



# Prisoners' Right to Vote in Ethiopia: Unconstitutionally stalled Human Right

Zemenu Tarekegn yimenu \*

## ARTICLE INFO

### Article history:

Received: 8 August 2016;

Received in revised form:  
29 September 2016;

Accepted: 4 October 2016;

### Keywords

Elections,  
Human rights,  
Constitution,  
Conviction.

## ABSTRACT

This article shows that right to vote is a recognized human right, under many international human rights instruments, that should be respected and ensured to citizens without any discrimination. It, after scrutinizing the election laws of Ethiopia via the mirror of the constitution and international human rights instruments, determines that the election laws of Ethiopia, which prohibit prisoners' right to vote, are unconstitutional and recommends the Ethiopian government to reconcile it again.

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## 1. Introduction

"In a democracy that takes collective self-government seriously, the right to vote is the 'right of rights'"<sup>1</sup>.

The right to vote is a basic human right that empowers citizens to influence government's decision-making and to safeguard their other human rights.<sup>2</sup> The right to vote is considered as gate keeper of all other human rights. It is because the right to vote empowers the sovereign to influence the government in which the later, in return, owes obligation towards the sovereign. It enables the sovereign to give authority to a party which best protects and enforces human rights.

\*LL.M in ICT laws, University of Oslo (NRCCCL); LL.M in business laws, Addis Ababa University. He is a lecturer in Debre Markos University School of law, and an Attorney and Consultant at Laws in Amhara Regional State, Ethiopia. He can be reached @: [zemenutarekegn1@gmail.com](mailto:zemenutarekegn1@gmail.com)

<sup>1</sup>William Cobbett cited in J Waldron, 'Participation: The Right of Rights' (1998), <http://philpapers.org/rec/WALPTR>, last visited on: 9/8/2013.

<sup>2</sup>Tuzin Alexander and de la Vega Connie, *the Right to Vote: A Basic Human Right in Need of Protection*, <http://daccess-ods.un.org>, last visited on 7/8/2013. While the right to vote is widely recognized as a fundamental human right, this right is not fully enforced for millions of individuals around the world. Consistently disenfranchised groups include non-citizens, young people, minorities, those who commit crimes, the homeless, disabled persons, and many others who lack access to the vote for a variety of reasons including poverty, illiteracy, intimidation, or unfair election processes. See., *Study guide for the right to vote*, university of Minnesota human rights center, <http://www1.umn.edu/humanrts/edumat/studyguides>, last visited on 8/8/2015.

The government which receives authority from the sovereign through the device of vote shall secure the will of the majority. This calls for the basic principle of election i.e. universal and equal suffrage. This principle requires that right to vote to be universal and accessed to all persons equally without any discrimination based on race, religion, sex, education, or any other status.

Even though, Ethiopia is the owner of the constitution which recognizes international treaties as part of the law of the land<sup>3</sup> and a signatory to conventions like ICCPR which prescribes for prisoners' right to vote, it deprived prisoners' right to vote by the electoral law<sup>4</sup> and directive<sup>5</sup> which is issued by the board against the principle of universal and equal suffrage. This means the electoral law of Ethiopia has infringed the right to vote as human right for more than 85,450 persons<sup>6</sup> who are currently serving their prison terms. This figure can play a greater role in determining the majority will of the sovereign.

The first section of the article highlights the legal basis of prisoners' right to vote as a human right. In this section international and regional covenants are dealt with. The obligation of the state towards the right to vote and the debate for and against the disenfranchisement of prisoners are addressed in section two and three, respectively. The different legal experience of countries like USA, European Union, and

<sup>3</sup> Constitution of Federal Democratic Republic of Ethiopia, 1995, article 9(4), proc. no. 1 Neg. Gaz. Year 1, No.1

<sup>4</sup> Electoral law of Ethiopia, 2007, article 33(3), proc. no.532, Neg. Gaz. Year 13, No. 54

<sup>5</sup> The directive for registration of electors (as amended), 2009, art. 20, directive no. 2.

<sup>6</sup> Walmsley Roy, *World Prison Population List* (ninth edition), [www.prisonstudies.org](http://www.prisonstudies.org), last visited on 6/8/2015

South Africa are assessed in section four. Section five of this article address specifically prisoners' right to vote in Ethiopia by reviewing pertinent laws of the country. This section, in particular, observes the FDRE constitution and election laws and makes analysis of the election laws via the constitution.

Finally, the writer argues that the prisoners may not be deprived of their right to vote on the ground of conviction as the limitation goes against the human rights of prisoners recognized in different international human rights documents and FDRE constitution. So, therefore, the electoral laws are determined as unconstitutional.

## **2. The Legal basis of prisoners' right to vote as a human right**

### **2.1. UDHR**

The universal declaration of human rights which is regarded as a founding document for human rights gives recognition for prisoners' right to vote as human right. Under article 21(3), UDHR states that "the will of the people shall be the basis of the authority of government; this will shall be expressed in a periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". This provision, by adhering to the principle of universal and equal suffrage, clearly indicates that the right to vote is given to persons regardless of their status.

