Introduction

It has often been considered that every addition of a new law in a statute book is amending a prior existing law. As a result, analyzing legislative proposal both in its relation and in its effect with rights and privileges under existing and established law continues to be an important subset of Legislative Drafting. A person engaged in analyzing the legislative proposal should either be familiar with the existing relevant law or know where it can be found. Existing laws, among other things, constitute human right treaties that a country has ratified and form part of its domestic law – either by way of ‘legislative’ or ‘automatic’ incorporation. Legislative and Automatic incorporation of human right treaties into domestic law is traditionally known as ‘Dualistic’ and ‘Monistic’ methods respectively. Regardless of whether a domestic law society is monist or dualist, one way of complying with human right treaties is through analyzing legislative proposals as to whether domestic draft laws accord with the values and principles enshrined under human right treaties.

The main focus of this essay is to examine the Ethiopian method of implementation of international Human right treaties with an emphasis on its impact on drafters’ analysis of legislative proposals. Although the implementation of human rights entails a wide array of activities, this essay briefly discusses incorporation of international standards into domestic laws as a main focus from the variety of activities that states are to take at national level. This essay argues that the method of implementation used by Ethiopia is ineffective and has deprived drafters from analyzing the consistency of legislative proposals with human right treaty provisions. In doing so, the essay proceeds as follows: section one offer the Ethiopian method of implementation of human right treaties. Section two explores Ethiopian drafters’ analysis of legislative proposals and the problem they face as a result of the method of implementation. The final section draws the threads together and concludes the essay.

I. Method of implementation of Human Right Treaties in Ethiopia

As there are no stipulations on how states should implement human rights standards at international level, the implementation of international human right treaties is dependent on domestic law and entirely left to the states to decide on how obligations will be implemented. Domestic legal system must provide favorable legislative and administrative frameworks if treaty based guarantees are to be translated into reality for domestic beneficiaries. In addition, human right treaties incorporate a set of values that have to be respected during interpretation, application and development of legislation and statutory laws. As a result, states must affirmatively incorporate international human
right treaties into domestic laws as one method of implementation. Although there are a
great variety of domestic methods for implementation of international human rights
instruments, there are two common ways of constitutional method which determines the
implementation of treaty provisions into domestic laws: legislative incorporation and
automatic incorporation. In some countries with the ‘legislative incorporation’ method
such as United Kingdom, there is a separate legislative Act enacting specific provisions
of a treaty for the incorporation of treaty provision into domestic laws. This method is
referred to as ‘dualist’ in that a strong distinction is maintained between domestic and
international law, and the latter must be written into the former in order to carry
substantial and enforceable weight. In other countries with the ‘automatic incorporation’
method like France, without the need to have separate legislative Act, ratification and
publication in the official Gazette simply converts treaty provisions into domestic
law. This method is referred to as ‘monist’, in that both domestic and international law
are considered equal and as having the same effect.

The method of incorporation of international human right treaties in Ethiopia indicate
that Ethiopia does not strictly adhere to one method of incorporation as the Ethiopian
constitution provides for both methods.

One the one hand, article 9(4) of the Ethiopian Constitution declares that “All
international agreements ratified by Ethiopia are integral parts of the law of the land.” From
international law point of view, the wording of this provision tends to show
international agreements need to be transformed as the word ‘…law of the land’
usually refers for international agreements to be transformed, rather than merely
adopted, into municipal law. Transformation in dualistic state refers to a situation where
relevant domestic laws are amended or repealed to comply with international
agreements. International agreement in Ethiopia is concluded by the State’s Executive
branch which must subsequently submit it for ratification to the House of Peoples
Representatives (HPR hereafter). Under Article 55(12) of the Ethiopian constitution, the
HPR ‘shall ratify international agreements concluded by the Executive.’ In addition,
article 2(2) and (3) of the Proclamation of Federal Negarit Gazette requires that all Laws
of the Federal Government shall be published and all Federal and Regional legislative,
executive and judicial organs should take judicial notice of laws published under the
Gazette. Once they are ratified, all international agreements, including human rights
instruments, are integral parts of the law of the land (Art.9 (4) of the constitution).
According to these provisions, Ethiopia could be classified as dualist as a national
legislation needs to be promulgated in order for the provisions of international
instruments to be implemented at the domestic level. However, all ratification
proclamations contain only three and sometimes four provisions with short title,
responsible organ (sometimes), ratification, and effective date. Although the dualist
method is much known for its ‘transformative’ concept, the Ethiopian parliament only
declares a mere pronouncement through ratification proclamation. There are neither
laws which are amended as a result of ratification nor repeal with the ratification
proclamation. In Ethiopian history of ratification proclamation, there is no single
ratification proclamation with the actual ratified treaty and there are no translations of
the actual treaty provisions.
On the other hand, from hierarchical point of view the Ethiopian constitution tends to prefer the monistic method of implementation of international human right treaties. In most monistic approach countries, international treaty norms have a higher rank than a domestic legislation or equal to constitution and sometimes higher than the constitution. In Ethiopia’s pyramid of law the normative hierarchy of ratified treaties is controversial. There are two-tiered dimensions to the status of ratified human right treaties. On one hand, the provision of Article 9(1) of the constitution which establishes the supremacy of the constitution and declares any inconsistent law with the constitution as null and void has led to the assertion that the constitution is superior to all ratified international agreements. A literal reading of Articles 9(1) and 9(4) of the constitution clearly indicate that international agreements, which under Article 9(4), are made an integral part of the laws of the land upon ratification, are subordinate to the constitution. On the other hand, ratified agreements are ‘integral parts of the law of the land’ and ‘the constitution (Chapter Three) must be interpreted in conformity with international instruments adopted by Ethiopia’ under Articles 9(4) and 13(2) of the constitution respectively led to the conclusion that international human rights instruments adopted have a status higher than, or at least equal to, Chapter three of Constitution itself.[16] While an exhaustive treatment of these issues is beyond the scope of this essay, the wording of Article 13(2) of the constitution at least makes it apparent that Ethiopia cannot issue legislation that contravenes any of the fundamental rights and freedoms stipulated under chapter three of the constitution. The fundamental rights and freedom provided in the constitution are subject to a special interpretative regime which should comply with principles of international human right treaties adopted by Ethiopia. This special feature gives international human right instruments at least equal hierarchical status to the constitution. Therefore, as the constitution under article 13(2) clearly stipulates Ethiopia cannot lawfully issue domestic proclamations that contradict its treaty obligations which is purely a monistic approach. But again the major human right treaties that the constitution is referring for authoritative interpretation are not yet translated and published in the official Gazette as the monistic approach so requires.

