

## The Praxis of Gender Responsive Lawmaking in Ethiopia: Challenges and Prospects

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### Abstract

The law plays an important role in shaping the norms, values, behaviors, actions and practices of the state and its citizens. This is, *inter alia*, observed in the realm of setting gender roles and expectations. Based on the extent to which the law addresses gender issues, it can be categorized as gender regressive, gender blind, gender neutral, or gender responsive. This article underlines the normative role of the law in achieving gender equality by examining the practice of gender responsive legislation in Ethiopia. It also discusses the approaches, techniques, tools and methods of gender responsive legislative drafting. For the purpose of conducting this research, reviews of laws, expert interviews and literature review have been undertaken. The finding of the research demonstrates that there is a strong legislative and institutional backing to integrate gender in the legislative drafting process and there are promising practices to integrate gender in the legislative drafting process. However, capacity gaps, lack of accountability mechanisms and gaps in the participation of women and women's organizations in the legislative drafting process have resulted in irregular and inconsistent practices in adopting a gender responsive legislative drafting process. There is thus a need for regularized and institutionalized approach to ensure that laws contribute toward gender equality in Ethiopia.

### Keywords:

Gender sensitive legislative drafting, lawmaking, gender equality, gender analysis of legislation, gender mainstreaming

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## 1. Introduction

Gender equality is one of the human rights principles that countries are expected to comply with. It has been recognized as one of the pillars of various international human rights instruments including the Convention to Eliminate Discrimination against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>1</sup> It can be achieved through various measures which includes adopting laws, policies and administrative measures.<sup>2</sup> In other words, law can serve as one of the instruments to bring gender equality in addition to taking other measures such as social changes and attitudinal and cultural changes in the mindset of individuals.

Gender equality can be achieved by integrating it in laws, policies, and practices. Laws that are adopted at national level have direct impact on the lives of men and women, and have direct impact on the equality between men

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Frequently used acronyms:

CEDAW	Convention to Eliminate Discrimination against Women
FDRE	Federal Democratic Republic of Ethiopia
GAL	Gender analysis of legislation
GIA	Gender Impact Assessment ()
HoPR	House of Peoples' Representatives
MoJ	Ministry of Justice

<sup>1</sup> Article 2 of Convention on the Elimination of Discrimination against Women (CEDAW), Article 2 of International Covenant on Civil and Political Rights (ICCPR) adopted in 1966, Article 3 of International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966 and article 2 of Maputo Protocol.

<sup>2</sup> Article 2 of CEDAW and Article 2 of the Maputo Protocol.

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and women. Thus, the legislative process can serve as a vital entry point for gender mainstreaming in laws, policies and practices.<sup>3</sup>

There was the view that laws should be gender neutral. However, ample evidence demonstrates that gender neutral laws do not take into consideration the biological and socially constructed difference between men and women.<sup>4</sup> Gender neutral laws assume that women and men's needs, interest and priorities are the same which can be addressed through the same laws for men and women. However, the needs, interests, concerns, responsibilities, roles and priorities of men and women differ based on social, economic, cultural and political factors which create gender gaps in access to social services, economic benefits, participation in decision making and access to resources. Thus, the process of legislative drafting should utilize gender mainstreaming in order to have a gender responsive legislation.<sup>5</sup> The process of legislative drafting should envisage mainstreaming gender or incorporating gender perspectives. This can be done through gender analysis of legislation (GAL) as discussed in this article.

This article assesses the practice of gender responsive legislative drafting in Ethiopia by reviewing various documents and literature on gender responsive legislative drafting. Key informant interviews were also conducted to assess the existing practice on gender responsive legislation drafting with experts at governmental and non-governmental institutions such as the Ministry of Justice (MoJ), Ministry of Women and Social Affairs (MoWSA), Ethiopian Human Rights Commission (EHRC) and the Consortium of Ethiopian Human Rights Organizations (CEHRO).

The second section that follows this introduction deals with the meaning of gender responsive legislative drafting. The third section examines the role of law in advancing gender equality. Sections 4, 5 and 6 discuss the approaches, importance, process and benchmarks of gender analysis of legislation and gender impact assessment that lead to gender responsive legislation. The seventh section examines the practices of gender responsive legislative drafting in Ethiopia.

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<sup>3</sup> Romana Vijeyarasa (2019). "Making the law Work for Women: Standard-setting Through a New Gender Legislative Index", *Alterative Law Journal*, Vol. 44, p. 3.

<sup>4</sup> Office of Democratic Institutions and Human Rights (ODIHR) (2017). *Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation*, 2017, pp. 15-17.

<sup>5</sup> Ibid.

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## 2. Meaning of Gender Responsive Legislative Drafting

Gender equality is one of the principles countries strive to achieve along with the empowerment of women and girls as well as ensuring the end to discrimination against women. Gender equality aims to enable women enjoy equal rights and opportunities with men. It provides equal access to resources and services and ensures equal participation of men and women in the economic, social, and political spheres. The realization of gender equality requires giving equal consideration to the needs, interests and priorities of men and women which sometimes differ based on biological and social factors.<sup>6</sup> One of the strategies to achieve gender equality is through the process of *gender mainstreaming*. According to United Nations Economic and Social Council (ECOSOC), gender mainstreaming is

the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetrated. The ultimate goal is to achieve gender equality.<sup>7</sup>

While gender equality is a goal by itself, gender mainstreaming is a process to achieve the goal of gender equality. Gender mainstreaming can be achieved through context specific approaches as well as technical and institutional processes. It is a process that aims to achieve social transformation by ending direct and indirect discriminatory practices in laws, cultural norms and social practices.<sup>8</sup>

Thus, the legislative process is a vital entry point for gender mainstreaming in laws, policies and practices in order to achieve gender equality by integrating gender in laws, policies, and practices. Laws that are adopted at national level have direct impact on the lives of men and women, and on the equality of men and women. Thus, laws are expected to be gender responsive.

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<sup>6</sup> Deborah L. Rhode (1989). *Justice and Gender: Sex Discrimination and the Law*. See also Catharine A. Mackinnon (1987). *Feminism Unmodified: Discourses on Life and Law*, p. 34 & 35.

<sup>7</sup> ECOSOC Agreed Conclusions 1997/2 available on <https://www.un.org/womenwatch/osagi/pdf/ecosocac1997.2.pdf> (accessed 20 September 2023).

<sup>8</sup> UN Women (2022). *Handbook on Gender Mainstreaming for Gender Equality Results*.

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A gender responsive law increases the law's ability to respond to explicit and implicit gender issues. It makes the legal drafting process accountable.<sup>9</sup>

### 3. The Role of Law in Advancing Gender Equality

There are two arguments on the role of the law in bringing gender equality. There are those who argue that the law plays a significant role in bringing gender equality by changing gender norms based on the normative role of laws. On the other hand, there are arguments that indicate the limited role of law in bringing about change in gender norms.

The first view considers law as “a powerful tool to transform society, determine the way in which the world functions, and shape how people live by setting norms and establishing new trends.”<sup>10</sup> Accordingly, law can contribute by changing social and cultural norms. Law's cultural power is reflected in changing existing practices by sanctioning or permitting such practices. For instance, a law that makes elementary education compulsory is a permissive law that contributes to changing societal norms on the importance of girls' education. Or laws that prohibit FGM (female genital mutilation) may contribute to changing societal norms related to the practice. Accordingly, laws can play three roles: identifying role, symbolic role and pluralistic role.

