Bahir Dar University Journal of Law
የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት

ISSN (e): 2709-5827 **ISSN (P): 2306-224X**

Vol. 14 No. 2
ቅጽ ፲፬ ቁጥር ፪

June 2024
ሰኔ ፳፻፲፮

In This Issue
Articles

በዚህ ዕትም
ጥናታዊ ጽሁፎች

A Biannual Law Journal published by Bahir Dar University, School of Law, Since 2010
በባሕር ዳር ዩኒቨርሲቲ ሕግ ትቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት፣ ከ፳፻፪ ዓ.ም. ጀምሮ

MESSAGE FROM THE EDITORIAL BOARD

The Editorial Board is delighted to bring Vol. 14: No. 2 of Bahir Dar University Journal of Law. The Journal is meant to serve as a forum for the scholarly analysis of Ethiopian law and beyond. It is dedicated to engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

The Editorial Board extends its gratitude to manuscript contributors, reviewers, and others who participated in different capacities.The Editorial Board appeals to all members of the legal profession, both in academia and practitioners, to contribute scholarly manuscripts.

Disclaimer: The views expressed in this journal do not necessarily reflect the views of the Editorial Board or the position of the Law School.

Address

Bahir Dar University Journal of Law
School of Law, Bahir Dar University
P. O. Box- 5001
Tel- +251588209851
E-mail- bdujol@yahoo.com
Bahir Dar, Ethiopia

Websites:
https://www.ajol.info/index.php/bdujl
https://journals.bdu.edu.et/index.php/bdujl
http://ejol.ethernet.edu.et/index.php/BDUJOL

Law School Academic Full Time Staff	
Abraham Mamo	Asst. Lecturer
Alebachew Birhanu	Assoc. Professor
Ashenafi Fiseha	Asst. Lecturer
Asnakech Getnet	Lecturer
Belayneh Admassu	Assoc. Professor
Berhanu Bayley	Asst. Lecturer
Dessalegn Tigabu	Lecturer
Endryas Getachew	Lecturer
Enterkristos Mesetet	Lecturer
Fikreabinet Fekadu	Asst. Professor
Gizachew Silesh	Asst. Professor
Mihret Alemayehu	Asst. Professor
Mohammode Doude	Asst. Professor
Mulugeta Akalu	Asst. Professor
Tajebe Getaneh	Lecturer
Tegegne Zergaw	Asst. Professor
Temesgen Sisay	Asst. Professor
Tessema Simachew	Asst. Professor
Tewachew Molla	Lecturer
Tikikil Kumlachew	Lecturer
Tilahun Yazie	Asst. Professor
Tirsit Woldegiorgis	Asst. Lecturer
Worku Yazie	Asst. Professor
Yenew Bitew	Lecturer
Yibekal Tadesse	Asst. Professor
Yihun Zeleke	Asst. Professor
Yonatan Ayele	Asst. Lecturer
Zewdu Mengesha	Asst. Professor
Academic Staff on Study Leave	
Adam Denekew	Lecturer
Addisu Gulilat	Lecturer
Essubalew Molla	Asst. Lecturer
Gedion Ali	Lecturer
Jhon Kebere	Asst. Lecturer
Mekash Chane	Asst. Lecturer
Misganaw Gashaw	Asst. Professor
Nega Ewunetie	Assoc. Professor
Tefera Degu	Lecturer
Tigist Derib	Asst. Lecturer
Yohannes Enyew	Lecturer
Academic Staff with home base Leave	
Mamenie Endale	Asst. Professor
Part-time Staff	
Biniyam Yohannes	ANRS Supreme Court Judge
Tsegaye Workayehu	ANRS Supreme Court Judge

Contents

Articles

Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power

Simeneh Kiros Assefa[α]& Cherinet Hordofa Wetere[β]

Abstract

While a constitution vests (limited) power on a government, criminal law may be used to effectively deny power to any contending party (group). This article argues that besides achieving its legitimate ends of prevention of crime, the criminal law is used to govern the country by denying power to contending parties. This is done based on the analysis of the adoption of the respective constitutions, the adoption of the criminal laws and the attending socio-political circumstances of the adoption of the criminal law.Emperor Haile Selassie adopted the 1930 Penal Code on the day of his coronation which is later sanctioned by the 1931 Constitution which makes his power perpetual 'divine right'. When the Provisional Military Government had come to power, it adopted a Special Penal Code to be applied by a Special Courts-Martial, and the PDRE Constitution came only 13 years later. Likewise, as soon as EPRDF came to power, it detained the previous regime officials, both civilian and military, in the first few days. It is only after such action that the Transitional Period Charter was drawn up.

Key terms: Constitution; Criminal Law; Instrumentalism; Special Penal Code; Special Courts-Martial; Special Laws.

[α] Simeneh Kiros Assefa, PhD, Associate Professor of Law, Addis Ababa University Law School, and Attorney-at-Law. e-mail: Simeneh@simenehlaw.com

[β] Cherinet Hordofa Wetere, PhD Candidate, Addis Ababa University School of Law, Attorney at Law, former judge at the Federal First Instance Court. e-mail: Cherinetww@gmail.com

Introduction

It has long been recognised that law in general, and criminal law and the institutions of criminal justice in particular, are used for achieving certain ends.[1] The ends of criminal law are diverse[2] but they can generally be put under two categories – legitimate and non-legitimate ends.[3] Certainly, criminal laws are used for legitimate ends of 'maintaining social order', which is a common good, provided other means, such as civil and administrative actions, are found to be ineffective.[4] However, the legitimacy of the ends of

[1] Tamanaha examines the various theories of law and their instrumentalist perspective. B.Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (Cambridge University Press 2006). The Comaroffs discussed how the law is fetishized as an instrument of 'combat'. J.L. Comaroff and J.C. Comaroff, *Reflections of the Anthropology of Law, Governance and Sovereignty* In RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW (F. von Benda-Beckmann, K. von Benda-Beckmann and J. Eckert eds., Ashgate Publishing 2009).

[2] TAMANAHA (2006) *supra* note 1, at 6.

[3] M. Tonry, *The Functions of Sentencing and Sentencing Reform*' In 58 STANFORD L. REV. 37 (2005).The discussion is made from the perspective of the purposes of punishment. However, it clearly shows the various ends of criminal law from punishment perspective. The instrumental aspect of criminalization of the conduct of 'others' is better dealt with by criminologists. See for instance, P. SCRATON, POWER, CONFLICT AND CRIMINALISATION (Routledge 2007). A. Norrie,*Citizenship, Authoritarianism and the Changing Shape of the Criminal Law* In REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW (B. McSherry, A. Norrie and S. Bronitt, eds., Hart Publishing (2009); J.J. RODGER, CRIMINALISING SOCIAL POLICY: ANTI-SOCIAL BEHAVIOUR AND WELFARE IN A DE-CIVILISED SOCIETY (Willan Publishing 2008). H.D. BARLOW AND D. KAUZLARICH, EXPLAINING CRIME: A PRIMER IN CRIMINOLOGICAL THEORY (Lanham: Rowman & Littlefield 2010). G.R. SKOLL, CONTEMPORARY CRIMINOLOGY AND CRIMINAL JUSTICE THEORY: EVALUATING JUSTICE SYSTEMS IN CAPITALIST SOCIETIES (Palgrave Macmillan 2009).

[4] For the principle of *ultima ratio* and subsidiarity of criminal law, see Simeneh Kiros Assefa and Cherinet Hordofa Wetere, *'Over-Criminalisation': A Review of the Special Penal Legislation and Penal Provisions* In 29 JOURNAL OF ETHIOPIAN LAW 49 (2017); A.M.P. del Pino*The Proportionality Principle in Broad Sense and Its Content of Rationality, the Principle of Subsidiarity* In TOWARD A RATIONAL LEGISLATIVE EVALUATION OF CRIMINAL LAW (A.N. Martin and M.M. de Morales Romero eds., Springer 2016). D.

criminal law may be seen both objectively as well as in historical context in their attending socio-political-economic circumstances.

Criminal law has played a central role in the Ethiopian politics, arguably, more than constitutional law. The 1930 Penal Code had been promulgated on the day His Imperial Majesty Haile Selassie was crowned. Even though the Code, in its preamble, states that it is a revision of the *Fetha Nagast*, and that it contains several provisions that are meant to achieve the common good in any open and democratic society, both the content and the circumstances of its adoption show that it is used as a political tool for suppression of contention to the throne.[5] The power consolidation had further been sanctioned by the 1931 Constitution. As Eritrea had become part of Ethiopia in 1952, the Federal Criminal Law had been adopted late in 1953 and Federal Courts were established to enforce such suppression of opposition and the protection of the federation, constituting 'the Empire'. The 1957 Penal Code was a comprehensive substitute of the previous criminal laws with fairly the same end.[6] In so doing, the state is using the 'rule of law' justification for its coercive action.

As soon as the Provisional Military Government Council ('PMAC') came to power in 1974, a new political economy was established – the means of

Husak, *The Criminal Law as Last Resort* In 24 OXFORD J. OF LEGAL STUDIES 207 (2004).

5 See section 3.2, infra.

6 The 1957 Penal Code is a penal code that would be adopted in any open and democratic society. Because Graven understood that Ethiopians believe in the expiation of punishment, he kept those severe penalties. Jean Graven, *The Penal Code of the Empire of Ethiopia* In 1 J ETH L 267(1964) at 271, 274, 288. He further maintained the spirit of the 1930 Penal Code regarding those crimes that are considered threat to the state and government many of which are punishable by death. *Id.*, at 289. For instance, offences against the Emperor or the Imperial Family (art 248), outrage against the Dynasty (art 249), outrages against the constitution or the constitutional authorities (art 250), armed rising and civil war (art 252) were potentially punishable by life imprisonment or death.

production were nationalised; and socialism was declared the national political-economic ideology.[7] The initial legislative action of the Military Government had first been establishing itself as a legitimate government by virtue of the *Provisional Military Government Establishment Proclamation (1 of 1974)* which also provided for the adoption of a special penal code to enforce the 'new' political economy. The PMAC had taken important extra-judicial measures, but it has also made good use of criminal justice for the enforcement of its political ideologies and preservation of political power.[8]

Our general observation is that political stability is an ever-present concern in the country and each new government attempts to maintain 'law and order' sanctioned by criminal law. Even though it had not bent on adopting new penal legislation, as if it is a natural course of action, as soon as the EPRDF Government came to power, it started detaining previous Government Officials.[9]

The state intervention and manipulations were not limited to criminal norms. Often the government uses certain institutions because the efficacy of those criminal norms is determined by the institutions behind them and the methods

[7] See in general, Fasil Nahum, *Socialist Ethiopia's Achievements as Reflected in Its Basic Laws* In J ETH L 83, (1980).

[8] The political irony is made clear when Let. Gen. Tefaye Gebrekidan released those former military generals as 'political prisoners' in his one week long acting president position in late May 1991, whom his convicted as a presiding judge in the Court Martial of the Supreme Court, for a failed coup d'état against President Mengistu Hailemariam in May 1988. ENA, *196 Political Prisoners Released on Amnesty*, ADDIS ZEMEN, Addis Ababa, 24 May 1991, at 1, 6 (in Amharic).

[9] The EPRDF forces took control of the city of Addis Ababa on 28 May 1991. In the following few days, the Dergue high ranking civil and military officials were arrested either on active search or on surrender. _____, *High Ranking Officials of the Previous Government Surrendered*, ADDIS ZEMEN, Addis Ababa, 03 June 1991, at 1, 6 (in Amharic). _____, *Legesse Asfaw Captured*, ADDIS ZEMEN, Addis Ababa, 03 June 1991, at 1, 6 (in Amharic). _____, *High Ranking Officials of the Previous Government Continue Surrendering*, ADDIS ZEMEN, Addis Ababa, 05 June 1991, at 1, 5 (in Amharic).

they employ. Generally, criminal laws are enforced by the ordinary courts. However, there are several institutional arrangements made for the various criminal laws. For instance, the Imperial Government created Federal Courts to enforce the 1953 Federal Criminal Law. The PMAC created a Special Courts-Martial manned by military officials to enforce the Special Penal Code. It also created a Special Prosecutor and a Registrar for the Special Courts-Martial. Those institutions were the manifestation of both the sheer force of the state and the specific desire of the government of the time.

There were also both subtle and overt changes in administration of criminal justice in the post-1991 period. Initially, there were no norm creation as the criminal law was already rich; there was no creation of special courts because it does not have particularly popular record.[10] Thus, it focused on the prosecution side, such as the Special Prosecutor's Office for the prosecution of the former Dergue officials, and later, the Federal Ethics and Anti-Corruption Commission for the enforcement of the anti-corruption laws, and the Revenue and Customs' Authority Prosecutors for enforcement of tax legislation, etc. Those institutions were established to enforce the values behind those special legislations and yet the state always and consistently uses the doctrine of 'rule of law' for using such coercive action.

In this article, we examine the state's use of criminal law as an instrument in the power relations arrangement through a chronological time frame and the rule of law justification provided by the governments of the time for the use of such coercive state acts. It reviews the content of specific criminal law and specific provisions in the context of the attending socio-political circumstances such rules were adopted. It illustrates with decided cases.

[10] It should be noted that specialized benches were established for those cases.

Section one gives the context of the utilisation of criminal law for various ends. It discusses the legitimate ends of criminal law; in so doing it attempts to show how the positive nature of criminal law is taken advantage of to achieve ideological ends too. Because the government of the time justifies the enforcement of criminal law as the rule of law, section two dwells on doctrine of rule of law. As the doctrine of rule of law borders the notion of limited government, and the coercive power of the government is manifested principally through criminal law, the content of the doctrine of the rule of law is discussed in order to give background to criminal law as an exercise of sovereign power. Section three then follows to chronologically illustrate how criminal law is used as an instrument of maintaining political power and ideology. It does so in putting the socio-political circumstances and events of the day in context. Often the sources are matters of common knowledge and provided for in the laws' preamble. However, some news reports are also examined in order to show the general political tendency of the time.

It can generally be observed that there is a tendency in the governments to make use of special legislation all the time. The Special Penal Code is historical black spot; however, its ramifications continued to date. Thus, Section four discusses the continuation of the spirit and activities of the Special Penal Code in an attempt to clarify certain conclusions. Section five makes an evaluation of the historically discussed criminal legislation in light of the doctrine of the rule of law as understood at the time of the application of those legislations. A final remark is also in order.

1. The Context of Political Changes and Criminal Law

Governments have a menu of actions from which they choose to achieve their legitimate ends. Because a government action must be based on law, more often than not, governments legislate laws to justify their actions on diverse

areas. In recent decades, the role of the state is expanding – as the ideology shifts from a *lassiez faire* to welfare state and administrative law is expanding too.[11] Those administrative actions are sanctioned by criminal law because it is the most effective instrument of social control. Such criminal sanctioning of administrative matters created inflation of criminal law[12]progressively changing the administrative state into a criminal state.[13] Such tendencies give the state a freehand to use criminal law for other purposes too.

The limitations on the criminalisation power of the state are developed in the area of criminal law rather than in other public laws, such as constitutional law and administrative law. There were various theories developed in order to limit the power of the state in resorting to criminal law, such as the principle of utility,[14] subjective rights,[15] protected legal interests,[16] and the common

[11] These are new developments in the common-law world particularly for the welfare state. Norrie, *supra* note 3, at 32, 33.

[12] Generally, see S. Eng, *Legislative Inflation and the Quality of Law* In A NEW THEORETICAL APPROACH TO LEGISLATION (L.J. Wintgens ed., Hart Publishing 2002).

[13] After the 'New Deal' the US Congress delegated extensive administrative rulemaking power to executive agencies. Thus, Barkow describes such state of affairs as 'administrative state'. R.E. Barkow, *Prosecutorial Administration* In 99 VIRGINIA L. REV. 277 (2013). R.E. Barkow, *Separation of Powers and the Criminal Law* In 58 STANFORD L. REV. 989, 994 (2006). In the Ethiopian case, the administrative agencies are also delegated criminal lawmaking power. Simeneh and Cherinet, *supra* note 4.

[14] Beccaria appears to have convoluted the social contract theory justification of sovereignty for criminalisation and enforcement of punishment, and the principle of utility in the criminal law. He further crossed over to the notion of the common good. C. BECCARIA, BECCARIA ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (R. Bellamy ed., Cambridge University Press 1995) (1764) at 7, 9, 11, 12.

[15] M.D. Dubber, *Theories of Crime and Punishment in German Criminal Law* In 53 AM. J. OF COMP. L. 679, 686, 687 (2005). T. VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW (M. Hiley Tr., Springer 2014) at 49, 51, 56.

[16] The doctrine of legally protected interest originally developed by Karl Binding to expand the criminalisation power of the state. Today, we are arguing for a limited criminalising power of the state based on that same doctrine. See, Dubber, *supra* note 15, at 686. VORMBAUM, *supra* note 15, at 49, 129,

good.[17] Despite the stark difference in the core of these theories, they converge on two central issues. Criminal law is used for the prevention of crime and it must be used as a last resort measure. The concern is always criminal law is used to achieve other purposes than the prevention of crime or as first resort state action.

Ethiopia had several government changes, many of which are traditionally accompanied by violence making political stability always a central concern of the government of the time. In the modern history of the change of governments, it appears to be a natural course of action that the new government makes various legal reforms and such reforms were led by criminal law, not by a constitutional law. Emperor Haile Selassie, for instance, signed the 1930 Penal Code into law before the adoption of 1931 Constitution.[18] When it established itself by Proclamation No 1 of 1974, PMAC promised a constitution would soon be adopted.[19] It had also promised to establish a Special Courts-Martial to deal with the 'past

[17] The doctrine of protected legal interests is expanded and refined in its content to refer to the common good as incorporated in the provisions of art 1 of the Criminal Code. Also, see S. Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct* In 11 NEW CRIM. L. REV.: AN INTER'L AND INTERDISCIPLINARY J. 409, 413 – 18 (2008).

[18] Graven, *supra* note 6, at 272.

[19] The *Provisional Military Government Establishment Proclamation No 1 of 1974* ('Proc No 1 of 1974') art 5(b) provided that 'the new draft constitution, the promulgation of which has been demanded by the Armed Forces Council *as a matter of urgency*, shall be put into effect after necessary improvements are made to include provisions reflecting the social, economic and political philosophy of the new Ethiopia and to safeguard the human rights of the people.' [emphasis added.]

events'.[20]The Special Courts-Martial had been established immediately while the constitution took more than 13 years to come by.[21]

Two months after their detention, all the former high-ranking Imperial officials, were summarily executed on 23 November 1974 on the order of PMAC.[22] It was only after such execution that the Special Courts-Martial went into business. Apparently, the Government was not satisfied with the way the Special Penal Code help accomplish its objectives. Thus, the Code had been revised in 1981 to increase the punishment for several of those offences and to include few other offences.[23] The Special Courts-Martial had also been replaced with Special Courts wherein civilian judges were presiding, this time, with both first instance and appellate jurisdiction.[24] Unlike that of the Special Courts-Martial, the decisions of the Special Court are available. This Special Court again was later merged with the regular courts we know of today.[25] The creation and transformation of the Special

[20] *Id*., art 9. It also provided that 'judgements handed down by the Military Court shall not be subject to appeal'.

[21] *The Special Courts-Martial Establishment Proclamation No 7 of 1974* ('Proc No 7 of 1974') and *The Special Penal Code Proclamation No 8 of 1974* ('Special Penal Code'), respectively.

[22] The letter written on 22 November 1974 with 'Extremely Urgent' note at the top was signed by Mengistu Hailemariam. It states that it is a unanimous political decision of the Dergue that those individuals be killed by a firing squad. _____ *Important Political Decision Rendered by Provisional Military Administrative Council*, ADDIS ZEMEN, Addis Ababa, 26 November 1974, at 1, 6 and 7 (in Amharic).

[23] *The Revised Special Penal Code Proclamation No 214/1981* ('The Revised Special Penal Code').

[24] *Special Court Establishment Proclamation No 215/1981* ('Proc No 215/1981') art 2 establishes 'First Instance Special Court' and 'Appellate Special Court'. Like its predecessor, art 4 (and art 22) of this proclamation give the exclusive jurisdiction on civil and criminal matters to such Special Court.

[25] The PDRE Constitution art 100(1) established 'one Supreme Court' whose power would be defined by the National Shengo, art 63(3)(c). The PDRE Supreme Court had, thus, been established by *Supreme Court Establishment Proclamation No 9/1987*. The Supreme Court had civil, criminal and military divisions, art 17(1). Proclamation No 215/1981 was repealed and all those matters arising under the Revised Special Penal Code would be given to the

Penal Codes and the Special Courts have historical parallels in the former Soviet Union, and other former Latin American military dictatorships, such as Chile and Argentina.[26] It is stating the obvious that both the norms and the institutions were used as political tools of convenience.

After the Military regime was deposed in 1991, the new government did not adopt a new criminal law immediately because the criminal law was already rich. However, it established a Special Prosecutor's Office ('SPO'), and prosecuted those former regime officials including all the PMAC founding members alive.[27] Even though the Transitional Period Charter was adopted before the adoption of the SPO Proclamation, because there were several groups contending for power,[28] those former officials were all arrested within

High Court. The High Court is established by the *High Court and Awraja Courts Establishment Proclamation No 24/1988*. It is worth noting that Military Courts were also established by *Proclamation No 10/1987* with traditional military jurisdictions. Finally, Central Courts were re-established by *Central Government Courts Establishment Proclamation No 40/1993*.

[26] See for instance, L. HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (Cambridge University Press 2007). A.W. Pereira, *Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile* In RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (T. Ginsberg and T. Mustafa eds., Cambridge University Press 2008). HANS PETTER GRAVER, JUDGES AGAINST JUSTICE (Springer 2015). K. Grzybowski, *Main Trends in the Soviet Reform of Criminal Law* In 9 THE AM. UNI. L. REV. 93 (1960).

[27] Girmachew Alemu Aneme, *The Anatomy of The Special Prosecutor v. Colonel Mengistu Hailemariam, et.al., (1994-2008)* In 4 INT'L JOURNAL OF ETHIOPIAN STUDIES1,(2009) at 1 – 3.

[28] The principal participants of the transitional period conference were EPRDF, OLF, EDU and ALF. There were also representatives of Benishangul, Gambella, Guraghe, Hadiya, Sidama, Somali, Adere, Kenbata, Wolaita, among others. ENA, *Conference Participants and Observers*, ADDIS ZEMEN, 06 July 1991, Addis Ababa, at 1, 8 (in Amharic). The Transitional Government legislative body was established with 87 seats and 81 of them were allocated to those groups participated in the Conference. (*Id.*) It is to be noted that some of those organisations were declared 'terrorist' organisations' by the House of Peoples' Representatives as per the *Anti-Terrorism Proclamation No 652/2009* ('Anti-Terrorism Proclamation') art 25(1). Adem Kassie Abebe, *From the 'TPLF Constitution' to the*

the first few days soon after EPRDF took control of the city of Addis Ababa and they were awaiting their trial while the Transitional Period Charter was being 'negotiated'.[29]

It is evident that criminal law has a unique feature that, in the political power struggle, while a constitution vests power in a 'limited government', a portion of the criminal law may effectively be used to deny power to 'the other' whoever claims or aspires to claim power legitimately or otherwise. In making use of criminal law, the new government asserts either of the two things or both; that is, it intends to install 'rule of law', and the previous government has failed to deliver such a public good. There are historical evidence for this assertion. The first ever written constitution, the 1931 Constitution, vests all the power of a government in the Emperor and makes his power perpetual and succession to the throne only through bloodline.[30] The official narration for adopting a constitution (and a positive criminal law) was to advance the country in positive direction, and maintenance of rule of law, making power succession predictable.[31] In fact, there was an elaborate discussion on the virtues of 'the law'.[32] The Constitution under article 6 also provides that the monarch would act 'in conformity with the established rule of law'.[33] The absolute power of the Monarch and the perpetual nature of his

'Constitution of the People of Ethiopia': Constitutionalism and Proposals for Constitutional Reform In CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA: CONTEMPORARY PERSPECTIVES FROM SUB-SAHARAN AFRICA (M.K. Mbondenyi and T. Ojienda eds., PULP 2013) at 56.

[29] E.g., see Girmachew, *supra* note 27. Adem, *supra* note 28, at 54.

[30] The 1931 Constitution art 3 provided that 'The Law determines that the Imperial Dignity shall remain perpetually attached to the line of His Imperial Majesty Haile Selassie I'.

[31] ----------, *Patterns of Progress: Constitutional Development in Ethiopia Vol. XI* (Ministry of Information 1968) at 25, 32.

[32] *Id.*, at 32, 33.

[33] The 1931 Constitution, art 6 provided that '[i]n the Ethiopian Empire supreme power rests in the hands of the Emperor. He ensures the exercise thereof in conformity with the established law.'

power and the bloodline succession to the throne is maintained in the 1955 Revised Constitution.[34]

Likewise, the PMAC vested all government powers on itself.[35] Any opposition to 'the changes' is prohibited and anything against the motto 'Ethiopia Tikidem' would be severely punished.[36] The Council promised to have a constitution in the 'immediate future' in which principles of democracy and human rights are enshrined and blames the previous government for monopoly of state power and abuse of such power.[37] The combined reading of these two statements would indicate that the rule of law is what the would-be coming constitution was sought to address. In the same vein, the FDRE Constitution recognise 'past grave injustices' and desires to establish a political community founded on a democratic order based on the rule of law and respect for individual fundamental rights and freedoms as well as group rights.[38]

There are two points of clarification. First, as alluded to earlier, criminal law is not used only for illegitimate purposes by those in power. Substantial part of the criminal law provisions are meant to promote public good by protecting life, liberty, property, good name, and social morality so that social existence of the individual may be possible. Likewise, the stability of the state and the incorruptibility of public offices is a common good.[39] The fact is that there are those few provisions that are susceptible to abuse in order to promote other

[34] The provisions of art 3 of the 1931 Constitution became art 2 of the Revised Constitution of 1955. The provisions of arts 3 – 25 govern succession to the throne.
[35] Proc No 1 of 1974, *supra* note 19. *Definition of Powers of the Provisional Military Administration Council and its Chairman, Proclamation No 2 of 1974* ('Proc No 2 of 1974') art 6.
[36] Proc No 1 of 1974, *supra* note 19, art 8. Special Penal Code, *supra* note 21, art 35.
[37] Proc No 1 of 1974, *supra* note 19, preamble paras 1, 2, 3.
[38] FDRE Const., preamble para 4.
[39] Dubber, *supra* note 15, at 684.

values that are aggressively prosecuted and remain in the news media. Second, criminal law is not the only branch of law that is used as a means for such purposes. The other areas of public law, such as constitutional and administrative laws, are also used for such purposes. However, they too are sanctioned by criminal law which may not be necessary.

Otherwise, the laws recognise that the state's power is not unlimited. Even the first Imperial Constitution article 6 provides that the king acts in accordance with the 'established rules of law'. This is a classical contradiction that he is the one making the law and at the same time he is bound by the laws he made. Such events appear to be occurring all the time. In the period of the PMAC, the Council is the highest organ and its chairman can set the agenda for discussion and acts on behalf of the Council. His actions were not any different from the Monarchical era except the fact that the Chairman of the Council was not claiming entitlement based on divinity.

It is in such sorts of political instability and infighting for dominance that the criminal laws are adopted and the institutions are established by the body in power. Unmistakably, the enforcement of such criminal law is presented as maintenance of rule of law.[40]The doctrine of the rule of law is about a limited government whose actions are justified by law.[41] Criminal law is quintessentially a manifestation of the state's coercive power.[42] Thus, whether

[40] As soon as PM Abiy Ahmed came to power, the EPRDF Executive Committee decided to release people detained for protesting against the Government and for violation of the state of emergency rules, in order to expand the political space (this is just not to say 'political prisoners') both the Prime Minster and the Attorney General state that 'the rule of law has to be maintained'.

[41] Barkow (2006) *supra* note 13, at 994.