Moreover, recent trends of judicial practice also support the conclusion that a proclamation that contradicts ratified treaties should be disregarded. In the case between Federal Police Criminal Investigation and Department v Naod Misale and others,[17] the court has decided that the law amending the Federal Anti-corruption Proclamation and the provision ‘A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail’[18] has led to the violations, inter alia, of Ethiopian’s international human rights obligations, particularly those guaranteed by the ICCPR. The court has ruled out this ‘prohibition of bail’ disallows the right to bail and it does not empower the police to keep suspects in its custody indefinitely.

Thus, the Ethiopian legal system employs both a ‘dualistic and monistic’ method for implementation of human right treaties into domestic law. Once Ethiopia has ratified an international agreement and decided to incorporate it into domestic law that incorporation seems to be done through a mere ratification proclamation adopting the
treaty provisions entirely. They have neither been transformed into Ethiopian laws by separate legislation nor have so far been published in any other main vernacular languages.

This method of implementation of human right treaties has confused and deprived legislative drafters from taking due care in analyzing legislative proposals against international human right treaties that form part of Ethiopian laws. Now let us consider how officer and draft person check the relation and effect of legislative proposals with human right treaty provisions in Ethiopia.

II. Analysis of Legislative Proposals with international human right treaty provisions

The process of legislative drafting comprises various stages through which the drafter converts a government’s often broadly defined policy objectives into clear and precise statutory language that accomplishes the legislator’s goal. As Thornton has identified one way of achieving the goals of the legislator is through a complete and thorough analysis of proposed legislation. The relation and effect of legislative proposals must be carefully analyzed with existing laws which among other things compromises International human right treaties. Both the drafter and those who instruct must be involved to consider whether every element of the proposed legislation adheres to with basic principles of the legal and constitutional system.

This also holds true for Ethiopian legislative drafting process. The Ethiopian legislative drafting manual provides that legislative proposals should be checked against existing law(s) and existing legal structures. Particularly a drafter is required to make sure that legislative proposals are consistent with international agreements ratified by Ethiopia and other international instruments adopted by Ethiopia. Here the question is—are drafters in Ethiopia in a position to check the consistency of legislative proposals with international instruments as set out in drafting manual? The answer for me is No. Drafters are not in the position to check and ascertain the consistency of legislative proposals with human right treaties.

As noted earlier, the Ethiopian constitution seems to favor both a dualistic and monistic approach. But this method has a number of purely practical problems both for the drafter and for those involved in drafting process.

Firstly, there is an acute lack of translations of human right treaties and decisions of international organs. This problem is more aggravated by the Ethiopian federal system where there are constitutionally entrenched distributions of powers between States and the Federal government to enact law and execute with their respective working languages. Leaving aside members of the federation, Amharic is the working language
of the federal government. As a result drafters first draft in Amharic and then translate it to English. Both the drafting instructions and analysis of legislative proposals are conducted through Amharic. Thus, drafters tend to neglect the relation and effect of legislative proposals with international human right treaties in general. As a matter of practical experience, when drafters fail to analyze and produce draft law which is not consistent with existing laws, discussion at ministerial level and parliamentary committees should identify the inconsistency and refer it back for detailed consideration and correction. However, as there is neither the actual ratified text nor translation of the treaty the problem continues to be a common problem for those involved in the legislative process as well. Even if those involved in the legislative process including instructing officers, drafters, different ministries and parliamentary committee wants to check the compatibility of legislative proposals through English, there is a problem of inadequate access to ratified human right treaties. In many cases there is no means of knowing or perhaps it is very frustrating to search which human right treaties become part of Ethiopian laws. Consequently, most consideration is spent on the draft laws compatibility with the provisions of the constitution and other Ethiopian laws.