#### 3.1 Identifying, symbolic and pluralistic roles of the law

*Identifying role of the law* relates to the law's role in identifying women's needs and interests in the social, economic and political spheres. It recognizes the difference between men and women's interest, needs, priorities and concerns. It envisages women-centered legislation which recognizes the need for the law to use gender neutral language. The law is expected to use a gender neutral or gender inclusive pronoun either 'they' or 'he/she' in addition to adopting gender neutral terms such as 'chairperson' instead of 'chairman' or chairwoman.<sup>11</sup> However, this mere linguistic shift is not enough to bring change to the gendered nature of laws and legal terminologies.

The demand for 'gender neutral language' is complimented with the demand for 'gender neutral legislation'. These kinds of laws do not differentiate between men and women. However, the gender neutrality of law

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<sup>9</sup> Romana Vijayarasa (2022). “Does Law Matter? Defending the Value of Gender-Responsive Legislation to Advance Gender Equality”, *New York University Journal of Legislation and Public Policy*, Vol. 24(3), p. 673.

<sup>10</sup> Vijayarasa, *supra* note 3, p. 3.

<sup>11</sup> Vijayarasa, *supra* note 9, p. 683.

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has reinforced gender stereotypes and discriminatory practices in implicit ways.<sup>12</sup> For instance, a law that declares that everyone can participate in night work (where women are not free from violence at night time), will end up discriminating women who may not opt for such work because of fear of violence. Thus, it is important that women are “seen, heard and written as a woman” in the law.<sup>13</sup>

The *symbolic role of law* relates to the laws’ role in regulating social behavior. There are legal and non-legal norms. Law is a legal means of norm setting. Law defines relationships, entitlements, rights, duties etc. This role of the law, *inter alia*, results in the law defining the relationship between men and women in public and private spheres. This symbolic role of the law can be used to challenge gendered norms and stereotype in the society.<sup>14</sup>

The *pluralistic role of law* is expressed in its capacity to challenge the single monolithic categorizing of women in the same basket and its capacity to advance the rights of marginalized groups in the society. In situations where women are perceived to be a monolithic group, gender sensitive law can play a vital role by deciphering this understanding through an intersectional lens. However, being a woman is not an exclusively single identity, because it overlaps with other grounds of identity such as class, race, ethnicity, disability etc. It is important that the law takes into account these grounds of diversity together with gender.<sup>15</sup> Thus, the law plays a role in identifying and addressing the intersecting discriminatory practices not only based on gender but also on the basis of other grounds or status of a woman.

### **3.2 Arguments that articulate the limited role of law in changing gender norms**

In spite of the above roles of the law, there are arguments that consider the role of law (in changing gender norms) as very low or moderate. According to this view, law is male-centered and the drafters are mostly male under the existing gendered social organization. The law sets men’s experience as the standard and women are expected to operate within this standard. Thus, it is unlikely for the law to bring gender equality or result in gender responsive legislation.<sup>16</sup>

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<sup>12</sup> Id., p. 684.

<sup>13</sup> Id., p. 684.

<sup>14</sup> Joel F. Handler (1978). *Social Movements and the Legal System: A Theory of Law Reform and Social Change* 233 cited in Vijayarasa, Id., p. 686.

<sup>15</sup> Vijayarasa, *supra* note 9, p. 688.

<sup>16</sup> Id., p. 677-678.

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Furthermore, some scholars argue that the law has moderate role in changing the social organization of society. According to this view, social change can only be achieved under two conditions. These are first by establishing new rules and invalidating the existing rules which can be undertaken by the law, and the second condition is by implementing these rules. However, implementation depends on the political will of decision makers, and not on whether there are good laws.<sup>17</sup>

The other argument is that laws should not only be responsive towards women, but should rather be responsive towards all marginalized members of the society.<sup>18</sup> This argument notes instances whereby a gender sensitive legislation may end up marginalizing or violating the rights of other vulnerable groups.<sup>19</sup> However, this view is based on skewed understanding of gender. Gender is not only about women. It is also about men and all members of the society who are marginalized. Thus, the law's responsiveness to women's need does not mean that it will not be able to respond to the needs of other members of the society. Legislations that respond to the needs of women will benefit the society at large.

#### **4. Gender Analysis of Legislation (GAL) and Gender Impact Assessment**

Gender responsive legislation or gender analysis of legislation (GAL) is a central part of gender mainstreaming in lawmaking process. It refers to “the integration of a gender perspective into all components of the legislative process –design, implementation, monitoring and evaluation– in order to achieve the ultimate objective of equality between women and men.”<sup>20</sup> It is an important process to achieve gender equality in the justice system.

Gender Impact Assessment (GIA) is “a tool that safeguards and promotes gender equality by intervening and redirecting policies, activities, programmes and projects with the intention of analyzing and addressing the diverse factors of gender discrimination and exclusion.”<sup>21</sup> It also brings accountability and effectiveness through assessing the impact of legislation,

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<sup>17</sup> Handler, *supra* note 14, p. 686.

<sup>18</sup> Vijayarasa, *supra* note 3, p. 10.

<sup>19</sup> For instance, a genders sensitive law which allows for abortion is challenged for violating the right of a child under the circumstances where the international human rights law has not yet set the age when childhood begins.

<sup>20</sup> ODIHR, *supra* note 4, p. 13.

<sup>21</sup> National Commission for the Promotion of Equality (NCPE) (2012). *Gender Mainstreaming in Practice: Step-by-Step Guide for Gender Impact Assessment*, p. 5.

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programme or project on gender equality. Subsections 4.1 and 4.2 discuss the approaches and importance of GAL and GIA.

#### 4.1 Approaches of GAL and GIA

The available literature shows that there is lack of unified and universal approach to conduct gender analysis of legislations and gender impact assessment at the international level. Various countries have adopted their own approaches to conduct gender-based analysis of legislation. They use different terms to describe the approaches they have adopted. These terms include ‘gender test’, ‘gender-based analysis’, ‘implementation of a comprehensive gender approach’, ‘analysis of existing legislation and new bills to eliminate gender inequalities’, ‘gender-based legal analysis’, ‘gender analysis of legislation’, ‘gender impact assessment’, ‘analysis of the likely impact of a new law for the needs and interests of citizens from a gender perspective’, ‘gender audit’ and ‘gender expertise’.<sup>22</sup>

An assessment conducted in 2021 on 33 European countries shows that half of the countries that participated in the assessment undertake gender impact assessment on draft legislations.<sup>23</sup> Various countries that carry out gender impact assessment are divided as<sup>24</sup>:

- a) Countries that separately conduct gender impact assessment: Canada, Portugal, Spain and Sweden are examples of countries that carry out a separate gender impact assessment.
- b) Countries that conduct gender impact assessment as part of regulatory impact assessments which assess the impact of the draft law on gender but also on issues such as the environment, human rights, social life, finance, etc. include Austria, Belgium, Albania, Cyprus and Switzerland.
- c) Luxembourg always dedicates a full chapter of the impact assessment for gender.
- d) There are countries (such as Norway) that conduct gender assessment when the draft law under review raises fundamental issues related to gender and gender equality.