[42] *Id.*, at 992, 993. N. PERSAK, CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS (Springer 2007) at 6, 10.

the state's power regarding the use of criminal law is limited is a proper area of enquiry.[43]

2. Doctrine of the Rule of Law

The doctrine of the rule of law has always been a point of debate for its content and connotation. However, there are intuitively understood qualities of the doctrine of the rule of law. It is a rule of law not of men and that the law is equally applied and that the state itself is also subject to law for all its activities.[44] Each of these assertions are also subjects of reasonable differences. However, there is a general agreement that the rule of law is 'good' as such for it is said to have the virtue of limiting discretion and establishing certainty.[45]

The classification of the discussions on the doctrine of the rule of law into the formal and the substantive rule of law made by Paul Craig is still guiding.[46] The formal doctrine of the rule of law is about formal things, such as the existence of rules and the manner such rules are adopted. Such definition of the rule of law does not question the content of such law. Because it is concerned with the ontology of the rules, some call such approach to the rule of law as 'strong legalism'.[47] In a general reference, the proponents of such

[43] Barkow (2006) *supra* note 13, at 993.
[44] D. Dyzenhaus, *Recrafting the Rule of Law* In RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER (D. Dyzenhaus ed., Hart Publishing 1999) at 1, 2, 8, 9.
[45] Ibid. Also, see B.Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (Cambridge University Press 2004) Chapter 11, at 137 ff.
[46] P.P. Craig, *Formal and Substantive Conception of Rule of Law: An Analytical Framework* In PUBLIC LAW 466 (1997).
[47] L.J. Wintgens, *Legislation as an Object of Study of Legal Theory: Legisprudence* In LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 9, 19 – 20 (L.J. Wintgens ed. Hart Publishing 2002).

approach are also called 'democratic positivists' because, often, they tend to be Benthamite.[48]

The substantive doctrine of the rule of law, on the other hand, takes into consideration both the form of the law, i.e., whether there is a law on the basis of which the state acts, how such law is made, as well as it enquires into the content of such law. There is intense debate regarding what to include in the nature and content of law in order for its compulsory application to constitute a rule of law. Brian Tamanaha, for instance, argues that the rules need to have certain quality and content without which the rule cannot be validly complied with.[49] Because this approach goes beyond the positive law to consider other disciplines or subjects, such as individual rights, morality, economics and sociology, it is also called 'weaker legalism'[50] and some refer to its proponents 'liberal anti-positivists'.[51]

Having these matters in mind, we now turn to the discussion on the formal and substantive doctrines of the rule of law. In his cascaded discussion from the thinnest doctrine of the rule of law to the thickest, Tamanaha further classifies the formal doctrine of the rule of law into three categories and the substantive doctrine into another three categories.[52] Because his classification is detailed and makes our discussion more intelligible, we rely on it without necessarily subscribing to it.

[48] Dyzenhaus, *supra* note 44, at 2 – 4.
[49] See text for notes 56 and 57, *infra*.
[50] Wintgens, *supra* note 47, at 19, 20, 25. Dyzenhaus, *supra* note 44, at 4, 5.
[51] Dyzenhaus, *supra* note 44, at 3.
[52] Following Craig's classification of theories on rule of law into formal and substantive (*supra* note 46) Tamanaha discussed the formal theories of rule of law under Chapter 7 and the substantive theories under Chapter 8. TAMANAHA (2004) *supra* note 45.

The first type of the formal rule of law is what he calls the *rule by law*.[53] This understanding of the rule of law requires that there be a law only on the basis of which the state acts however it is made.The second type of the formal doctrine of rule of law is *pure legality*,[54] i.e., the law must meet the legal requirements of the law-making process. The third type of formal rule of law requires pure legality but it also requires that the law should be *democratically made*.[55] What is common among the three categories is that they all are content with the positive law and they do not go beyond. Doctrine of the rule of law in the formal sense is complying with 'a rule'.

Substantive doctrines of the rules of law are also classified into three but we discuss only the two of them which are relevant to our discussion. The first category of substantive rule of law requires pure legality, but it also requires respect for *human rights*.[56] Thus, the law-making power of the legislative body is limited by fundamental rights and freedoms of citizens.The second category of the substantive doctrine of rule of law further requires it should be *democratically made*,[57] which, as the pure formal doctrine of rule of law, is without content. Unlike, the formal rule of law, the substantive rule of law considers matters that are 'beyond' the positive law. Those two last categories overlap with the doctrine of constitutionalism.[58]

Before going into the details, there are few theoretical cautionary notes to make regarding how the theory of law defines almost everything else that follows, including doctrine of the rule of law itself. Theory is a method of solving a given problem because it gives paradigm to the enquirer on the

[53] TAMANAHA (2004) *supra* note 45, at 91-93.
[54] *Id.*, at 93-99.
[55] *Id.*, at 99-101.
[56] *Id.*, at 102-108.
[57] *Id.*, at 110-112.
[58] TAMANAHA (2004) *supra* note 45, Chapter 11.

subject at hand, such as law, in our case.[59] The theory of the nature of law defines the meaning of such notion of law, because it affects the method in law and the role of the institutions interpreting the law, which ultimately affect the doctrine of the rule of law.[60] This is because, first, the type of theory we choose determines how we see the relationship between law and other subjects, such as morality or politics. For instance, positivism makes a clear boundary between law and those 'other things' that are beyond 'the law', such as the social values and politics.[61] Positivism is about whether the law is validly made without looking at its content; the existence of the law as valid law made according to the procedure that empowers the making of such law is the necessary and sufficient condition without questioning the content of such law because positivism does not deal with matters that are not part of 'the law'.[62]

The nature of theory of law also determines the method of the legal system, such as interpretation of the law. For positivism, rules are sufficient in themselves, therefore, it utilises exegetic method of interpretation.[63] Other schools, such as natural law and realist schools consider matters that are said to be 'beyond the law'; they utilise hermeneutic interpretation method.[64] Consequently, the theory of law the system adopts further determines the role

[59] Barlow and Kauzlarich, *supra* note 3, at 1-15.
[60] Wintgens, *supra* note 47, at 18. Dyzenhaus, *supra* note 44, at 2 – 4.
[61] M. ZAMBONI, LAW AND POLITICS: A DILEMMA FOR CONTEMPORARY LEGAL THEORY (Springer 2008). Also, see K. Touri, *Legislation Between Politics and Law* In LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 9, 102 ff(L.J. Wintgens ed. Hart Publishing 2002).
[62] Wintgens, *supra* note 47, at 14.
[63] Wintgens, *supra* note 47, at 11, 17, 18.
[64] *Id.*, at 11, 17, 18. See, e.g., A. Ornowska, *Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe* In INTERPRETATION OF LAW IN THE GLOBAL WORLD: FROM PARTICULARISM TO A UNIVERSAL APPROACH (J. Jemielniak and P. Miklaszewicz eds., Springer 2010). R.S. SUMMERS FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY (Cambridge University Press 2006).

of institutions, such as the courts and the legislature. For instance, in positivist school, the courts' authority is limited to interpreting and applying the law in a formal way, leaving major actions to the legislature.[65] As such, governing through law is considered to be the sovereign authority of the lawmaker.[66]

In fact, the principle of legality requires that criminal law be positive law. Stated otherwise, the rules must be pre-declared. That, however, does not mean criminal law subscribes to the positivist theory of the nature of the law. There are few general observations one can reasonably make. First, criminal law displays intuitional character; it is both normative in that it declares rules of conduct and it has real consequence in life.[67] Second, its interpretation is guided by several postulates and principles that are not necessarily written in the law; included are, the principle of legality, the principle of unity of legal system and coherence, non-retroactivity of criminal law, equality before the law, and the principle of lenity.[68]

Third, at least in the discussion of criminalisation, politics has significant role in criminal law. By definition, criminalisation is a borderline between law and politics that it cannot squarely fall under positivist theory of law.[69]

[65] E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES (Cambridge University Press 2005) at 255.

[66] D.S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (Cambridge University Press 2006) at 26, 27. B. KRIEGEL THE STATE AND THE RULE OF LAW (M.A. LePain and J.C. Cohen Tr., Princeton University Press 1995) at 31.

[67] O. WEINBERGER, LAW, INSTITUTION, AND LEGAL POLITICS: FUNDAMENTAL PROBLEMS OF LEGAL THEORY AND SOCIAL PHILOSOPHY (Springer 1991). M. LA TORRE, LAW AS INSTITUTION (Springer 2010).

[68] Ornowska, *supra* note 64, at 254, 255. Also, see H. AVILA, THEORY OF LEGAL PRINCIPLES (Springer 2007) Chapter 3, Metanorms. Simeneh Kiros Assefa, *Methods and Manners of Interpretation of Criminal Norms* In 11 MIZAN L. REV. 88 (2017) at 100 – 110.

[69] ZAMBONI, *supra* note 61, at 9, 23. PERSAK, *supra* note 42, at 23. Also, see Tuori, *supra* note 62. Simeneh Kiros Assefa, *Legisprudential Evaluation of Ethiopian Criminal Law-Making* In 14 MIZAN L. REV. 161 (2020) at 165 – 167.

Criminalisation is a process by which a yet to be law conduct, which is not in the realm of positive law, is transformed into an already law, which is in the realm of the positive law. In fact, positivism has been blamed for every evil that occurred in history, including Nazism, Apartheid, slavery and colonialism.[70] Each of those institutions claimed rule of law and by that they mean positive law.

The question then would be which doctrine of rule of law is applied in the Ethiopian criminal justice? All of those successive Governments appear to have similar theory of the nature of law, either expressly adopted or actually implemented. However, as we are reviewing a fairly long time range and different political systems, in order to evaluate the doctrine of the rule of law of the time, it is appropriate to evaluate the prominent criminal legislation of such period.

3. Ethiopian Criminal Laws in Historical Context

3.1. The Fetha Nagast

The *Fetha Nagast* is a religious text as well as a legal document. The first part, composed of 22 chapters, deals with religious matters.[71] The second part, composed of 51 chapters, deals with secular matters because it is applicable to citizens in their everyday life. The *Fetha Nagast* appears to be a universe of the law complemented by the Pentateuch and other scriptures;[72] the criminal

[70] See, for instance, U. MATTEI AND L. NADER, PLUNDER – WHEN THE RULE OF LAW IS ILLEGAL (Blackwell Publishing 2008).

[71] The first part deals with the Church, the Holly Books accepted by the Church, Baptism, appointment of Patriarchs, Bishops, Priests and Deacons, and the various mass services, fasting, prayers, etc.

[72] This part also deals with, for example, betrothal, dowry, marriage, prohibition of concubines, loan, pledge, guarantee, deposit, mandate, liberty, slavery, guardianship, sales, purchase, lease, loan, will regarding property, succession, and various types of crimes, appointment of judges, and hearing of witnesses.

law, given a relatively expanded coverage than other subjects,[73] is found in the second part and is highly influenced by the first part.

It is evident that those rules are meant to maintain law and order in the church structure, instil morality and obedience in the society and maintain law and order. The content of *Fetha Nagast* was progressively revised by religious fathers, also enforced by the monarch. Once the king is anointed by the Church, the latter also sanctions that any challenge to his power is meted out severely, thereby maintaining the monarchical power.[74] The *Fetha Nagast* had a commanding obedience because of the religious influence it had.[75]

3.2. The 1930 Penal Code

On the day of his coronation, Emperor Haile Selassie signed the 1930 Penal Code into law.[76] In order to inspire greater legitimacy, the Penal Code claims to be a revision of the *Fetha Nagast*; however, a closer examination shows otherwise. The *Fetha Nagast* is dominated by religious matters. Therefore, the conducts that are criminalized in the *Fetha Nagast* are religious and moral offences, such as blasphemy and fornication.[77] The Penal Code does not have similar content.[78]

[73] Criminal provisions are found in different parts but chapters 44 – 50 deal with criminal matters directly.

[74] See the trial of one Surahe Krestos, the chief of Wolkait in the reign of Iyasu II (1730-1755). He had been adjudged 'a rebel', which is an act of high treason, a crime against the monarch. He was judged not worthy of 'being spared from death'. FETHA NAGAST: THE LAW OF THE KINGS (Trans. Abba Paulos Tsadwa, Law Faculty HSIU 1968) at xxi-xxv.

[75] *Fetha Nagast*, *supra* note 74, at xix. Graven, *supra* note 6, at 268 – 270.

[76] Graven, *supra* note 6, at 272.

[77] Chapters 46 and 44, respectively.

[78] The association of the Code with the *Fetha Nagast* is only for legitimacy purpose. Graven, *supra* note 6, at 273, note 15.

The Code is relatively well organised and modern for its time. Even though it appears to be divided into five parts, it can generally be said it has a general part and a special part. The first part appears to be the general part governing punishment – it defines the types of punishment, aggravation and mitigation grounds, defences, and calculation of fines. The second, third and fourth parts govern crimes against the government, against persons and against property, respectively. The fifth part governs contraventions. In this Code, there are only three provisions regarding religious crimes reducing them to minor crimes – articles 270 – 272.

However, the instrumental nature of criminal law may be seen in context. When Emperor Menelik II passed away, Lij Iyasu succeeded the throne. He was dethroned by conniving nobilities, putting Empress Zewditu, the daughter of Emperor Menelik II, as the Queen and Ras Teferi as her Reagent.[79] When Queen Zewditu died in dubious manner, Ras Teferi had been designated for the throne in 1928 and anointed as King of Kings in 1930. Teferi was aware of the various front battles to succeed to the throne even against Queen Zewditu, and the main resistance coming from Lij Iyasu assisted by his father, *Negus* Michael.[80] He knew maintaining power in the traditional combat style is difficult. Thus, as soon as he came to power, he adopted the 1930 Penal Code.[81]

[79] EMIRU HAILE SELASSIE, FROM WHAT I SAW AND WHAT I RECOLLECT (second edn, in Amharic, Addis Ababa University Press 2002 EC) at 53 – 89.

[80] Negus Michael was granted posthumous amnesty on 02 November 1952, on 23rd coronation anniversary of His Imperial Majesty apparently only to 'make peace' with the people of the province of Wollo. _____, *His Imperial Majesty's Benevolence to the Nobilities and People of the Province of Wollo and Amnesty to Negus Michael,*ADDIS ZEMEN, 02 November 1952, Addis Ababa, at 1. (in Amharic).

[81] Regarding development of those institutions and their work see, Simeneh Kiros Assefa, *The Development of Modern Criminal Justice Process and Institutions in Ethiopia (1907-1974): An Overview*In 18 MIZAN L REV 215 - 240 (2024) Notes (in Amharic).

The following year, in 1931, the first written constitution was adopted. The official narrative for the adoption of the Constitution focuses on modernization of the country; but there are also admissions made that it is meant 'for the maintenance of [the] government'.[82] However, the content of the Constitution shows that the Emperor was solidifying his power not only to himself but also to his successors.

3.3. Special Legislation and Penal Code Amendments

Between the 1930 and the 1957 Penal Codes, there were two major political events. The first was the Italian occupation of the country for five years. In restoring the Empire, the Penal Code was amended to punish those alleged to have had taken side with the invading Italian force for crimes of treason, espionage and allied offences.[83] In order to handle such matters, a Security Court had been established by *The Security Prosecution Proclamation 1947* (No 87/47) to be presided by nine judges. Records show that, Dejazmach Haile Selassie Gugsa was tried by this court and sentenced to death.[84]

The second political event was the federation of Eritrea to Ethiopia in 1952. Just a few months later, in November 1953, *Federal Crimes Proclamation No 138 of 1953* was adopted.[85] It is stated in the preamble and in the content of the Federal Criminal Law that it was meant for the protection of 'the Federal

[82] *Patterns of Progress*, *supra* note 31, at 28, 30

[83] This appears to be trial for war crimes as it had been conducted elsewhere at the conclusion of WWII. See *Penal Code (Amendment) Proclamation 1942 and Penal Code (Amendment No 2) Proclamation No 1942*. N. MAREIN, THE ETHIOPIAN EMPIRE – FEDERATION AND LAWS (Royal Netherlands Printing and Lithographing Company 1954) at 75.

[84] But there is no evidence that he was executed. *Id.*, at 76

[85] Marein calls this law 'a code in miniature' because it incorporates broad range of offences. *Id.*, at 181. However, the legislation clearly depicts its common-law touch as reflected in its definition of murder and manslaughter.

Government and of the integrity of the Federation'.[86] The obvious, yet unstated, objective of the Federal Criminal Law was in fact to suppress any opposition to the federation both from Eritrean and Ethiopian sides.[87] This legislation was probably the first to require registration of any type of non-governmental organisations at the pain of criminal punishment.[88]

In order to enforce such law, the courts established in 1942 were transformed into Federal Courts;[89] where the court hears matters of federal jurisdiction. One of the members of the Court is required to be of Eritrean origin appointed by the Monarch.[90]

3.4. The 1957 Penal Code

Subsequent to the adoption of the Revised Constitution, Ethiopia adopted the 1957 Penal Code. Suffice here to state only a few points. The Code is purely continental code, comprehensive and requiring special knowledge for its application. Second, it also incorporates enforcement of individual rights through criminal law.[91] Third, it restricts the criminalization power of the state by requiring it to comply with certain requirements, as provided for under article 1.[92] Yet, it had extensive provisions for the protection of the Monarch

[86] *Federal Crimes Proclamation No 138/1953* ('Proc No 138 of 1953') preamble para 2.

[87] See, e.g., treason, not reporting treason, inciting and aiding treason, conspiracy to overthrow the government, and acts against the territorial integrity of the Federation were severely punished. arts 3 – 9.

[88] Proc No 138 of 1953, *supra* note 86, art 10(B).

[89] *The Federal Judiciary Proclamation of Ethiopia No 130 of 1953*, later amended by *Proclamation No 135 of 1953*.

[90] Marein, *supra* note 83, at 77. There was no publication of appointment of Eritrean origin to such court. *Id.*, at 79.

[91] The Code introduced basic principles of criminal law which help in the interpretation and application of criminal law in general and the Penal Code in particular. Simeneh (2017), *supra* note 68, section 3.

[92] For in-depth discussion on the interpretation and application the provisions of art 1 of the Criminal Code, see Simeneh and Cherinet, *supra* note 4, section 2.3.

and the Imperial family the violation of which would be punished severely. It is the specific nature of those provisions that enticed the PMAC to adopt special rules for the protection of the members of the PMAC and their families.[93]

3.5. Special Penal Code Proclamation No 8 of 1974

When the PMAC came to power on 12 September 1974, it promised to have a special court to deal with 'past matters'. Thus, it would adopt the Special Penal Code, to address 'grave offences [committed against] the changed' political economy, matters that had not been covered by the Penal Code and that had come to light along with the political change; it would also provide for 'the internment of persons found committing crimes and considered to be a danger or the cause of danger to society' and to empower the court, when it is necessary, to confiscate any property or wealth obtained by illegal means'.[94] The belief that punishments in the Penal Code were 'light' is also expressed as one of the reasons for the adoption of the Special Penal Code.[95]

The Special Penal Code was made applicable retrospectively.[96] The reason was said to be most of those crimes provided for in the Special Penal Code 'have previously been defined in the criminal laws and the rest have long been recognized by natural law, custom and the practice of the professions' that they were not new.[97]

[93] See texts to notes 98 and 99 *infra*.
[94] Special Penal Code, *supra* note 21, preamble paras 5 and 6.
[95] *Id.*, preamble para 8.
[96] *Id.*, art 2(1), preamble para 11.
[97] *Id.*, preamble para 9.

The Special Penal Code had 6 Chapters; Chapter 1 provided for Offences against the Ethiopian Government and the Head of State.[98] However, this protection is also provided for the members of the PMAC personally and to their family.[99] All offences provided for under this Chapter carry the death penalty, except those committed in relation to preparation and offences against the activities of the PMAC.

Chapter 2 was about breach of trust and offences against the interest of the government; it provided for improper use of government property, crimes relating to tax and bribery. Those offences were all punishable by imprisonment and fine. Chapter 3 was about abuse of official power. Those offences were punishable by a lesser term of imprisonment and fine. Chapter 4 was about crimes against the judicial proceedings of the Special Courts-Martial, such as court contempt, perjury and improper translation, and aiding escape of detainees. These offences were also punishable by a term of imprisonment and fine, similar to those provided for under Chapter 3.

Chapter 5 contained signature offences to the time, such as offences against the Motto 'Ethiopia Tikidem', false or tendentious information, traffic in prohibited arms, and illicit making, acquisition, concealment or transport of dangerous materials without special authorization. Each of these offences were also punishable by a term of imprisonment and fine. Chapter 6 provided for additional punishments, such as fines to be imposed in addition to imprisonment when the crime is committed for gain,[100] confiscation of property[101] and internment as a special measure after a convict completes the

[98] Proc No 2 of 1974, *supra* note 35, arts 2 and 3 provide that the 'Council shall discharge [both] the functions of the Head of Government' and Head of State. The Head of Government and Head of State is the Provisional Military Administrative Council.
[99] Special Penal Code, *supra* note 21, art 7.
[100] *Id*., art 42.
[101] *Id*., art 43.

terms of his punishment should he be found to be 'dangerous to the national security and unity or public order and general welfare'.[102]

3.6. The Revised Special Penal Code

The long-awaited constitution had not come forth. However, the Government believed the Special Penal Code and its institutions needed revision. The revision of the Special Penal Code is only increasing those punishments which were already severe in comparison to the 1957 Penal Code. For instance, the punishment for smuggling money and property to foreign countries was originally punishable with 3 to 10 years' rigours imprisonment; this punishment is increased from 3 to 25 years' rigorous imprisonment.[103] Likewise, corrupt practices and acceptance of undue advantage were punishable with fine and in exceptional circumstances from 10 to 20 years' rigorous imprisonment. This punishment is increased from 1 to 25 years' imprisonment and in exceptional circumstances imprisonment for life or death.[104]

The Revised Special Penal Code also introduced few new offences, such as commission of counter-revolutionary acts (art 12),[105] offences against the economy (art 18), each of which is punishable with 5 to 25 years' rigorous imprisonment and in exceptional grave conditions, with life imprisonment or death. Failure to supervise, breach of duties and procurement of undue advantage (arts 24 to 26) were also newly introduced offences.

[102] *Id*., art 44.
[103] *Id*., art 18. The Revised Special Penal Code, *supra* note 23, art 19.
[104] Special Penal Code, *supra* note 21, art 17 and 19. The Revised Special Penal Code, *supra* note 23, art 20.
[105] As crime against the national motto 'Ethiopia Tikidem' (Special Penal Code, art 35) was dropped, one may consider this as a substitute. See note 131, *infra*.

The Special Penal Code cannot be seen in isolation. The Special Courts-Martial was also created to enforce the Code by virtue of *Special Courts-Martial Establishment Proclamation No 7 of 1974*. The Proclamation creates not only the court but also Special Prosecutor and Registrar of such court.[106]

The Court had two tiers – The Special General Court-Martial and the Special District Court-Martial.[107] Jurisdiction is allocated to these two courts in the schedule attached to the Special Criminal Procedure Code Proclamation No 9 of 1974, and those crimes that are considered serious are allocated to the Special General Court-Martial. The decisions of those courts were not subject to review.[108] However, cases in which serious penalties were imposed by the court may be reviewed by the Head of State.[109] Further, as the Courts-Martial was only in session in Addis Ababa, jurisdictions of the Special Courts-Martial were partly delegated to provincial civil courts.[110] In order to counter clandestine opposition, the Special Penal Code was amended in July 1976 to include death penalty for 'anti-revolutionary activities'.[111]

Perhaps a legislation that is worth mentioning is *A Proclamation to Provide for a Measures Ensuring Public Order, Safety and Welfare, No 10 of 1974*. This Proclamation assumes that there were people attempting to 'disrupt the peaceful change' in the country, and desiring 'to create chaos'.[112] It thus authorizes the State to take temporary measures to suppress threats by 'demand[ing] for surety' or to order the 'preventive detention' of those

[106] Proc No 7 of 1974, *supra* note 21, art 16.
[107] *Id*., art 3(1)(a) and (b).
[108] *Id*., art 10.
[109] *Id*., art 11.
[110] *Special Courts-Martial Establishment, Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 21/1975*.
[111] *Special Penal Code and Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, art 17.B.(2).
[112] *A Proclamation to Provide for a Measures Ensuring Public Order, Safety and Welfare, No 10 of 1974*, preamble.

persons the State believes to have posed 'a threat to public order'.[113] Such preventive detention may be ordered for a maximum of three months. However, the Government may extend it for a maximum of additional three months.[114]

After having things under relative control through several extra-judicial actions and the Special Courts-Martial,[115] the later was transformed to a Special Court.[116] All the detainees were released and there was actually no case to be transferred to the newly created Special Court.[117] The Court had both Special First Instance Court and Special Appellate Court which were presided by 'civilian judges'.[118] The Special Court is later integrated to the ordinary courts.[119]

We focused on the Special Penal Code and the Special Courts-Martial because they were signatures of the time. There were also other legislations that were meant to pursue the state's objectives. From the provisions discussed here, one can discern that they were meant to achieve certain objectives of the Government of the time that were not necessarily legitimate nor do they justify the use of criminal law or such severe punishment. The obvious government objectives were maintaining political power, pursuing a particular political ideology, maximizing government revenue and

[113] *Id*., art 3.
[114] *Id*., art 4(1), (2).
[115] See, *supra* note 22.
[116] Proc No 215/1981, *supra* note 24, arts 4, 22.
[117] ABERRA JEMBERE, AGONY IN THE GRAND PALACE: 1974 - 1982 (Shama Books 1991, in Amharic) at 172 – 73.
[118] Proc No 215/1981, *supra* note 24, arts 4, 5. Some of those military judges who were presiding in the Special Courts-Martial remained judges in the Special Court of First Instance and Appellate Court and civilian judges were also appointed.
[119] See, *supra* note 25.

maintaining public property. The reading of the decisions of the Special Court shows that the political rhetoric finds its way into the judicial decisions.[120]

3.7. Later Developments

Even though the Special Court had already come to an end in 1991, the direct application of the Special Penal Code continued for a longer period. In later times, the State is engaged in excessive use of criminal law which may be put under three categories. The first type of criminal norms include special penal legislation, such as *Proclamation to Control Vagrancy No 384/2004*, *Anti-Terrorism Proclamation No 652/2009*, and *Corruption Crimes Proclamation No 881/2015*. These proclamations were meant to govern conducts that were originally in the 1957 Penal Code and later in the 2004 Criminal Code.[121]

The second category of norms include administrative proclamations, such as the *Banking Business Proclamation No 592/2009* and *Commercial Registration and Business Licensing Proclamation No 980/2016*. These legislation were principally meant for administrative purposes but they also contain penal provisions that carry serious punishments. The third type of

[120] *Special Court Prosecutor v. Assefa Ayinalem Mehanzel* (Special First Instance Court, Crim. F. No A3/14/74, June 7, 1984). *Special Court Prosecutor v. Abdi Mohammed Ibrahim, et. al.,* (Special First Instance Court, Crim. F. No 62/75, December 8, 1983). *Special Court Prosecutor v. Addisie Libassie* (Special First Instance Court, Crim. F. No A/61/75, November 1, 1983). *Special Court Prosecutor v. Tamiru Kershewa* (Special First Instance Court, Crim. F. No 42/76, June 6, 1985). In all these cases, either in pleading the facts of the case, or as part of the sentencing hearing, parties present political matters in their favour. For instance, the defendant asserts that he belongs to a proletarian class, and that he is happy the revolution have come. On the other hand, the prosecutor presents that the crime is committed at a moment where the nation is at war from different fronts directed against the revolution.

[121] See Simeneh and Cherinet, *supra* note 4.

criminal norms were created by administrative agencies either by direct or indirect delegation of such criminal lawmaking power.[122]

4. Continuity of (the Spirit of) the Special Penal Code

The Special Courts-Martial Establishment Proclamation No 7 of 1974 and the Special Penal Code, Proclamation No 8 of 1974 were adopted simultaneously. The Special Penal Code was exclusively given to the Special Courts-Martial; and if there is doubt as to whether the 1957 Penal Code or the Special Penal Code applies, the Special Courts-Martial decides.[123] Further, if there is doubt as to the applicability of laws and jurisdiction of the court, the Special Prosecutor decides.[124] The proper contents of the Special Penal Code, as discussed above, were not entirely new. They also include prohibitions contained in the Penal Code.[125] However, the Code basically merges civilians

[122] *Id*., at 74 – 76. Also see 'Evaluating the Existing Criminal Law: Proposed Subjects and Manners of Revision' In Criminal Justice System Working Group, DIAGNOSTIC STUDY OF THE ETHIOPIAN CRIMINAL JUSTICE SYSTEM (FDRE Attorney General 2021) at 2 – 6. The political motives for the adoption of those legislation were made clear in the minutes of committee hearings. See for instance, Minutes of Public Hearing Organised by Law and Administrative Affairs, and Social Affairs Standing Committees on the Vagrancy Control Draft Bill, 12 January 2004 (later adopted into law as *Proc No 284/2004*). Brief Minutes of Public Hearing Organised by the Trade and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Draft Bills, 23 June 2010 (later adopted into law as *Proc Nos 685/2010* and *686/2010*, respectively). Brief Minutes of Hearing with Stakeholders on the Anti-Terrorism Draft Bill Organised by Justice and Administrative Affairs, Foreign Relations Affairs, Defence and Security Affairs Standing Committees, 24 June 2009 (later adopted into law as *Proc No 652/2009*). Brief Minutes of Public Hearing Organised by Commercial Affairs Standing Committee on The Commercial Registration and Business License Draft Bill, 27 June 2016 (later adopted into law as *Proc No 980/2016*).

[123] Proc No 7 of 1974, *supra* note 21, art 15(2).

[124] *Id*., art 18.

[125] Offences against the independence of the state – Special Penal Code (*supra* note 21), art 2 (Pen. C., art 253, 259), armed uprising and civil war – art 3 (Pen. C., art 252), provocation and preparation – art 10 (Pen. C., art 269), breach of trust, malversation and receipt of ill-gotten gains – art 12 (Pen. C., art 320), misuse or waste of government or public property – art 13 (Pen. C., art 319, 421), unlawful refusal to pay public taxes or dues – art 14 (Pen. C.,

with the Armed Forces and the Police Force to be tried before the Special Courts-Martial.[126]

The application of the Special Penal Code would come to an end when the Special Court, the court empowered to apply it, was abolished. The 'abhorrence' to such special courts is incorporated into the FDRE Constitution, article 78(4). However, the application of the substance and/or the spirit of the Special Penal Code continue to date in different forms.