Moreover, prisoners' right to vote should be respected and observed universally and equally. It is because, in UDHR, the states have already pledged for the promotions of *universal respect for and observance of human rights* and fundamental freedoms.<sup>7</sup>

### **2.2. ICCPR**

The International Covenant on Civil and Political Rights ("ICCPR") codifies the right to vote under Article 25 as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions ... and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Moreover, the General Comment 25 to the ICCPR emphasizes that "no distinctions are permitted between citizens"<sup>8</sup> in the

enjoyment of the aforementioned rights on the grounds of race, colour, sex... or other status."<sup>9</sup> It further qualifies that if states are instant to suspend the right vote on the basis of conviction for an offence, the period of such suspension should be proportionate to the offence and the sentence. However, the general comment 25 refers to suspensions of voting rights by criminal bench in accordance with criminal law of states. This may be considered as a part of sentences and has specified time span by the law. Such suspension of right to vote is imposed purposely to correct and deter the criminal and others respectively. So, the general comment while it tolerates temporary suspension of right to vote based on conviction, it prohibits the limitation of right to vote by law.

Moreover, the Optional Protocol to International Covenant on Civil and Political Rights no. 14668 to which Ethiopia is a signatory, under article 25, stipulate similar terms like UDHR and ICCPR. Nevertheless, in some countries including Ethiopia, citizens are denied their voting rights as a matter of law, based on a criminal conviction.

### **2.3. ACHPR**

Article 13(1) of the African Commission on Human and People's Rights stipulates that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law." The provisions of Article 13(1) of the African Charter are similar in substance to those provided for under Article 25 of the International Covenant on Civil and Political Rights.<sup>10</sup> In interpreting Article 13(1) of the African Charter, the African Commission has endorsed the clarification provided by the Human Rights Committee in relation to Article 25.

The African human rights commission has best explained the universality of the right to vote in the Gambia case.<sup>11</sup> In this case, the Complainants alleged that legislation governing mental health in the Gambia is outdated and violates Articles 2, 3, 5, 7(1) (a) and (c), 13(1), 16 and 18(4) of the African Charter on Human and Peoples' Rights. The commission, after communicating complains to the respondent state and declaring the admissibility of complains, has adjudicated over the merit of the case. In the adjudication, under Para.76, the commission has put the following important synthesis.

"The right provided for under Article 13(1) of the African Charter is extended to "every citizen" and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State. Legal incapacity may not necessarily mean mental incapacity. For example a State may fix an age limit for the legibility of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards."

<sup>7</sup>Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III) (1948), the preamble, emphasis added. However, since UDHR is a declaration it has no binding effect on states though it is being regarded as international customary law.

<sup>8</sup> The text of this article borrows the language of Article 21 of the UDHR. One important distinction, however, bears noting: the covenant specifies that only citizens shall have the right to vote. See Kirshner Alexander, *The International Status of the Right to Vote*, <http://archive.fairvote.org/media/rtv/kirshner.pdf>, last visited on 7/8/2015. The right to vote may be subject only to reasonable restrictions, and States must 'take effective measures to ensure that all persons entitled to vote are able to exercise that right. See HRC General Comment 25, Para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.7, 1996.

<sup>9</sup> HRC General Comment 25, Para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7, 1996. In contrast to the UDHR, Article 25 of the ICCPR takes its binding effect from its ratification by a large number of signatories. See Kirshner Alexander, *The International Status of the Right to Vote* p.3, <http://archive.fairvote.org/media/rtv/kirshner.pdf>, last visited on 8/8/2015.

<sup>10</sup>The Gambia case, (Purohit and Moore v. The Gambia), Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII para.76

<sup>11</sup> ibid

As the above extract alarms, the right to vote is universally enshrined human right which cannot be allocated by the wish of states. The denial to the right to vote can only be justified exceptionally by nationality or legal incapacity which is properly determined by the law of the state. In short, the African human rights commission has loudly condemned the denial of prisoners' right to vote by the respondent state and has expressly stated a message to other contracting parties who denied the same right in contradiction with article 13(1) of ACHPR.

### 3. The obligation of the state towards the right to vote

According to art.2 (1) of the ICCPR each State Party 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. The prime obligation of States is to refrain from directly infringing human rights. Here the state owes a negative obligation by abstaining itself from interference and breach of rights. If it controls its own flaws, the next obligation is to protect or ensure citizens' rights from unjust interferences by others. Here the State owes positive obligation towards the protection of human rights. Progressively, at tertiary level, the State has the obligation to fulfill through positive interference for proper implementation of human rights.