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<sup>22</sup> ODIHR, *supra* note 4, p. 8.

<sup>23</sup> European Centre for Parliamentary Research and Documentation, Gender Impact Assessment of Legislation N° 34 - March 2021 available on [https://www.europarl.europa.eu/cmsdata/233272/No.34\\_Gender\\_Impact\\_Assessment\\_of\\_Legislation\\_250321.pdf](https://www.europarl.europa.eu/cmsdata/233272/No.34_Gender_Impact_Assessment_of_Legislation_250321.pdf) (accessed on 10 August 2023)

<sup>24</sup> *Ibid.*

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The impact assessment in all of these countries is carried out by the executive branch of the government which initiates the law. It is carried out at the drafting stage of the legislation before it is sent to the parliament.<sup>25</sup>

The informants of this assessment pointed out that conducting gender impact assessment as self-standing activity in the Ethiopian context may not be feasible because of human resource limitation. It should rather be part of broader assessments/research that are conducted before any legislation is drafted. However, they are of the opinion that a separate gender impact assessment on draft legislation should be conducted relating to draft laws that fundamentally concern women or which specifically affect women. As part of the impact assessment, it is important that gender experts participate in the drafting process of legislation. It is also important to know who (CSOs, experts, general public), when, and at what stage of the legal drafting should participate in gender impact assessment.

#### **4.2 The importance of GAL and GIA**

Conducting a gender based legal analysis (GAL) and gender impact assessment (GIA) or making the law gender responsive rather than gender regressive is important for the following reasons.<sup>26</sup>

*To identify the needs and priorities of men and women.*

Laws should not necessarily aim to be “gender neutral”. This is because gender-neutral approach in lawmaking process usually assumes that women and men have the same needs and concerns. However, in real life, men and women have different concerns, needs and priorities in addition to having different roles and expectations in the society. They have also different responsibilities and different levels of access to resources and goods. Thus, gender neutral approaches in legislation do not allow us to appreciate these differences in the needs, concerns, priorities, access to resources, responsibilities and roles of men and women. A “gender-neutral” approach might even lead the legislation to only respond to male priorities than addressing women’s needs. Thus, it is important to conduct GAL and identify the needs and priorities of men and women.

*To identify the areas of inequality*

Identifying areas of inequality requires analysing perceptions, experiences, knowledge and interests of both women and men. Gender analysis of legislation (GAL) is not only about women. It is a process that identifies the

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<sup>25</sup> Ibid.

<sup>26</sup> ODIHR, *supra* note 4, p. 15.

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outcomes of the relationship between women and men. This relationship might have advantaged one over the other in the social, economic or political sector. For instance, the social norm that overburdens women with childbearing responsibility might have disadvantaged women by restricting them from fully participating in their professional life/education/employability etc. Or, the same norm might have disadvantaged men from getting paternal leave and contributing to their family life/child rearing activities when they want. Thus, the GAL should aim to identify and analyse the situation of both men and women in order to facilitate a level playing field, so that they can both benefit from equal opportunities. It can reveal discriminatory patterns and help mitigate them by integrating appropriate measures into new legislation by conducting a proper analysis of perceptions, experiences, knowledge and interests of both women and men.

*To bring equal participation/substantive representation of women*

The identification of inequality and the needs and priorities of men and women by conducting GAL enable us to identify areas of focus of the legislation to be adopted. The legislation is expected to give equal weight to the needs and priorities of men and women and facilitate equal participation of men and women in social, political, economic and cultural life. The law should not only aim to bring gender balance or equal representation (descriptive representation of women) but it should also aim to facilitate substantive representation. In other words, it should aim to see beyond equal number of women and men who are represented in a certain sector (e.g., the numbers of women and men in parliament) or who have benefited from a certain activity (e.g. number of women and men beneficiaries of a health services). It should also aim to bring meaningful participation of women in all sectors (e.g. women leaders being able to lead a certain sector in a way that it will benefit both men and women)

*To bring measurable changes in the law that goes beyond insertion of certain terminologies such as gender*

Gender analysis of legislation should not merely aim to include terms such as ‘gender’, ‘gender inclusive’, ‘gender equality’ etc. For instance, some legislation merely state that “the Committee that will be established under this legislation will be gender inclusive”. However, this is a subjective term that does not tell us what it means to be gender inclusive –is it having one woman in a committee composed of five? Or does it envisage two women representatives in a committee composed of five? It is difficult to measure what it means to be gender inclusive. Thus, gender inclusive laws should go beyond the mere inclusion of “proper” terminology in legislation. It should rather provide for measurable actions toward equal participation; and should

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be specific with regard to what it means by gender inclusion. An example in this regard can be express statements such as the minimum number in participation.

*To bring substantive equality*

GAL should go beyond bringing formal equality in law, and should promote the examination of the lived reality of men and women in concrete terms. Women are discriminated during employment, in education, in decision-making bodies, and bear most of the burden for unpaid work in the home. On the other hand, men's life expectancy is lower in most countries because of insufficient attention given to men's needs in areas of health and safety, traffic accident, suicide etc.<sup>27</sup> Analysing these situations will lead to a law that will achieve gender equality in all sectors. For example, enacting laws that provide access to credit for women working in agriculture sector or eliminating obstacles that precludes women's access in certain sectors may increase economic productivity by as much as 25 per cent in some countries.<sup>28</sup>

*To analyse intersectional issues*

All women or men do not have the same interest and needs. They have diverse needs and interests based on age, marital status, disability, class and many other factors. "One size fits all" approach to all women or men does not bring social transformation and gender equality. It is important to analyse the gender impact of the law on diverse groups before it is adopted. The law should not only provide equal opportunity but should aim for equality of outcome.

*To provide evidence-based foundation for the law to be adopted*

The decision to adopt a law should be based on evidence on its importance and impact. Conducting gender analysis of legislation or gender impact analysis will help us to have evidence-based laws which will facilitate monitoring of their implementation. It will allow the parliament to have reasoned analysis of the impact of the legislation on women's right beyond a mere statement on the compatibility of the legislation with gender equality. The data that is collected to conduct gender analysis of legislation or gender impact of legislation can also serve as baseline at the later stages of monitoring by the executive, legislative and other branches of the government.

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<sup>27</sup> Id., pp. 15-16.

<sup>28</sup> Id., p. 17.

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## 5. The Process of Gender Responsive Legislative Drafting

Gender-neutral or gender-blind laws and policies were thought to lead to gender equality. However, it is observed that, in practice, these kinds of laws lead to indirect discrimination. It is important to take into account the effects of gender in order to be able to address ingrained discrimination. Gender-conscious laws ensure that gendered practices are addressed by the legal system and promote gender equality. Gender conscious laws in the areas of law that is concerned with women's interest such as family law are needed to eliminate discrimination.<sup>29</sup>

Any gender-sensitive legislation requires thorough gender-based analysis. Such analysis is a prerequisite "to ensuring that every step of design, planning, implementation, and monitoring and evaluation of laws and policies takes into account existing gender disparities." It creates "an opportunity to identify and address gender needs throughout the life cycle of a legal intervention and allows users to evaluate the way in which interventions will impact gender roles, relations or responsibilities."<sup>30</sup> Gender based legislative analysis or Gender Analysis of Legislation (GAL) prevents, detects and addresses direct and indirect discrimination based on sex in laws that are adopted by the national legislative body.<sup>31</sup>

The introduction of GAL typically involves two stages. *First*, it requires a thorough analysis of the *status quo* from a gender perspective and it should identify the possibly distinctive needs and priorities of women and men in relation to the law under consideration.