The other main exacerbating factor that contributes for the poor analysis of legislative proposals with human right treaties is that legislative drafting tends to be handled by decentralized drafting offices in different ministries. Each ministry has the power to initiate policies and laws and send its draft either to the Ministry of Justice or the Prime Minister’s Office where the draft laws compatibility with criminal law and with major policies of the government is analyzed respectively. Drafters in each ministry are lawyers (sometimes not) specializing in the ministry’s own sphere of activities and have little knowledge and limited access to human right treaties. They continue to have inadequate training both in legislative drafting and human right treaties. Therefore, the room for analyzing drafting proposals is very limited. Furthermore, most drafting works are carried out by a working group or a committee or special advisers, or one-person committees formed from different civil servant officials. The working group or committee is given a clear task and express mandate to draft laws in the form of government proposals within the time limit set by the instructing ministry. As soon as the draft is finalized the committee or work group members will return to their former official duties. Ad hoc committees and working groups usually spend more time to produce what the instructing ministry’s desire and the room for analysis of legislative proposals with international human right treaty provisions becomes less important. Lack of awareness because of the confusion created by the method of implementation in the constitution, language barrier and inaccessibility of treaties are the obvious reasons for the non existence and poor analysis of drafting proposals.

In addition, language barrier and inaccessibility of international human right treaties as a result of the method of implementation contributes for the poor preparation of drafting instructions. As Thornton identified good drafting instruction among other things will illuminate the impact of the proposals on existing circumstances and law. A well developed and prepared drafting instruction will help the drafter to identify and refer any standards and international obligations that might be affected by the proposals. Although complete and comprehensive drafting instructions are not yet developed in
Ethiopia, few prepared drafting instructions fail to accommodate the relation of proposals with ratified human right treaties because of language and accessibility problems. This in return creates further problem to the drafter, working force or committees and gives blurred picture on the intended goal of legislation and avoids the opportunity to check proposals compatibility with ratified human right treaties.

As a result of this, there is a growing new legislation that reflects a poor analysis of drafting proposals that result in apparent contravention of ratified human right obligation. Recent laws all of which were prepared by selected from different civil service working groups such as: The Charities and Societies Proclamation, the Prevention and suppression of Money Laundering and the financing of terrorism Proclamation and Anti – Terrorism Proclamation are among the laws that have key provisions that violates Ethiopian’s obligation under ratified Human Right treaties. These laws have been criticized by the outside world, most notably by the Human Rights Watch and Amnesty International.

The law on NGOs; for example, declares that foreign NGOs are prohibited from engaging in activities pertaining to human rights, women’s rights, children’s rights, disability rights, citizenship rights, conflict resolution and democratic governance. Furthermore, local NGOs are considered as foreign NGOs if they receive more than ten percent of their funds from foreign sources. These provisions have been repeatedly declared as a limitation of freedom of association and freedom of expression under article 22 of UDHR, articles 19 and 22 of the ICCPR and articles 9 and 10 of ACHPR. As Human Rights Watch has repeatedly pointed out the Anti-terrorism proclamation also contains provisions criminalizing speech that incites or supports terrorism which is actually limits the freedom of expression. The prevention and suppression of money laundering and the financing of terrorism Proclamation is currently under revision because the proclamation lacks consistency with human right treaty obligations. Furthermore, the African Commission on Human and Peoples’ Rights calls the government of Ethiopia to:

Amend the Charities and Civil Societies Proclamation in accordance with the UN Declaration on Human Rights Defenders.

Remove restrictions on freedom of expression imposed on the Mass Media by the Access to Information Proclamation (2008) and the Anti-terrorism Proclamation (2009) that do not conform to rights of freedom of expression provided in international human rights law.
Conclusion

In summary, although the Ethiopian constitution favors for both dualistic and monistic methods of implementation of human right treaties, there are neither transformation into domestic laws including amendments and repeals as dualistic approach so demands nor any single translation and publication of the actual treaty provisions as the monistic approach so requires. This in result produced lack of human right treaty texts into one of the main vernaculars of the local languages, lack of access to international human right treaties and decisions, and led drafters and other officials in drafting process to focus only on constitution and other domestic laws.

Lack of sufficient training, federal system with more local languages, decentralized drafting method including drafting in different ministries and drafting through working groups and special committees from different civil service, are the aggravating circumstance for the poor analysis of legislative proposals. This has diminished the quality of legislation and contributes for ineffective legislation which results with international condemnation including from International Human Rights Watch and Amnesty International.

Further steps need to be taken to enhance the accessibility of international agreements, including local language versions of international human right treaties. Furthermore, the training of draft persons on the relation and effect of human right treaties with drafting process is an important contribution to the application of human right treaties in Ethiopia.