nation because it requires publication in national legislature as a pre-requisite to take judicial notice of international human rights laws. However, one may argue as a defense that since FDRE become a signatory member of the ICCPR before the coming into force of the constitution of the FDRE [has come into full force and effect as of the 21 day of August, 1995,] it is not necessary to follow the ratification procedures prescribed in the later. On the other hand, the constitution of the FDRE allows us to utilize as human rights standard only those standards enshrined by international human rights instruments adopted by FDRE.<sup>3</sup> Beside, one logical person can also argue that the constitution of the FDRE internationally has withdrawn certain rights enshrined under the ICCPR, particularly the right to claim compensation for unlawful deprivation of liberty because it is the later law and also the constitution demand only those rights already recognized under it to be interpreted in conformity with international human rights standards adopted by FDRE. Furthermore, all persons, government organs, including the judiciary are responsible to take judicial notice of only those laws published in the *Federal Negarith Gazeta*.<sup>4</sup> The controversy continued to exist in such manner. Whether the ICCPR is part of the law of the land is now controversial issue among the law scholars even if the government of FDRE has been indicating that the ICCPR is ratified by FDRE in its official reports. Therefore, the FDRE state should comply with those steps so that it enhances uniform applicability, awareness and enjoyment of those rights enshrined therein. Since publication in the national legislature requires translation into national working language, it enhances the implementation of such law as well. While as the constitution shall be amended so that it shall incorporate a provision to the effect that any international human rights instruments to which Ethiopia is a signatory member before the coming into force of the constitution of FDRE shall be enforced without further requirement of fulfilling procedures of ratification provided in the constitution. Moreover, the constitution shall be amended so that it shall incorporate a provision to the effect that entitling the right to claim compensation for human rights violation.

II. Even if Article 13(2) of the constitution FDRE declares 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,<sup>5</sup> 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 is still disputable. Is

<sup>1</sup> Supra note 17-24

<sup>2</sup> Ibid, article 59(1) state that "unless otherwise provided in the Constitution, all decisions of the House shall be by a majority vote of the members present and voting."

<sup>3</sup> Supra note 43

<sup>4</sup> Supra note 24

<sup>5</sup> Supra note 92

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 constitution of FDRE is also doubtful because the provision concerns only those rights enshrined therein. For example, even if these drawbacks concerning the ratification procedure of ICCPR as indicated above do not exist, this debate continued to exist because the constitution of the FDRE failed to incorporate some of the rights enshrined in the ICCPR such as there is no provision entitling the victim of unlawful deprivation of liberty the right to claim compensation and it fails to incorporate the right to be represented by legal counsel of their choice as fundamental human rights of arrested persons. In this regard, one may logically suppose that the constitution of FDRE has purposely denied those rights because it has come into force after the FDRE became party to the ICCPR.

On the other hand, article 9(4) of the same constitution declares that all international agreements ratified by Ethiopia are an integral part of the law of the land. If we take the literal meaning of this provision all international human rights laws adopted by FDRE are subordinate to the constitution and if there is contradiction between the provisions of the two the constitution necessarily prevails due to the supremacy clause and I believe that this line of interpretation may go against the universality principle of human rights and it may diminish the enjoyment of human rights by citizens. To this end, how can we compromise article 13(2) with article 9(4) of the same constitution? Shall we consider the former provision an exception to the later since the former provision specifically deals with the scope and interpretation of fundamental human rights and 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. What if the provisions of the international human rights adopted by FDRE and the provisions of the constitution of the FDRE dealing with the same right contradict each other? Which one shall prevail? Mind you there is a supremacy clause under the constitution.<sup>1</sup>

As one of its fundamental principles, 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.<sup>2</sup> Following this, the author advocates 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 chapter three of the constitution. Hence, in case when there is contradiction between the provisions of the constitution dealing with fundamental rights and freedoms and international human rights laws adopted by FDRE the latter shall prevail. I suppose this way of interpretation enables 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 provision of the constitution, if we agree in this point, it is one of the provisions of the constitution having such status on the basis of which the above line of interpretation has been logically developed. Thus, to avoid the above ambiguity the constitution of FDRE has to be amended so that it shall include clear and specific provision regarding which one shall override during inconsistency between the provisions of the constitution and international or regional human rights instruments adopted by FDRE. Moreover, the amended constitution shall also resolve the controversy whether article 13(2) of the constitution of FDRE entitles citizens to enjoy those rights which are not specifically recognized therein, but enshrined under international or regional human rights laws which are adopted by FDRE through interpretation or the above provision only concerns those rights recognized under the constitution to be interpreted in conformity with international standards.

- III. Even if the constitution of the FDRE imposes the responsibility upon the judiciary to respect and enforce fundamental rights and freedoms recognized under the constitution,<sup>3</sup> it precludes the court from interpreting the constitution.<sup>4</sup> This will create another difficulty in the field. Since HoF<sup>5</sup> which is empowered to interpret the constitution is purely a political body as to me it is inconsistent with the citizens' right to be heard before an independent and impartial court established by law. Therefore, the constitution has to be amended so that it shall specifically empower the court to interpret the provisions of the constitution, particularly those dealing with fundamental rights and freedoms of citizens.
- IV. With regard to the manner how the victim of unlawful deprivation of liberty can exercise his/her right to claim compensation has to be clarified and the law should impose the duty upon the public prosecutor to file the civil suit jointly with the criminal charge through public prosecution against the offender in order to save the victim from incurring extra costs. Regarding the amount of moral damage the law has to be

<sup>1</sup> Supra note 68

<sup>2</sup> Supra note 14

<sup>3</sup> Supra note 60

<sup>4</sup> See supra note 69-76

<sup>5</sup> Ibid

amended to the effect that the amount should be increased so that it has to be commensurate with the damage caused to the victim. This is because the purchasing power of 1000.00/one thousand Ethiopian Birr/ at the time of enactment of the civil code of Ethiopia in 1960 is absolutely different from its purchasing power now days.

### **Competing Interest**

The author declares that he has no competing interest.

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### **Authors Contribution**

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

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