This analysis, commonly dubbed as GAL aims to systematically identify the key issues contributing to gender inequalities, so that they can be properly addressed by the law in question. It can be described as an analysis of differences in the conditions, needs, participation rates, access to resources and development, control of assets, and decision-making powers between women and men. This analysis typically draws on the existing evidence base on gender distinctions within a particular sector and may also require new data collection.<sup>32</sup>

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<sup>29</sup> Eve M. Grina (2011). "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", *William & Mary Journal of Women and the Law*, Vol. 17, p.471.

<sup>30</sup> ODIHR, *supra* note 4, p. 21.

<sup>31</sup> Ministry of Regional Development, Construction, Housing and Communal Services of Ukraine (2018), *International Experiences: Gender Analysis as a Tool for Improving Legislations*, p. 10.

<sup>32</sup> ODIHR, *supra* note 4, p. 14.

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The *second* step involves analysing or making sure the draft law complies with international and national laws on gender equality. In all processes, it is important to ensure the participation of women and reflection of women's voices. The question that may arise is 'whether all laws need to be gender responsive. The answer to this question is that all laws need to pass through a gender analysis whether the law explicitly involves women's issue or not. Family law, succession law or land law are considered to have gender issues as they try to regulate family, succession and land issues in which women's interest during marriage, divorce, inheritance or access to land are manifested.

However, there are laws related to credit, taxation or bankruptcy<sup>33</sup> that may not directly involve gender issues, except under certain circumstances. For instance, a taxation law that aims to exempt tax for certain social goods may consider exempting women's specific items such as sanitary materials considering their impact in girls' education as girls might be escaping schools during menstruation due to the unaffordability of sanitary material in rural areas. Or a law on credit may exempt women who do not have assets from providing collaterals considering their limited access to immovable property.

The nature of gender-based legislative analysis has a form of recommendations and is conducted by combination of experts with legal and gender expertise with the view to assess the impact of the adoption of laws on men and women. A comprehensive gender based legislative analysis involves:

- Analysis of the existing gender situation and identification of the distinctive needs and priorities of women and men in relation to the law under consideration by conducting qualitative and quantitative research;
- Analysis of the possible impact of the new law on the needs and priorities of men and women which is known as gender impact assessment of laws;
- Integration of gender-focused interventions, perspectives or considerations into law under consideration in order to address the identified needs of men and women.
- Development of gender-sensitive indicators to monitor progress.<sup>34</sup>

Furthermore, it might be necessary to conduct gender impact assessment (GIA). It is conducted to forecast the result of a legislation in advance (negative, positive or neutral) and mitigate its negative impacts on the equality between men and women. It is an *ex ante* assessment, evaluation or analysis

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<sup>33</sup> Vijayarasa, *supra* note 9, p. 679.

<sup>34</sup> ODIHR, *supra* note 4, p. 14.

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of the law.<sup>35</sup> It is also defined as “the process of comparing and assessing, according to gender relevant criteria, the current situation and trend with the expected development resulting from the introduction of the proposed [law]’.<sup>36</sup> Thus, it should be conducted before a draft legislation is adopted. It allows drafters to integrate gender in the designing of the legislation.

The Central question GIA should address is whether the proposed law reduces, maintains or increases gender inequalities. GIA involves two steps: (i) Assessing the current gender-related position of men and women; and (ii) predicting how the law will change the position of men and women in the society. The following section deals with benchmarks of gender responsive legislations.

## 6. Benchmarks of Gender Responsive Legislative Drafting

A gender responsive legislative drafting process can follow the regular techniques of legislative drafting. However, from a gender perspective, it should attempt to address the gender gaps and discriminatory practices that are identified. It should also ensure that the impact of the law is positive in the promotion and protection of women’s rights. Moreover, the drafting process should intend to achieve substantive or transformative equality by going beyond aiming at formal equality.<sup>37</sup>

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<sup>35</sup> European Institute for Gender Equality (EIGE) (2016), *Gender Impact Assessment: Gender Mainstreaming Toolkit*, p. 6 available on <https://eige.europa.eu/publications/gender-impact-assessment-gender-mainstreaming-toolkit> (accessed on 22 December 2023)

<sup>36</sup> *Ibid*, p. 8.

<sup>37</sup> A legislation that merely focuses on formal equality provides for the provision of equal opportunity for men and women to access resources and services in socio-economic and political spheres through laws and policies. Legislation that aims at substantive equality does not only intend to bring equality of opportunity between men and women but also equality of result by correcting inequalities in the gender relation and power imbalance between men and women. These power imbalances can be corrected through affirmative actions or special measures that go beyond policy and legal provisions and brings not only *de jure* equality but also *de facto* equality. A transformative approach to legislation aims to bring transformation in the existing gendered system and patriarchal structures of the society and the state through legislations. See Alda Facio and Martha I. Morgan (2009), Equity or Equality for Women? Understanding CEDAW’s Equality Principles, *Alabama Law Review*, Vol. 60, p. 1146-1147.

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### **6.1 Factors that need to be considered**

In drafting the law, the following should be considered:

- a) Comparative laws in other countries which have relatively similar context and legal tradition as that of Ethiopia;
- b) Ensure that the law addresses existing problems of gender gap in Ethiopia;
- c) The legislative drafting process should identify legal enforcement mechanisms. It should identify whether there is an institution that can enforce the law. If there is no institution, it should either assign the law to be enforced by the existing institutions or propose a new institution that oversees the enforcement of the law.
- d) Ensure that there are financial resources needed to enforce the law and establish the mechanisms to solicit the finance. The current and future availability of human and financial resources must be considered before or during the legislative drafting process. The legislative process should not only assess available resources, but it should also be a planning tool for the future to identify what resources a government needs to put in place to deliver on its legal mandate. In this regard, the South African ‘legislative costing’ experience in drafting comprehensive child act (which was part of its implementation planning) has been lauded as a ground-breaking benchmark at the international level.
- e. Prepare ‘implementations plan’ which elaborates on the application of each proposal for changes in the existing law or the introduction of a new law.<sup>38</sup>

### **6.2 The need to conduct compatibility test**

Compatibility test is important, and it is conducted by undertaking compliance assessment of the draft legislation with the FDRE Constitution, international laws, and national laws. The compliance test involves the following.

#### **6.2.1 Assessing compliance with gender equality provisions of the FDRE Constitution**

The FDRE Constitution recognizes women’s rights by including specific provisions on women’s rights, and it further requires specific laws, customs or practices to comply with gender equality principles. This reflects a strong commitment to gender equality and ensures that gender equality will not be the subject of political whim. The FDRE Constitution under Chapter Three embodies provisions on human rights. Entitlement to human rights are inalienable, inherent and universal in their nature. They are moral claims

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<sup>38</sup> Center for Human Rights of Addis Ababa University (2013). *Baseline Study for a Comprehensive Child Law in Ethiopia*, p. 160 & 167.