When we see the obligation of the state on the right to vote, it is negative obligation. The traditional rights of ICCPR imposes a negative obligation on the state since a State Party 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. However, one can argue that the obligation of the state on the right to vote is positive because according to art.2 (1) of the ICCPR the obligation of the state is not only to respect but also to ensure human rights. The argument that alleges that there is a conceptual difference between civil and political rights and socio-economic rights is thus tenable in as far as we are referring to the duty of the State toward socio-economic rights at the tertiary level as opposed to the duty toward civil and political rights at the primary<sup>12</sup> and secondary level.

### 4. Disenfranchisement Based on Criminal Conviction: arguments for and against

There are arguments for and against the disenfranchisement based on criminal conviction. Let's first see proponents who argue for disenfranchisement and lastly the argument against it.

#### 4.1. Arguments for Disenfranchisement Based on Criminal Conviction

The first argument for disenfranchisement goes to state that individuals who commit crimes show contempt for the rules of civil society and that consequently they should lose the protection of those rules.<sup>13</sup> This argument directly refers to rules of civil society. If an individual breaches the rule of the civil society, that individual committed contempt of rule of society. Hence, such disobedience to rule of the society shall, in effect, entail loss of rights and entitlements from that rule.<sup>14</sup>

<sup>12</sup> Rakeb Messele, enforcement of human rights in Ethiopia(2002),p.11,[www.apapeth.org/docs/enforcement%20of%20hr.pdf](http://www.apapeth.org/docs/enforcement%20of%20hr.pdf),last visited on 9/8/2015.

<sup>13</sup>-----, Against Prisoner disenfranchisement in the UKp.8,<http://cognitivelibertyuk.files.wordpress.com>, last visited on 7/8/2015.

<sup>14</sup>David Cameron said he felt "physically ill" at the thought of granting convicted prisoners the right to vote. see Carrell, 2010

The second argument urges that allowing prisoners to vote may impair democracy. There are some crimes which could be deemed to be direct assaults on the democratic political system itself like electoral fraud, treason or sedition, or attempts to overthrow or undermine an elected government.<sup>15</sup> So, allowing prisoners to exercise their right to vote may be against democracy itself.

The third assertion in favor of disenfranchisement advises that if prisoners are given the right to vote then they will vote in ways that do not serve the public interest in crime reduction and will instead vote with a view to advancing "criminal interests".<sup>16</sup> The defenders of this argument asserts that if a prisoner is allowed to vote, she/he may advance their Criminal interests like the decriminalization of certain acts, changes in punishment measures, and better prison conditions. Therefore, this interest may go against the public interest.

The fourth and perhaps the strong argument which more or less resembles to first argument is the social contract<sup>17</sup> justification for disenfranchisement. According to this argument, committing a crime is breaching the social contract. If a person commits a crime he can be said to have failed to uphold his side of the social contract, in response to this the state is justified in removing the person's right to vote: the right being a benefit only bestowed on citizens who adhere to the social contract.<sup>18</sup>

The fifth debating point for disenfranchisement is sacred of the ballot box. It argues that if one allows convicted prisoners to vote the "purity of the ballot box" is jeopardized.<sup>19</sup>

#### 4.2. Arguments against disenfranchisement based on criminal conviction

There are strong and persuasive arguments against disenfranchisement based on conviction. In the aforementioned subtopic, we have seen the arguments in favor of disenfranchisement. But, these arguments have drawbacks and subjected to critics. We can see few weak sides of

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as Cited in ...*Against Prisoners enfranchisement in the UK*p.6,<http://cognitivelibertyuk.files.wordpress.com>, last visited on 7/8/2015.

<sup>15</sup> Supra note 13, p.9. If individual broke laws designed to maintain the democratic system, it could be argued that they should lose the right to participate in that system. Failing to disenfranchise such prisoners would risk damaging the democratic system. See Supra note 13, p.9.

<sup>16</sup> Supra note 13, p.14.

<sup>17</sup> Social contract is a wide concept drawn by Plato and advanced by Thomas Hobbes, Jean Jacques Rousseau and John Locke. "The 'social contract' is a thought experiment, whereby we ask when people would agree to cede authority (i.e., the obligation to obey) to a governing body in return for the social order and other benefits it might provide." See Leonard David K. and Vincent James, *Social Contracts and Security in Sub-Saharan African Conflict States: The Democratic Republic of Congo, Sierra Leone and Somalia*, a paper presented in 2011 to Africa studies association, p.3, [www.diiis.dk/...org.../Contracts%20and%20Conflicts%20-%20ASA.pdf](http://www.diiis.dk/...org.../Contracts%20and%20Conflicts%20-%20ASA.pdf), last, visited on 9/8/2015. Social contract is a contract between the state and the society in which the latter gives public authority to the former.

<sup>18</sup> Supra note 13, p.17.

<sup>19</sup>Johnson-Parris, 2003 as Cited in ...*argument against disenfranchisement in UK*, P.13,<http://cognitivelibertyuk.files.wordpress.com>, last visited on 7/8/2015

proponents of disenfranchisement while observing the strong arguments of opponents of disenfranchisement.