4.1. Direct application of the Special Penal Code

The Special Penal Code was expressly repealed by the 2004 Criminal Code. Unfortunately, the Federal Supreme Court applied the Special Penal Code against the former Prime Minister, *Tamirat Layine*.[127] This opened the door for application of the same law by lower courts; see, for instance, the case against *Abate Kisho*,[128] the former Southern Nations, Nationalities, and Peoples' Regional State President, was tried before the Federal High Court as per the Special Penal Code.

4.2. Indirect application of the Special Penal Code

The Special Penal Code is criticised for various reasons, including for expediting the instrumentality of the law for achieving other ends. For

art 360), incitement to refusal to pay taxes – art 15 (Pen. C., art 361), forgery of government or public documents – art 16 (Pen. C., arts 367, 372, 383, 387), abuse of authority of search and seizure – art 24, (Pen. C., art 415), unlawful arrest or detention – art 25 (Pen. C., art 416), false or tendentious information – art 37 (Pen. C., art 346) are few comparisons.

[126] Special Penal Code, *supra* note 21, art 14(3) defines public servant as 'a person appointed or employed by the Government, a member of the Armed Forces, Police Force, Territorial Army, Parliament or a Judge'.

[127] *Federal Public Prosecutor v. Tamirat Layine et. al.* (Federal Supreme Court, Crim. F. No. 1/89).

[128] *Federal Ethics and Anti-Corruption Commission v. Abate Kisho, et al.* (Federal High Court, Crim. F No. 260/94).

instance, the law expressly stated that the existing punishments were light; it is made applicable retroactively.[129] Often the moral requirements were not included in constituting the crime.[130] The provisions are broad and vague both to comply with and to enforce[131] sometimes criminalising the very basic human activity of communication[132] or movement;[133] any activity could constitute a criminal activity when the public prosecutor initiates a case against an individual.

These features and flavours of the Special Penal Code are reflected in the various special penal and administrative legislations containing penal provisions. There are some reasonably discernible patterns of prosecution on

[129] Special Penal Code, *supra* note 21, preamble paras 7-9, art 2.

[130] In stating the crime, the lawmaker does not state the moral requirement. In such cases, resort may be had to the General Part of the 1957 Penal Code for interpretation, which the court did not.

[131] Art 35, for instance, provided that '[w]hosoever fails to comply with Proclamations, Decrees, Orders or Regulations promulgated to implement the popular Motto 'Ethiopia Tikidem' or hinders compliance therewith by publicly inciting or instigating by word of mouth, in writing or by any other means, is punishable with rigorous imprisonment from five to ten years'.

[132] It provided that any communication with anti-revolutionary group or individual is prohibited and severely punished. Proc No 96/1976, *supra* note 110, art 17.B.(1)(c).

[133] In a country where there was no free press or media, the Special Penal Code, *supra* note 21, art 10(5) provided that '[w]hosoever, with the object of permitting or supporting the commission of any of the acts provided for in Articles 2, 3, 5, 7, 8, and 9 [] launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate or subversive information or insinuations calculated to demoralise the public and to undermine its confidence or its will to resist, is punishable with simple imprisonment from one year to five years, or, where the foreseeable consequences of his activities are particularly grave, with rigours imprisonment not exceeding ten years'. Further, art 37 provided that '[w]hosoever, with intent to incite troops to indiscipline or insubordination, or to foment disorder between the military and the civilian population, puts forth or disseminates tendentious information which he knows to be false is punishable with rigorous imprisonment from three to fifteen years'. The Revised Special Penal Code, *supra* note 23, art 12(1)(b) provided that '[w]hosoever [] commits treason against the country and the people by illegally leaving or attempting to leave the country is punishment with rigorous imprisonment from five [] to twenty-five [] years'.

the basis of a particular legislation. At one time, violation of the press proclamation was aggressively prosecuted; in subsequent years, prosecution under the anti-corruption legislation was heavy handed; later the prosecution under the dangerous vagrancy proclamation followed; currently, aggressive prosecution is made under the anti-terrorism law and tax crimes.

These are legislations adopted while there are provisions in the Criminal Code that cover the subject; those legislations expand the scope of the criminal activity and increase the punishment.[134] In their statement of the offences, many of them are vague, and some are not providing for the moral element constituting the crime, thus, are enforced as strict liability crimes.[135] For instance, the Vagrancy Control Proclamation increases the punishment for those prohibited activities.[136] The Anti-Terrorism Proclamation punishes acts the content of which are not properly defined or are not justified.[137]

Some statutes expand the reach of the criminal law unreasonably. For instance, the basic conception of corruption is associated with public power.

[134] On the relationship between those special penal legislation and administrative legislation containing penal provision and the Criminal Code, see Simeneh and Cherinet, *supra* note 4, section 3.

[135] For discussions on how sentences are increased in those special penal legislation and administrative legislation containing penal provisions, see *Id*., section 4.3.

[136] Those acts that are listed under art 4 of the Vagrancy Control Proclamation are 'punishable with imprisonment not less than one year and half [sic], and not exceeding two years. In cases of exceptional gravity, the maximum penalty may be extended to three years' imprisonment'. Those conducts as provided for in the Criminal Code are, however, punishable by fine or detention for a few days.See, e.g., Criminal Code, Part III, art 842, 846, 854.

[137] The provisions of arts 3 and 4 of the Anti-Terrorism Proclamation, *supra* note 28, are always subject to debate as to their content. Further art 15 provided that a person leasing 'a house place, room, vehicle or any similar facility have the duty to register in detail the identity of the lessee and notify the same to the nearest police station within 24 hours'. A violation of those prescriptions is 'punishable with rigorous imprisonment from three to ten years'. The content of the obligation and the consequent punishments are reduced under art 33(3) in the *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*.

As such, only those exercising public power may be held criminally liable for corruption; other individuals may be held criminally liable for participating in such crimes of corruption. However, officers of the private entities are also made criminally responsible for corruption.[138]

One can discern that those legislations provided for heavier punishment than what is provided for in the Criminal Code. The statutes defining the crimes of corruption, for instance, provide for the heavier sentences, the standard punishment in the Criminal Code appears to be between 7 and 15 years. In aggravated circumstances, the sentence may even be higher.

4.3. Other Modes of Application of the Special Penal Code

The Special Penal Code is criticised for its distortion of criminal provisions from their theoretical base. The latent purpose of the Special Penal Code was to impose such oppressive criminal law in order to achieve other ends. The instrumentalist view of the court regarding criminal law finds every excuse to hasten such criminal conviction. For instance, the Revised Special Penal Code included a presumption of guilt unless defendant proves his innocence.[139]Likewise, the Special Penal Code has blanket criminalisation of conducts that are not clear at all.[140]

[138] In conventional understanding employee of a public organisation is a public servant exercising public authority. However, the *Corruption Crimes Proclamation No 881/2015* ('Proc No 881/2015') art 2(5) defines 'employee of a public organisation' as 'an employee who is employed, appointed or elected by members to work [] in a public organisation and include leaders of the organisation, any members of the board of directors or any person or committee involved in the formation of a share company or a charity'. The rest of the Proclamation criminalises conducts for which 'public servant or employee of a public organisation' may be held responsible for corruption crime.

[139] The Revised Special Penal Code, *supra* note 23, art 13(3). Provide the existence of the moral element was the common practice in the Special Court. This is the common practice also held in *Special Prosecutor v Deputy Commander Yihe'alem Mezgebu and Petty Officer*

The content and spirit of the Special Penal Code find their way into contemporary special penal and administrative legislations and continue their oppressive effect by making prosecutorial burden of proof lighter and conviction faster. For instance, contrary to the presumption of innocence, in crimes of corruption, the moral element is presumed to exist.[141] Even worse, if the prosecutor proves certain basic facts, the burden of proof shifts onto the defendant as though it is a civil case.[142] In some instances, the standards of proof are expressly made lower.[143] In the Anti-Terrorism Proclamation, contrary to the basic constitutional rights of the defendant to be protected against ill treatment, confessions are admissible irrespective of their quality;[144] contrary to the right of the defendant to have access to evidence,

Zenebe Shiferaw (Special First Instance Court, Crim File No 24/75, 15 April 1983); *Special Prosecutor v Oukube'ezgi Teklemariam*(Special Frist Instance Court, Crim File No 50/75, 29 November 1983). *Special Prosecutor v Let. Goshime Wondimtegegn* (Special First Instance Court, Crim File No 7/75, 26 March 1983).

[140] Special Penal Code, *supra* note 21, art 35. The Revised Special Penal Code, *supra* note 23, art 12 Commission of Counter-Revolutionary Acts.

[141] Proc No 881/2015, *supra* note 138, art 3 provides that '[u]nless evidence is produced to the contrary, where it is proved that the material element (the act) has been committed as defined in a particular provision providing for a crime of corruption perpetrated to obtain or procure undue advantage or to cause injury to another person, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person'.

[142] Proc. No 881/2015, *supra* note 138, art 21 provides that any public servant or employee of a public organisation, '(a) maintains a standard of living above which is commensurate with the official income from his present or past occupation or other means; or (b) is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means; unless he proves […otherwise] shall be punishable, without prejudice to the confiscation of the property [], with simple imprisonment and fine or in serious cases, with rigorous imprisonment not exceeding five years and fine not exceeding Birr five thousand'.

[143]*The Revised Anti-Corruption Special Procedure and Rule of Evidence Proclamation No 434/2005*, art 33 provides that '[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings'.

[144] Anti-Terrorism Proclamation, *supra* note 28, art 23(5).

evidence are admissible irrespective of access to defendant or not.[145] There are several provisions in different legislations criminalising conducts in blanket, leaving conducts criminalised vague.[146]

The foregoing discussion may not reflect a perfect comparison between two sets of provisions; but it shows the similarity of the belief behind them and how the actors think of the role of law and institutions in society and in the power relations. We can generally see that, even though the state has several tools at its disposal for achieving certain ends and enforcement of its political ideologies, it excessively uses the law and the criminal law in particular. Such inflation of the criminal law only reflects abuse of sovereign power.

There is extensive government intervention into the judiciary, both personally and institutionally.[147] However, the government established various strong prosecution institutions, such as the ethics and anti-corruption commission, the revenue and customs authority, the competition and consumers' protection authority, etc., with prosecution authority. In their heydays, they were powerful to the extent exerting influence on the court. They are all now brought under one umbrella.

There is also another aspect to the discussion. Obviously, vagrancy law is directed against the unemployed; the trade license and tax proclamations are directed against those who engage in trade and business; save for publicly

[145] *Id*., art 23(1), (2), (4), (5). The content of those provisions is vague in the English version; the Amharic version is rather clear.

[146] See, e.g., The *Banking Business Proclamation No 592/2009*, art 58(7) provides that '[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations[sic] or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years'.

[147] For instance, 1n 1996 several hundred judges were purged. JANELLE PLUMMER (ed), DIAGNOSING CORRUPTION IN ETHIOPIA: PERCEPTIONS, REALITIES, AND THE WAY FORWARD FOR KEY SECTORS (IBRD 2012) at 212 – 13.

traded companies executives, corruption crimes are directed against public officials and government employees. This nature of the law predisposes defendants for selective prosecution which makes the enforcement of the criminal law more political.[148]

5. Observations

Law and political power are closely linked because the law gives as well as denies such power. Legal manifestations of political debates often play into the hands of those in power. The law is the forum where all political fights are fought through and the Comaroffs appropriately call it *lawfare*.[149] In this essay we examine criminal law as one such forum of political battle for (maintaining) power; thus, it goes without saying that criminalisation and determination of punishments are political decisions.[150] Some even legitimately opine that the extent the criminal law strives to accommodate human nature reflects how liberal the state of the political affair is.[151]

In Section two, where the various doctrines of the rule of law are discussed, it is also indicated that, the scope of application of legal doctrines determines the content of the doctrine of the rule of law. In section three where the

[148] The Minutes of Public Hearing Organised by Law and Administration, and Social Affaires Standing Committees on Vagrancy Control Proclamation Draft Bill (12 January 2004) at 12, show that the concern that such law is intended against opposition political parties is raised. The authors argued in several cases based on art 25 of the Constitution against discriminatory prosecution, but the court never addressed the mater directly. See for instance *Public Prosecutor v. Ali Aduros, et. al.* (Federal High Court, Crim File No 134044, 11 December 2014).

[149] Comaroff and Comaroff, *supra* note 1, at 36, 37. TAMANAHA (2006) *supra* note 1, at 46.

[150] Substantial number of legal theories argue the existence of a strong relationship between law and politics except the degree varies. In fact, it is only legal positivism that holds the autonomous nature of law.Generally, see ZAMBONI, *supra* note 61. PERSAK, *supra* note 42, at 5-7.

[151] See, e.g., A. Masferrer, *The Liberal State and Criminal Law Reform in Spain* In THE RULE OF LAW IN COMPARATIVE PERSPECTIVE (M. Sellers and T. Tomaszewski eds., Springer 2010).

criminal laws are seen in historical context and their justifications for their adoption, we discussed both the one stated by the State, which makes the use of criminal law appear legitimate, and the unstated one which is reflected by the contemporary socio-political-economy. It is now appropriate to evaluate whether our criminal laws actually meet the contemporary understanding of the doctrine of the rule of law, since at least that was required by the existing consciousness of the nation.

The doctrine of the rule of law in Ethiopia is not defined anywhere both in the law and in judicial decisions; neither has it been a subject of academic research, but the doctrine of the rule of law has long lived in the political rhetoric having evolved over decades.[152] This may be abstracted from the laws of the country and their application.

The *Fetha Nagast* would be considered a classical natural law, because as a religious norm it invokes validity by conforming with divine orders. However, as it is made by religious fathers, at their convenience, to achieve religious and monarchical purposes, it is used as a means of social ordering; in this sense, the rule of law is only whether the prohibited conduct is provided for in the law. This gives the impression that the rule of law in this context revolves around legalism. However, the analogical interpretation of the criminal law makes the rule of law impossible to imagine.[153]

[152] It is only recently that Adem discussed the notion of rule of law in Ethiopia, which is not very flattering. Adem Abebe, *Rule By Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical*, CGHR WORKING PAPER 1, CAMBRIDGE: UNIVERSITY OF CAMBRIDGE CENTRE OF GOVERNANCE AND HUMAN RIGHTS 2011).

[153] There were several requirements listed in the *Fetha Nagast* for one to become a judge. The ninth requirement is that he must know the law and the rules of procedure – which fall under four categories and the fourth category is the potential judge 'must be able to draw analogies [] the ability of connecting the branches [] to the roots from which they sprouted'.

The preface of the 1930 Penal Code states that the Code is merely a revision of the *Fetha Nagast*; in the *Fetha Nagast*, the crimes are stated, and the punishments are not. The practice was that, once the judge finds guilt, defendant is sent to the government for sentencing because it is the governor who knew the punishment.[154] Further, the criminal law was subject to interpretation by analogy, inherited from the *Fetha Nagast*. This lack of knowledge of punishment on the part of the judge, and interpretation by analogy reflecting on the lack of knowledge on the part of the subject regarding the prohibited conduct, utterly contradicts the doctrine of rule of law.

Both the 1953 Federal Criminal Law and the 1957 Penal Code were adopted by the Emperor who was not elected. The 1974 Special Penal Code was adopted as per the provisions of the Proclamation that Defines the Powers and Responsibilities of the PMAC, an organ which vested all lawmaking power on itself.[155] The PMAC was composed of unelected army personnel to administer the country provisionally, until a constitution would be drawn up and elections were conducted.[156]

These phenomena give the impression that the lawmaker was principally focused on the doctrine of a valid positive law. Therefore, one may conclude that the doctrine of rule of law that existed at the time was merely having a valid law irrespective of its content.

The rule of law conception based on the existence of positive law is a positivist understanding of the law. Nevertheless, PMAC gives the impression

Obviously, there is no distinction between civil and criminal cases. *Fetha Nagast*, *supra* note 74, at 251, 253.

[154] The *Fetha Nagast* only helps in the determination of guilt. If the person is convicted, he wold be sent to the Governor for sentencing. Graven, *supra* note 6, at 273.

[155] Proc No 2 of 1974, *supra* note 35, art 6.

[156] Proc No 1 of 1974, *supra* note 19, art 6.

that it has naturalist theory of law; this is abstracted from two provisions of the law. First, the Special Penal Code was made applicable retroactively, based on the assertion that some of the crimes that had allegedly been committed by the previous regime were contrary to natural justice.[157] Second, it accused the previous government that human rights emanating from nature are coined as the ones that is granted from the Emperor.[158]

These appeals to higher moral principles give the impression that the state's theory of law is naturalist and, thus, the positive law would have been tested against a certain higher standard for validity.However, such appeals were matters of convenience and there had not been any higher standard against which the laws were being tested, nor had the Government complied with the positive law it put in place. Its claim to higher moral values is rather defeated by its assertion that it shall make all types of laws which is a claim of 'sovereignty' an antithesis of rule of law.[159]

An essential element of the pure legality notion of the rule of law is the clarity of the rules. First, the law was made applicable retroactively. Yet, some of the provisions, such as article 35 of the Special Penal Code were difficult to comply with due to the fact that the content of the provision could not properly be defined.[160] The content of the motto *Ethiopia Tikidem* was not subject to any discussion for that matter. Thus, what was contrary to this motto ever remained vague. Also, the fact that the law was made by the Council which had not been elected would make a big difference on the claim of the rule of law. However, a retroactively applied criminal law could never

[157] Special Penal Code, *supra* note 21, preamble para 11.
[158] Proc No 1 or 1974, *supra* note 19, preamble para 3.
[159] Proc No 2 of 1974, *supra* note 35, art 6. However, one should not forget the extra-judicial acts of the Government, despite all these powers. See, e.g., *supra* note 22.
[160] See *supra* note 131 for the content of the provisions the Special Penal Code, *supra* note 21, art 35.

be complied with and it contradicts to any doctrine of the rule of law. Thus, in those several decades, the Ethiopian criminal laws never complied with the elementary doctrine of the rule of law.

In later developments, the FDRE Constitution provides for fundamental elements of the thick concept of the rule of law. First, it recognises that sovereignty is vested in the people[161] not in the government or the law. Second, it commits itself to an establishment of a political community based on 'democratic order' which is further based on 'rule of law';[162] third, it also expresses its conviction in that such democratic order based on rule of law is possible only when there is respect for fundamental rights and freedoms of the individual and people.[163] For the rest, the Constitution provides that it is the supreme law of the land;[164] that 'human rights and freedoms emanating from the nature of mankind, are inviolable and inalienable'.[165] 'Every person has the inviolable and inalienable right to life, and the security of person and liberty'.[166]

In terms of the power arrangement, Ethiopia is a federal state. Power is distributed both horizontally and vertically. Thus, the powers of the Federal Government are provided for under article 51. The law-making power of the Federal House is also provided for under article 55. There are two provisions that require specific examination. Article 51(1) provides for a general

[161] The Constitution makes reference to the Ethiopian Nations, Nationalities and Peoples. FDRE Const., art 8(1). For the instrumental and fictitious nature of sovereignty, see Simeneh Kiros Assefa, *Sovereignty, Criminalising Power of the State and Fundamental Rights* In 12 MIZAN L. REV. 127 (2018).
[162] *Id*., preamble para 1.
[163] *Id*., preamble para 2.
[164] FDRE Const., art 9(1).
[165] *Id*., art 10(1).
[166] *Id*. art 14. The following provisions, arts 15 – 17, provide for the content of the right to life, liberty and security of person. art 18 specifically provides for the prohibition of cruel, inhuman and degrading treatment and punishment.

legislative power of the House on matters that are designated to fall under the power of Federal Government; yet, the criminal lawmaking power is expressly provided for under article 55(5).

Despite such constitutional normative and institutional limitations, however, there is an inflation of criminal law which resulted in the over-criminalisation and over-punishment of conducts.[167] Those legislations indicate that some of the conducts should not have been criminalised; and others are over-punished. Thus, the criminal law is unjustifiably used to achieve purposes other than the purpose of the criminal law. Some of the legal provisions are contrary to the constitutional provisions and values. Criminal laws made by government agencies are contrary to the constitutional institutional arrangement; even when the law is properly adopted by the House, when it punishes conducts that should not be criminalised, or those conducts are legitimately criminalised but over punished, which is contrary to the Constitution and the legislative promise to limited use of the criminal law.

The unlimited power of the House is obviously contrary to the basic notion of limited government; which in turn is contrary to the doctrine of the rule of law. The court is also applying those criminal rules scrupulously.[168] The claim of the Government that whatever the nature of the criminal law the House adopts has to be complied with and the claim that the rule of law should be maintained at the same time contradicts the very doctrine of rule of law however it is understood.

[167] For detailed discussion, see Simeneh and Cherinet, *supra* note 4, section 4.3.
[168] Simeneh Kiros Assefa, *Non-Positivist 'Higher Norms' and Formal Positivism: Interpretation of the Ethiopian Criminal Law* In 14 MIZAN L. REV. 85 (2020).

Conclusion

It is stating the obvious that there is a strong link between law and politics. Because of such strong link, political fights are fought through the law. In this fight law is used as a means to achieving various ends for those who have political leverage; at the forefront is the criminal law; there is an excessive use of criminal law. There is also a constant effort to increase punishment. While the single most important purpose of criminal law was maintaining the social existence of men, the instrumental nature of the law and institutions becomes a challenge to the rule of law.

The mere enforcement of criminal law is equated with the rule of law in this country. However, in order to better understand the doctrine of the rule of law or the instrumental nature of criminal law, one has to first adopt a particular legal theory regarding the nature of law. This theory is a paradigm which define the understanding of law, the method, the process and institutions. The Ethiopian law does not appear to be adopting a particular legal theory other than giving such impression.

The discussion should not be understood to make criminal law as a whole irrelevant because that part of the criminal law punishing, such as murder, rape and robbery helps to make the social existence of man possible. Nor is criminal law the only instrument in the political power struggle. The constitutional and administrative laws are also used to achieve such objectives but their overarching objectives are also sanctioned by criminal law. This makes criminal law quintessentially a political tool. The chronology clearly depicts that, for the most part, Ethiopia is administered by criminal law rather than constitutional or administrative law.

Yet, when the content of the law is not known, the lawmaking body is not democratically elected, the law does not meet the requirements of

fundamental rights; mere aggressive enforcement of criminal law cannot create a sense of rule of law. This is clearly so where there is no contemporaneous constitutional litigation to afford defendants protection from unreasonable criminal law and punishment.

Social Enterprise in Ethiopia: Examining Major Regulatory Issues

Tajebe Getaneh Enyew[β]*

Abstract

Traditionally, private entities were divided into for-profit and non-profit organizations, with the goal of maximizing profit and social impact, respectively. Recently, however, both social and financial maximization have begun to be carried out in a single institution. Investors start a firm with the primary purpose of fixing the community's social, environmental, economic, and cultural (SEEC) concerns while earning a modest profit. These types of businesses are called social enterprises. Social enterprises combine profit and social mission into a single company. Though their income is primarily derived from their business, they also get donor-funded grants and government subsidies. Though these types of businesses are flourishing in Ethiopia, there is no special regulatory framework in Ethiopia designed for social enterprise so far. They are treated and regulated as ordinary for-profit businesses under Ethiopia's existing Commercial Code. The goal of this article is to investigate the regulatory concerns of social enterprises and the viability of regulating them within Ethiopia's existing commercial laws. To achieve this goal, the author applies doctrinal research methods. Finally, the author discusses important regulatory challenges for social companies in Ethiopia. The major issues of social enterprise regulation identified by this study include business legal form, evaluation of the social mission, profit allocation, asset transfer, business sale and merger, disclosure of enterprise performance, the duty and liability of directors and managers to stakeholders, and supervision. The author concluded that the existing rules of the

[β]Department of Law, School of Law, Bahir Dar University, P.O.Box 79, Bahir Dar, Ethiopia. The author can be reached at tajebe01@gmail.com

Commercial Code are not suitable to regulate these major concerns of social enterprises. Thus, the author recommends that the government promulgate a specific law that regulates these issues of social enterprises.

Key words: Social Enterprise; Regulatory Concerns; Social Mission; Ethiopia

Introduction

Traditionally, private entities were dichotomized as for-profit and nonprofit.[1] While for-profit legal entities try to maximize the interests of shareholders, nonprofit organizations (NPOs) work to tackle social, environmental, economic, and cultural problems (SEEC) of societies by collecting income mainly from grants, "legacies," and membership payments.[2] Nowadays, however, the attributes of for-profit and nonprofit legal entities begin to be mingled in a single legal entity. On the one hand, nonprofit legal entities participate actively in income-generating activities like for-profit corporations to fund their mission.[3] On the other hand, for-profit business entities enter a deep commitment to solving the SEEC problems of the community like that of nonprofit entities.[4] The fuse of the features of nonprofit and for-profit entities in a single legal entity causes the creation of another category of a legal entity called social enterprise, which engages in commercial activity

[1]Mark S. Blodgett *et al*, 'Social Enterprise: Reaffirming Public Purpose Governance through Shared Value',*Journal of Business and Securities Law*, Vol. 16:No. 2, (2016), p. 306.

[2] Bob Dohert*yet al*, 'Social Enterprises as Hybrid Organizations: A Review andResearch Agenda', *International Journal of Management Reviews*, Vol.16:No. 4, (2014), p. 3.

[3] Matthew F. Doeringer, "Fostering Social Enterprise: A Historical and International Analysis', *Duke Journal of Comparative &International Law*, Vol. 20: No. 2, (2010), P. 293-294.

[4]Robert Katz and Antony Page, The Role of Social Enterprise, *Vermont Law Review*, Vol. 35, (2010), P 3.

with the prime mission of solving SEEC problems of society.[5] Such a type of legal entity is also known as shared value, mission-driven business, social business, social entrepreneurship, or triple bottom line.[6]

In the past few decades, the concept of social enterprise has expanded in many countries in Europe, USA, Latin America, and Asia.[7] As social enterprise is a strategic tool to solve SEEC problems in the community, it easily gets acceptance in many countries.[8] Even some countries develop separate policies and regulatory frameworks for social enterprises with the view of facilitating them.[9] The United Kingdom (UK),[10] United States of America (USA),[11] Canada (British Columbia and Nova Scotia),[12] and Italy[13]are countries that develop policies and regulatory frameworks for social enterprises.

The concept of social enterprise has also begun to be practiced in Ethiopia in recent periods.[14] There are many socially conscious businesses running their commercial activities to address SEEC problems of the society in Ethiopia.

[5] Alissa Mickels, 'Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe', *Hastings International and Company Law Review*, Vol. 32: No. 1, (2009), P. 279.

[6]Alicia E. Plerhoples, 'Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles toNew Social Enterprise Legislation',*Transactions: The Tennessee journalof Business Law*, Vol. 13: No.2, (2012)

[7]Jacques Defournyand Marthe Nyssens, 'Conceptions of Social Enterprise in Europe: A Comparative Perspective with the United States', (2012), p. 4.

[8] Id. p. 1 ff.

[9] Doeringer, *Supra* note 3, p. 306 ff.

[10] Id. p. 309.

[11] Id. p. 210 ff.

[12] Pauline O'Connor, 'The New Regulatory Regime for Social Enterprises in Canada: Potential Impacts on Nonprofit Growth and Sustainability', *Centre for Voluntary Sector Studies*, Ryerson University, Working Paper Series, Vol. 1, (2014,), P. 7 ff.

[13] Alissa Pelatan and Roberto Randazzo, 'The First European Benefit Corporation: Blurring the Lines Between 'Social' And 'Business', ___, p.1.

[14] British council, The State ofSocial Enterprises in Ethiopian, (2016), P. 7.

This type of business dons not, however, get policy recognition and support on the part of the government. Rather, they are subject to the same rules of regulation as other profit-oriented businesses.[15]They are licensed and registered in various business legal forms such as partnerships, companies, and sole traders.[16]They acquired the status of social enterprise through self-declaration after they were licensed as an ordinary business.[17] Nevertheless, there is some confusion about whether the existing business laws of Ethiopia are fit to regulate social enterprises in the country. Specifically, it is not clear whether the existing business regulations of Ethiopia are fit to regulate social enterprises' activities and to protect the interests of customers, the community, donors, and investors. The purpose of this article is, therefore, to examine the major regulatory concerns of social enterprises and the feasibility of regulating them through the existing commercial laws of Ethiopia.