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which have legal recognition since the adoption of the (1948) Universal Declaration of Human Rights.

Moreover, the FDRE Constitution contains provisions that are directly and indirectly related to women's rights. Its preamble guarantees gender equality. There are also specific provisions such as Article 25, 34 (1), 35, 42(1)(d) and 89(7) which are very relevant as they make specific reference to women. Legislations should comply with the purpose and intents of these provisions.

### **6.2.2 Assessing compliance with gender equality provisions of ratified international human rights instruments**

The human rights regime at the international and regional level has set minimum normative standards. The international human rights regime depends on the domestic systems for its enforcement and realization. International human rights conventions can become justiciable upon ratification as is the case in monist countries or need to be adopted and translated by the legislator in a complimentary legislation to become justiciable and applicable in the domestic jurisdiction as argued by dualist countries.<sup>39</sup> Upon ratification of international instruments, states are expected to implement these instruments by taking legislative, administrative, judicial and other measures at the domestic level.

A State cannot invoke custom or domestic law in defense of its non-compliance with international law to which it is a party according to the Vienna Convention on the Law of Treaties. In this regard, Article 2(f) of CEDAW specifically requires States to 'modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. Furthermore, CEDAW has set various principles on women's rights under its various general recommendations issued since 1986. Romania, for example, has identified seven criteria to be considered in legislative drafting by reviewing CEDAW Committee's recommendations. These are:

1. Does the law guarantee access to non-discriminatory, and accessible, affordable, acceptable services?
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?
3. Does the law guarantee non-coerced and informed decision-making and, where relevant, protect women's confidentiality?
4. Does the law promote equal relations between men and women?

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<sup>39</sup> Takele Soboka Bulto (2009). "The Monist-dualist Divide and Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia", *Journal of Ethiopia Law*, Vol. 23, No. 1.

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5. Does the law protect women from situations of vulnerability linked to their gender?
6. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.
7. Does the law guarantee accessible and effective remedies (i.e., access to justice)?<sup>40</sup>

To ensure compliance, the following points should be considered. *First*, the state is required to comply with ratified conventions. It should identify provisions on women's rights, gender equality and non-discrimination in order to ensure the draft law does not contradict these provisions. With regard to a convention that is signed but not yet ratified, the state is expected not to adopt a law that contradicts with the purpose and spirit of such convention.

The *second* factor in compliance is the need to ensure that there is no reservation or declaration made by Ethiopia on any of the provisions of an international convention under consideration. For example, upon ratifying the Maputo protocol, Ethiopia has entered a number of reservations and declarations. Thus, it is important to take note of these reservations and declarations.

*Third*, it is important to take into account the interpretation of the provision of any convention by international treaty monitoring bodies. Although these interpretations are not binding, they have a persuasive effect and are important guidance to interpret treaty provisions.

The *fourth* factor relates to compliance with customary international law unless Ethiopia has been a persistent objector of the application of the customary rule. For example, elimination of gender-based violence is considered as customary international law. *Fifth*, it is recommended to take into account recommendations/concluding recommendations given to Ethiopia by treaty monitoring bodies on gender equality during the review of the periodic report of the state.

Relevant international instruments on women's rights are CEDAW, CRC, ICRPD, Beijing Declaration, and Palermo Protocol. Moreover, Maputo Protocol and the African Charter on the Rights and Welfare of the Child (ACRWC) are key regional instruments intended to ensure the protection of the rights of women at the regional level. Ethiopia has ratified these core international and continental human rights instruments.

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<sup>40</sup> Vijayarasa, *supra* note 3, p. 9.

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These binding international instruments can bring change if they are implemented at the domestic level. Domestic laws that translate the international norms into reality by making them accessible to victims at the local level are important for the full realization of human rights. This will close the gap between the aspiration of these instruments and the reality on the ground.

### **6.2.3 Assessing compatibility with gender equality provisions of relevant legislations**

During the drafting process, it is important to take into account existing laws on the issue under consideration. The draft law should be compatible with existing rights, responsibilities and entitlements. When drafting a law on gender equality issues, previous laws on gender equality should be considered. These laws include: specific legislations on women rights or legislations that affect the realization of the rights of women.

### **6.3 Assessing the use of gender inclusive language in the legislations**

Language has a key role in shaping social attitudes. It is not only used to express ideas, but it has a role in shaping thoughts. The use of gender-neutral language in legislations plays a role in changing societal attitude towards men and women. This persuades us to adopt an inclusive language in law. The use of gender neutral or gender inclusive language contributes towards gender equality and the elimination of gender bias/stereotypes.

The legislative drafting in its current form applies a masculine reference. Most legislations in Ethiopia provide a provision which stipulates that the masculine gender reference covers the feminine. However, the use of the masculine form of language has a negative consequence on gender equality. This can be addressed by using steadily progressing steps indicated in this section. The failure to use gender-neutral language in legislative drafting was considered as a systematic exclusion, devaluation and ignorance of women by some writers. Thus, there has been an effort by various international institutions and countries to use a gender-neutral language in legislative drafting.<sup>41</sup>

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<sup>41</sup> LiveWire, *Why the Language of Law Should be Gender Neutral?* available on <https://livewire.thewire.in/gender-and-sexuality/why-should-the-language-of-laws-be-gender-neutral/> (accessed on 19 March 2023)

Various institutions and countries have adopted guidelines to make legislative drafting in English language gender sensitive. These guidelines include the British Columbia Law Institute's essay 'Gender Free Legal Writing' (see <https://www.bcli.org/sites/default/files/GenderFree.pdf>), UNESCO's 'Gender

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Several strategies can be adopted to promote gender equality through language in legislative drafting. These strategies are applied when using English language to draft legislations such as the following:

- a) Using gender-neutral expressions: E.g. person/s, everybody, individual/s, chairperson instead of chairman, firefighter instead of fireman etc
- b) Using inclusive language: E.g. we, they
- c) Using both feminine and masculine forms either as separate words: E.g. he or she, his or her or through the use of slashes (he/she, his/her)
- d) When referring to certain official positions such as of ‘President’, ‘Prime Minister’, ‘Ministers’ or ‘Judges’: using ‘women or men’ and ‘she/he’ to correct gendered historical assumptions.
- e) using the singular ‘they’ and its other grammatical forms (‘them’, ‘themselves’ and ‘their’) to refer to indefinite pronouns and singular nouns;
- f) replace the masculine pronoun with an article such as ‘the’, ‘a’, ‘an’ or repeat the noun;

When reviewing a draft law for gender sensitivity of its language, the following are some of the questions that a drafter should ask herself/himself:

- Does the text contain gender-specific expressions that could have been replaced with gender-neutral ones? For instance, does the text use the words “man” or “men” (used as single words or in compound words) to refer to people who may not be men? E.g. Does the text use ‘Reasonable man standard’ instead of ‘reasonable person standard’? or ‘chairman’ instead of chairperson?
- Does the text contain the use of masculine forms in generic references, i.e. when referring to an unspecified group of people? E.g. Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of *his* choice anywhere within the national territory. (FDRE Constitution)
- Does the text adopt occupational or other gender stereotypes? E.g. when referring to a president, judge, Commissioner, Prime Minister or Minister, does it refer to them in masculine forms?
- Does the text contain unnecessary references to sex or gender?