First of all the disqualification of prisoners from voting is usually opposed because it conflicts with a variety of international covenants to do with human and political rights.<sup>20</sup> The main thesis of the argument relies on right and obligation perspective. Disqualification of prisoners from their right to vote directly contradicts with international human rights and political documents like ICCPR since it is going to breach right and obligation of the prisoners and the state parties to covenants, respectively.

The proponents of disenfranchisement have argued that commission of crime would amount as contempt of rule of society. However, the idea that breaking a law is, fundamentally, an act of contempt for that law is an oversimplistic interpretation since it is not true that those who break the law necessarily show contempt for the rules of civil society.<sup>21</sup>

The other very important argument is that disenfranchisement is against the inclusive and non-prescriptive spirit of democracy and against the general move towards enshrining the right to vote as inalienable.<sup>22</sup> Moreover, disenfranchisement does not take in to account the nature of prison population, where both the poor and members of ethnic minorities are highly over-represented, which makes disenfranchisement a morally dubious practice which perpetuates inequalities and corrupts the democratic process.<sup>23</sup> It is also argued that enfranchising prisoners is an important safeguard against unjust laws, over criminalization, and oppressive governments.

As we have seen above, opponents assert that enfranchisement of criminals is considered as a threat to democracy. However, such an argument cannot be used to justify a blanket ban on prisoner voting.<sup>24</sup> It shall be rather on selected crimes which could be deemed to be direct assaults on the democratic political system itself like electoral fraud, treason or sedition, or attempts to overthrow or undermine an elected government. Disenfranchisement in the commission of such crimes even may not be justified because it has the nature of revenge and is against inviolable rights of citizens. Democracy does not preach for vengeance rather for tolerance. The Preach for the "purity of the ballot box" argument by defenders of disenfranchisement may be found offensive to prisoners. It conveys a message as if prisoners are "impure".<sup>25</sup> The author agrees that the ballot box may be considered as

pure and divine box in which proper leaders come out. However, the purity of the box is tainted not by prisoners who exercise their right to vote but by those persons who conceal the vote of electors.

The criminal interest argument raised by defenders of disenfranchisement is also problematic. The determination of 'criminal interests' is difficult and problematic. What constitutes "criminal interests" is defined in terms of what is socially constructed as crime.<sup>26</sup> However, the construction of laws and crimes ought to be informed by the democratic will of the population, at large, since laws should be determined democratically, in a fair democracy it is illegitimate to, from the off-set, marginalize a set of interests as "criminal".<sup>27</sup>

The social contract argument is also ambiguous. From the very beginning the conception that committing crime as a breach of social contract is problematic. As stated elsewhere above, social contract is taken as **state forming contract** in which the society trust its sovereignty to the former. Most often the constitution of a given country is considered as a social contract between the state and the people. However, a question may trigger once mind that if a given individual breaches a particular provision of the constitution, does it constitute as a breach of the social contract<sup>28</sup> thereby that individual will lose all his/her rights enshrined in the constitution? The answer is definitely no. The criminal will not lose all the rights recognized by the constitution save some restrictions which may emanate by the very nature of imprisonment like the right to movement. Why other rights which are recognized by international human right documents are not limited?<sup>29</sup> So, we can determine that the limitation of prisoners' right to vote is arbitrary.

Disenfranchisement does not meet the purpose of punishment. The purpose of punishment is to correct, rehabilitate and deter. If the prisoner is going to lose his right to vote, the purpose of punishment may not be served.

<sup>26</sup>Supra note 13, p.16

<sup>27</sup> ibid

<sup>28</sup> The UK government in Hirst case argued that the ban served these aims 'by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence'. The UK government added that 'Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country. See the Hirst case, ( Hirst v UK ) 2005, para.50. however, Johnson-Parris (2003) argues that: "disenfranchised felons are unequal parties to a contract that is fundamentally unfair in its formation and substance; thus, their social contracts should be invalidated on the grounds that they are unconscionable.", the contracts are unconscionable" in that they are "unreasonably favorable to one party while precluding meaningful choice for the other party". See Johnson-Parris (2003) as Cited in -----, *Against Prisoner disenfranchisement in the UK* p.20.

<http://cognitivelibertyuk.files.wordpress.com>, last visited on 7/8/2015

<sup>29</sup> Defenders of disenfranchisement underlines that whilst the rights of prisoners that are essential to their survival ought to be respected (e.g. rights to food and water), rights such as the right to vote are luxuries only to be given to those who live in compliance with society's laws. See supra note 13, p. 19.

<sup>20</sup>Fitzgerald Sandey, *Ending Felon Disenfranchisement*, p.6,<http://democratic.audit.anu.edu.au/papers/200507>, last visited on 8/8/2015.

<sup>21</sup> Supra note 13, p.8. The mere fact that an individual has committed a crime does not amount to the disobedience of the whole rules of the society/state. The individual may knowingly or unknowingly breach certain provision of a law. So we can safely argue that the individual has committed contempt of that particular law or provision of the law. This cannot then be interpreted as if his/her act overrides the whole rule of the society.