1. Nature, Development and Features of Social enterprise

1.1. Nature of Social Enterprise

Though the social enterprise business type is expanded in many jurisdictions in the world, including Ethiopia, it lacks a single definition.[18] In some European countries, social enterprise is understood as not-for-profit entities that engage in commercial activities without profit distribution.[19] For example, in Italy, social enterprise is understood as a private legal entity,[20] in for-profit or nonprofit legal form, that 'perform *continuously and mainly*

[15] Id.
[16] Id.
[17] Id., p. 23.
[18]Blodgett *et al*, *Supra* note 1, p. 313.
[19] Mystica M. Alexander, 'A Comparative Look at International Approaches to Social Enterprise: Public Policy,Investment Structure, and Tax Incentives', *William &Mary BusinessLaw Review*, Vol.7: No 2, (2016), p. 9.
[20] Id.

economic activity of production or exchange of goods and services of social utility, aimed at achieving general interest goals'[21] and "either *reinvest* those profits in public benefit or use them to increase assets.[22] In some other countries, however, it is used to describe for-profit ventures that carry out a business to solve SEEC problems with possible distribution of limited profit to owners.[23] For example, in Belgium, it is understood as a company with 'a purpose of serving members of the community rather than seeking profit, independent management, a democratic decision-making process, and the primacy of people and labor over the capital in the distribution of income.'[24] In the UK, it is defined as 'a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise[sic] profit for shareholders and owners'.[25] Furthermore, in South Korea, article 2 of the Social Enterprise Promotion Act enacted in 2006 (SEPA) defined social enterprise as;

"[T]hose companies that have been certified (…) that engage in business activities such as the production and sale of goods and services with the objective of achieving social goals, including providing vulnerable groups with social services or jobs, thus improving the local residents' quality of life." Additionally, for an enterprise to be legally recognized as a social enterprise, the SEPA requires that it "adopt a decision-making structure where stakeholders (including service recipients, workers, etc.) are

[21]Weisen Tang, The Research on Social Enterprise Legal Systems —To Establish the Social Enterprise Legal System in China, PhD Thesis, Doctoral School in Comparative And European Legal Studies, (2014-2015), P. 16 ff.

[22] Alexander, *Supra* note 19, p. 9.

[23] Id., p. 2.

[24] Doeringer, *Supra* note 3, p. 308.

[25] Robert T. Esposito, The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation, *William & Mary Business Law Review*, Vol. 4, (2013), p. 646.

represented" and that "at least two-thirds of any profits generated (…) be used for the realization of social goals", thus making the elements of participatory decision-making and social contribution mandatory requirements. (*Quotations in original*)[26]

When we see the definition of social enterprise in the context of Ethiopia, we may not be able to get any literature or legal instrument that gives a clear definition of social enterprise, as it is a newly developed business type. In fact, an attempt is made in one literature to give some operational criteria of social enterprise.To mention it, research conducted by the British Council[27] tries to give some operational criteria of determining the social enterprise status of a business. According to this study, a social enterprise is a legal entity that (1) gives primacy for achievement of social goals or equal weight with the profit-making objective; (2) drives its majority fund from its business operation, but can receive donation; and (3) can distribute few profits but not as a primary mission.[28] Except for these criteria, there has been no any attempt thus far to define social enterprise in Ethiopia. Because of this, the author adopts the following operational definition:

Social enterpriseisa privately owned business that undertakes a business freely with the primary aim of solving SEEC problems of the community in tandem with limited profit distribution and that collects funds from multiple sources, including donations. Such entities, from the outset, registered as a for-profit legal entity, not as a non-profit entity or as a subsidiary of a nonprofit entity. Though their primary source of such entities is income

[26] Hwang Deok Soon *et al*, 'Social Enterprise in South Korea: International Comparative Social Enterprises Models (ICSEM)', ICSEM Working Papers No. 35, (2016), p. 4
[27] British council, *Supra note* 14, P. 7
[28] Id.

generated from their business, they also receive funds from donations, debt, and other sources of funding.

1.2. Development of Social Enterprises

In its modern sense, social enterprise emerged in Italy in the 1980s.[29]Social enterprise first originated from the nonprofit sector when "volunteers" undertake businesses to render "social services" and create job opportunities to the disadvantaged people.[30] It was in 1991 that social enterprise got official recognition when the Italian government recognized it in distinctive legislation, Social Cooperative Act (law 381/1991) and legal form, Social Cooperative.[31] Unlike traditional co-operatives whose primary aim is to serve their members, the Italian social co-operatives aim at serving non-member communities by undertaking business with total inhibition of profit distribution to members.[32] Inspired by the development of social cooperative social enterprises in Italy, most European countries also introduced Italian-like co-operative social enterprises at different times.[33] Italy also enacted another law on social enterprises in 2005 that allows any legal form of entity, be it non-profit or for-profit, to operate as a social enterprise, which is referred to as social enterprise et lege.[34] This law also prohibits the distribution of profit and assets to owners even during the dissolution period.[35]

Through different times, most European countries introduced the not-for-profit social enterprise type, which includes cooperatives, associations,

[29]Jacques Defourny & Marthe Nyssens, Social Enterprise in Europe:Recent Trends and Developments, EMES Research Network, 2001, P. 4.
[30] Alexander, *Supra* note 19, p.9.
[31] Id.
[32] Id., p. 5.
[33] Defourny and Nyssens, *Supra* note 7, p. 4.
[34] Alexander, *Supra* note 19, p. 9.
[35] Id.

foundations, and mutual societies[36]. In general, the social enterprise in most European countries developed in the nonprofit sector through undertaking a business to resolve SEEC problems of non-member societies with a total prohibition of profit distribution and asset lock in the dissolution period. Such a type of social enterprise is categorized as a "not-for-profit" social enterprise.[37]

The concept of social enterprise, however, has also begun to develop in the for-profit sector.[38] For-profit entities have begun to engage in commercial activities with the prime motive of solving SEEC problems, but with limited profit distribution.[39] Such type of social enterprise is called a for-profit or hybrid social enterprise and serves two masters: driving profit and solving SEEC problems.[40] For-profit social enterprises were recognized for the first time in Belgium in 1995, during which the Belgium parliament passed a law that creates a legal form called "Société à Finalité Sociale (SFS)" for social enterprises.[41]SFS is a legal form designed for social enterprises with a total or partial (not more than 6% on the investor's principal) restriction of profit distribution.[42] Similarly, the UK government recognized social enterprises in a distinct legal form called 'community interest company (CIC) in 2004.[43] The UK's CIC is a hybrid social enterprise model that integrates "the mission of creating social betterment with generating a profit for investors."[44] The parliament of the UK opted to adopt a for-profit social enterprise than a not-

[36]Jacques Defourny & Marthe Nyssens, 'Social enterprise in Europe: At the crossroads of market, public policies and third sector', *Policy and Society*, Vol. 29: No. 3, (2010),P. 232.
[37] Defourny and Nyssens, *Supra note* 7, p. 4.
[38] Katz & Page,*Supra note* 4, p. 60-61.
[39] Alexander, *Supra note* 19, p. 2.
[40]Plerhoples, *Supra note* 6, p. 223.
[41] Doeringer, *Supra note* 3, p. 308.
[42] Id., p. 309.
[43] Esposito, *Supra note* 25, P. 675 ff.
[44] Alexander, *Supra note* 19, p. 12.

for-profit social enterprise model by justifying that the former is better to raise capital through attracting investors by rewarding return for owners.[45]

Similarly, in the USA, many states introduced for-profit social enterprises at different periods. Vermont introduced a low-profit limited liability Company,[46] California introduced Flexible Purpose Corporations (FPCs) in 2011, and Maryland introduced benefit Corporation (BC) in 2010.[47] Moreover, British Columbia and Nova Scotia in Canada have also introduced their own hybrid social enterprise legal form namely Community Contribution Companies (C3s) in 2012, and Community Interest Companies (CICs) in 2012, respectively[48]. Like the UK's CIC social enterprise model, these two forms of social enterprises designed to enable investors to do business to bring positive social and environmental externalities, and at the same time, to drive limited profit for owners.[49]

The concept of social enterprise is not well developed in Africa compared with the US and Europe. But there are some movements to seek the development of social enterprise in the country. For example, Rwanda, which is the first African country to recognize social enterprise officially, has introduced the community benefit Company legal form of social enterprises at the beginning of 2021 through promulgating legislation known as Benefit Corporation.[50]However, most African countries do not enact a separate law for social enterprises, though such a type of business exists in many jurisdictions.

[45] Id., 13.
[46] Id.
[47] Id. P. 688 ff.
[48] O'Connor, *Supra note* 12, P. 7.
[49] Id. p. 28 ff.
[50] "Rwanda Becomes 5th in the world to pass law on conscious Business Practices," available at <https://b-labafrica.net/rwanda-becomes-5th-country-in-the-world-to-pass-law-on-conscious-business-practices/>, accessed on August 20, 2024.

In Ethiopia, investors in the for-profit sector commence undertaking businesses with the primary aim of solving SEEC problems of the society by considering themselves as social entrepreneurs.[51] They start to be socially, culturally, and environmentally conscious and endeavor to fill the gaps left unmet by other sectors. Ecopia Organic Food PLC,[52] Eternum Energy Ventures (EnVent),[53] World Entrepreneurs Do Good (W.E. Do Good) company,[54]Oliberté Limited company,[55] Eminence Social Entrepreneurs Company,[56] Bahir Zaf Restaurant[57], Whiz Kids Workshop PLC,[58]and Tebita Ambulance Company[59] are some of the businesses that claim the status of social enterprise, declaring that their primary aim is solving SEEC problems of the community. Generally, after recent periods, the concept of social enterprise is also being practiced in Ethiopia without, however, any policy, and legal recognition on the part of the government.

[51] Id. p. 4 ff.

[52]"Ecopia// Welcome//Company", availableat <http://www.ecopia.de/>accessed on February 23, 2024

53 "Africa's Need is Not Another Great Lamp Design– EnVent Energy Energizes Solar Lamp Distribution in Ethiopia (EcoStories)", available <http://www.bailiffafrica.org/africas-need-is-not-another-great-lamp-design-envent-energy-energizes-solar-lamp-distribution-in-ethiopia-ecostories/> accessed on February 23, 2024

[54] "SDUS Business Alum Builds School in Ethiopia" available at <https://business.sdsu.edu/articles/2016/02/Ethiopia> accessed on February 23, 2024

[55] "Oliberté's factory in Addis Ababa, Ethiopia: The world's first Fair Trade Certified™ footwear manufacturing factory" available at <https://www.oliberte.com/pages/fair-trade-certified/> accessed on February 23, 2024

56 "Eminence Social Entrepreneurs" available at <https://www.2merkato.com/directory/19911-eminence-social-entrepreneurs)> accessed on February 23, 2024

[57] British council, *Supra note* 14, p.27.

[58] "Mission and Milestones", available at <http://www.whizkidsworkshop.com/about/mission-milestones/>accessed on February 23, 2024

[59] "Team-Tebita Ambulance", available at <http://tebitaambulance.com/team/> accessed on February 23, 2024

1.3. Basic Features of Social Enterprise

As the name indicates, social enterprise has two dimensions, namely the enterprise and social dimension. These two dimensions are the major characteristics of social enterprise. In appreciating the major features of social enterprises, one may say that social enterprises are the direct replica of public enterprises. As different literature mentioned, similar to social enterprise, the public enterprise has two basic aspects, i.e. public and private/enterprise dimensions.[60] But this doesn't mean that all features of public and social enterprises are the same. For example, unlike public enterprises, social enterprises may not be necessarily fully owned by the public or society. Especially, in the case of for-profit social enterprises, there is no public ownership at all. The details of each dimension are elaborated herein under.

1.3.1. The Enterprise Feature

Social enterprises undertake economic activities with the motive of generating profit.[61] They continuously engage in the production and sale of goods and services, which is the very secret of their survival.[62] They employ business methods, principles, and strategies like that of profit-oriented business[63] and interact with the market, other competitors, and business regulatory institutions.[64] The profit motive of social enterprises makes them efficient and

[60] Tewedros Meheret, 'The Concept and Characteristics of Public Enterprises in Ethiopia', *Mizan Law Review*, Vol. 8: No.2, (2014), P. 342.

[61] Keren G. Raz, 'Toward an Improved Legal Form for SocialEnterprise', *New York University School of Law*, Vol. 36, (2012), P. 283-310.

[62] Robert A. Katz & Antony Page, 'Sustainable Business', *Emory Law Journal*, Vol. 62, (2012-2013), P. 851.

[63] Id.

[64] Nardia Haigh and Andrew J. Hoffman, 'Hybrid organizations: The Next Chapter of Sustainable Business', *Universe Science Direct*, Vol. 41, (2012), p. 129.

innovators.[65] They strive to maximize their investment return by winning the competition that may face in the market.[66] Financially, social enterprises primarily rely on incomes generated from their commercial activities.[67] Though there are some other sources of funds, such as grants, driving an economic gain through engaging in commercial activities takes the lion share of their fund source.

The other enterprise feature of social enterprise is the distribution of profit to investors. Unlike NPOs, social enterprises reward some sort of return to investors, as an incidental to their non-financial mission.[68] For example, in the UK[69], Belgium[70], USA[71] and Canada[72], social enterprise investors can receive a restricted amount of dividend. Because of the possibility of distributing a limited amount of profit to investors in social enterprises, social enterprises, unlike NPOs, can issue equity security to raise their capital through attracting new equity investors.[73] In addition, social enterprises may also receive a donation from donors like that of NPOs.[74]

[65] J. Gregory Dees and Beth Battle Anderson, 'For-Profit Social Ventures', in Marilyn L. Kourilsky and William B. Walstad, *Social Entrepreneurship*,(2003), p. 5.
[66] Id.
[67] Katz & Page, *Supra note* 62, P. 853.
[68] Michael D. Gottesman, From Cobblestones to Pavement, P. 348.
[69] In the UK, social enterprise investors allowed to receive not more than 50% of the annual net profit (O'Connor, *Supra note* 12, P. 46).
[70] Social enterprise investors in Belgium permitted to receive not more than 6% of the annual profit (Doeringer, *Supra note* 3, p. 309).
[71] Alexander,*Supra note* 19, p.5.
[72] In a district of British Columbia and Nova Scotia, social enterprises allowed to distribute surplus to investors which shall not be exceeded 40% of the total annual profit of the enterprise (O'Connor, *supra note* 12).
[73] Michael Blatchford and Margaret Mason, 'Introducing the Community Contribution Company: A New Structure for Social Enterprise', *presented for the Legal Education Society of Alberta*, (2013), p. 17.
[74] Raz, *Supra note* 61, p. 294-295.

1.3.2. The Social/Environmental Feature

The social and/or environmental dimension is the other feature of social enterprises. Social enterprises are created primarily to solve SEEC problems of society.[75]Their core objective is the creation of "social value,"[76] and they describe their social objectives expressly.[77] They, rather than donating some amount of money to charities, worry about how to address certain social problems that happen in society.[78] They reinvest the majority portion of their profit to solve SEEC problems in the community.[79] Unlike for-profit businesses, social enterprises make social goals a primary motive of their existence.[80] For-profit businesses practice CSR, not with a true conscious of solving SEEC problems; but as a means of building a brand for their business.[81] In addition, the objective of social enterprise is to solve SEEC problems of the society, i.e. non-members of the enterprise. Unlike cooperative legal entities, which primarily focus on addressing members' SEEC problems, social enterprises' focus is to solve SEEC problems of non-members.[82]

Moreover, the social dimension of social enterprises includes the social management system and stakeholders' participatory corporate governance system. Users or customers participate in the decision-making process and

[75] Fiona Wilson and James E., 'Business models for people, planet & profits: exploring the phenomena of social business, a market-based approach to social value creation', *Small Business Economics*, Vol. 40: No. 3, (2013), p. 716.
[76] Id.
[77]Reiser, 'Theorizing Forms For Social Enterprise', *Emory Law Journal*, Vol. 62, (2013), p. 684.
[78] Raz, *Supra note* 61, p. 290.
[79] Alexander, *Supra note* 66, P. 34.
[80] Alexander, *Supra note* 19, p. 6.
[81] Id.
[82] "Demutualization of Cooperatives: Reasons and Perspectives", available at <www.coopgalor.com/doc/DemutualizationCooperatives21.5.08.pdf>,accessed on April 26, 2024.

management of the business through their representatives.[83] Furthermore, the social dimension of social enterprises includes the public control feature.[84]Social enterprises are supervised by public authorities representing individuals to ensure the fulfillment of requirements of law and the alignment of social enterprise deeds to their original motive.[85]

2. Major Regulatory Issues of Social Enterprises in Ethiopia

Normally, one may identify a lot of areas of regulation of social enterprises that a law needs to address. The area of regulation may be entry regulation, operational regulation, and exit regulation. This article may not go through all these areas of regulation in detail. Rather, the focus of the article is to examine only the major issues of regulation for social enterprise business types. Hence, the next analysis of this paper focuses on some selected major issues of social enterprise regulation.

2.1. Legal Form

The first legal concern of social enterprise is the availability of a legal form that allows investors to blend social and profit-making objectives in a single business. Social enterprises are businesses that blend financial and non-financial missions into a single entity.[86] They are motivated by the mission of realizing "triple bottom lines" (social, environmental, and profit) in a single

[83] Defourny and Nyssens, *Supra note* 7, p. 7.
[84] Policy Department C: Citizens' Rights and Constitutional Affairs of European Parliament, *A European Statute for Social and Solidarity-Based Enterprise*,European Union, Brussels, (2017), p.7.
[85] Id.
[86]Leff, Benjamin M., Preventing Private Inurement in Tranched Social Enterprises, *Seton Hall Law Review*, Vol. 41, (2015), p. 10.

undertaking.[87]To license such types of investors to engage in the market, there shall be a legal form that permits investors to blend both the social and profit-making objectives into a single business entity. The form shall also be designed in a way that allows investors, customers, employees, funders, and other stakeholders to identify socially-oriented businesses from profit-oriented businesses.[88] Though it may not be conclusive evidence as to the genuineness of the social mission, the nomenclature of the form of the business can at least gives the first-impression to stakeholders that whether the enterprise's primary motive is to realize social missions.[89] Mission-sympathetic parties, including donors, employees, customers, and investors who want to make a contribution to social-oriented businesses, will, at first glance, look at the name of the form using which social enterprises are licensed and registered to identify the entity's primary mission.[90] If the form of the enterprise transmits a message to society about the purpose of the business, stakeholders may easily distinguish socially conscious businesses from others. This can help them avoid confusion in determining the status of the businesses while they make interactions with such businesses.

Furthermore, the form of the social enterprise shall allow the social entrepreneur to build a brand for their products and services.[91] Branding is the core advantage that social entrepreneurs can receive from investing in social enterprises.[92] Because of the social aspect of social enterprises, customers will give special preference for products and services of such enterprises; donors may incite to support such businesses; talented employees may be attracted to

[87]Murray, J. Haskell, Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes, *American University Business Law Review*, Vol. 2: No. 1, (2012), p. 4.
[88]John Tyle *et al*, 'Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures', *Quinnipiac Law Review*, Vol. 33, (2015), p. 242.
[89] Id. p. 243.
[90] Katz & Page,*Supra note* 4, P. 93.
[91] Id., P. 44.
[92]Plerhoples, *Supra note* 6, P. 235.

work in such businesses; and investors may become interested investing in such businesses.[93] But this can be so when there is a form that is specifically designed for social enterprises and easily identifiable. The name of the legal form of social enterprises in the UK is the best example for this discussion. UK has designed "Community Interest Company" as a legal form for social enterprises.[94]The name 'Community Interest Company' transmits the message to society about the purpose of the businesses that adopt this form. It, at least, tells the community that the businesses that are licensed through this form have the mission of serving the community along with profit-making motives. Generally, the name of the form shall also be easily identifiable by customers, donors, and other stakeholders.

Under the current Ethiopian Commercial Code, a person can engage in businesses either as a sole proprietorship,[95]or through a business organization.[96] A person may need to undertake a business in his individual capacity without creating any cooperation with someone else. The available legal form for such a type of businessperson is sole proprietorship. Individuals may also conduct a business in cooperation with other persons who have a common objective by bringing their capital or labor together.[97]The available legal forms for such types of businesses are joint venture, general partnership, limited partnership, Private Limited Partnership, Share Company, one person limited company, and private limited company.[98] In fact, some writers list cooperative legal form as an additional available legal form for businesses in

[93] Murray, *Supra note* 87, p. 52.
[94] O'Connor, *Supra note* 12, P. 37.
[95] Commercial Code of Ethiopia, 2021, Federal Negarit Gazzete, Exra Ordinary Issue, Proc. No. 1243/2021, art. 5 ff (hereinafter, Commercial Code of Ethiopia).
[96] Id., art. 172 ff.
[97] Gizachew Silesh, The Commercial Dichotomy of Business organization and Its Legal Significance Under the Ethiopian Law, *Bahir Dar University Journal of Law*, Vol. 3,: No. 1, (2014), p. 40.
[98] Commercial Code of Ethiopia, *Supra Note* 84, art. 174.

Ethiopia.[99]This author, however, does not agree about the availability of cooperative business legal form in Ethiopia. The cooperative legal form is not a legal form available for investors. It is a legal form designed for individuals who want to solve their common SEEC problems.[100]An investor cannot choose a cooperative legal form as an option for his investment. From the outset, it is hardly possible even to say that cooperatives are businesses since their objective is not to make a profit from their business.

Given these legal forms of business, the next issue is whether social enterprises in Ethiopia can operate using either of these business forms. This issue can be analyzed from two perspectives. First, it can be explored from the perspective of social entrepreneurs. Under the current business laws of Ethiopia, though there is no clear permission, at least; there is no prohibition to operate a business with the primary motive of solving SEEC problems of the society along with the distribution of a limited amount of profit. Individuals who want to undertake a business in Ethiopia as a trader or businessperson need, among others, to engage in economic activities that are designed as such by law professionally and for gain.[101] The law does not, however, prohibit the reinvestment of the majority portion of businesses' profit to social purposes so long as owners agree to that effect.

What if, for example, investors agree to limit their portion of return to be distributed to them only ten percent or else and to reinvest the remaining to social purposes? Can the regulatory authority refuse to license and register

[99] For example on a legal guide written by Mehrteab Leul & Associates Law Office mentioned cooperative legal forms as one form available for doing business in Ethiopia (Mehrteab Leul & Associates Law Office, *Doing Business in Ethiopia: A Brief Legal Guide*, 1st ed.,(2015), p., 4 ff).

[100] Cooperative societies proclamation, 2016, Federal Negarit Gazette, proc. No. no. 985, 23rd year no. 7, Article 2/1

[101] Commercial Code of Ethiopia, *Supra note* 95, art. 5; and Commercial Registration and Licensing, 2016, Proc. No. 980, 22nd year, no. 101, art 2/2.

such investors as a trader or businessperson? The answer is probably not. The law requires only the continuous engagement of a person in commercial activities and the driving of some benefit from such activities in the form of profit, regardless of the amount to be distributed to him. Even the law may not prohibit the reinvestment of the majority portion of businesses' profit for the social mission unless such act has an intention of illegal activities. Thus, persons who want to undertake economic activities with the primary objective of resolving SEEC problems in tandem with the distribution of a limited amount of profit can be licensed as a trader/businessperson using the existing businesses legal forms. Even though the law does not prohibit the licensing and registration of such types of businesses, the name of existing legal forms do not fit to protect the interests of stakeholders and social entrepreneurs. As mentioned above, the names of the legal form of social enterprises needs to communicate the purpose of the enterprise.

The existing legal forms of business in Ethiopia are not, however, able to describe the purpose of the business to the community.For example, a social enterprise that wants to be licensed and registered as a general partnership,[102] limited partnership,[103] share company[104]or private limited company[105]is required by law to include the name of the form using which they have been established next to the trade name of the business. These forms, however, do not tell the mission/purpose of the business. None of them send a message to stakeholders, including customers, donors, investors, and others, whether the mission of the business is solving SEEC problems or maximizing owners' financial interests.

[102] Commercial Code of Ethiopia, *Supra Note* 95, art. 184/1.
[103] Id. art. 213/2.
[104] Id. art. 246.
[105] Id. art. 497.

For example, Ecopia (Ecological Products of Ethiopia) private limited company (PLC) is a for-profit social enterprise that operates a food processing business in Ethiopia with the objective of creating the market opportunity for farmers, improving food security and rural development in the country.[106] But these missions of the Ecopia PLC cannot be inferred from the name of the form through which the Ecopia operates, i.e. from the 'Private Limited Company'. The name Private Limited Company' does not have any indication as to the purpose of the business.Donors who want to make a donation; customers who want to buy from the socially conscious business; investors who want to buy socially oriented businesses' equity; and other stakeholders cannot easily identify whether Ecopia is a socially committed company or not.

Similarly, this problem creates a difficulty for owners of the Ecopia PLC to build a brand for their products and services. Unless the purpose of the enterprise can be deduced from the name of the form of the business, it can't receive the advantage of the branding of its products and services. In fact, social enterprises can communicate the purpose of their firm to the people using a trade name, as the law doesn't forbid using such types of trade names. But, in such a case, the brand will be limited only to the specific enterprise, which uses a trade name that conveys the purpose of the business. There will not exist legal branding for the social enterprise in general. Even allowing social enterprises to operate in a scattered legal form using their own trade name will cause uncertainty of form for a social enterprise on the part of socially conscious investors and societies.

[106] "Ecopia (Ecological Products of Ethiopia)" available at <http://www.ecopia.de/ecopia-organic-food/> accessed on April 15, 2024.

2.2. Evaluation of the Social Mission of Social Enterprise

Normally, when social entrepreneurs enter the market, their intention is expected to be benefiting society at large.[107]They engage in the market claiming that their primary mission is to solve SEEC problems of the community. Sometimes, however, the social motive of social enterprise investors may not be as true as declared. Profit seeking investors may falsely claim the status of social enterprise.[108] Especially, the existence of branding advantage in social enterprises may inspire greedy investors to claim deceitfully the status of social enterprises.[109]The fake status of a social enterprise may, consequently, result in the problem of "green or social washing", whereby investors use or attempt to use the "branding" and "goodwill" advantage of social enterprise, by alleging that they are social entrepreneurs.[110]It may give rise to a problem where investors "pay only lip service to the social mission thereby depriving the potential branding and signaling benefits of being perceived as a social enterprise without actually contributing a significant social benefit."[111]

To show this problem, Robert A. Katsz & Antony Page describes it as "a wolf (the conventional business) in sheep's clothing (the social enterprise form)."[112]To avoid the mock use of the status of social enterprises, social entrepreneurs shall be required by law to pass a certain criteria of social

[107]Dana Brakman Reiser, 'Benefit Corporations —A Sustainable Form of Organization?',*Wake Forest Law Review*, Vol. 46, (2011), p. 597.
[108] Michael A. Hacker, "Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries, *Boston College Law Review*, Vol. 57, (2016), P. 1757.
[109]Katz & Page, *Supra note* 62, p. 865.
[110] Hacker, *Supra note* 108, P. 1757.
[111]Katz & Page, *Supra note* 62, p. 865.
[112]Id.

mission evaluation.[113] They have to be required by law to show whether they are really inspired by and to achieve social missions. To do so, the law shall set clear social mission evaluation criteria that a social enterprise needs to pass. In fact, the standards that the social mission of the enterprise going to be evaluated may vary depending on the SEEC problem of countries. For example, in the social enterprise model law of USA, the social mission of the enterprise is evaluated by requiring it to pass the public benefit test i.e. bringing 'a material positive impact on society and the environment … as measured by a third-party standard.' (Internal quotations omitted).[114]Specifically, in the USA, social mission is said to exist when the purpose of the enterprise is;

> *providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge;(6) increasing the flow of capital to entities with a purpose to benefit society or the environment; [or] (7) conferring any other particular benefit on society or the environment.*[115]

In general, it is the concern of social enterprise regulation to set some social mission evaluation yardsticks for a legal entity to acquire the status of social enterprise and to prevent the fake use of the status of social enterprise that may ultimately result in a social or green washing problem.

[113]Blatchford and Mason, *Supra note* 73, p. 8, and Reiser, *Supra note* 107, p. 597.
[114]*Reiser*, *Supra note 77*, p. 690.
[115] American Model Benefit Corporation Legislation with Explanatory Comments, (2016), section 102.

When social businesses are left to be regulated under Ethiopia's existing commercial rules, the regulating organ cannot order them to meet specific social mission evaluation criteria because there is no legal basis for doing so. It may expose stakeholders to being manipulated by sham social entrepreneurs. Sham social entrepreneurs may use their false status to get donations, attract customers, and get government subsidies, if any. Therefore, it can be simply concluded that the existing business laws of Ethiopia don't fit to regulate the social mission evaluation concern of social enterprises.

2.3. Allocation of Profit

The very reason for the emergence of any social enterprise is to achieve a certain social goal, rather than maximizing owners' private gain.[116] Accruing of private benefit to owners through distributing profit is their incidental mission.[117] As time goes by, however, the primary mission of social entrepreneurs may be "shadowed" by the profit-making motive.[118] Investors may be fascinated by the profitability of their enterprise and decide to drift towards receiving a lot amount of dividend from their enterprise's profit.[119] The possibility of shifting towards profit maximization to owners of social enterprises may be exacerbated after the enterprise builds a brand to its products and services in the pretext of SEEC problems. The tendency of investors to receive much profit from their social enterprise will finally lead to the problem of mission drift,[120] "a process of organizational change where an

[116] Alexander, *Supra note* 19, p. 4.
[117] Raz, *Supra note* 61, p. 289.
[118] Joseph W. Yockey, 'The Compliance Case for Social Enterprise', *Michigan Business & Entrepreneurial Law Review*, Vol. 4, *(*2014), P. 6.
[119] Yockey, Joseph W., Does Social Enterprise Law Matter? *Alabama Law Review*, U Iowa Legal Studies Research Paper No. 14-06, (2014), p. 780.
[120] Id.

organization diverges from its main purpose or mission" through time.[121]The existence of mission drift, obviously, will cause the loss of non-financial missions of the enterprise.