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Equality Guidelines for UNESCO Publications’ (see [https://en.unesco.org/system/files/guidelines\\_for\\_pp\\_-\\_annex\\_3.pdf](https://en.unesco.org/system/files/guidelines_for_pp_-_annex_3.pdf)) and the United Kingdom’s Parliamentary and Government Legal Department’s ‘Guide to Gender Neutral Drafting’ (see <https://www.interlawdiversityforum.org/guide-to-gender-neutral-drafting>).

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- Does the text include the same kinds of information when referring to people of different genders?
- Are the terms used to name or describe citizens, public officers, and officials neutral and/or gender inclusive?

It is important to note that the legislative drafting history in Ethiopia is far from using gender sensitive language. Gender in Ethiopian legislations is referred in the masculine almost indiscriminately and a reference pointing that the masculine gender reference covers the feminine is included. However, this should be changed step by step towards using either a gender-neutral language or gender inclusive language. It is also important to use gender sensitive language in relation to occupational and other contexts in order to change these stereotypes.

There has been an attempt to use a feminine reference to cover a masculine reference in some laws such as the Directives by the National Election Board of Ethiopia (NEBE) in 2020. A shift can be progressively made to make the reference of one sex to apply to the other sex in addition to using a gender neutral language. Accordingly, gender sensitive language is one of the first steps that can be taken by the drafters if there is a genuine will to ensure gender equality in the legislations.

It is also important to engage language experts and experienced drafters. In draft laws that embody few provisions, gender neutral or gender inclusive drafting can be used easily while in laws that involve several provisions, there should be strategic engagement of institutions such as the Ethiopian Academy of Sciences (EAS) and language/linguistics departments of Higher Education Institutions. While the challenge in English language only relates to pronouns, Amharic language is gender-specific not only in pronouns but also verb usages. A step-by-step approach can thus be envisaged so that

- a) the word ‘ለው’ can only refer to the word ‘*person*’ (which is gender neutral) and not ‘*man*’, and
- b) gender neutral verbs can progressively be coined in due course. During the transition, drafters can be innovative and do their utmost to ensure gender sensitive drafting.

It is important to note that care must be taken not to detract clarity of the legislation in an effort to use a gender inclusive language such as he/she, him/her etc. unless the laws embody a few provisions.

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#### **6.4 Participation of women and women's organisation in the consultation process**

The political legitimacy of laws is linked to the extent of participation and representation of various sections of society. Research suggests women's representation and participation during the adoption of legal frameworks in order to bring inclusive social and economic reforms and sustainable peace.<sup>42</sup> The inclusion of women is grounded in the 'politics of presence' theory which links the descriptive and the substantive representation of women's strategic interests during the process of legislative drafting to that of legitimacy, democracy, responsiveness and effectiveness.<sup>43</sup>

This underlines the importance of women's participation and inclusion in legislative drafting process. The participation of women should not be a reflection of symbolism or 'tokenism' but should be based on genuine interest to reflect on their interests, needs and concerns in the legislative drafting process. It is important to seek the participation of diverse women with distinct socio-economic status, ethnic identity, religious belief, disability status, geographic location and a host of other considerations.

To ensure the reflection of diverse voices in the draft law, it is important to enhance the participation of women in their individual capacity or as members of various groups. Women may organise themselves and work towards achieving a certain objective by establishing CSOs or mass-based organisations.

During the drafting process of law, it is important to ensure the representation of women in the various stages. The first stage is when there is consultation with stakeholders to validate the situation assessment and the identification of needs of men and women. During this stage, stakeholders assist in offering ideas on how to strengthen and promote gender equality objectives, mitigate the negative impacts of existing inequalities in a participatory and consultative process. Such stakeholders may include prospective beneficiaries of the law, government representatives, civil society, academics and the media. It is important to target women's organisations as they can reflect on gender perspective, and the consultation should be made in an open and inclusive manner.<sup>44</sup>

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<sup>42</sup> O'Reilly *et al.* 2015; Krause *et al.* 2018; Lee-Koo & True 2018 cited in Institute for Democracy and Electoral Assistance (IDEA) (2019), *Women Constitutional-Makers: Comparative Experiences with Representation, Participation and Influence: First Annual Women Constitution-Makers' Dialogue*, Edinburgh, p. 9.

<sup>43</sup> Ibid.

<sup>44</sup> ODIHR, *supra* note 4, p. 26

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The second stage for consultation is after drafting the law. Diverse groups should be consulted in a representative manner. The draft law should be sent to stakeholders in advance. In order to make the consultation gender inclusive, the following should be considered in selecting participants of the consultations:

- What are the major target gender sub-groups (e.g., girls, boys, young women/men, adolescent women/men, single parents, working parents, elderly women/men) in the sector?
- What are the existing inequalities between women and men (or sub-groups of women and men)?
- What are the practical and strategic interests, needs and priorities of each of these sub-groups?
- What are the impediments that prevent the fulfilment of these needs and priorities for each sub-group?

As a final stage, it is important to ensure that comments and feedback received during these consultations are taken seriously and the views are reflected in revising the final draft law.

## **7. Practices of Gender Responsive Legislative Drafting in Ethiopia**

### **7.1 Existing legal and institutional framework on legislative drafting from gender perspective**

The FDRE Constitution entrusts the House of Peoples' Representatives (HoPR) with the power to adopt federal laws. According to Proc. No. 1263/2021 and Proc. No. 943/2016, the Ministry of Justice (MoJ) and each Ministry are mandated to initiate law.<sup>45</sup> The MoJ is further mandated to ensure that draft laws prepared by government organs are consistent with the Constitution and federal laws and to provide legal opinion to concerned bodies on draft laws. However, there is no specific law that provides for the procedure of legal drafting although the HoPR, the Council of Ministers, and MoJ have issued guidelines and circulars which elaborate the procedures for drafting a law.

Thus, based on the mandate given by the law, the existing practice is that any institution with the mandate to initiate a legislation can prepare draft law and send it to the MoJ for its comments and opinion on technical matters

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<sup>45</sup> Article 19 (3) of Proc. No. 1263/2021 and Article 6 (5)(a) of Proc. No. 943/2016.

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before it is sent to the Council of Ministers and HoPR.<sup>46</sup> The law empowers each government ministry to initiate, implement and enforce federal policies and laws on themes that fall within its jurisdiction based on its powers and responsibilities.