<sup>22</sup>Supra note 13, p.2

<sup>23</sup> ibid

<sup>24</sup>Ibid at .9

<sup>25</sup>Johnson-Parris, 2003 as cited in---, *against disenfranchisement of prisoners in the UK*, p.13.<http://cognitivelibertyuk.files.wordpress.com>, last visited on 7/8/2015.

Moreover, deprivation of the right to vote discourages re-integration of prisoners and may escalate recidivism.<sup>30</sup>

## 5. Countries' experience on prisoners' right to vote

### 5.1. USA

The right to vote forms the hub of American democracy.<sup>31</sup> However, the USA constitution fails to incorporate constitutional provisions save some amendments of the constitution which introduced abolition of discrimination of the right to vote based on color and other backgrounds.<sup>32</sup> This led the fate of the right to vote to be determined by the wish of states. State disenfranchisement policies vary so widely that the Department of Justice has described current law as "a national crazy-quilt of disqualifications and restoration procedures."<sup>33</sup> Accordingly, thirteen states disenfranchise some offenders during every stage of their sentence and indefinitely thereafter; fifteen disenfranchise during incarceration, probation, and parole; four bar the vote during incarceration and parole, but not probation; sixteen states and the District of Columbia bar offenders from voting only during incarceration; and two states do not strip voting rights from convicts<sup>34</sup>.

#### 1.1. European union

The European Union had endorsed the right to vote which is enshrined in the article 25 of ICCPR in 1950 through Protocol 1 of European Convention on Human Rights. Article 3 of protocol no. 1 of European Convention on Human Rights states that: "the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." According to

this provision every contracting party is under a duty to ensure universal and equal suffrage.

The provision of this protocol is best explained and enforced in the *Hirst v. the United Kingdom*<sup>35</sup>. The applicant<sup>36</sup> successfully challenged his denial of the right to vote on the ground of criminal conviction.

The Grand Chamber has stated:

'Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconciled with the underlying purposes of Article 3 of Protocol No. 1.'<sup>37</sup>

The Grand Chamber of the European Court of Human Rights ruled that this ban violated prisoners' right to vote, a right protected by Article 3 of Protocol 1 ECHR.

### 5.2. South Africa

Section 19(3) (a) of South Africa constitution states that every adult citizen has the right to vote. There has therefore been some legal controversy around the questions of whether it would be unconstitutional to limit the right of any prisoner to cast a vote in national elections<sup>38</sup>. The constitutional court of South Africa in the case of *August and Another v. Electoral Commission and Others* declared the action, by the electoral Commission, which excluded all prisoners from voting, is invalid. Following this declaration by the constitutional court, the parliament amended the Electoral Act (2003) to deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections.<sup>39</sup> The Constitutional Court again declared the amendment is invalid.<sup>40</sup> In the declaration the court has maintained that the

<sup>30</sup> Supra note 13 , p.29.

<sup>31</sup> Wood Erika, *Restoring the Right to Vote*, Brennan Center for Justice at New York University School Of Law P.1,[http://brennan.3cdn.net/5c8532e8134b233182\\_z5m6ibv1n.pdf](http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf), last visited on 9/8/2015.

<sup>32</sup> See for example the 15 amendment of USA constitution :voting rights(1870)

<sup>33</sup> Margaret Colgate Love & Susan M. K Uzma, *U.S. Dep't Of Justice Civil Disabilities Of Convicted Felons: A State-By-State Survey 1 (1996)* As Cited In "Ewald Alec C., *Civil Death*": *The Ideological Paradox Of criminal Disenfranchisement Law In The United States* , Wisconsin Law Review, 2002 P. 1054.

<sup>34</sup> "Ewald Alec C., *Civil Death*": *The Ideological Paradox Of criminal Disenfranchisement Law In The United States* , Wisconsin Law Review, 2002 P. 1054. States vary widely on when voting rights are restored. Maine and Vermont do not withdraw the franchise based on criminal convictions; even prisoners may vote there. Kentucky and Virginia are the last two remaining states that permanently disenfranchise all people with felony convictions, unless they receive individual, discretionary, executive clemency. Some states like New York -Voting rights restored automatically after release from prison and discharge from parole. As a result, there remains one significant blanket barrier to the franchise. 5.3 million American citizens are not allowed to vote because of a felony conviction. As many as 4 million of these people live, work and raise families in USA, but because of a conviction in their past they are still denied the right to vote. See supra note 31, P.4

<sup>35</sup> The Hirst case ( *Hirst v. The United Kingdom* ) (No. 2) Application no. 74025/01)

<sup>36</sup> The complaint is a British national, Mr John Hirst. He alleged that as a convicted prisoner (for manslaughter) in detention he had been subject to a blanket ban on voting in elections. He invoked Article 3 of Protocol No. 1 alone and in conjunction with Article 14, as well as Article 10 of the Convention.