Thus, it is the concern of social enterprise regulation to regulate the allocation of the profit and thereby to thwart the problem of drifting of the mission of the enterprise towards profit-making by forgetting its original mission. A regulation needs to be made by law as to how much of the profit of social enterprises shall be allocated.[122]Profits need to be allocated in a way that can balance the interests of shareholders and stakeholders of social enterprises.[123]A legal specification needs to be made as to how much of the profit should be reinvested to the SEEC missions and to be distributed to owners. This will help to maintain or lock the SEEC missions of the enterprise by preventing owners of social enterprises from distributing the whole or the huge part of the profit to their private benefit.[124]Indeed, a difficulty may arise in determining the amount of profit to be distributed to owners and to be reinvested for social purposes. For example, if we put the cap for the profit to be distributed to owners above 50%, in effect, social enterprises may become the same with for-profit businesses that discharge their corporate social responsibility (CSR) properly. The social missions may still remain subordinate to profit-making objectives, and it may be hardly possible to say that the primary purpose of social enterprises is solving SEEC problems. Similarly, if we make the cap of profit to be distributed to owners very few, it may have the effect of discouraging investors to undertake social enterprises in the country. Thus, the restriction shall be in the middle of the

[121] Chris Cornforth, 'Understanding and Combating Mission Drift in Social enterprises', *Social Enterprise Journal,* Vol. 10: No.1, (2014), p. 3.
[122] The UK'S Mission Alignment Working Group, Profit with Purpose Businesses, (2014), p. 14.
[123] Id.
[124] Id.

two extremes, i.e. it shall reconcile the interests of stakeholders and investors in the social enterprise.

When we scrutinize the existing profit allocation rules of businesses in Ethiopia, the law doesn't regulate the profit allocation of businesses. The law, rather, leaves the power to determine the allocation of the profit of the business to be determined by the decision of investors.[125]Thus, when we allow social enterprises to operate under the existing business laws, the allocation of their profit will be determined by the decision of owners like that of traditional for-profit businesses. If, for example, investors in social enterprises decide to distribute the whole profit of their business to their private benefit, there is no legal means to prohibit them from doing so. The regulatory authority can't forbid them from doing that since there is no law that imposes a restriction on the allocation of profit of social enterprises. Letting investors distribute the profit of the enterprise to owners without imposing any restriction may, however, create an opportunity for owners of social enterprises to drift towards maximizing the interests of owners through distributing more profit of the business as time goes by. Even it may create a chance for owners to distribute the sum of money collected from donors to their private benefit. Some self-interested entrepreneurs may enrich themselves by distributing donor-funded capitals for their private benefit. To conclude, the existing business laws of Ethiopia do not fit to regulate the profit allocation of social enterprises. Rather, the Ethiopian government needs to enact a special law for social enterprises that sets a limitation on the amount of dividend social enterprise investors should receive.

[125] For example, the profit allocation of share companies required to be determined by the ordinary shareholders meeting (Commercial Code of Ethiopia, *Supra Note* 95, art. 394/1).

2.4. Asset Transfer, Sale of Business, and Merger

Besides the aforesaid regulatory concerns, the transfer of assets to members or to third party both at the time of dissolution and operational stage; the sale of the social enterprise to another investor; and the merger of the social enterprise with other for-profit businesses are concerns that a social enterprise regulation needs to address. Firstly, the concern of asset transfer arises when a specific asset is transferred to other third parties through sale or else during the operational life of the enterprise. Here, an asset is understood as "an item or property which is owned by a [social enterprise]…and which has a money value."[126] It includes tangible assets such as land and equipment, intangible assets such as trade name and goodwill, and financial assets such as shares and stocks.[127] Normally, a transfer of a single asset to another person may not be problematic provided that the asset is transferred with a fair market value and in realizing social objectives.[128]

Nevertheless, sometimes, directors of social enterprises may, for example, sell an asset of the social enterprise below the market value of the asset to another for-profit business in which they have a share.[129] An asset may be transferred to owners or directors below the market price in the pretext of sale to drive income for their non-financial objectives. This will ultimately weaken the attainment of the non-financial missions of the enterprise. It may also result in the problem of mission drift. To prevent the happening of such problems, some restrictions need to be imposed by law on the transfer of assets during the operational life of the enterprise.

[126] The Free Dictionary", available at <https://financial-dictionary.thefreedictionary.com/asset> accessed on April 20, 2024.
[127] Id.
[128] Carol Liao, 'The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise', *McGill International Journal of Sustainable Development Law and Policy*, Vol. 9: No. 1, (2013), p. 80.
[129] Esposito, *Supra note* 25, P. 677.

Secondly, the issue of asset transfer in social enterprises may arise at the time of the dissolution of the enterprise.[130] Comparable with traditional for-profit businesses, social enterprises may be dissolved due to different reasons. Then, the issue that will arise is how the assets that are left after the accomplishment of liquidation should be distributed. In traditional for-profit businesses, upon their dissolution, assets left after the liquidation process are permitted to be distributed to owners or shareholders.[131] But if the assets of social enterprises are allowed to be distributed freely to owners upon the dissolution of social enterprises, it may affect the interests of donors who were donating grants to the enterprise; customers who paid beyond the market price for the products and services of the enterprise, thinking that the enterprise is a socially motivated entity; and the government, which may give to the enterprise different policy supports, including tax credit. To protect the interests of such stakeholders, there shall be some means of locking the assets of social enterprises during the dissolution of social enterprises. In the UK, for example, during the dissolution of a social enterprise, equity shareholders can receive only to the extent of their paid-up capital, and if there is a residual asset of the dissolved business, it shall be transferred to other similar community-benefit enterprises.[132] The experience of the UK can be adopted in Ethiopia to lock the assets of social enterprises during dissolution.

The other concern of the social enterprise regulation is when there is the sale of the social business as a whole or merger of a social enterprise with another

[130] Id.

[131] Under the Ethiopian commercial code, assets left after the settlement of the debts of the business organization allowed to be distributed to owners or shareholders of the dissolved business (Commercial Code of Ethiopia, *Supra note* 95, art.211/1 and 486).

132 "The Community Interest Company Regulations 2005",https://www.legislation.gov.uk/uksi/2005/1788/regulation/23/ made last accessed on May 24, 2024.

for-profit business.[133] The owner of a social enterprise may decide to sell his enterprise/the whole business to another person for different reasons. Buyers, profit-oriented buyers, may become interested in buying the enterprise since social enterprises are better than traditional for-profit businesses in building a brand for their products and services.[134]The sale of the businesses has two prominent problems. On the one hand, the seller may enrich himself by selling the whole business, including capital collected from grants and other supporting mechanisms. On the other hand, the new owner may divert away from the original social mission of the social enterprise entity and may focus on generating much profit to his own benefit.[135] As Susan Mac Cormac wrote, the social mission of social enterprise, in most cases, 'is dependent on founders' fervor, and when founders retire or sell, their social legacy is often lost as more traditional owners and managers takeover.'[136] This problem is named a legacy problem.[137] The legacy problem is defined as the "risk of subordinating social missions to the profit" following the change of ownership of the social enterprise.[138] It is one type of mission drift that new owners of social enterprises drift away from their non-financial objectives towards driving profit for private benefit following to a change of ownership.[139] Stakeholders of social enterprises, especially donors and beneficiaries, may lose a certain interest in the social enterprise provided that there is a loss of legacy of the original founder after the enterprise has been

[133]J.Haskell Murray, 'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law', *Harvard Business Law Review*, Vol.4, (2014), P. 366.
[134] Id., p. 40.
[135]Susan H. Mac Cormac Et Al., 'The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial And Social Missions*',* Summit on The Future of The Corporation: Paper Series On Corporate Design, p. 88- 97 As Cited by Katz' & Page,*Supra note* 4, P. 96.
[136] Id.
[137] Katz & Page,*Supra note* 4, P. 95.
[138] Id.
[139]Yockey,*Supra note* 119, p. 793.

taken over by another new purchaser. To minimize this problem, the UK social enterprise legislation, for example, allows the sale of socially conscious businesses only to similar community benefit companies.[140] If the social business is transferred to non-community benefit entities, it has to be sold at a market value that, in turn, shall be used by the seller for community purposes.[141] Similarly, the Ethiopian government shall enact a law that stipulates asset lock provisions for social enterprises to maintain the mission of the enterprise during the sale of social enterprises.

Loss of legacy may also occur when there is a merger of social enterprises with another for-profit business.[142]A social enterprise may merge with another traditional for-profit business due to different reasons. The merger of a socially conscious entity with a profit-conscious entity may result in the loss of the legacy of social mission, or it may at least give rise to a difficulty in detecting whether the legacy of social mission survives after the action of the merger. Therefore, to avoid such undesirable consequences of the merger, a legislative regulation must be made about the merger of socially conscious entities with profit-oriented entities. Different ways of regulation may be introduced to eliminate the problems of mergers of social enterprises with for-profit businesses. For example, the Vermont social enterprise statute requires boards of directors to provide justification why they propose mergers of a social enterprise with for-profit entities.[143] In addition, in order to reduce the possibility of merger of social enterprise with for-profit businesses, social

[140]"The Community Interest Company Regulations 2005",<https://www.legislation.gov.uk/uksi/2005/1788/regulation/23/ made> accessed on May 24, 2024.

[141] Henry Peter *et al*, **The International Handbookof Social Enterprise LawBenefit Corporations and Other Purpose-Driven Companies, Springer, 2023,** P, 64.

[142]Plerhoples, *Supra note* 6,P. 236.

[143] Esposito, *Supra note* 25, p. 698.

enterprise legislations of many countries, require the proposal of the merger to be approved by two-third vote of shareholders.[144]Generally, because of these potential problems which may arise following the transfer of asset, sale of the enterprise or merger of the enterprise with another for-profit business, regulating the transfer of assets of social enterprises both during the operational and dissolution stage; change of ownership in the sell-out or takeover of it by another person; and the merger of social enterprises with another traditional for-profit businesses become the concern of social enterprise regulation.

If we regulate social enterprises through the existing commercial laws of Ethiopia, we may not have any restrictions on the asset transfer, sale, or merger of a business. As per the Ethiopian commercial laws, during the operational life of the business, owners have full freedom to transfer a specific asset of their business to a third party through sale, donation, or otherwise. There is no legal restriction on the transfer of the assets of businesses to a third party (outsiders), so long as the owners agree. Similarly, under the existing laws, assets left after the process of liquidation during the dissolution of businesses are allowed to be distributed freely to shareholders or owners of the business.[145] Hence, if we regulate social enterprises under the existing business laws of Ethiopia, it means that they can freely transfer the assets of the enterprise without being locked both during the operational and dissolution period.

Moreover, under the existing business law rules of Ethiopia, there are no any restriction as to the sale of businesses.[146] Owners of the businesses can sell their business as a whole if they want. There is no any provision that requires

[144] Id.
[145] Commercial Code of Ethiopia, *Supra note* 95, Art. 211/1, 233, and 486.
[146] Id., art. 122 ff/

owners to consider the interests of stakeholders at the time of sale of a business to another person in the existing business law of Ethiopia. Owners are free to maximize their private interest through selling their business to the maximum purchase price, regardless of its impact on the stakeholders' interest in the post-sale. Furthermore, as per the commercial code of Ethiopia, business entities are free to decide the merger of their business with another business legal entity[147]unless it has an anti-competitive effect.[148] The decision to merge with another firm is left to be made by the concerned business entity. Unless the merger has an anti-competitive effect on the market, there is no ground on which the regulatory organ can interfere in the merger decision of business firms.

Thus, if we regulate social enterprises through the existing business rules of Ethiopia, they will be free to sell their business to a third party without considering the interests of other non-stockholders interests. This may, however, create a couple of problems. First, the owners may enrich themselves by selling the whole business, which comprises assets collected from donations, government support, and contributions from other socially conscious persons. Second, the sale of a business may result in the loss of legacy problem whereby the new purchaser changes the social mission of the enterprise to profit mission. This also affects the interests of stakeholders who had made different contribution thinking that the non-financial missions of the enterprise will remain intact. Similarly, if we let social enterprises to be housed under the existing business laws, they can merge with another for-profit business without being restricted. This may also have the effect of loss of a legacy of the original social enterprise. After the taking place of the merger of the enterprise with another for-profit business, the social mission of

[147] Commercial Code of Ethiopia, *Supra note* 95, art. 565 ff.
[148] Trade Competition and Consumer Protection Proclamation, (2013), Federal Negarit Gazette, 20th year, no 28, Proc. No. 813, art. 9.

the entity in the pre-merger may be darkened by the profit-making mission of the for-profit business. Generally, the existing business laws of Ethiopia don't fit to regulate the asset transfer, sale, and merger concerns of social enterprises.

2.5. Disclosure of the Performance of the Enterprise

Like the case of traditional profit-making businesses, there is a problem of information asymmetry in social enterprise.[149]In most cases, the information of the social enterprise is not known for outsiders.[150]It is only reachable for persons who control the enterprise, such as managers, directors, and owners. The problem of information asymmetry may frighten stakeholders to make interactions with social enterprises. Unless there is disclosure of the social performance of the enterprise, donors, customers, quasi-donors, and socially conscious investors may not know whether their contribution is really used to address SEEC problems. To reduce this problem, therefore, minimum disclosure legal requirements need to be set by law that any social enterprise must fulfill.[151]It is only when the act of the social enterprise is disclosed that individuals or the government know whether the enterprise actually acts in line with its non-financial mission, and can apply for regulatory measures to be taken against any deviance, if any.[152]

One means of disclosing the performance of the social enterprises is requiring them to make a report on their performance with respect to their non-financial objectives to the enforcement organ.[153]Unlike traditional for-profit businesses, social enterprises should be required to produce a report of the performance of

[149]Yockey, *Supra note* 119, P. 792.
[150] Id. P.793.
[151] The UK'S Mission Alignment Working Group, *Supra note* 122, p. 13-14.
[152] Policy Department C: Citizens' Rights and Constitutional Affairs of European Parliament, *Supra note* 84, p. 28.
[153] The UK'S Mission Alignment Working Group, *Supra note* 122, p. 13-14.

both financial and social missions annually or biannually according to the manner and conditions set for by law. This reporting requirement will help to know whether the social enterprise genuinely acts in accordance with its original mission.[154]It will also serve as the regulatory body to take any measure provided that there is a deviation from the original mission.

In fact, the mere existence of self-reporting of the performance of the entity may not necessarily safeguard the continuity of the original mission of the enterprise. It shall be, rather, evaluated against certain standards and shall be a certified enterprise.[155]Specifically, there shall exist auditing of the non-financial social performance of social enterprises, social auditing, in addition to financial auditing of the enterprise.[156]The social performance of an enterprise shall be audited by independent and professional social auditors.[157]Social auditing shall be made in order to protect stakeholders of social enterprises from the problem of social or "green washing" _ claiming to be a socially conscious business, though it actually not.[158]In general, requiring social enterprises to fulfill minimum standards of transparency will be one concern of regulation of social enterprises since it is a strategic tool to give a notice for stakeholders of social enterprises such as customers, donors, and investors whether the enterprise really acts in accordance with its original mission.[159]

[154] Id.
[155] Rebecca Lee, The Emergence of Social Enterprises in China: The Quest for Space and Legitimacy, p. 96.
[156] Id.
[157]Yockey, *Supra note* 119, P. 822.
[158]"Social Accounting and audit for the Community Sector" available at <https://socialauditnetwork.wordpress.com/2015/12/12/the-need-for-social-audit/> accessed on April 26, 2024.
[159]John Tyle et al, Producing Better Mileage, Supra Note 88, p. 292.

Under the existing Ethiopian business law, we can find some rules that require businesses to fulfill some standards of transparency. For example, as it is provided under the commercial code, directors of share companies are required to prepare the annual report on each financial year with respect to the balance sheet, profit and loss accounts, and the company's activities and affairs in the financial year.[160]They are mandatorily required to prepare the annual report on the above-mentioned areas. Similarly, though it is not a mandatory requirement, the law indicates the possibility of making a report in the case of partnership business on the management of the partnership provided that the partners require.[161]Besides the requirement of reporting, the law requires, especially in the case of share companies and private limited companies, the auditing of such reports by professional auditors.[162] The law imposes a duty on auditors to audit "the books and securities of the company; to verify the correctness and accuracy of the inventories, balance sheets, and profit and loss accounts; [and] to certify that the report of the board of directors reflects the correct state of the company's affair."[163]

But when we carefully see these transparency requirements, they have two major shortfalls. On the one hand, the disclosure requirements emphasize only the financial performance of the businesses. There is no clear and mandatory requirement of reporting and auditing of the non-financial performance of the business. The existing reporting and auditing requirements focus on the disclosure of the financial performance of the business, including the balance sheets and profit and loss accounts.On the other hand, even the reports of the financial performance of businesses are not required to be made for a regulatory organ, and rather, the law requires such reports to be prepared

[160] Commercial Code of Ethiopia, *Supra note* 95, art. 349, 426.
[161] Id. art. 191/4.
[162] Id. art. 349 ff.
[163] Id. art. 349.

at the partnership or company level and to be read out to partners or shareholders in their meeting. The existing business laws of Ethiopia don't require the reports of the businesses to the regulatory authority and to be evaluated by the authority, except the reports of financial businesses.[164]

Likewise, if we make social enterprise licensed and regulated through existing business laws, they may not prepare any social performance reports and they may not also be audited since there is no rule that requires social reporting and auditing. The social performance of social enterprises is neither disclosed to society nor audited to determine whether it is adequate and rightly made. This may, however, cause stakeholders, including the government to face the problem of information asymmetry. Stakeholders may not exactly know whether the enterprise acts in accordance with its original social mission or not. Because of the information asymmetry, they may be cheated by fake social enterprises. Donors may, for example, donate a certain amount of donation to fake social enterprises due to the problem of lack of information about the actual performance of the enterprise. To sum up, the disclosure requirements under the existing business law of Ethiopia are not sufficient to regulate the social performance of social enterprises.Rather, there shall be a disclosure requirement that requires social enterprises to report both the enterprise and social dimension performance of the business, i.e. combination of reporting standards for for-profit and NPOs.

[164] Financial businesses including banks, micro finances and Insurances are required to produce a report of the financial statements and other reports prescribed by National Bank of Ethiopia to the regulatory authority, National Bank of Ethiopia. (See Banking Business Proclamation, 2008, *Federal Negarit Gazzeta*, Proc. No. 592, 14th year, No. 57, art. 28, Micro Finance Business Proclamation, 2009, *Federal Negarit Gazzeta*, Proc. No. 626, 15th year, No. 33, art. 15/2 and Insurance Business Proclamation, 2012, *Federal Negarit Gazzeta*, Proc. No. 746, 18th year, No. 57, art. 33).

2.6. Duty and Liability of Directors and Managers towards Stakeholders

The other concern of social enterprise regulation is the duty and liability of directors and managers towards stakeholders.[165] In the corporation tradition, though they are owned by shareholders, the power to control the activities of the corporation is exercised by directors and managers.[166]Shareholders, in most cases, have a very limited participation in the management of the activities of their business, except that they participate in the corporate governance through shareholders' meeting.[167]They are simply beneficiaries of the fruits of their business. They empower directors and managers to manage and control the corporation as a proxy for them.[168] In such a case, directors and managers are required to act in the best interest of their appointees_ shareholders of the enterprise.[169]Specifically, they do have a duty to act in the best interest of the corporation and its shareholders.[170]Any breach of such duty will result in a derivative suit[171] against them by shareholders and may finally make them liable.[172] But they don't have a mandatory duty to

[165]Thomas J. White IIX, 'Benefit Corporations: Increased Oversight through Creation of the Benefit Corporation Commission', *Journal of legislation*, Vol. 41: no. 2, (2014-2015), p. 342.
[166] Hacker, *Supra note* 108, P, 1761.
[167] "Role of Shareholders of the Corporation", available at <https://thebusinessprofessor.com/knowledge-base/role-of-shareholders-of-the-corporation/>, accessed on May 24, 2024.
[168] Id. P, 1761 &1762.
[169]White IIX, *Supra note* 165, p. 342.
[170] Hacker, *Supra note* 108, P. 1762.
[171] Derivative suit mans "[a] lawsuit brought by a shareholder of a corporation on its behalf to enforce or defend a legal right or claim, which the corporation has failed to do" ("Derivative Action," available at <https://legal-dictionary.thefreedictionary.com/Derivative+suit>accessed on May 15, 2024.
[172] Id.

solve SEEC problems of the community, stakeholders, but not to create a negative impact on them.[173]

Because of these blended objectives of social enterprises, directors and managers of such businesses need to strive to realize both missions simultaneously.[174] They have the duty to maximize the interests of owners and stakeholders through driving appropriate profit and through enforcing the non-financial mission of the enterprise properly, respectively.[175]In social enterprises, therefore, the duty of directors and managers includes their accountability to stakeholders "who [have] an interest or concern with the business but do not necessarily have an ownership interest in the business."[176] Thus, like that of traditional for-profit businesses, a legislative declaration needs to be made about the existence of the duty of directors and managers of the social enterprises to protect the interests of non-shareholders.[177] The liability of directors and managers towards non-shareholders for the failure to discharge their duty towards stakeholders of a social enterprise shall be established by law.

In fact, the mere declaration of the existence of the duty of directors or managers to protect the interests of non-stockholders may not be a guarantee for the protection of stakeholders' interests in the enterprise. Directors or managers may act against the interests of stakeholders by breaching their duty to act in accordance with what is required by law.[178]In such a case, another specific issue may arise as to how and by whom a suit should be instituted

[173] Id.
[174] Esposito, *Supra note* 25, P. 699.
[175] Id.
[176] White IIX, *Supra note* 165, p. 342.
[177]Blodgett *et al*, *Supra note* 1, P.326.
[178] Hacker, *Supra note* 108, P, 1765.

before a court of law against a director or manager that violates his duty.[179]In traditional for-profit businesses, any breach of directors or managers' duty gives shareholders the right to institute a derivative suit before a court of law.[180] Shareholders can seek remedy before a court for the damage they have suffered due to the failure of directors or managers to discharge their corporate duty properly. Similarly, there shall be a means for stakeholders of social enterprises to claim the damage they will have suffered because of the failure of directors or managers to act in accordance with their duty that they have towards non-stockholder. Non-stockholders need to have the opportunity to claim their violated interest before a court either through being represented by shareholders of the enterprise[181]or by themselves.

When we examine Ethiopia's existing business laws, we may not locate a section that specifically states the presence of duties and liabilities of directors and/or managers to stakeholders. In fact, the law does impose a general duty on them to carry out the duties outlined in the memorandum, or partnership agreement.[182] This demonstrates that, in addition to the law, the duties of managers and directors can be derived from a company's memorandum or partnership agreement. Thus, for example, if a social enterprise imposes a duty on its manager and directors to consider the interests of stakeholders under its memorandum or partnership agreement then the law will make directors and managers liable for any breach of that duty. However, the issue arises when managers and directors of social enterprises are not required to consider the interests of stakeholders under their memorandum, articles of association, or partnership agreement. In such a circumstance, there is no legal

[179] Id.
[180] Id. P, 1764.
[181] For example, in USA, in almost all states, right to bring a legal action before a court of for the violation of stakeholders' right is required to be exercised by shareholders representing non-shareholders.(Esposito, *Supra note* 25, P. 700).
[182] Commercial Code of Ethiopia, *Supra note* 95, art. 315.

basis for holding directors and management accountable for their failure to heed the interests of stakeholders.

Should we regulate the duties of managers and directors of social enterprises under the present business legal environment, shareholders will be the only ones who can file a court action to enforce directors' liability. However, shareholders/owners of social enterprises may collude with directors to ignore their enterprises' social goals in favor of focusing on profit. In such instances, no one can hold directors or management accountable to stakeholders. In general, Ethiopia's existing business rules are not adequate to control the duties and liabilities of directors and managers of social enterprises toward stakeholders.

2.7. Regulatory Supervision

Thus far, attempts have been made to enlist the unique substantive regulatory concerns of social enterprises. Indications have also been made as to the need for the determination of such substantive concerns by legislation. The mere existence of a well-designed regulation may not be, however, a guarantee for the proper enforcement of such regulatory rules.[183] Though they are voluntarily established social-oriented businesses, in some cases, they may fail to act in accordance with their blended objective. Thus, a regulatory oversight needs to be made by a government enforcement organ, whether these businesses are actually performing as required by law. Specifically, there shall exist an enforcement authority that can supervise the activities of social enterprises, receive complaints and take administrative measures, protect investors and customers from being misled by false social enterprises,

[183]Dana Brakman Reiser, 'Regulating Social Enterprise', *UC Davis Business Law Journal*, Vol.14, (2013), P. 240

maintain the community interest in such businesses, and follow up on the general state of the social enterprise sector in the country.[184]

Currently, no formal regulatory authority exists to oversee social enterprises. They are, instead, governed and overseen by the Ministry of Trade and Regional Integration and similar regional trade bureaus. They are overseen as conventional profit-making firms by the profit-oriented business supervisory body. The current monitoring of social enterprises, however, is restricted to the business element of such enterprises, as there is no explicit regulatory legislation requiring the regulatory body to monitor the social performance of social enterprises. Consequently, they are left to run freely without any regulatory follow-up about their social mission. However, allowing social enterprises to operate in the market without being monitored by any regulatory organization for their social performance may encourage fraudulent social entrepreneurs to claim the status of a social enterprise. To attract consumers and acquire donor-funded financing, a business that spends a little amount of money on a social purpose can claim the status of a social enterprise. This could lead to misleading stakeholders such as investors, donors, consumers, and even the government. A fake social enterprise may influence stakeholders in social enterprises due to information asymmetry. To address this issue, a regulatory authority shall be established to oversee social enterprises from the time they enter until they exit. There must be an authority that can license social businesses by ensuring that all requirements are met during formation, supervise their operations during the operational stage and exit period, and take appropriate action against them if they violate the law.

Another related problem is which government authority should be tasked with regulating social enterprises in Ethiopia. Should they be governed by the Ministry of Trade and Regional Integration (MOTRI) and the Regional Trade

[184]Id.

Bureaus, Charities, and Civil Societies Agency (CSA), or both, or do we need a new regulating body? If we give trade bureaus the authority to regulate social enterprises, they will fail to supervise the social performance of social enterprises because they are unfamiliar with how businesses' social performance may be monitored. These authorities are not experts in overseeing charitable activities of legal entities. Rather, they are intimately conversant with business supervision issues. Similarly, allowing them to be governed by the CSA will not be helpful in overseeing the commercial component of social enterprises, as the CSA's specialty is solely supervising the social works of organizations. The other option is to delegate the responsibility for supervising social companies to both authorities, namely MOTRI and the CSA. Giving the CSA the responsibility to supervise the social component of social enterprises and the MOTRI the commercial aspect will be an effective approach to regulating social enterprises because both are professionals in their respective fields. However, delegating the responsibility for regulating social enterprises to two separate regulatory authorities may cause inconvenience for social enterprises. For example, they will be expected to report their business performance to MOTRI and their social performance to the CSA. This will not be convenient for social enterprise founders, managers, or directors.

The author, however, believes that Ethiopia should establish a distinct regulatory entity that is solely responsible for overseeing social enterprises from their entry to their exit. A single regulatory authority shall oversee the social and business performance of social enterprises. Establishing a single, separate regulatory authority for social enterprises will help to ensure strict regulatory oversight of their social and financial performance, while also making it easier for social entrepreneurs to meet supervision requirements. In fact, one may argue that having a single regulatory authority for a specific type of business will be costly to the government. However, the cost that a

government may pay in supervising such enterprises through a separate authority will not outweigh the advantage that the country, including the society, will derive from improved supervision. Thus, the cost that the government may expend for the supervisory organ of social enterprises shall not be used as a reason not to establish a separate regulatory authority for such organizations.

Conclusion

The primary purpose of this study was to investigate the major regulatory concerns of social enterprises and the possibility of regulating them under Ethiopia's existing commercial laws. To accomplish this goal, the author cites a few regulatory concerns of social enterprises. The first two primary regulatory concerns identified in this article are developing an appropriate legal form and establishing the standards for obtaining social enterprise status. Furthermore, the article highlights certain significant regulatory issues that arise throughout the operational stage of social enterprises. The areas of regulation identified by this study include profit allocation, asset transfer and sale, social enterprise mergers, disclosure of social performance, the duty and obligation of directors and managers, and oversight of social enterprises. Lastly, regulating the fate of the assets of the social enterprise during dissolution is also another area of regulation that the article identifies.

Furthermore, the author finds that the regulations of Ethiopia's commercial code are insufficient to address the regulatory issues of social enterprises. It is stated that existing legal forms of business are unsuitable for social enterprise business types since none of them can communicate the aim of the enterprise to the community. Existing legal forms cannot protect the interests of social enterprise owners, i.e., brand building interests, and stakeholders' interests, i.e., distinguishing social enterprises from others, because they are not structured to convey the message of the business's purpose. It is also stated

that the existing business legal structures are insufficient to evaluate the social mission of the enterprise during formation, limit the enterprise's profit distribution, regulate the transfer of an asset, the sale of the social enterprise, the merger of the social enterprise with other profit-oriented businesses, and regulate the disclosure of information about the enterprise's performance. It is also noted that Ethiopia's current business regulatory regime is unsuitable for placing obligations and liabilities on directors in order to maximize the community's interests. The existing rules limit the duty and liability of directors and management to the firm owners, not stakeholders. Stakeholders cannot file a lawsuit in court when directors and management fail to maximize the community's societal interest. It was also discovered that there is currently no supervisory authority in place to monitor the social performance of social enterprises.