Ethiopia did not have a strong pre-enactment review mechanism until recently. The only mechanism was scrutiny by Parliament standing committees. The establishment of a directorate for Legal Studies, Drafting and Consolidation under the MoJ in 2009, was the first concrete step to have pre-enactment assessment of legislations in Ethiopia before a draft legislation reaches the federal parliament.<sup>47</sup>

The MoJ can initiate and audit draft law for technical matters before it is sent to Council of Ministers or HoPR. Thus, MoJ is expected to provide audits to drafts sent to it for technical matters such as language issues, forms of the law and compatibility of the draft law with the FDRE Constitution, international human rights obligations and national laws. The ministry that initiated the draft law is expected to revise the draft law based on the comments or send its opinion on the comments to the Ministry of Justice.<sup>48</sup> However, according to experts, there is no mechanism to check whether the comments are incorporated or not before it is submitted to Council of Ministers or HoPR.<sup>49</sup>

With regard to mainstreaming gender in the legislative drafting process, Ethiopia has guaranteed the equal rights of men and women under its Constitution (1995) and subsequent legislations. Proclamation No. 1263/2021 requires all government institutions to give due attention to women's issues in all policies, development programs, and projects; and they are required to ensure that policies, laws, development programs and projects they formulate benefit women.<sup>50</sup> These laws underline that gender mainstreaming is no longer a matter of policy choice by public leaders but rather a legal duty. Based on these laws and Ethiopia's commitments under international human rights laws, the government is expected to integrate gender in its laws, policies and programs. Women should also be able to equally participate in legislative

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<sup>46</sup> Interview with experts at the Legal Studies, Drafting and Consolidation Directorate of the Ministry of Justice on Nov. 23, 2021 and Dec. 2, 2021.

<sup>47</sup> Ibid.

<sup>48</sup> ለሚኒስትሮች ምክር ቤት የሚቀርብ ረቂቅ ሕግ አዘገጃጀትና አቀራረብ የአሠራር ሥርዓት ስርኩላር (2009), p. 10.

<sup>49</sup> *Supra* note 46.

<sup>50</sup> Article 19(11) of Proclamation No. 1263/2021.

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drafting process; and gender issues should be integrated to ensure that women benefit from the laws that are adopted.

In spite of the legal foundation to integrate gender in laws and policies, there is lack of a systematic approach to integrate gender. Most of the laws have been adopted without conducting any gender analysis of legislations and gender impact assessments as part of pre-enactment review mechanisms. Various factors have contributed to this as discussed in the subsequent sections.

### **7.2 Gaps in the availability of tools for gender mainstreaming in laws**

Lawmaking involves the process of initiation, drafting, consultation and approval. It is important to make sure that all phases of this process take gender issues into consideration and ensure women's participation. Gender mainstreaming in legal drafting is done based on the Constitution, international law and best practices. This requires a tool for gender analysis and gender impact assessment before a law is drafted.

According to the interviews conducted, the existing practice demonstrates that the Ministry that initiates the law is responsible to conduct a study to identify the existing social, political or economic problems, and to determine whether a legislation can address the problem or to justify the need for the law.<sup>51</sup> Based on this study, a law is drafted to address the issues identified. According to informants, such studies most of the time overlook gender issues. To address this gap, a guideline is developed by the MoJ on Gender Responsive Legislative Drafting, and training has been carried out to introduce the guideline. However, lack of expertise on gender issues has persisted, and the turnover of staff trained with the guideline has made it difficult to bring consistent and uniform changes in drafting gender responsive legislation.<sup>52</sup>

### **7.3 Capacity to apply gender lens in legislative drafting**

To integrate gender in the legislative process, it requires expertise to be able to identify gender issues and integrate these issues in the law. However, there is a technical capacity gap on how to mainstream gender in the legal drafting process. The study found out that although the current staff of MoJ's

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<sup>51</sup> *Supra* note 46.

<sup>52</sup> Training participants during the presentation of an Assessment on the Implementation of the Gender Responsive Legislative Drafting Guideline (በአገ ማርቀቅ ሂደት የሥርዓተ ምክርቤት አካላት ፕሮጀክት ውጤት ዳሰሳ ጥናት) in a training organised on Legal drafting and gender responsive legislative drafting and post project assessment conducted on March 25-26, 2024.

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legislative drafting Directorate have expertise in law and legal drafting, there is no expert trained in gender with university degree even if most of the experts have participated in short term gender trainings. Although a legal drafting training from a gender perspective have been provided by the MoJ with the support of development partners, a high turnover of staff has reduced the number of experts with such knowledge and skills.<sup>53</sup>

Gender analysis of legislation requires the involvement of experts in social science fields such as gender experts in addition to legal experts. The lack of gender experts in the composition of legislative drafting teams at MoJ and other institutions has created gaps in the capacity to make gender analysis of legislations. In addition to the drafting department of MoJ, other government institutions such as sectoral ministries are involved in initiating and drafting legislation. Thus, experts of other ministries need to be acquainted with gender responsive legislative drafting.

Legislative and executive organs of regional states have also the responsibility to ensure that legislations are gender sensitive. However, regional states have not yet adopted a guideline on gender responsive legislative drafting except Somali Regional State which has translated MoJ's Handbook into Somali language.<sup>54</sup> Thus, it is important that not only the Ministry of Justice but other actors (with the mandate to initiate, draft and follow up laws and their implementation) take gender responsiveness into account before drafting legislation.

#### **7.4 Experience in applying a gender perspective in legislative drafting**

The practice shows that there is no regularized and institutionalized approach to ensure the inclusion of gender perspectives in legislative drafting. The experience at the MoJ shows that the extent to which gender analysis is included in drafting legislations or reviewing draft legislations depends on the expertise of the legal drafter. In recent years, gender analysis was sought for some draft laws in relation to the legal reform undertaken after the coming into power of the new government in 2018. In this regard, it is important to mention that during the drafting process of the electoral law in 2019, a consultant was commissioned to undertake gender analysis of the draft electoral and political parties' law. Analysis of the draft law from a gender perspective was indeed commendable.

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<sup>53</sup> Interview with a prosecutor at Women, Children and Cross-Sectoral issues Directorate of the Ministry of Justice on Nov. 23, 2021.

<sup>54</sup> ፍትሕ ሚኒስቴር-ፕሪላይስ ኮንሳልት (2016 ዓ.ም). በስግ ማርቆስ ሂደት የሥርዓተ ፆታ አካታችነት ፕሮጀክት ውጤት ዳሰሳ ጥናት

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However, the incorporation of the recommendations of the analysis in the draft law was left to the discretion of the Working Group that drafted the legislation. As the process of drafting the law was driven by expediency, the analysis which was conducted at the later stage of the drafting process did not influence the drafting process which was criticized for its failure to engage women's organization and gender expertise.<sup>55</sup>

A review of Ethiopian Laws from a gender perspective conducted in 2022 indicates the gaps in existing laws.<sup>56</sup> For instance, it shows that Articles 620 and 621 of the Criminal Code that deal with rape have gendered implications. Article 620 excludes rape of a woman in marital relationship while Article 621 criminalizes a woman's act of compelling a man to sexual intercourse. Furthermore, the criminal procedure law lacks gender sensitive investigation and prosecution methods for gender-based crimes and does not provide for protective measures for victims of gender-based violence. It also fails to give special consideration for gender-based crimes during the assessment of bail and in relation to standard of proof which inadvertently perpetuate gender bias. In spite of several studies, however, there has not been any follow-up action to revise these legislations based on gender analysis.

In an attempt to experiment the use of feminine language in the drafting of law, the directives of electoral laws have used feminine terms. However, this has been taken as unusual since it deviates from the common usage of referencing in masculine by including a provision in the law that states all referencing in masculine refers to feminine too.<sup>57</sup> The drafting of laws in the feminine form created difficulty to understand the substance of the law.