<sup>37</sup> Supra note 35, Para. 62

<sup>38</sup> De Vos Pierre, *South African prisoner's right to vote*, (2004). P.3,<http://cspri.org.za>, last visited on 6/8/2013.

<sup>39</sup> ibid

<sup>40</sup> The NICRO case, (Minister of Home Affairs v. National Institute for Crime Prevention (NICRO)), 2004 (5) SA 1 (CC), Case CCT 03/04. In the judgment, the court ruled over the allegation of Department of Home Affairs of south Africa that was claimed as necessary to limit the rights of prisoners to vote to ensure that prisoners are not favored over others who might have difficulty in attending polling stations but for whom no arrangements have been made interestingly. It distinguished between the positions of prisoners and the positions of others who might have had difficulty in attending polling stations on Election Day and stated that Prisoners are prevented from voting by legislation and by the action that the State has taken against them. The implication is therefore that they are in a unique position because they are locked up and cannot be compared with other categories of people. It was therefore not justifiable reason to prevent all prisoners from voting to say that other categories of persons might also not have been catered for invalid. See the NICRO case (Minister of Home Affairs v National Institute for Crime Prevention (NICRO)). P. 6

disenfranchisement of prisoners is a violation of South African law and international law, and that the State has a positive obligation to enable its prisoners to vote.<sup>41</sup>

## 6. Prisoners' Right to vote in Ethiopia

### 6.1. The FDRE constitution: does it limit prisoners' to vote?

The FDRE constitution under Article 38 provides for the Right to Vote as follows:

1. Every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights:

- a) To take part in the conduct of public affairs, directly and through freely chosen representatives;
- b) On the attainment of 18 years of age, to vote in accordance with law;
- c) To vote and to be elected at periodic elections to any office at any level of government; elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

When we scrutinize article 38 of FDRE, Universal suffrage is constitutionally enshrined. It confers the right to vote to all citizens who are of age<sup>42</sup> save other incapable persons which would be determined by other laws. This implies that the right to vote is guaranteed to all Ethiopians of age. The constitution has trusted power to the legislature<sup>43</sup> to make laws on how to determine who are eligible to vote. But, the constitution never limits prisoners' right to vote. It has no even the intention to limit prisoners' right to vote.<sup>44</sup>

<sup>41</sup>ibid

<sup>42</sup> Most States lay down citizenship, age and residency requirements. 18 years is currently the voting age norm, adopted by some 109 States of the 150 surveyed. See Goodwin-Gill Guy S. *Free and Fair Elections*, Geneva 2006, P. 126, [www.ipu.org](http://www.ipu.org), last visited on 7/8/2015.

<sup>43</sup> Thirty nine percent of democratic constitutions which contain a right to vote grant legislatures the power to determine those who are eligible. See Kirshner Alexander, *The International Status of the Right to Vote*, p.1 <http://archive.fairvote.org/media/rtv/kirshner.pdf>, last visited on 8/8/2015.

<sup>44</sup> The phrase "—in accordance with law under article 38(1) b of FDRE constitution meant to the exclusion of other incapable persons. To illustrate we can take sample case of constitution of two countries on the right to vote. Article 49 of the constitution of Portugal stipulates that "All citizens who are over 18 years of age have the right to vote, except for the incapacities laid down in general law. The exercise of the right to vote is personal and constitutes a civic duty." On the other hand Article 42 of Bulgaria's constitution : Every citizen above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, is free to elect state and local authorities and vote in referendums. From these constitutional provisions the writer argues that if the FDRE constitution wants to limit prisoners' right to vote, it would explicitly put the phrase like its counter Bulgaria's. so, therefore, the phrase "—in accordance with law under article 38(1) b of FDRE constitution takes the instance of constitution of Portugal and it is only meant to the exclusion of other incapable persons.. See constitution of the Portuguese

### 6.2. The election laws

Ethiopia has enacted different electoral laws in different time. Currently it has a revised Electoral Law<sup>45</sup> and different directives issued for the proper implementations of the electoral law.

The electoral law under article 26(1) endorses the universal suffrage election principle which is enshrined in ICCPR. It states that "Any election shall be conducted on the basis of universal suffrage and by direct and secret ballot through which the electors express their consent freely without discrimination with equal participation." However, it, under article 33(3) b) put a blanket ban on the right to vote of a person serving a term of imprisonment passed by a court of law.

Moreover, the board has issued the directive for registration of electors number 2/2009 (as amended) pursuant to the authority granted to it by the amended electoral law of Ethiopia proclamation no. 532/2007. This directive, like the electoral law, prescribes who is eligible to be registered as elector and who is not under article 18 and 20, respectively. The directive follows two approaches in determining the eligible elector. The first approach which is incorporated under article 18 is positive approach. In this provision, the directive lists out requirements which enable a person to be eligible as an elector. These are Ethiopian nationality, majority and 6 months residence requirement. This means, save the listings in negative approach, any person can be eligible to be an elector if she fulfils the three cumulative requirements.