Hence, since the existing legal regime of businesses doesn't address the potential concerns of social enterprises, problems such as information asymmetry, mission drift, social washing, and loss of legacy or existence of fake social enterprises might have arisen if we left them to be regulated in the existing business regulatory regimes of Ethiopia. It is open for owners of social enterprises to manipulate capital collected from donations for their personal benefit.

To address these concerns of social enterprise regulation, the government shall enact a separate regulatory legal regime for social enterprise. It shall frame a regulatory framework that can prevent the happening of information asymmetry, mission drift, loss of legacy, entrance of fake social entrepreneurs, and social/green washing problems in the social enterprise sector. It shall, in particular, specify the legal forms for social enterprises, criteria for licensing and registration of social enterprises, and evaluate the social mission of the business. The intended regulation shall also determine

the allocation of profits, asset transfer, sale and merger of social enterprises, and disclosure of social and financial performance. It shall also impose duties and liabilities on managers and directors of social enterprises towards stakeholders and empower the latter to claim against directors or managers for the breach of their duty before a court of law, either through the regulatory organ or by themselves. Finally, there shall be a law that shall establish a specific and separate regulatory authority empowered to regulate social enterprises.

Assessing Ethiopia's Readiness to Combat Computer-focused Crimes: A Legislative Analysis.

Molalign Asmare Jemberie[√]&Audrey Guinchard[Π]

Abstract

The rapid digitalisation of Ethiopia's telecommunication services has brought not only opportunities but also challenges, not the least an increasing vulnerability to cybercrime attacks. The Ethiopian government started to criminalise computer-focused offences in the 2004 Criminal Code by including a short list of computer crime provisions, partially completed by the 2012 Telecom Fraud Offence Proclamation. A decade later, the 2016 Computer Crime Proclamation significantly amended these offences and their punishments. Yet, the Ethiopian legislator is contemplating a third set of legislation, with the 2019 draft Computer Crime Proclamation. This article critically analyses these three legislative reforms. It contends that the 2016 Computer Crime Proclamation represents a strong positive step towards a proportionate and adapted response to computer-focused crimes. Ethiopia's current readiness to tackle cybercrime would be, however, strengthened if it were to further improve the provisions of the 2016 Proclamation. Unfortunately, the 2019 Draft Proclamation is not the way forward. As it stands, it would perpetuate the cycle of revisions without being justified by rapid changes in technological advancement or by the specificities of cybercrimes, such as their scale and transnational dimension. For the

[√]Ph.D. Candidate (School of Law, Bahir Dar University, Ethiopia). Email: molalignasmare@gmail.com.

[Π]Essex Law School, University of Essex (UK). Email: abguin@essex.ac.uk.

Note from the authors. Molalign has done all the ground work for this article, which he built on the significant chapters of his thesis. Audrey, who has been his co-supervisor, helped put the article into its present shape. Both would like to thank Dr. Dadimos Haile, Molalign's other co-supervisor, for his precious guidance and input along the last five years and for this article.

reform to be effective and long-lasting, the legislator should simultaneously maintain the 2016 Proclamation, which successfully modernised the law, and remedied its deficiencies. Reform should notably consider the specific features of computer-focused crimes and the best experiences from international and regional standards, notably the Budapest Convention, and the AU Malabo Convention. Such an approach would reinforce Ethiopia's adequate criminalisation of computer-focused crimes cognisant of the cybercrime and cybersecurity ecosystem.

Key words: *Computer-Focused Crimes, Taxonomy, Legislative Response, Gaps, Punishment, Proportionality*

Introduction

Following late telecom liberalisation in 2020 and digitisation of Ethiopian telecommunication services from the late 1990s onwards,[1] Ethiopia's access to the internet has steadily increased, reaching its peak in 2022 with a 25% internet penetration rate from a 1.9% internet penetration rate in 2014.[2] Despite this penetration rate slowing down to 19.4% in 2024[3] due to non-technical issues,[4]

[1] Federal Democratic Republic of Ethiopia, *Digital Ethiopia 2025: A Strategy for Ethiopia Inclusive Prosperity*, 51 (2020); Tsicie, Abiie and Feyissa, Cirma., Ethiopia: Past, present, and future, in Eli M. Noam, (ed.) *Telecommunications in Africa*, Oxford University Press, (1999), pp.51-78, spec, pp.53-56.

[2] Data Portal, Digital 2022: Ethiopia, Stage of the Digital in Ethiopia in 2022, https://datareportal.com/reports/digital-2022-ethiopia?rq=ethiopia%202022 (accessed July 30, 2024). From a 1.9% internet penetration reported for 2014, Kinfe Micheal Yilma and Halefom H. Abraha, The Internet and Regulatory Response in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media, Mizan Law Review Vol.9: No.1 (2015), 108-153, spec 110

[3] Data Portal, Digital 2024: Ethiopia, State of digital in Ethiopia in 2024, https://datareportal.com/reports/digital-2024-ethiopia (accessed on July 26, 2024).
Digital Watch Observatory, Geneva Internet Platform (digwathch), Ethiopia, https://dig.watch/countries/ethiopia (accessed on July 26, 2024).

[4] Federal Democratic Republic of Ethiopia, State of Emergency Proclamation No 6/2023, *Federal Negarit Gazzete*, (November 2023); A State of Emergency Proclamation No. 5/2021, *Federal Negarit Gazzete*, (November 2021). These

digitised telecommunication services have brought significant benefits to its economy and society.[5] This has, however, increased vulnerability to cybercrime risks, which is also the case worldwide.[6] This article critically analyses Ethiopia's responses to cybercrime, focusing solely on computer-focused crimes.[7] It contends that the Computer Crime Proclamation No.958/2016,[8] represents a significant and positive step towards a proportionate and adapted response to computer-dependent crimes, compared to the initial criminalisation in the 2004 Federal Democratic Republic of Ethiopian (FDRE) Criminal Code.[9]

Nevertheless, Ethiopia's readiness to tackle cybercrime would be strengthened if it were to further improve the Proclamation's

Proclamations allowed for communication restrictions in some part of the countries such as Tigray, Afar, Amhara, Western Oromia and so on.

[5] Elvis Melia, *The Impact of Information and Communication Technologies on Jobs in Africa: A Literature Review*, Deutsches Institut für Entwicklungspolitik (giz), 30 (2019); Tsicie and Feyissa *supra* note 1.

[6] For Ethiopia, Kinfe Micheal Yilma, Developments in Cybercrime Law and Practice in Ethiopia, Computer Law & Security Review Vol.30: No.6, (2014) p. 720, pp. 720-721; globally, Stein Schjolberg, The Road in Cyberspace to United Nations: A Report on the Development of Global Cyber security Since 2008 and Recommendations for Future Initiatives, 63, 2007-2008 (HLEG, GCA, ITU), (2018) p.1.

[7] Also called computer-dependent crimes, *see* Thomas Holt and Adam Bossler, Introduction, in Thomas Holt and Adam Bossler, *Cybercrime in Progress: Theory and Prevention of Technology-Enabled Offences*, Routledge (2015), p.7; Jonathan Clough, *Principles of Cybercrime*, Cambridge University Press,(2015), pp.10-12; *see* discussion infra, II.

[8] A Proclamation to Provide for the Computer Crime, Proclamation No. 958/2016, *Federal Negarit Gazeta*, 22nd Year No. 83, (Addis Ababa 7th July, 2016), Article 5. [hereinafter the 2016 Proclamation]. The text is available on Federal Democratic Republic of Ethiopia, Ministry of Innovation and Technology website athttps://mint.gov.et/docs/telecom-fraud-offence-proclamation-no-761-2012/?lang=en (accessed on July 30, 2024).

[9] *See* the Criminal Code of the Federal Democratic Republic of Ethiopia, *Negarit Gazzeta*, Proclamation No.414/2004, 9th of May, Article 706-711, (2004), [hereafter the "2004 Criminal Code"]. Book VI "Crimes against Property," Chapter III "Crimes against Right in Property," Section II "Computer Crimes" from Articles 705-711.

substantive criminal law provisions on computer-focused crimes. This article argues that the third legislation currently explored, the 2019 Draft Proclamation, is not the way forward.[10] To be effective and long-lasting, tailored to cybercrime's specificities and able to withstand the rapid technological advancement characteristic of digital technologies, the proposed text should be substantially revised, should the legislator decide to go forward with it.

Introduced in 1894, Ethiopia's telecommunication network struggled to expand and recover from the Italo-Ethiopian wars of the first half of the 20th century.[11] It took a series of market reforms in 1996 to broaden its telecommunication services, offering mobile services by 1999, 3G in 2001, roaming by 2003 and broadband in 2004.[12] With this rise in quality telecommunications, the threat of cybercrimes became an increasing possibility, calling for the newly reintroduced Ethiopian Federal Government to regulate the use of information

[10] The Draft Proclamation to Provide for the Regulation of Computer Crime, Computer Proclamation No…./2019, at Article 3. [hereinafter the 2019 draft Proclamation].

[11] Tsicie and Feyissa *supra* note 1; ITU, *Internet from the Horn of Africa: Ethiopia Case Study*, Geneva, (July 2002) pp.6-12 available at https://www.itu.int/osg/spu/casestudies/ETH_CS1.pdf (accessed on July 30, 2024). [hereinafter "ITU: Ethiopia Case Study"]; Timothy John Charles Kelly, "Concept Project Information Document (PID)-Ethiopia Digital Foundations Project-P171034." World Bank Group (2019), p.47 – the World Bank Group had financed some of the telecommunication infrastructures; Taye E. Dubale, *Telecommunication in Ethiopia*, in UNTCAD, Multi-Year Expert Meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, (Geneva, 17-19 March 2010) p.2. Can also be consulted TheEthiopian Telecommunications Corporation (ETC), *Birds Eye View of the Ethiopian Telecommunications Corporation in the Past Millennium,Tele Negarit*, 44:1 (2007), pp.40-43.; and *Brief Historical Review of Telecom Sector in Ethiopia*, https://www.ethiotelecom.et/history/ (accessed on July 30, 2024).

[12] Id. Yilma and Abraha, *supra* note 2, pp.114-119.

technology in the country.[13] Ethiopia used the revision of the 1957 Penal Code to introduce a specific chapter on *Computer Crimes* in its 2004 Criminal Code.[14] Multiple sources inspired the drafting of this first cybercrime legislation, notably: the Convention on Cybercrime n. 185[15], despite Ethiopia not being a signatory; and the US and UK legislations.[16] The Ethiopian Government's commitment to tackle cybercrime was later reinforced with the introduction of the 2009 Information and Communication Technology Policy, the 2011 National Information Security Policy, and the 2011 Criminal Justice Policy.[17] Nevertheless, the Code suffered from some weaknesses, not

[13] The federal structure was re-introduced in 1991, followed by a new constitution in 1995, Constitution of the Federal Democratic Republic of Ethiopia (FDRE) Constitution, (21 August, 1995), Article 5 (2). *See* notably Yilma *supra* note 6, pp. 720-721.

[14] For the 2004 Criminal Code, *supra* note 9; the Penal Code of The Empire of Ethiopia 1957, Proclamation No. 158 of 1957, *Negarit Gazeta, Gazette Extraordinary,* 23 July 1957. The technology born crimes was not criminalized in the Penal Code.

[15] Council of Europe, *Convention on Cybercrime*, ETS 185, 23.XI, Budapest, (2001). [hereinafter the "Budapest Convention"].

[16] *See*የኢትዮጵያፌዴራላዊዲሞክራሲያዊሪፐብሊክየተሻሻለውየወንጀልሕግሐተታዘምክንያት (Explanatory Note to the 2004 Criminal Code). [original language was in *Amharic*, translation: mine]. [hereinafter "Explanatory Note to the Criminal Code"]. As stated in the Explanatory Note to the 2004 the Criminal Code, the main sources of national criminal code computer crime provisions are the 1990 Massachusetts "Act to Prevent Computer Crime", the 1994 Texas "Computer Crime Statute," the 1990 UK "Computer Misuse Act", the USA "Fraud and Related Activity in Connection with Computer".

[17] These policies contribute to a country's readiness to fight cybercrime. *See* notably: Marco Gercke, Understanding cybercrime: a guide for developing countries, *International Telecommunications Union* (2009), pp.63-83; Marco Gercke, Understanding cybercrime: Phenomena, challenges and legal response, *International Telecommunication Union* 366 (2012), pp.97-113, 169-280; UNODC, Comprehensive Study on Cybercrime, February 2013; M. Y. Ayenew, Assessment of Cybercrime Governance in Ethiopia Since 2004, *New Media and Mass Communication* Vol.96 (2021) p.1 DOI: 10.7176/nmmc/96-01; Beatrice Brunhöber, *Criminal Law of Global Digitality: Characteristics and Critique of Cybercrime Law,in* Matthias C. Kettemann, Alexander Peukert, and Indra Spiecker gen. Döhmann, *The Law Of Global Digitality*, Routledge (2022) pp223, 245-247. *See* also Michal Choraś, Rafal Kozik, Andrew Churchill, and Artsiom Yautsiukhin, Are We Doing All the Right Things to Counter Cybercrime? *in* Babak Akhgar and Ben Brewster, (eds) *Combatting Cybercrime and*

least the non-criminalisation of illegal interception.[18] In 2012, the Telecom Fraud Offense Proclamation partly attempted to tackle some of the Code's deficiencies concerning cyberattacks against the telecom critical infrastructures.[19] These inadequacies of the first wave of law making led to a legislative overhaul barely a decade later, along with further revisions of the above policies.[20] At the heart of this second wave of legislative reforms, is the 2016 Proclamation, which repealed the Computer Crimes chapter of the Code as well as Article 5 of the 2012 Proclamation, followed soon after by a new ICT Policy.[21] The 2016 Proclamation's drafting committee conducted extensive research on cybercrime, identifying prevalent attacks and vulnerabilities, and examining gaps in relevant laws.[22] It also consulted international standards, model laws, and national legislation to align the law with the international aspect of computer crimes. Despite Ethiopia not being a signatory to both, the

Cyberterrorism. Advanced Sciences and Technologies for Security Applications, Springer, (2016), p. 279.

[18] *See* e.g.Yilma, *supra* note 6; Yilma and Abraha, *supra* note 2.

[19] A Proclamation on Telecom Fraud Offense, Proclamation No.761/2012, Federal *Negrait Gazeta*, (September, 2012). [hereinafter the "2012 Telecom Fraud Proclamation"]. Article 5 of the Proclamation that deals with computer related crimes has been repealed by the 2016 Computer Crime Proclamation.

[20] Kinfe Micheal Yilma, Some Remarks on Ethiopia's New Cybercrime Legislation, *Mizan Law Review* Vol.10: No.2, (2016), pp. 448, 453-454; Kinfe Micheal Yilma, Ethiopia's New Cybercrime Legislation: Some Reflections, *Computer Law& Security Review*, Vol. 33, (2017), p. 250.

[21] Soon after, there are also the Federal Democratic Republic of Ethiopia, National Information and Communication Technology Policy and Strategy, (September, 2017). [hereinafter the 2017 New ICT Policy].

[22] የኮምፒውተርወንጀልአዋጅማብራሪያ (The Explanatory Note to the Computer Crime Proclamation), 2-4 (2016) [original language was in *Amharic*, translation: mine]. [hereinafter "Explanatory Note to Computer Crime Proclamation"].

BudapestConvention and the future Malabo Convention[23]had a noticeable influence on the Ethiopian legislature.[24]

The 2016 Proclamation's scope is wider than the particular focus of this article. This *lex speciali* created computer-content crimes, including terrorism; and introduced legal mechanisms to prevent, control, investigate, and prosecute computer crimes, and collect evidence.[25] These provisions have been heavily criticised for favouring law enforcement authorities to the detriment of the basic

[23] The Draft African Union (AU) Convention on the Establishment of a Credible LegalFramework for Cyber-security in Africa, AU Draft Version, (2011), and later adopted as the African Union, the *African Union Convention on Cyber Security and Personal Data Protection*, 27 June 2014 (EX.CL/846(XXV)). [hereinafter the "Malabo Convention"].

[24] Notably: ITU, Computer Crime and Cybercrime: Southern African Development Community (SADC) Model Law, Harmonization of ICT Policies in Sub-Saharan Africa (HIPSSA). (2013). [hereinafter the "ITU SADC Model Law"]; United Nations Economic and Social Commission for West Asia (ESCWA) (2007), *Models for Cyber Legislation in ESCWA Member Countries*, E/ESCWA/ ICTD/2007/8, Beirut: ESSWA [hereinafter the ESCWA Model Legislation]; G8 Communiqué, Meeting of Justice and Interior Ministers, December 9–10, 1997,*Communiqué Annex: Principles and Action Plan to Combat High-Tech crime,* available at https://www.justice.gov/sites/default/files/ag/legacy/2004/06/08/97Communique.pdf (last visited on July 31, 2024); and UN General Assembly Resolutions from 1990-2004: The UN General Assembly Resolution 45/121, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, A/RES/45/121, (14 December 1990); The UN General Assembly Resolution 55/59, *Vienna Declaration on Crime and Justice: Meeting theChallenges of the Twenty-first Century*,A/RES/55/59**, (**4 December 2000); The UN General Assembly Resolution 55/63, *Combating the Criminal Misuse of InformationTechnologies*,A/RES/55/63, (4 December 2000); The UN General Assembly Resolution 56/121, *Combating the Criminal Misuse of InformationTechnologies*,A/RES/56/121, (19 December 2001); The UN General Assembly Resolution 57/239, *Creation of a Global Culture of Cyber-security*,A/RES/57/239, as annexed, (20 December 2002); and The UN General Assembly Resolution 58/99, *Creation of a Global Culture of Cyber-security and theProtection of Critical Information Infrastructures***,** A/RES/58/199, (23 December 2003).

[25] The 2016 Proclamation, *supra* note 8.

protection of human rights, especially freedom of expression.[26] In contrast, its Articles on computer-focused crimes have not attracted comments, whether praises or criticisms, although they represent a significant modernisation of the 2004 offences.[27] Furthermore, the 2019 Draft Proclamation proposes further amendments to the computer-focused offences, in addition to possibly remedying the controversial aspects of the Proclamation.[28]

This frequent cycle of revisions of the criminal law framework raises the question of the legislation's adequacy in tackling computer-focused crimes. Are the revisions justified by the need to update the criminal law to account for new, unforeseeable *modi operandi* and rapid technological advancement? Or are they the symptom of the legislator's difficulty in structuring the criminal law to capture the specificities of cybercrime while remaining technologically neutral? One way to measure this adequacy could be by looking at the number of crime reports, prosecutions and convictions for computer-focused crimes. Yet, reliable national statistics on cybercrimes are notoriously

[26] Article 19, Ethiopia*: Computer Crime Proclamation: Leal Analysis*, Free World Center, (2016) pp. 1-32; Dagne Jembere & Alemu Meheretu, Implications of the Ethiopian Computer Crime Proclamation on Freedom of Expression. *Jimma University Journal of Law*, Vol. 10, (2018) https://doi.org/10.46404/jlaw.v10i0.989; Shishay Abraha Mehari, Implications of the Ethiopian Computer Crime Proclamation on the Enjoyment of Human Rights, *Ijrar- International Journal Of Research And Analytical Reviews* Vol.7: No. 2, (2020) p.110, 116-119. For an overview on freedom of expression, *see* also Freedom House, *Freedom on the Net 2021, Ethiopia*, https://freedomhouse.org/country/ethiopia/freedom-net/2021 (accessed on Sept., 22, 2021).

[27] *See* Yilma supra note 20.

[28] The 2019 draft Proclamation, supra note 10, Art. 3; Kinfe Micheal Yilma, Cybercrime Law Making and Human Rights in Ethiopia, *Mizan Law Review* Vol. 15: No.1, (2021), pp.73-106.

lacking;[29] and there is a 'conspicuous divergence' between reported cybercrimes and successful prosecutions, even in countries where cybercrime legislation is several decades old and statistical tools already exist albeit in need of tweaking as in the UK.[30] Ethiopia is no different in this respect, with only a few reported cases[31] and a paucity of information on cyber-attacks due to poor reporting.[32] A more fruitful approach to evaluate the adequacy of substantive criminal law is to analyse the structure of the offences and their penalties by reference to existing international legal instruments, notably the Budapest Convention, even though a country such as Ethiopia has not ratified the Convention. The specificities of cybercrimes, especially their large-scale and transnational nature, call indeed for national legislators to establish a common legal ground for the criminalisation and punishment of computer-focused crimes. This allows for their country to avoid becoming a safe haven where cybercriminals cannot

[29] Gargi Sarkar & Sandeep K. Shukla, Behavioral Analysis of Cybercrime: Paving The Way For Effective Policing Strategies, *Journal Of Economic Criminology* Vol. 2, (2023), p.1, 7. On the lack of statistics, Clough, *supra* note 7, pp.15-16; David S. Wall, *Cybercrime : the transformation of crime in the information age*, Polity (2007), pp.25-40; Audrey Guinchard, Between hype and understatement: reassessing cyber risks as a security strategy, *Journal of Strategic Security* Vol. 4: No. 2, (2011), pp. 75-96; Bert-Jaap Koops, The Internet and its opportunities for cybercrime, in M. Herzog-Evans (Ed.), *Transnational Criminology Manual*, Wolf Legal Publishers (2010), pp. 735-754; Alisdair A. Gillespie, *Cybercrime: Key Issues and Debates*, 2nd edition, Routledge, (2019), ch 1; Ian Walden, *Computer Crimes and Digital Investigations*, Second Edition, Oxford University Press, (2016), p. 7; Ian Walden, Crime and Security in Cybercrime, *Cambridge Review Of International Relations* Vol. 18: No.1 (2005), p. 51, 53.

[30] For a summary on the UK for example, see Appendix B, in Criminal Law Reform Now Network, Reforming the Computer Misuse Act 1990, Report, (2020) http://www.clrnn.co.uk/publications-reports/(accessed on July 27, 2024).

[31] Yilma, *supra* note 28.

[32] For an unofficially sanctioned survey, *see* the work of Hailu, Halefom, The state of cybercrime governance in Ethiopia. *Article published on ResearchGate, available at https://www. researchgate. com* (2015); *see* also the Ethiopian Monitor, *INSA Thwarts 787 Cyber-Attacks on Ethiopia in 2019/20 FY*, https://ethiopianmonitor.com/2020/08/24/insa-thwarts-787-cyber-attacks-on-ethiopia-in-2019-20-fy/ (accessed on July 2, 2024).

be prosecuted simply based on deficiencies in the criminalisation of the relevant offences.[33]

This article therefore has adopted a doctrinal approach to assess Ethiopia's readiness to combat computer-focused crimes. It argues that the 2016 Proclamation, compared with the 2004 Code, significantly improved the criminalisation of computer-focused offences and their punishment. Further improvements can still be sought, not because of technological advancement justifying a third reform, but because of the Proclamation's deficiencies in articulating some aspects of cybercrime offences and their penalties. This article will thus start with section 2 on the contextualisation of Ethiopia's cybercrime legislative response, to critically review the current taxonomies in cybercrime legal instruments and scholarly work and sketch the conceptual framework on proportionate penalties. It will then analyse how the 2016 Proclamation has articulated the computer-focused offences (section 3), and their penalties (section 4), both by reference to the 2004 Code and in anticipation of the third revision, i.e. the 2019 Draft Proclamation. It then concludes in section 5 that the 2019 Draft Proclamation would need important revisions to

[33] The Council of Europe, Committee of Experts on Crime in Cyber-Space, *Explanatory Report to the Convention on Cybercrime*, Explanatory Report–ETS 185–Cybercrime (Convention),Budapest, 23.XI.2001, (2001). [hereinafter the "Explanatory Report to the Budapest Convention"]; UNODC, *supra* note 17; Helena Carrapico & Benjamin Farrand, Cybercrime as a Fragmented Policy Field in the Context of the Area of Freedom, Security and Justice, in Ariadna Ripoll Servent and Florian Trauner, (eds), *The Routledge Handbook Of Justice And Home Affairs Research*, Routledge, (2017), pp. 146-156, 148; Wang Qianyum, *A Comparative Study of Cybercrime in Criminal Law: China, United States, England, Singapore and The Council of Europe*, PhD Thesis, Erasmus University: Rotterdam, unpublished, 342-353 (2016).

adequately complement the current 2016 Proclamation and provide Ethiopia with a fully adequate substantive criminal law framework.

1. Contextualising Ethiopia's Legislative Responses to Cybercrimes

Due to the frequent, large-scale nature and transnational dimension of cyberattacks, the fight against cybercrime calls for a baseline, a common denominator, which in substantive criminal law, means establishing a taxonomy of offences to inform their criminalisation as much as their punishment.[34] In this section the article aims to assess the legislative response to cybercrimes in Ethiopia.

1.1. Defining cybercrimes: taxonomies to inform criminalisation

The term cybercrime has become a familiar occurrence, but it remains ill-defined, often used interchangeably with other expressions such as *computer crime, e-crime, internet crime, digital crime, online crime, virtual crime, techno-crime,* and *networked crime*.[35] Both the

[34] Jeremy Horder, *Ashworth's Principles of Criminal Law*, 10th edition, Oxford University Press, (2022), ch. 4; Jeremy Horder, The Classification of Crimes and the Special Part of the Criminal Law, in Robin Antony Duff and Stuart Green, *Defining Crimes: Essays on the Special Part of the Criminal Law*, Oxford University Press (2005), p.21; Andrew P. Simester and Andreas Von Hirsch, *Crimes, harms, and wrongs: On the principles of criminalisation*, Bloomsbury Publishing, (2011), pp 202-208; George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, And International: Volume One: Foundations*. Oxford University Press, 2007, pp 69-80; similarly, Ian Walden, (2016), *supra* note 29, p. 26.

[35] For example, in the law literature, Clough, supra note 7, ch. 1; Walden, *supra* note 29, ch 2; Marc D. Goodman and Susan W. Brenner, The Emerging Consensus on Criminal Conduct in Cyberspace, *International Journal of Law & Information Technology*, Vol.10 No.2 (2002), pp.139-223.; Mohamed Chawki, Ashraf Darwish, Mohammad Ayoub Khan, and Sapna Tyagi, *Cybercrime, Digital Forensics and Jurisdiction*, Vol. 593. Springer, (2015), ch 1; in criminology, Wall supra note 29, ch 2; Michael McGuire, It Ain't What It Is, It's The Way That They Do It? Why We Still Don't Understand Cybercrime, in Leukfeldt Rutger and

domestic and the international legal framework provide no accepted definition for the term cybercrime. At the international level, neither the Budapest Convention nor the Malabo Convention, nor for that matter, the UN Draft Convention, have defined the term.[36] The meaning of 'cybercrime' can be derived from the broad range of offences the texts criminalise. These offences widely differ in their constitutive elements and rationale, ranging from hacking to unauthorised interference, fraud, child pornography and, for the Budapest Convention only, copyright infringements. At a national level, Ethiopia's 2016 Proclamation chose a different approach, also adopted by the 2019 Draft Proclamation. Its Article 2 expressly defines 'computer crime' by means of three categories of offences: those 'against a computer, computer system, data or network'; the 'conventional crime[s] committed by means' of digital technologies, such as fraud; and the content-related crimes, such as child pornography.At the policy level,the2021 Draft National Cybersecurity Policy and Strategy of Ethiopia adopts a similarly broad definition of

Thomas J. Holt, (eds) *The Human Factor of Cybercrime*, Routledge (2019), 3-28, 8. Matthew David, *Networked Crime. Does the Digital Make the Difference?* Bristol University Press 2023, ch 1; Ravinder Barn & Balbir Barn, An Ontological Representation of a Taxonomy for Cybercrime, Research Papers. 45, *in* 24TH European Conference on Information Systems (ECIS 2016) 1, (2016), https://aisel.aisnet.org/ecis2016_rp/45 (accessed July 30, 2024).

[36] UN draft Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, A/AC.291/22/Rev.3 (Reconvened concluding session of the Ad Hoc Committee (July 29 – August 9, 2024) https://www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/ahc_reconvened_concluding_session/main (accessed July 30, 2024).

cybercrime as a crime committed by using information and communication technologies and networks, particularly the Internet.[37]

In the absence of an accepted legal definition of cybercrime, scholars from non-legal disciplines have proposed various classifications, noting the difficulties in establishing relevant taxonomies, with some authors adapting over time their proposed categories to better account for cyber behaviours.[38] Legal scholars have been less adventurous,[39]mostly following the classification of the international legal instruments[40] used by international organisations.[41] The

[37] The Federal Democratic Republic of Ethiopia National Cyber-security Policy and Strategy, draft 1.0, Addis Ababa, 2 (February, 2021), at iii. [hereinafter "the 2021 Draft Cyber Security Policy," original document in Amharic, translation: mine].