As stated above (in Section 6.3), the Amharic language has feminine referencing in verbs and pronouns while gender referencing relates solely to pronouns in English. It was also pointed that the language to be used in drafting legislations should be specific and clear for an appropriate application of the law.<sup>58</sup> On the other hand, an attempt to use both genders in the draft law, can adversely affect the clarity and brevity of the law. Experts thus

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<sup>55</sup> Meskerem Geset & Tayechalem G. Moges (2020). "Counting Absence in Political Equality: A Preliminary Gender Analysis of the Electoral Law Reform in Ethiopia", in Meron Zeleke and Meskerem Geset, *Gender, Development and Women's Rights: Ethiopian Perspective*, Center for Human Rights, AAU, p. 71.

<sup>56</sup> UN Women (2022). A Review of Ethiopian Law from a Gender Perspective.

<sup>57</sup> Interview with women's rights expert at Ethiopian Human Rights Commission on January 13, 2022.

<sup>58</sup> *Supra* note 46.

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suggest that it is rather important to make the language of the law gender neutral as much as possible.<sup>59</sup>

A recent assessment on the implementation of the MoJ's *Handbook on Gender Responsive Legislative Drafting* demonstrated that there are some positive developments observed in adopting a gender responsive legislation after the handbook was adopted.<sup>60</sup> The example given for this development is the Rural Land Use and Administration Proclamation,<sup>61</sup> draft legislation for the protection and support of internally displaced persons, migration policy, and the legal aid strategy. The assessment finds them to be gender responsive in most of their parts. However, the assessment recognized that there are still gaps in using the handbook to assess the gender responsiveness of laws.<sup>62</sup> The gaps, for instance, include failure to consider gender representativeness in the composition of committees.

For instance, the draft legislation for the protection and support of internally displaced persons proposes the establishment of National Council composed of representatives of government organs. However, it failed to create a mechanism to ensure gender representativeness in the composition of the council. Likewise, the Federal Advocacy Service Licensing and Administrative Proclamation does not ensure gender representativeness in the leadership positions of the Federal Advocates' Association. Several of these laws also do not provide for the collection of sex disaggregated data.

It was also observed that there are recent draft legislations that are gender regressive. For instance, a draft directive issued by Ministry of Education (MoE) provides that absence of a student from class for fifteen consecutive days will entail suspension from school without any consideration for the reason that caused the absence. This indirectly discriminates against pregnant girls during child birth (from attending school as pregnancy before the age of eighteen may happen in rural settings as a result of child marriage. In addition, the Draft Civil Servant Proclamation provides that public institutions should be representative of ethnic diversity in the country. However, it does not include gender representativeness in the public sector. Although merit-based

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<sup>59</sup> Ibid.

<sup>60</sup> ፍትሕ ሚኒስቴር-ፕሪላይስ ኮንሳልት, *supra* note 54.

<sup>61</sup> The draft proclamation has included provisions that allows for affirmative action for rural women to access land, rights of rural women in polygamous marriage to own, access and control land, protection of rural women's interest during expropriation of land for irrigation.

<sup>62</sup> ፍትሕ ሚኒስቴር-ፕሪላይስ ኮንሳልት, *supra* note 54.

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recruitment of employees in public institutions should take primacy, gender representation can also be ensured within the framework.

One of the main gaps in legislative drafting process is the lack of public consultation when laws are adopted and gaps in the participation of women (or women's organizations) in such consultations. Thus, it is important to eliminate institutional, cultural and societal obstacles and biases that limit meaningful participation of women and their capacity to exert influence. Owing to various constraints, however, laws are adopted without adequate consultation. This challenge is also related to the limited capacity of CSOs in lobbying for revision of laws. There are limited NGOs that regularly assess and monitor the gender responsiveness of legislations.<sup>63</sup> Furthermore, the exigencies and urgency in adopting legislation of national interest have been among of the reasons for laws to be enacted without adequate public consultations.<sup>64</sup>

Some of the informants raised lack of monitoring and accountability mechanisms for the failure to integrate gender perspective in legislative drafting process as one of the challenges.<sup>65</sup> Though the Ministry of Women and Social Affairs (MoWSA) is mandated to oversee and coordinate gender mainstreaming in policies, programs and any activity through the line ministry, its involvement in the realms of coordination and collaboration in the course of overseeing gender responsive legislative drafting is very limited. This relates to mandate deficiency which only allows the Ministry to coordinate gender mainstreaming at the line Ministries.<sup>66</sup> There is no mechanism that makes institutions accountable for their failure to mainstream gender in laws, policies and programs.

## 8. Conclusion

The law plays an important role in shaping societal norms. This normative role can be achieved when laws are gender responsive and consider the difference in men and women's interests, concerns, needs, priorities, roles, responsibilities and expectations. This requires pre-enactment gender analysis of laws or gender audit of existing laws which involve tasks such as identifying men and women's needs and undertaking legislative compatibility

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<sup>63</sup> Interview with Executive Director of CEHRO on December 22, 2021.

<sup>64</sup> Ibid.

<sup>65</sup> Interview with a Prosecutor at Women, Children and Cross-sectoral Issues Directorate of Ministry of Justice on December 2, 2021.

<sup>66</sup> Interview with Director of the Legal Services Directorates of Ministry of Women and Social Affairs on January 10, 2022.

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test to examine whether the law complies with gender equality principles and standards under the FDRE Constitution, international human rights obligations and other laws. The lawmaking process should also ensure the participation of women. The tasks of integration of gender in the law requires the competence of legal drafters including the specific knowledge and skills to undertake gender analysis of laws or gender impact of laws.

Gender responsive laws are beneficial to the whole society. The *first benefit* is based on the efficiency argument. Accordingly, gender responsive laws increase the efficiency and impact of laws in practice. Adopting laws after making proper gender analysis benefits men and women. It can bring change on the ground by narrowing down the gender gap. The *second benefit* is based on utilitarian argument. Accordingly, gender responsive legislation can serve as an instrument to increase women's participation in long-term economic and social development which benefits the whole society. Women constitute half of the society, and their full participation in development doubles the potential outcome for the whole society. To this end, gender analysis of legislation (GAL) provides reliable evidence on how legislation contributes to untap this potential by eliminating inequalities and discrimination.

The *third benefit* relates to enabling us to tackle systematic and structural barriers of gender equality. GAL focuses on structural barriers for gender equality and addresses legislative and institutional gaps. It systemically identifies opportunities for advancing gender equality across all laws and ways to bring equal outcomes of gender equality. It also contributes by creating a level playing field for men and women so that they can utilize their potential to the fullest.

Although there is legislative backing for gender responsive legislative drafting and institutional set up to undertake gender responsive legislative drafting in Ethiopia, the existing practice shows that there are a number of gaps. These gaps include lack of knowledge and skill on how to conduct GAL and GIA, lack of consultation with women's organizations and gender experts, lack of accountability mechanism for failure to integrate gender in laws, and limited internal capacity to review draft legislation from a gender perspective at various ministries with mandate to initiate and draft legislation. Despite these limitations, there are promising practices by various institutions which should be replicated. ■

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