The second approach which is provided under article 20 is negative approach. This article shortly lists categories of persons who are excluded from exercising the right to vote. These are foreign nationals, minors, notorious insane persons, persons *serving prison terms* and persons whose right to vote is deprived by the law.

Scrutinizing the justifications behind the blanket ban on the right to vote (disenfranchisement) may open the room which is unjustifiably locked. When we see nationality, it is a base to establish the highest authority because it is the determinant factor to determine the sovereign. According to article 8(1) of FDRE constitution, it is the people who are sovereign. So, non-nationals shall not snatch away the powers of the sovereign by exercising the right to vote.

The second and the third restrictions are based on incapacity of persons. Holding rights and duties does not automatically entitle holders to exercise the same. Exercising rights and duties needs capacity. Hence, minors and notorious insane persons<sup>46</sup> cannot exercise their right to vote due to lack of capacity. In same token, hoarding the right to vote when expressly deprived by the law is justifiable. The law may specifically and expressly deprive persons' right to vote when they commit crime. This may serve the purpose of correcting wrong doers. This may be imposed by the criminal bench as

republic seventh revision [2005] and the Constitution of the Republic of Bulgaria, adopted on 12 July 1991.

<sup>45</sup>Supra note 4

<sup>46</sup> The directive restricts only notorious insane persons. This trigger a question about judicially interdicted persons. Judicially interdicted persons have got some protection and restriction under the civil law. So, it seems that the directive has mistakenly identified notorious insane persons from the category of insane persons.



part of sentence<sup>47</sup> and such punishments shall apply only when the Court has expressly so directed.<sup>48</sup> However, Disenfranchisement is not part of the offender's sentence, and is therefore considered as a "collateral consequence" of conviction.<sup>49</sup>

The evil comes when we see apprehension of prisoners' right to vote. The electoral law and the directive automatically exclude a person who is serving prison terms even without further qualifications like nature of the crime,<sup>50</sup> gravity of the crime,<sup>51</sup> terms of imprisonment,<sup>52</sup> convicted person.<sup>53</sup>

### 6.2.1. Are the electoral law and directive constitutional?

<sup>47</sup>The Criminal Code of Federal Democratic Republic of Ethiopia 2004, articles (121, 123, 124, 172, 470, 475) proclamation number 414.

<sup>48</sup>Ibid article 121 1<sup>st</sup> Para.

<sup>49</sup>Supra note 34, P.1057. Here, it may trigger a question about the difference between collateral and secondary punishments. Disenfranchisement is considered as a collateral punishment and imposed by legislation like the electoral law of Ethiopia whereas secondary punishment is part of the sentence that shall be imposed by the court. Because the court is, in deciding the application of secondary penalties, guided by their aim and the result they would achieve on the safety and rehabilitation of the criminal. See supra note 47, article 121 3<sup>rd</sup> Para.

<sup>50</sup> The nature of the crime shall be taken in to consideration while prohibiting prisoners from their right to vote. "where the nature of the crime and the circumstances under which the crime was committed justify such an order, and the criminal has, by his unlawful act or omission, shown himself unworthy of the exercise of any of the following rights, the Court may make an order depriving the criminal of: (a) his civil rights, particularly the right to vote, to take part in any election or to be elected to a public office. See article 123 of criminal code. Moreover, the criminal code gives emphasis that where an electoral crime is punished by imprisonment; the Court shall at all times order temporary deprivation of civic rights for a definite period (Art. 123(a)). See supra note 47, Article 475.

<sup>51</sup> The deprivation of the right to vote may be temporary or permanent taking in to consideration the gravity of the crime. See supra note 47 article 124(1).

<sup>52</sup> "In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote." See the General Comment (No. 25(57)) adopted by the Human Rights Committee under Article 40(4) of the ICCPR dated 12 July 1996, the general comment (No. 25(57)) as cited in Hirst case (Hirst v. the United Kingdom) (no. 2) (application no. 74025/01), p.6.

<sup>53</sup> It should have been selective in depriving the right to vote taking in account different factors which may justify prohibition and permission. For example, the measures and penalties imposed upon a young criminal shall not result in the loss of his civil rights for the future, save in exceptional cases where the Court regards it as absolutely necessary on account of the special gravity of the crime committed within the meaning of Article 168. See supra note 47 Article 172.

To determine whether the electoral law and directive which prohibit prisoners' right to vote are constitutional the following question should be addressed here. The first question is does the constitution prohibit prisoners from exercising the right to vote? How the clause "---in accordance with the law" which is incorporated in the constitution can be interpreted? Should that clause be interpreted to prohibit prisoners from vote while the constitution under article 9(4) and 13(2) states all international agreements ratified by Ethiopia are an integral part of the law of the land, and the fundamental rights and freedoms specified in chapter three 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, respectively? So, are the electoral law and directive constitutional?