[38] In criminology, notably Wall, *supra* note 29; David S. Wall, The Internet as a Conduit for Criminals, in April Pattavina (ed.) *Information Technology and the Criminal Justice System*, Sage (2005), pp.77-98, 82 (2005) as revised in 2015; Thomas J. Holt, Adam M. Bossler, and Kathryn C. Seigfried-Spellar. *Cybercrime and digital forensics: An introduction*. *An Introduction*, Routledge, (2022), ch. 1; in psychology and criminology, Kirsty Phillips, Julia C. Davidson, Ruby R. Farr, Christine Burkhardt, Stefano Caneppele, and Mary P. Aiken, Conceptualizing Cybercrime: Definitions, Typologies and Taxonomies, *Forensic Sciences*, Vol. 2: No. 2 (2022), p.379, 383-389; Douglas Thomas and Brian Loader, Introduction,in Douglas Thoms and Brian Loader, (eds), *Cybercrime: Law Enforcement, Security And Surveillance In The Information Age*, Psychology Press (2003), p3.; in computer science and business studies,**Charlette Donalds and Kweku-Muata Osei-Bryson, Toward a cybercrime classification ontology: A knowledge-based approach, Computers in Human Behavior, Vol 92 (2019), p.403;** in computer science alone, *see*Sarah Gordon and Richard Ford, *On the definition and classification of cybercrime*, Journal In Computer Virology, Vol. 13: No. 2, (2006) 14; George Tsakalidis, Kostas Vergidis, and Michael Madas, Cybercrime offences: Identification, classification and adaptive response, in 2018 5th International Conference On Control, Decision And Information Technologies, IEEE, (2018), p.470.

[39] For e.g., Walden (2016), *supra* note 29, ch 2; Clough, *supra* note 7, p.17; Gillespie, *supra* note 29, pp. 3-7; Goodman and Brenner, *supra* note 35.

[40]The Budapest Convention, *supra* note 15; Malabo Convention, *supra* note 23; Commonwealth of Independent States, Agreement on Cooperation in Combating Offences related to Computer Information, (2001); ITU-SADC Model Law, *supra* note 19.

[41] From early on: Council of Europe, Computer-related crime : recommendation no. R. (89) 9 on computer-related crime and final report of the European Committee on Crime Problems, (1990), p.12-14; [hereinafter the "Bequai Report Council of

consensus on the taxonomy of cybercrimes in law is thus to classify them into three categories; computer-focused crimes or computer-dependent crimes, computer-related crimes, and content-related crimes, the last two sets pre-existing the emergence of digital technologies, albeit at times needing some adaptations.[42] The fourth and last category of copyright-related offences present in the Budapest Convention has not been widely adopted. This article concerns only the first category, which the Budapest Convention has defined by reference to the computer-science-based triad of confidentiality, integrity and availability.[43]Sometimes nicknamed "true" cybercrimes,[44] these offences were created to palliate the weaknesses of the traditional criminal law offences which could not capture the relevant cyber-behaviours. There are thus five offences: *illegal access*, *illegal interception*, *data interference*, *system interference*, and *misuse of devices*.[45]

Europe R(89)9"]; OECD Information Computer Communications Policy, *Computer-related Crime: analysis of legal policy*, 1986) ch 1; United Nations, United Nations Manual on the Prevention and Control of Computer-Related Crime; United Nations: New York, NY, USA, (1994); UN draft Convention, *supra* note 40.

[42]Goodman and Brenner, *supra* note 35.

[43] The Budapest Convention, *supra* note 15, Section 1, Title 1, Art. 2-6; on the triad, ENISA, *Guidelines for SMEs on the security of personal data processing*, December 2016, p.10 at https://www.enisa.europa.eu/publications/guidelines-for-smes-on-the-security-of-personal-data-processing (accessed on July 27, 2024); Jeroen Van Der Ham, Toward a Better Understanding of 'Cybersecurity, *Digital Threats: Research and Practice*, Vol. 2: No. 3, (2021) pp 1–3

[44] Wall, *supra* note 29, ch 4; *see* also David S. Wall, *What are Cybercrimes?*, Crime And Justice Studies, No 58 (2004/05) 20,https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627250408553239.pdf (accessed July 30, 2024)

[45] The Budapest Convention, *supra* note 15, Articles 2-6.

What is at stake behind these debates on taxonomy is the ability of the law to criminalise cyber-behaviours without depending on a particular digital technology while still accounting for the relevant specificities of cybercrimes. Therefore, two questions, at this stage, matter: what are the characteristics specific to computer-focused crimes and to what extent the criminal law can and should account for them when shaping its response? International legal instruments as well as scholars agree on the positive and adverse impacts that digital technologies have on our daily lives, usually citing as characteristics of cybercrime: the absence of a physical crime scene, including the intangibility of data and offender's relative anonymity; the scale and the transnational dimension of the crimes; as well as the speed and technical nature of cybercrimes, with rapid technical advancement fuelling the impact of the other characteristics.[46] These specificities undoubtedly affect the procedural response, creating new challenges for victims to report crimes and for investigators to meet the standards of evidence in criminal law and collaborate in transnational investigations.[47]

For substantive criminal law's purpose, which is the sole focus of this article, these elements are less prominent. Computer-focused crimes

[46] *See* the Bequai Report Council of Europe R(89)9, *supra* note 41, pp.18-20; Preambles of the Budapest and Malabo Conventions,*supra* note 15 and 23, and UN draft Convention, *supra* note 36; UNODC, *supra* note 17. For scholarly work, *see* notably Gillespie, *supra* note 29, ch. 1; Clough, *supra* note 7, p219; Wall, *supra* note 29, ch. 2; Maryke Silalahi Nuth, Taking Advantage of New Technologies: For and Against Crime, *Computer Law & Security Report*, Vol. 24, No. 5, (2008) p. 437; Goodman & Brenner, *supra* note 35;*see* also Holt, Bossler and Seifried-Spellar, *supra* note 41, ch. 12-14; Marc Rogers, Natalie D. Smoak, and Jia Liu, Self-Reported Deviant Computer Behavior: A Big-5, Moral Choice, And Manipulative Exploitive Behavior Analysis, *Deviant behavior* Vol. 27, No. 3, (2006), p. 245.

[47] Gillespie, *supra* note 29, p. 9; Walden (2016), *supra* note 29, ch. 6 and 7; *see* notably, for non-Western countries, Sarika Kader and Anthony Minnaar, Cybercrime Investigations: Cyber-Processes for Detecting of Cybercriminal Activities, Cyber-Intelligence and Evidence Gathering,*Acta Criminologica: African Journal of Criminology & Victimology*, No.5, (2015) p. 67, 71.

have arisen as a response to the difficulties of traditional criminal law to account for behaviours created using technologies. Nevertheless, these new offences also need to be broadly defined to encompass a diversity of situations, targets and means to commit them. Consequently, while the law cannot ignore the specific characteristics of cybercrime, it has to be, paradoxically, technologically neutral to anticipate technological innovations. Legislators also have to balance the need for the law to be specific enough to avoid a challenge of vagueness, while not being too narrow to avoid becoming outdated by technological advancement.[48]

Criminal law has long been familiar with this balancing act. For example, the constitutive elements of fraud, a traditional offence pre-existing the digital technologies, include the offender's misrepresentation of reality with their intention for their victim to depart with property, instead of describing the myriads of ways and technologies constitutive of the misrepresentation.[49] Computer-focused crimes are no different in that respect.[50] International legal instruments have strived to define these offences in the most technologically neutral way so that they do not need constant updating.[51] In that respect, it is probably a testimony to the quality and

[48] As noted as far back as 1989, the Bequai Report Council of Europe R(89)9, *supra* note 41, pp.22-24.

[49] Again as noted very early on, R(89) Report Bequai, pp22-24; for a more modern, specific, comment, *see* for example, John Price, *Dealing with fraud: A regulator's perspective*, Australian Securities & Investments Commission (Speech delivered at the Association of Certified Fraud Examiners Melbourne Chapter annual seminar, Melbourne, 10 (November 2015).

[50] *Id.*

[51] *See,* for example, the definition of data, without any reference to a possible technology other than the most basic and neutral words indicative of the digital component, i.e. a computer system and program, Budapest Convention, Art. 2.

pervasive influence of the Budapest Convention that the multiple drafts of the UN Convention have adopted definitions of computer-focused crimes that are similar, if not identical, to those of the Budapest Convention.[52] The taxonomy in these international legal instruments becomes therefore a crucial point of reference, providing national legislators with a framework to define the offences so that their criminal law can pass the test of time, without multiple revisions, even when they have not been ratified, as it is the case of Ethiopia.[53] Taxonomy also represents a crucial first step for the law to then identify the degree of seriousness each of the criminalised behaviours reveals, so that the criminal law's response remains proportionate and dissuasive, with corresponding punishment.

1.2. Defining cybercrimes: taxonomies to establish proportionate penalties

Prevalent in punishment theories, the proportionality principle states that the severity of punishments should be proportionate to the severity of the offence.[54] The academic literature on proportionality in punishment is vast and often includes not only the legislative process of choosing and grading penalties but also the sentencing stage whereby the judge will take into account other considerations than just the ordinal proportionality that the legislator stated for a particular

[52] *See* UN draft Convention, *supra* note 36, Chapter 2. In that sense, before the writing of the UN draft Convention, **Jonathan Clough, A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation, Monash University Law Review, Vol. 40, No. 3, (2014), p. 698, 729.**

[53] *See* notably Clough, *supra* note 7, p. 27; Walden (2016), *supra* note 29, p. 19.

[54] Horder (2022), *supra* note 34, ch 1; Fletcher, *supra* note 34, ch 6; Lucia Zedner, *Criminal Justice*, Clarendon Law Series, OUP (2004) ch 3. The life-long work of Andrew von Hirsch dominates modern criminal law. *See* notably: **Andrew von Hirsch,** Proportionality in the Philosophy of Punishment, *Crime and Justice*, Vol. 16, (1992), p.55; **and Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles, Oxford University Press, (2005)**.

crime.[55] Given the paucity of reported cybercrime cases, this article will focus solely on the choices the Ethiopian legislator made in terms of ordinal proportionality. Therefore, it will analyse how the legislator scaled penalties based on the comparative seriousness of computer-focused crimes.[56]

Ordinal proportionality involves two sub-requirements: *parity* and *rank-ordering.* Parity allows for differences in punishments only if they reflect variations in the degree of blameworthiness of the conduct. Similar crimes should receive a similar assessment of severity unless special circumstances are identified. Rank-ordering requires punishments to be ordered on a scale that reflects the seriousness rankings of the crimes involved.[57] This restricts internal variation for crime prevention purposes, such as imposing exemplary penalties for a specific offence, outside the scale established and with no valid justification. The language of criminal law has evolved to ascertain offences' respective degree of seriousness along three central concepts, which are reflected in the general part of the 2004 Criminal Code: the criminal pathway that runs from the thought process (the least serious) up to achieving the result, itself an indicator of the harm to be avoided; culpability (intention or negligence); and

[55]Matt Matravers, The Place of Proportionality in Penal Theory, in Michael Tornry (ed.), *Of One-Eyed And Toothless Miscreants: Making The Punishment Fit The Crime?*, Oxford University Press, (2019), p.76, 77-78.

[56] On legal pluralism in Ethiopian criminal law, Jean Graven, The Penal Code of the Empire of Ethiopia, *Journal of Ethiopian Law* Vol. 1, No. 2, (1964), p. 267; Dolores A. Donovan and Getachew Assefa, Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism, *American Journal of Comparative Law*, Vol. 51, No. 3, (Summer 2003), p. 505.

[57]**Von Hirsch, Proportionality in the Philosophy of Punishment, supra note 57, pp.81-82;** Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation*, Kluwer Academic Publishers, (2004), pp. 59-99.

circumstances surrounding the commission of the offence which are not constitutive of the offence's basic structure but can usually aggravate the seriousness of the crime.[58]

The challenge is of course how to assess the seriousness of computer-focused offences and grade them accordingly. The Budapest and Malabo Conventions may both insist on their signatories to establish proportionate and dissuasive penalties, but none is explicit on how to achieve this. The consensus though is that the five computer-focused offences have various degrees of seriousness when their respective *modi operandi* and criminal pathway are considered. The misuse of tools offence is considered less serious than the offence of illegal access. The latter is also described as the frequent first step of a cybercriminal before s/he undertakes illegal data and/or system interferences or illegal interception. In addition, none of the two texts indicates the ordinal proportionality of penalties; and the Budapest Convention does not mention aggravating circumstances such as the targeting of critical infrastructures, particularly relevant given the scale and transnational dimensions of many cyber-attacks. Only the regional Directive 2013/40/EU requires a minimum threshold for imprisonment as a penalty but remains silent regarding fines.[59] All five offences are required to attract 'at least' two years imprisonment; for illegal data and system interferences, this is aggravated to three years when a hacking tool is used, to five years when the target is a critical infrastructure when organised crime is involved, or there is serious damage; and when illegal interference concerns personal data, Member States are required to establish aggravating circumstances,

[58] Fletcher, *supra* note 34; *see* the 2004 Criminal Code, *supra* note 9, Title III on the 'conditions of liability to punishment in respect of crimes.'

[59] Directive 2013/40/EU, of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

without the Directive specifying more.[60] This paucity of information on ordinal proportionality for computer-focused offences should not however act as a deterrent to critically evaluate the Ethiopian legislator's approach to the punishment of its computer-focused crimes. The degree of seriousness of the offences is now established, and the Budapest Convention's approach has become the international standard of reference. This taxonomy gives a framework to label and critically analyse Ethiopia's criminal law response.

2. The Criminalisation of Computer-Focused Offences

Relying on international and regional standards, the 2016 Proclamation took care to define each of the base offences, clearly distinguished from their aggravated forms. It also innovated with Article 2 which provides further definitions of terms used across the legislation. The Proclamation is not however without some gaps,[61] although the nature of the deficiencies varies according to the base offence considered.

2.1. Illegal access: an improved and more coherent definition.

The 2004 Criminal Code criminalised mere unauthorised access to computer services and aggravated unauthorised access to commit further crimes.[62] These offences committed negligently or intentionally, could apply concurrently to the other offences relevant to further crimes, such as fraud.[63]Eight years later, the 2012 Telecom

[60] Id. Art. 9.
[61] These gaps are recapped in section 3.7.
[62]*See* the 2004 Criminal Code, *supra* note 9, respectively Art. 706(1) and 706(2).
[63]*Id.*, Art. 711.

Fraud Proclamation added illegal access to a telecom system, effectively criminalising illegal access that targeted a particular set of critical infrastructures. In that sense, it remedied the Code's weakness of not differentiating between the types of targeted computer systems.[64] Nevertheless, the two offences potentially overlapped, depending on how a computer network was to be interpreted, compared to a telecom system and internet service. Indeed, the 2012 Proclamation did not articulate the scope of either offence, despite a definition of 'telecom service' and 'telecom equipment'.[65]

The 2016 Proclamation brings these different offences into one provision, repealing both Article 5(2) of the 2012 Proclamation, and Article 706 Criminal Code.[66] At first sight, the structure of the offence of illegal access in the 2016 Proclamation remains the same as in the Code and the 2012 Proclamation.The base offence is still about securing access to a computer system, data, or network, and without authorisation. Yet, the 2016 Proclamation brings some significant, positive, changes: it clarifies the scope of the base offence and brings coherence to the legislative choices for criminalisation.

The first main difficulty with the initial offences was the Code's absence of definitions of the key elements (access, authorisation, computer system or data), leading to important uncertainties in terms of the offences' scope and their potential overlap with that of the 2012 Proclamation. By contrast, the 2016 Proclamation specifies that the target can be as much the 'whole' or 'any part of the computer system, data, or network. Thus, it leaves no ambiguity as to whether accessing just one part of a system would be criminalised.[67] It also defines the terms 'computer or computer system', 'computer data',

[64]The 2012 Telecom Fraud Proclamation, *supra* note 19, Art. 5(2).
[65]*Id*., at Art. 2(1).
[66] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 3.
[67]*Id*., Art. 3(1).

'network' and 'access' in techno-neutral language, thus future-proofing the legislation against technological improvements or changes.[68] Most importantly, the Proclamation refers to 'in excess of authorization' alongside 'without authorization', with examples of employees and computer crime investigator officers exceeding their authorisation in the Proclamation's Explanatory Note.[69] This accounts for the various *modi operandi* of the crime while remaining techno-neutral. The criminalisation is thus not dependent on the use of a particular technology to commit illegal access. The precision brought to authorisation therefore lifts any ambiguity that existed in the Code and the 2012 Proclamation as to this key criminalising element of the offence.

The other significant weakness in the Code's provision was its criminalisation of negligent illegal access, leading the criminal law to overreach and criminalise an individual who was simply careless, and not even reckless, in their access to a computer system or data.[70] This overbroad legislative choice was in contradiction to the 2012 Proclamation's approach to criminalise only intentional, not negligent, access to telecom networks. The 2016 Proclamation radically departed from the Code, eliminating the possibility of committing illegal access negligently.[71] Ethiopia is thus in line with the Budapest Convention's requirement for the intention to restrict the mental element of the offence.[72] This choice reflects a balance between the need to capture the specificities of cybercrimes and the necessity not

[68] *Id.*, respectively, Art. 2(2), 2(3), 2(7) and 2(9).
[69] *Id.*,Art. 3(1); the Explanatory Note to Computer Crime Proclamation, *supra* note 23, p.10.
[70] The Criminal Code, *supra* note 9, Art. 706(3)
[71] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 3(1).
[72] The Budapest Convention, *supra* note 15, Art. 2.

to over-criminalise. Trespass in criminal law is generally not a crime, but its criminalisation was here required given that accessing a computer system or data is often a first step towards immediately committing a more serious crime. Yet it cannot become the door to an overreach of the criminal law, hence the requirement of intent for illegal access.[73]

To summarise, while the Code's criminalisation of illegal access could only be welcomed, the 2012 Telecom Fraud Proclamation did not remedy the initial weaknesses of the legislation. The initial legislative choices as to the scope of the offences, the absence of definitions for the key terms and the lack of proportionality between the offences called for further reform. The 2016 Proclamation presents a balanced response in terms of the structure of the offence of illegal access.

2.2. Illegal Data 'Interference': a better-articulated offence despite its name of "causing damage to computer data"

As for illegal access, the 2016 Proclamation brought together into one base offence the various iterations of the offence present in the Code and the 2012 Proclamation.[74] In doing so, it clarified four main aspects of the initial base offences which were problematic. Firstly, the 2016 legislator removed the possibility of negligently committing the offence, avoiding the criminalisation of simple mistakes employees could make, such as data deletion.[75] In that sense, it implicitly reaffirms that the criminal law should be used only as a last resort.[76] Secondly, it specifies that interference could be caused not just "without authorization", but also "in excess of authorization",

[73] The Explanatory Report to the Budapest Convention, *supra* note 33, para. 44-50; Clough, *supra* note 7, pp. 68-69.
[74] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 6(1).
[75] The 2004 Criminal Code, *supra* note 9, Art. 707(3).
[76] Horder (2022), *supra* note 34, pp. 79-81.

such as when an employee intentionally deletes data in their employer's computer system.

Thirdly, the 2016 Proclamation criminalised separately those computer-focused crimes and the computer-related crimes,[77] instead of combining the two as in the Code.[78] This welcome move reinstates the coherence of the criminal law and respects the *modi operandi* of most cybercriminals, since theft, forgery, and fraud, are usually facilitated by illegal access without necessarily leading to illegal data interference. A fraudster does not want to damage the personal data of their victim, but to use it to defraud their target.

Finally, the 2016 Proclamation clarified the concept of interference in two ways. It clearly differentiates interference from access, by dropping the Code's reference to access when the latter defined its aggravated offence of data interference with intent to commit further crimes.[79] Thus, the change eliminated the overlap that potentially existed between the two sets of offences (access and data interference), reinstating a clearly delineated taxonomy of cybercrimes attuned to the boundaries in the Budapest Convention and the Malabo Convention.[80]

The second way the Proclamation clarified the meaning of interference is by rewriting the description of the results to be achieved in the base offence. Initially, the 2004 offence was about intentionally causing damage by adding, altering, deleting, or

[77] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 6, 9-11.
[78] The 2004 Criminal Code, *supra* note 9, Art. 707(2).
[79] Id., Art. 707(2) & 706(2).
[80] Phillips, Davidson, Farr, Burkhardt, Caneppele, and Aiken, *supra* note 38, p. 386.

destroying data.[81] Despite the four verbs not being defined, their use seemed to indicate the aim of protecting the confidentiality and integrity of computer data, but not its availability. The problem is that in computer science, data interference can include data becoming unavailable without its integrity or confidentiality being compromised. In other words, data interference is not just damage to data. The Budapest Convention recognised the specificity of this cybercrime by including in its definition the word 'suppression', which its Explanatory Report described by reference to data being unavailable but not altered.[82]Despite theBudapest Convention being available for reference, the drafters of the Ethiopian Criminal Code did not contextualise by referring to this standard concerning suppressing computer data.[83] Consequently, this omission brought an ambiguity as to whether the Ethiopian provision included all scenarios of interfering with data, including interfering with its availability, or whether the drafters meant to discard availability as a protected value. The 2012 Proclamation added to this confusion. Its definition of the offence against telecom infrastructure seems to have included the protection against unavailability, Article 5(3) using 'intercept' in addition to 'alter, destroy or otherwise damage'and Article 5(1) referring to the 'obstruct[ion] with any telecom network, service or system'.

The 2016 Proclamation puts an end to any uncertainty as to the meaning of interference and thus as to the scope of the offence. Of course, it continues to indicate the altering and deleting of data, taking away 'adding', arguably captured by 'altering'. More importantly, instead of 'destroying', it uses the expression of 'rendering it meaningless, useless or inaccessible', thus clearly referring to the

[81] The 2004 Criminal Code, *supra* note 9, Art.707 (1).
[82] The Budapest Convention, *supra* note 15, Art. 4; the Explanatory Report to the Budapest Convention, *supra* note 33, para.61.
[83] The 2004 Criminal Code, *supra* note 9, Art. 707(1).

underpinning values of integrity and availability. The choice of terms also future-proves the offence of data interference. It is not just a response to the crime of the day, where the drafters claimed to tackle the incoming wave of ransomware attacks rendering their victims' data unavailable without the encryption key.[84] Moreover, the legislator's choice of techno-neutral language shifts the focus away from the conduct towards a description of the result achieved -the destruction and unavailability- independently of the technology used to commit the conduct. In that sense, it could be regretted that the legislator kept the title of 'causing damage to computer data' when the new definition of the offence protects data availability, and not just data integrity (damage). On the positive side, the reform puts Ethiopia in line with the Budapest Convention and the Malabo Convention, it was inspired by.

2.3. System Interference: still an imperfect criminalisation

The two waves of Ethiopian legislative response to cybercrime have struggled, in different ways, to fully and coherently criminalise system interference in line with the Budapest and Malabo Conventions. The 2016 Proclamation certainly remedies two of the weaknesses of the Code's offence. As for illegal access and data interference, it lifts the ambiguity as to whether such crimes could be committed when exceeding authorisation.[85] It also broadened the scope of the offence to reflect the various *modi operandi* of cybercriminals interfering with computer systems or networks. The initial offence in the Code used

[84] The Explanatory Note to Computer Crime Proclamation, *supra* note 22, para. 17; Lena Y.Connolly and David S. Wall, The rise of crypto-ransomware in a changing cybercrime landscape: Taxonomising countermeasures, *Computers & Security*, Vol. 87, (2019), 101568.

[85] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 5.

solely the verb 'disrupting'.[86] This would of course capture several behaviours and techniques, notably denial-of-service attacks (DoS attacks), a typical example of system interference that harms the system's availability. Nevertheless, the Code's choice of the word 'disrupting' may have unduly restricted the scope of the offence, when contrasted with the use of 'hindering' in the Budapest Convention,[87] 'disruption' was featured only twice in the Convention's Explanatory Report.[88] Indeed the term "hinder" covers a broader set of behaviours including keeping back, delaying, or preventing; whereas "disrupt" implies a narrower scope where behaviours are limited to those of impeding or interrupting.[89] The 2016 Proclamation better reflects the multiple variations in the *modi operandi* of cybercriminals interfering with a system or network. Indeed, it now refers to both hindering and disrupting, as well as adding 'impairing' and 'interrupting', a language that remains techno-neutral, thus future-proofing the offence against technological advancement.

Despite these improvements, the 2016 Proclamation does not fully criminalise system interference. As data interference, system interference can affect the integrity as well as the availability of the computer system or network. The 2004 Criminal Code split these two aspects into two separate offences. Damage affecting the integrity of the computer system or network was captured via the offence of data interference, which expressly referred to data and computer system and network; whereas harm to the system's availability was a separate offence, defined as intentionally disrupting the use of computer

[86] The Criminal Code, *supra* note 9, Art. 708(1).
[87] The Budapest Convention, *supra* note 15, Art. 5.
[88] TheExplanatory Report to the Budapest Convention, *supra* note 33, para. 148 & 155.
[89] *Id.*

services by an unauthorised user.[90] The 2016 Proclamation does not fully reinstate the coherence of the cybercrime taxonomy. Certainly, it takes away the reference to computer systems and networks in the illegal data interference offence; but it does not bring the criminalisation of these behaviours within the scope of the offence of system interference. Indeed, the offence does not incorporate terms such as "damaging," "deteriorating," and "suppressing" as found in the Budapest Convention.[91] Thus it is unclear as to whether the new definition of the offence includes these aspects of system interference.

Moreover, it does not require hindering to be 'serious', keeping this element as an aggravating factor, -without definition-, rather than as constitutive of the offence as in the Budapest Convention.[92] Obviously by repealing the negligent mental element of the base offence, the Proclamation reinstates a certain degree of seriousness. Yet, by not specifying that hindering must be serious, the scope of the offence remains broad, in line with the Malabo Convention, but in contrast with the more restrictive approach of the Budapest Convention.[93] By requiring 'hindering' to be serious, the drafters of the latter aimed to avoid the criminalisation of system interference when its form, size or frequency causes little to no damage to integrity or availability, such as when a former employee acts out of revenge against the employer who fired them but without causing damage; or when the size or frequency is more of a nuisance, such as spam, calling for the use of other regulatory means rather than criminal

[90] The 2004 Criminal Code, *supra* note 9, Art. 708.
[91] *Id*.
[92] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 5 (1) (2) (b).
[93] The Budapest Convention, *supra* note 15, Art. 5.

law.[94] The requirement of serious hindering is thus a means to comply with the principle of subsidiarity, whereby criminal law is of last resort and should not be used just because the crime involves digital technologies.[95] It is the approach that should be preferred so that the criminal law also complies with human rights principles. That the Proclamation requires 'serious hindering' for the aggravated offence when committed against critical infrastructure does not alleviate the fact that the offence has an overreach.[96] It is a deficiency that strikes at the heart of the specificities of this particular cybercrime and would thus require remedying in a future reform.

2.4. Illegal Interception: a delayed criminalisation

Data interception and data interference are distinct in that data interception impacts data during transmission, while data interference affects data once it is stored.[97] Therefore, there are two separate offences in the Budapest Convention, and later, in the Malabo Convention. Yet, the 2004 Criminal Code chose not to criminalise illegal interception, either as a separate offence or via data interference (which would have been controversial anyway). The 2012 Proclamation partially addressed this gap, having introduced the offences of unauthorised interception in any telecom system and the interception of personal information of subscribers.[98] The scope of these offences remained however limited. Any illegal interception of

[94] The Explanatory Report to the Budapest Convention, *supra* note 33, para 67-69.
[95] Horder (2022), *supra* note 34, section 4.4; R A Duff and Stuart P Green, Introduction: The special part and its problems, in Duff and Green, *supra* note 34, pp. 4-5.
[96] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 5 (1) (2) (b).
[97] *See* notably, Lewis C. Bande, Legislating against Cyber Crime in Southern African Development Community: Balancing International Standards with Country-Specific Specificities, *International Journal Of Cyber Criminology*, Vol. 12, No. 1, (2018), p. 9, 17.
[98] The 2012 Telecom Fraud Proclamation, *supra* note 19, Article 5(3).

computer systems or data not transmitted via Ethiopia's telecom system was not criminalised.

It fell on the 2016 Proclamation to at last criminalise intentional interception of "non-public computer data or data processing service',[99] without limiting it to the telecom system or data as in the 2012 Proclamation. In addition, the 2016 Proclamation provides the first definition in Ethiopia's criminal law of interception: the real-time surveillance, recording, listening, acquisition, viewing, controlling, or any other similar act of data processing service or computer data.[100] Expanding on this, the Explanatory Note to the Computer Crime Proclamation adds examples of the act of directly monitoring, listening to, taking, viewing, controlling, or using content, traffic, customer information, computer programs, or similar data without permission during communication, data transfer, or internet activities.[101] Technological advancements will create new opportunities to commit illegal interception, opportunities that the Explanatory Note may not have mentioned. Nevertheless, the techno-neutral language of the Proclamation should ensure that the definition is future-proof.