When we examine the constitution, as it is argued elsewhere above, it enshrines universal and equal suffrage. It granted the right to vote to all citizens without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status.

The expression "...other status" in article 38 (1) of FDRE constitution denotes that the constitution does not prohibit prisoners to vote based on their status as prisoners. Moreover, the prohibition on the right to vote is based on capacity as stipulated under article 38(1) (b).

When we consider the interpretation of the clause "...in accordance with law" in article 38(1) (b) of the constitution, first of all the clause is incorporated there not with the sense to limit right to vote. It is rather incorporated the clause to authorize the legislature to issue laws on further determination of eligible voters and detail regulation of election. Moreover, the sub article of the constitution more concerns about capacity.

In addition, we can resort to principles of interpretation of the constitution. The constitution more concerns on the protection of human rights as one third its provisions are devoted to human rights. Accordingly, it under article 13(2) provides that the fundamental rights and freedoms specified in chapter three 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. This means article 38(1) (b) shall be interpreted in conformity with UDHR, ICCPR<sup>54</sup> and other international Covenants on Human Rights and international instruments adopted by Ethiopia. When we refer these human rights instruments, as mentioned elsewhere above, they fully recognize prisoners' right to vote in similar fashion. This conveys a message that the constitution has not limited prisoners' right to vote in contradiction with its provision article 9(4) and 13(2) which provide all international agreements ratified by Ethiopia are an integral part of the law of the land, and the fundamental rights and freedoms specified in chapter three shall be interpreted in a manner conforming to

<sup>54</sup> the covenant not only protects the right of every citizen to vote, but also requires states to take the measures necessary to ensure that citizens have an effective opportunity to enjoy the right—in particular the Human Rights Committee (HRC), a permanent treaty organ, which was created by the ICCPR Committee, has emphasized that the right to vote ought to be guaranteed by law. See Kirshner Alexander, The International Status of the Right to Vote p.4, <http://archive.fairvote.org/media/rtv/kirshner.pdf>, last visited on 7/8/2015.

the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia, respectively.

More importantly, we can see Interpretative Principles Relating to Specific Limitation<sup>55</sup> Clauses<sup>56</sup> which lists down limitative clauses like "prescribed by law", "in a democratic society", "public order", "public health", "public morals", "national security", "public safety", "rights and freedoms of others," or "rights and reputations of others". Here, we can mention two important points. The first one is a limitation clause, other than the aforementioned clauses, which is not recognized by ICCPR is not permitted.<sup>57</sup> Accordingly, the clause "...in accordance with" which incorporated in the constitution cannot be considered as a limitation clause since it is not recognized by ICCPR limitation clause annex list. The second point even the recognized limitation clauses can be applied under strict condition of application; The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned, shall be interpreted strictly and in favor of the rights at issue and in the light and context of the particular right concerned, limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.<sup>58</sup>

So, therefore, the electoral law and the directive which limit prisoners' right to vote can be determined as unconstitutional.

## 7. Conclusions

The right to vote is a basic human right and is considered as gate keeper of all other human rights because it empowers citizens to influence government's decision-making and to safeguard their other human rights. To this effect, international human rights instruments give recognition and seek for its implementations. However, different state parties to those instruments limit the right to vote on the basis of different discriminatory status like conviction.

<sup>55</sup> We should have to identify limitation to rights and derogation from rights. States may sometimes for certain legitimate purposes impose limitations on the enjoyment of many rights. Such limitations are often called "ordinary" limitations since they can be imposed permanently in normal times. On the other hand, derogations are designed for particular stringent situations that require the introduction of extraordinary measures. Derogations have therefore also been called "extraordinary limitations" on the exercise of human rights. Indeed, on closer examination, it will be seen that ordinary limitations on the exercise of human rights and extraordinary limitations in the form of derogations "are closely linked and ... rather than being two distinct categories of limitations, they form a legal continuum". See..., *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* P.814, [www.ohchr.org](http://www.ohchr.org), last visited on 8/8/2015.

moreover, measures derogating from the provisions of the covenant must be of an exceptional and temporary nature See the general comment no. 29 states of emergency (article 4) of ICCPR

<sup>56</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)) p.1

<sup>57</sup> ibid

<sup>58</sup> ibid

Ethiopia is state party to international human rights instruments which recognizes universal and equal suffrage of votes. Accordingly, under its constitution, it endorsed the same on equal terms as those international human rights instruments are considered as integral part of the laws of the land. However, the electoral laws of Ethiopia proclamation number 532/2007 and the directive for registration of electors' number 2/2009 (as amended) expressly deprive prisoners' right to vote for the mere fact that they are serving prison terms. This, in effect, makes the electoral law and the directive for registration of electors unconstitutional. This ultimately led Ethiopia to breach international obligations to respect and ensure the right to vote which is enshrined in UDHR, ICCPR, ACHPR and other protocols.

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