At odd with this aim of facilitating the interpretation of the offence through carefully techno-neutral definitions, the Proclamation does not explain whether the term 'non-public' refers to the nature of the transmission process or the data transferred. It falls on the Explanatory Note to guide the interpreter, despite 'non-public' being a key constitutive element of the offence. The offence covers non-public

[99] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 4(1).
[100] Id., Art. 2(12).
[101] The Explanatory Note to Computer Crime Proclamation, *supra* note 22, p. 14.

computer data transmissions, which refer to the communication mechanism used for transmission rather than the material being transferred.[102] Thus, individuals could still commit illegal interception for example when recording conversations or data in a public space, which they wish to keep private. Rather than leaving it to the Explanatory Note, it would be preferable though for the offence to define 'non-public' in line with, generally, the laudable definitional effort of the 2016 Proclamation.

2.5. The Criminalisation of the Misuse of Tools Offence: from too simple to too complex?

The 2004 Criminal Code's provision on the offence called "criminal acts related to usage of computer devices and data" was not adequately articulated but it had the merit of being short and simple to understand and apply, despite its broad scope potentially leading to some ambiguities. By contrast, the new version of the offence in the 2016 Proclamation shines by its length and complexity, although it better aligns with the Budapest Convention's provisions.[103]

2.5.1. The initial criminalisation of the misuse of tools

The 2004 Criminal Code, inspired by the other national jurisdictions and the Budapest Convention, criminalised the misuse of 'instruments, secret codes or passwords' to deter those who facilitate the commission of computer crimes.[104] Its choice of conducts aligns well with that of the Budapest Convention, although the latter also added 'buying and receiving'. Liability stems from intentionally importing, producing, selling, offering for sale, distributing, or possessing these tools with the intent of committing computer crimes, making the

[102] *Id*., at 15; the Explanatory Note to the Budapest Convention, *supra* note 33, para 54.
[103] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 7.
[104] The Code, *supra* note 9, Art. 709; the Budapest Convention, *supra* note 15, Art. 6.

offence a possessory crime. The aim of making the conduct an offence was clearly to address the black market that facilitates the sale or transfer of software used to gain unauthorised access or to impair the availability of computer systems and networks.[105]

The offence's brevity though raised questions about its scope. While the term passwords created no issue of interpretation, the other terms of 'instruments' and 'secret codes' remained undefined and unspecified. By contrast, the Budapest Convention restricted the scope of its offence to the tools 'primarily designed' for crime purposes to alleviate the concerns of the cybersecurity industry about the criminalisation of the legitimate cybersecurity tools they use to protect against cyberattacks. Thus, the Code's silence as to the nature of the tools potentially left the door open to the criminalisation of a wide range of software and hardware, including legitimate cybersecurity tools used in the fight against cybercrimes.[106] Paradoxically, Ethiopia aligned, on this issue, with other national cybercrime legislations, even among signatories of the Convention, as they failed to integrate this important restriction.[107]

The 2012 Proclamation did not tackle any of these issues. It created an offence for manufacturing, assembling, important, or offering for sale

[105] The Explanatory Report to the Budapest Convention, *supra* note 33, para 71.

[106] *See*Audrey Guinchard, The Criminalisation of Tools Under the Computer Misuse Act 1990: The Need to Rethink Cybercrime Offences to Effectively Protect Legitimate Activities and Deter Cybercriminals, in Tim Owen and Jessica Marshall (eds), *Rethinking Cybercrime: Critical Debates*, Palgrave McMillan (2021), p. 41.

[107] Apart from France, *see* Audrey Guinchard, Better cybersecurity, better democracy? The public interest casefor amending the Convention on cybercrime n.185 and the Directive 2013/40/EU on attacks against information systems, in Ricardo Pereira, Annegret Engel & Samuli Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, localism, and public participation in an evolving constitutional order*, Edward Elgar 2020, p148.

'any telecom equipment' and using or holding the equipment but on the condition that the person had not 'obtained a prior permit'. Thus, a defendant who obtains a permit but thereafter uses the equipment for the wrong purposes would not be liable under the 2012 Proclamation. The initial offence was thus in serious need of revisions.

2.5.2. A revised offence: too complex, too broad?

The 2016 Proclamation organises the Article 7 offence into five sub-articles, with sub-article 3 being a possessory offence to sub-articles 1 and 2, and sub-article 5 criminalising sub-section 4 when committed negligently. The overall objective of the offence is to criminalise preparatory acts that are left outside the scope of attempted illegal access or attempted illegal data interference for example, but which, if tackled at an early stage, have the potential to quell the tide of cybercrimes. Its complexity stems from the difficulty in achieving its legitimate objectives without criminalising the cybersecurity industry, and from the difficulty in understanding the *modi operandi* of cybercriminals on the black market for tools.

Regarding the first two Article 7 offences, i.e. the conduct of distributing computer programs, the Proclamation distinguishes between transmitting a computer program (Article 7(1)), and importing, producing, offering for sale, distributing, and making available either the program or the computer device (Article 7(2)). It seems that the legislator had two scenarios in mind. In Article 7(1), the aim is to criminalise defendants who distribute malware without checking if the recipient intends to use it for nefarious purposes. In Article 7(2), it criminalises defendants acting as intermediaries with the knowledge that their customers intend to use the malware for cybercrime offences. The apparent negligent behaviour of the first attracts a lesser punishment: five years of simple imprisonment, and a fine of 30,000 Birr, compared to five years of rigorous imprisonment,

and a fine of between 10,000 to 50,000 Birr. The problem is that the two offences arguably create an artificial difference among cybercriminal behaviours. Most cybercriminals distribute problematic computer programs on the black market, not on legitimate markets. Given the context, most will not enquire about the specific objectives of each of their customers, not by negligence, but because their customers may not be particularly forthcoming about their intention to commit cybercrimes.[108] They are in practice as culpable as those who enquire about their customers' intentions. The legal provisions, therefore, do not seem to adequately reflect the *modi operandi* of cybercriminals, offering a lower punishment to cybercriminals under Article 7(1) when culpability is the same in both scenarios. In addition, the distinction unnecessarily complicates the task of the prosecution having to choose between Article 7(1) and Article 7(2).

This criticism should not mask the laudable and successful effort of the legislator to structure the two offences of Article 7(1) and (2), as well as that of Article 7(3) of possessing a tool, to protect legitimate security research activities. The three offences work on the basis that the tool at stake, whether a computer program or computer device, has been 'exclusively designed or adapted for the purpose' of causing damage or committing a computer-dependent crime under Articles 3 to 6.[109] The use of 'exclusively' has the merit of keeping all dual-use hacking tools outside the scope of the offence, directly avoiding the broad scope of the initial 2004 offence.[110] It has the corresponding

[108] Thomas J. Holt and Eric Lampke, Exploring stolen data markets online: products and market forces, *Criminal Justice Studies* Vol. 23, No. 1 (2010), p. 33; Thomas J. Holt, Examining the Forces Shaping Cybercrime Markets Online, *Social Science Computer Review*, Vol. 31, No. 2, (2013), p.165.
[109] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 7(1)(2).
[110] The Explanatory Note to the Computer Crime, *supra* note 22, pp.18-19.

merit of protecting the security industry from any accusation of creating or designing cybersecurity tools to commit illegal access when searching for vulnerabilities or Criminal Code failures enabling illegal access. This is a welcome development, very much in line with the spirit of the Budapest Convention. Importantly, it places Ethiopia amongst the extremely few countries which have structured their misuse of tools offence to protect legitimate security researchers from criminal law.[111]

Finally, the provision criminalises the disclosure or transfer of computer programs, secret codes, keys, passwords, or similar data to gain access to a computer system, data, or network, either intentionally or negligently,[112] without authorisation or exceeding authorisation. The objective is to address poor and negligent cybersecurity practices, such as leaving passwords open or poorly implemented security measures leading to unintentional disclosure. Article 7(5) may therefore criminalise many IT administrators who are negligent and do not strictly adhere to security standards. It raises important questions as to whether criminal law should be used to tackle poor cybersecurity practices, or whether regulatory measures would be better suited to encourage the adoption of state-of-the-art cybersecurity practices. The principle of subsidiarity, which promotes a minimalist approach, requires using criminal law as a last resort, protecting legal interests by other means, such as tort law, administrative law or sectoral codes of guidance.[113] Awareness of this requirement not to overcriminalise in this field dates back to 1989. Three decades later, the argument remains valid and underpins the EU efforts to enact the Cyber Resilience Act to create civil law duties to implement cybersecurity standards throughout the lifecycle of a

[111] Guinchard, *supra* note 95.
[112] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 7(4) & (5).
[113] The Bequai Report Council of Europe R(89)9, *supra* note 41, pp. 24-26; Horder (2022) *supra* note 34, section 4.4; Duff and Green, *supra* note 95, pp. 4-5.

product be it hardware or software.[114] In this instance, the use of criminal law is unlikely to be the most adequate means to deal with poor or absent cybersecurity measures.

2.6. Attempts and accessorial liability of computer-focused crimes

Through its general provisions, the 2004 Criminal Code punished attempts, distinguished from preparatory acts and defined as a crime committed intentionally without achieving the necessary outcome.[115]These general provisions automatically apply to all crimes, including the computer crime provisions. Consequently, the attempt of any computer crime offence in the Code was criminalised and attracted the same punishment as if the offence had been completed.[116] A similar pattern can be observed for accessorial liability, where the Criminal Code criminalised accessories in its general provisions, when the offenders provide information, advice, or assist the principal(s) before, during, or after the commission of the offence so long as the later assisting was agreed beforehand.[117]

By contrast, the 2016 Proclamation is entirely silent on attempts and accessorial liability, raising the question as to whether it implicitly criminalises them or whether it has, surprisingly, left them outside the

[114] EU Cyber Resilience Act, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0454 (accessed on July 27, 2024); *see* notably the works of Michael D. Scott, Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?, *Maryland Law Review*, Vol. 67, (2007-2008), p. 425, and Susan W. Brenner and Leo L. Clarke, Distributed Security: Preventing Cybercrime, *John Marshall Journal of Information Technology & Privacy Law*, Vol. 23, (2005), p. 659; *see* also Brunhöber, *super* note 17.

[115] The Criminal Code, *supra* note 9, Art. 27 (1) and 26.

[116] *Id*., Art. 27(2).

[117] *Id*., respectively, Art. 37 and 40.

scope of the statute. A few indicators point towards their indirect criminalisation. Firstly, the Proclamation in Article 29(2) provides that unless otherwise stated, the general part or provisions of the Criminal Code apply. The slight confusion stems from the location of this provision: it is under the procedural Part of the statute, rather than under the substantial law provisions of the statute.[118]It would have been far clearer to introduce this reference to the Criminal Code either before any other provisions or under both the substantial law and procedural Parts of the statute. Nevertheless, the Criminal Code also states that, unless otherwise clearly specified, the general principles included in the Criminal Code apply to other penal legislation, which of course includes computer crime laws such as the 2016 Proclamation.[119]The general criminal code principles concerning attempt and accessorial liability, therefore, help establishing criminal responsibility for attempts and accessories in the 2016 Proclamation.

The problem though pertains to the scope of the criminalisation of attempts, a problem which the 2016 Proclamation perpetuated by not specifying which computer-focused crime could be attempted or not. The Budapest Convention has rejected the criminalisation of attempted illegal access and attempted misuse of tools on the basis that it is 'conceptually difficult to attempt'. For the misuse of tools, it is understandable: the offence itself criminalises preparatory acts. Criminalising its attempts (such as attempted possession of tools) would amount to criminalising the thought process, in violation of human rights principles.[120] For illegal access, the attempted conduct, for example inputting a password, may not indicate a sufficient

[118] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 22 (2).

[119] The 2004 Criminal Code, *supra* note 9, Art. 3. On this general principle, *see* Simeneh Kiros and Chernet Hordofa, Over-Criminalisation: A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia, *Journal of Ethiopian Law*, Vol. 29, (2017), p.49.

[120] Horder (2022), *supra* note 34, ch. 4. (Criminal Conduct: Actus Reus, Causation, and Permissions).

criminal state of mind.[121] Conversely when it does, for example via the use of a tool to check at speed passwords, the offence would not be attempted illegal access but that of the completed offence of misuse of tools. There is therefore no possibility of criminalising attempted misuse of tools without an overreach of the criminal law. Therefore, instead of the current blanket criminalisation of attempts, the Proclamation should specify which computer-focused crimes could be attempted and exclude attempted illegal access and misuse of tools offences. There is also value in articulating how their attempts could be defined to account in a techno-neutral language for the *modi operandi* of the cybercriminals.[122] Unlike attempts though, the scope of this criminalisation is unlikely to be questionable and in that sense, the silence of the Proclamation is not problematic.[123] The only source of possible confusion pertains to accessorial liability in the transmission of harmful content data or malicious code through internet service providers, but the Proclamation addressed it expressly, conditioning their liability to the requirement of criminal intent.[124]

2.7. Criminalisation gaps to be addressed in the 2019 Draft Proclamation and beyond

The 2016 Proclamation's modernisation of computer misuse offences has resulted in a more complete range of offences. Its terms defined in Article 2 in techno-neutral language also allow for the application of

[121] The Explanatory Report to the Budapest Convention, *supra* note 33, paras. 118-122; *see* the Budapest Convention, *supra* note 15, Art. 11.
[122] Generally, in the theory of criminal law, Horder (2022), *supra* note 34, ch. 13.
[123] Chawki, Darwish and Khan, *supra* note 35, pp. 49-50.
[124] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 16; and the Explanatory Note the 2016 Computer Crime Proclamation, *supra* note 22, pp. 28-30. *See* also the Budapest Convention *supra* note 15, Art. 11; the Explanatory Report to the Budapest Convention, *supra* note 33, paras. 118-122.

laws to both current and future technologies.[125] Nevertheless, some deficiencies remain, which the 2019 Draft Proclamation allegedly aims to tackle. The 2019 Draft certainly does not propose amending the base offence of illegal access, a welcomed approach since the offence's structure is well established in the 2016 Proclamation.[126]

Regarding illegal data interference, the only minor criticism made of the 2016 Proclamation is that of a title not representative of the scope of the offence. The use of 'damage' is associated with attacks against the integrity of the data, whereas the offence now clearly captures attacks against availability. The 2019 Draft proposes a change in title and the elements of the offence but does not remedy this slight discrepancy. Instead, it would more than likely create an additional problem by extending the offence to computer devices, -without defining the term either- to incorporate what seems to be physical damage to machines as done before the rise of digital technologies and thus unrelated to the taxonomy of computer-focused crimes.[127]The reform is not in that sense the way forward.

Concerning illegal system interference, the 2016 Proclamation suffers from ambiguity as to the scope of the offence, whether the offence protects the integrity of the system as well as its availability. The 2019 draft not only failed to clarify this but by adding 'computer data' to its title, it would create further confusion: the offence of system interference would overlap with that of data interference.[128] Furthermore, it would not restrict the offence to 'serious hindering', again not reflecting the specific *modus operandi* of system

[125] The Explanatory Note to Computer Crime Proclamation, *supra* note 23, pp. 4-5*;* the Explanatory Report to the Budapest Convention, *supra* note 33, para. 36.
[126] The 2019 draft Proclamation, *supra* note 10, Art. 3; the 2016 Computer Crime Proclamation, *supra* note 8, Art. 3.
[127] The 2019 draft Proclamation, *supra* note 10, Art. 6.
[128] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 5; the 2019 draft Proclamation, *supra* note 10, Art. 5;

interference, in addition to the concept being left undefined. On a positive note, though, it proposes a new definition of a computer system to differentiate between a computer as a standalone and an interconnected device, thus clarifying the term, in line with the Budapest Convention.

For illegal interception, the only flaw is that of not defining 'non-public' in the statute, which the 2019 Draft leaves intact.[129] At present, this is remedied by the Explanatory Notes to the 2016 Proclamation, and thus it could be argued that the law should remain untouched. Yet, the transmission of data can still occur without encryption and yet not meant to be openly accessed, so should a reform be proposed, the criminal law would benefit from defining in the statute a key constitutive element of the offence.[130]

By contrast, for the misuse of tools offence, the draft 2019 Proclamation proposes some welcome changes, addressing one of the identified weaknesses, without creating new deficiencies. It would remove the provision that currently criminalises negligent misuse of devices and excludes from the scope of the offence the tools legally obtained from personal or commercial computer devices, data, and programs used for authorised training, testing, or protection of computer systems.[131] Therefore, the draft Proclamation would reinforce Ethiopia's strong position as being one of the few countries having provided a safe haven for security researchers to legitimately test systems and networks for vulnerabilities to improve cybersecurity

[129] *Id*., at Art. 4; the 2016 Computer Crime Proclamation, *supra* note 8, Art. 4.
[130] Woodrow Hartzog, The Public Information Fallacy,Boston University Law Review, Vol. 99, (2019), p. 459, 479-480.
[131] The 2019 draft Proclamation, *supra* note 10, Art. 9.

and resilience to cybercrime attacks. The artificial distinction between Article 7(1) and (2) of the 2016 Computer Crime Proclamation remains unchanged in the draft 2019 Proclamation. Finally, regarding attempts and accessorial liabilities, the 2019 Draft remains entirely silent.

To summarise, the 2016 Proclamation places Ethiopia in a solid position to tackle the rise of cybercrimes with a substantive criminal law, which is mostly cognisant of the taxonomy of computer-focused crimes as defined in the Budapest Convention. There are some deficiencies though, and the 2019 Draft only addresses the one on the misuse of tools offence committed by negligence. Worse it creates further difficulties by introducing some overlaps between the various offences which cannot be justified by technological advancement and cybercrimes' specificities.The reform is certainly not the way forward. Does a similar conclusion apply to the punishment of these offences?

3. The Punishment of Computer-Focused Offences

In line with the caveat explained in section 2.2, proportionality can be appreciated in two ways: by the legislative use of aggravating factors, and by its tailoring of ordinal proportionality to the taxonomy of cybercrimes and its grading of the offences' seriousness. Another aspect that needs to be looked at is the proportionality of punishment when the offender is a juridical person.

3.1. A wider use of aggravating factors

Ordinal proportionality when aggravating factors exist depends on the degree of seriousness attributed to these factors. Their choice is thus an important part of the taxonomy of cybercrimes.

3.1.1. A consistent choice of aggravating factors

The 2004 Criminal Code recognised one aggravating factor, i.e. the further intent to steal, defraud, or extort, but not others such as the targeting of critical infrastructures.[132] This gap was only partially tackled by the 2012 Proclamation with its creation of the same offences when the targeted critical infrastructure was the telecom networks. In addition, the Code's use of its sole aggravating factor was not entirely consistent. Only the base offences of illegal access and data interference were aggravated. The offence of system interference was not, even though it could be used, for example, as a first step to blackmail a victim. The omission was not consistent with the cybercrime ecosystem already existing at the time. Certainly, crypto-ransomware only became dominant around the 2010s,[133] after the Criminal Code's enactment, but other forms of ransomware, using for example Trojan horse programs, were already widely circulating as far back as 1989.[134] The Criminal Code was therefore not future-proof.

Paradoxically, that the Criminal Code did not aggravate the misuse of tools offence with further intent to commit crimes reflected a stronger awareness of the specificities of cybercrime. Indeed, the offence is preparatory, removed from the circumstances that would reveal a further intent to steal or extort; thus, proving the existence of the

[132] The 2004 Criminal Code, *supra* note 9, Art. 706-709.
[133] Connolly and Wall, *supra* note 84.
[134] Samar Kamil, Huda S. A. S. Norul, Ahmad Firdaus and Opeyemi L. Usman, The Rise of Ransomware: A Review of Attacks, Detection Techniques, and Future Challenges, in 2022 *International Conference on Business Analytics for Technology and Security (ICBATS)* 16-17 Feb. 2022, ieee, pp. 1-7 DOI: 10.1109/ICBATS54253.2022.9759000

aggravating factors would mostly be impossible and may well amount to criminalising a thought process rather than a conduct reflecting intent based on tangible elements. In that sense, it is welcome that the 2016 Proclamation adopted the same approach as the 2004 Criminal Code, not aggravating the misuse of tools offence while remedying the latter's other weaknesses in its choice of aggravating factors.

The 2016 Proclamation indeed establishes consistent aggravating factors across all computer-focused offences except the misuse of tools offence. The first two concern targeting computer data or systems 'exclusively destined for the use of a legal person' and targeting critical infrastructure, a term it defines by reference to an attack that 'would have considerable damage on public safety and the national interest'[135] and which is therefore not restricted to a telecom network as with the 2012 Proclamation. The other two aggravating factors consist of targeting computer data, systems or networks classified as top secret for military purposes or intentional relations (Article 8(a)), and when the country is in a state of emergency (Article 8(b)).

This range of aggravating factors has the merit to cover most circumstances that demonstrate additional seriousness in the commission of cybercrimes. The only lacunae could be the legislator's choice to abandon further intent to commit crimes as an aggravating factor, despite further intent being a common occurrence in cybercrime. Article 19 of the Proclamation however seems to indirectly tackle the situation as it allows for the computer-focused offences to apply concurrently to the offences punishable in the Criminal Code. So, for example, illegal access with intent to commit fraud can be punished as illegal access and attempted fraud. There is, however, an argument to be made as to whether the concurrence of

[135] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 2(11).

the two would suffice to capture all circumstances that a specific aggravated offence with further intent would cover. Indeed, the aggravated factor can include the criminalisation of behaviours at the preparatory stage of committing, for example, fraud, where obtaining illegal access demonstrates the offender's criminal mental element before the offender engages in the process of defrauding their victim. In that sense, the 2016 Proclamation introduces a gap that ignores the taxonomy of cybercrimes that the two main international Conventions – the Budapest one and the Malabo legal instrument- have established. Reinstating this aggravated offence would be a welcome step forward.

Overall, the reform represents a graduated response that reflects the legislator's strong awareness of the cybercrime ecosystem. Ethiopia has a dissuasive legal framework, ahead of some other, yet older, cybercrime legal frameworks such as the UK Computer Misuse Act 1990 known for its proportionality inconsistencies.[136] Furthermore, Ethiopia's choices mostly align with international approaches, which should facilitate Ethiopia's ratification of the Budapest Convention and/or the Malabo Convention should it wish to do so.[137]

3.1.2. Proportionality of punishment between each base offence and their aggravated forms

Proportionality between the base offence and its aggravated forms requires the use of lesser sentences for the base offence. This question

[136] Criminal Law Reform Now Network, *supra* note 30, chapter 5, para 2.28, and Appendix C p159.
[137] The Malabo Convention, *supra* note 23, preamble, para 1; Art. 25.

concerns all offences, except that of the misuse of tools, which has not been aggravated whether in 2004 or 2016.

The 2004 Criminal Code partially recognised the need for proportionality. Its base offences of illegal access and data interference, where committed with *negligence*, attracted a fine of 2,000 Birr or 3 months simple imprisonment,[138] whereas their aggravated (intentional) form would be punished by a fine of 20,000 Birr and five years of rigorous imprisonment.[139] Nevertheless, the punishment for both base offences, when committed, this time, intentionally, was disproportionate to their aggravated form. Both base offences attracted an unlimited fine, with no established maximum, whereas their aggravated forms had a maximum both for the fine and the imprisonment.[140] It could be argued that the Criminal Code's general part provided the courts with constraints to exercise their discretionary sentencing power and sentence offenders to the commission of these two base offences.[141] The vagueness of the provisions however offered little direction for the courts to ascertain what a proportionate punishment would be, especially in the absence of any sentencing guidelines for cybercrimes until 2013.[142] The other weakness in the 2004 Criminal Code was, as stated, the absence of aggravating factors for system interference.

The 2016 Proclamation reinstates proportionality in the punishment of these base offences and their aggravated forms, as well as for illegal system interference. It also applies the same principles to the new

[138] The 2004 Criminal Code, *supra* note 9, Art. 706(3) & 707 (3).
[139] Id., Art. 706 (2) & 707(2).
[140] Id., Art. 706 (1) & (2) & 707(1).
[141] Id., Art. 90(2).
[142] የኢትዮጵያዲሞክራሲያዊፌዴራላዊሪፐብሊክፌዴራልጠቅላይፍርድቤት፣የተሻሻለውወንጀል ቅጣትአወሳሰንመመሪያቁጥር 2/2006፤ 10(2006)/Federal Democratic Republic of Ethiopia, Federal Supreme Court, *Revised Sentencing Manual* No. 2/2013, 10 (2013). [The original document is in Amharic language, translation is mine].

offence of illegal interception. The four base offences therefore have a maximum threshold, and their punishment is gradually increased: the first factor of targeting a legal person attracts a lesser sentence than the second factor of targeting a critical infrastructure. So, for example, mere illegal access now attracts 'simple imprisonment' of no more than three years or/and a fine between 30,000 and 50,000 Birr. It is thus punished more severely than before,[143] with a penalty of imprisonment, instead of just a fine, but with a maximum threshold for the fine, instead of leaving it to judicial discretion as in the 2004 Criminal Code. The Proclamation increases the imprisonment to rigorous imprisonment of five years, when the target computer system, data, or network 'is exclusively destined for the use of a legal person'.[144] It increases the imprisonment even further, up to ten years, as well as the fine (50,000 to 100,000 Birr) when the target is a critical infrastructure.[145] The same pattern can be seen for illegal data and system interferences and illegal interception.[146]

Two criticisms can be nonetheless formulated. The first relates to the fine for the base offence of illegal access, which is not increased when the first aggravating factor applies. The second pertains to system interference, with the fine for the second aggravated factor remaining the same as for the first aggravated factor. The justification probably lies in the legislator's increasing the imprisonment to mark the increased seriousness. For illegal access, it obliges the court to sentence the offender to both a fine and more severe imprisonment, rather than the alternative for the base offence. And for system

[143] The 2004 Criminal Code, *supra* note 9, Art. 706.
[144] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 3(2)(a).
[145] *Id*., Art. 3(2)(b).
[146] *Id*., at Art. 3(2)(b), 4(2) (b), 5(2)(1)(b), & 6(2)(b).

interference, imprisonment is noticeably more severe for targeting a critical infrastructure (fifteen to twenty years) than for targeting a legal person (five to ten years). Nevertheless, this appreciation of the fine's seriousness of these two aggravated offences could still be argued as problematic. For example, illegal system interference with legal persons' computer data, especially for example in the financial sector, is notoriously more harmful than the base offence against individuals' computer data as the harm will affect the targeted legal persons as well as their customers. Accounting for this difference in the fine, not just concerning the imprisonment, would be welcome. In that sense, the 2016 Proclamation struggled to completely account for the specific harms that the aggravating factors of all cybercrime offences create.

3.2. The need for punishment to better mirror the taxonomy of cybercrimes

Computer-focused crimes are not equal in their seriousness. The misuse of tools offence for example is considered to be preparatory to the other four offences of illegal access, data and system interferences, and illegal interception. Similarly, illegal access often is the first step towards committing other offences of data and system interferences and illegal interception.Conversely, data and system interferences can have very similar harmful consequences for their victims, with or without illegal access having been committed. It can also be argued that at times data interference is more harmful than system interference, since crypto-ransomware (data interference) leads the victim to lose their data, rather than having their data made temporarily unavailable as with a DDOS attack (system interference). The question therefore is whether the current legislation mirrors these subtle differences in the seriousness of each set of offences. The answer is globally positive and a noticeable change to the previous

2004 Criminal Code's approach. Yet some improvements are needed, notably to maintain ordinal proportionality between offences.

Before the 2016 reform indeed, all base intentional offences and the misuse of tools offence had an unlimited fine, leaving it to the courts to establish any proportionality in the absence of any sentencing guidelines until 2013. And where aggravated (illegal access and data interference), the offences attracted identical maximums of 20,000 Birr and five years of rigorous imprisonment, even though illegal access tends to be less serious than data interference. With the 2016 Proclamation, proportionality between the different base offences is partially, but not fully, reinstated, depending on whether we consider their associated fine, imprisonment, or the combination of the two. For example, the base offence of illegal access attracts a 30,000 to 50,000 Birr fine, whereas the base offence of data interference, despite being more harmful, attracts a lower fine of 30,000 Birr maximum. It could be argued that the severity of the punishment for data interference is marked by the use of rigorous imprisonment of three years, instead of a three years simple imprisonment for mere illegal access, in addition to the fact the fine and imprisonment are cumulative for data interference but alternative or cumulative for illegal access, a decision left to the courts.[147] Yet, if a fine exists to reflect the harm done, then the choice of a lower fine for the base offence of data interference is questionable, as data interference is more harmful than mere illegal access. In the opinion of the the authors, increasing the fine for data interference, as the legislator did for system interference, would be appropriate. Punishment for the base offence of system interference is indeed commensurate to the

[147] *Id*., Art. 3(1).

more severe harm the base offence creates, compared to mere illegal access. It leads to a higher maximum of 50,000 Birr and three to five years of rigorous imprisonment; similarly, interception – which can be less harmful than system interference but more serious than illegal access- attracts a fine between 10,000 Birr to 50,000 Birr, with up to five years of rigorous imprisonment.

Another discrepancy in the punishment's proportionality concerns again illegal access and data interference, but this time in their aggravated forms. Both sets of aggravating factors lead to the same fines and imprisonments: 30,000 to 50,000 Birr and three to five years rigorous imprisonment for targeting a legal person; and 50, 000 to 100,000 Birr, with five to ten years rigorous imprisonment for targeting critical infrastructure. The reform thus, failed to account for the difference in the seriousness of the harms that the offences aim to protect against. In that sense, the revised punishments ignore the taxonomy of cybercrimes. Paradoxically the taxonomy is better reflected in the structure of the offences since the Proclamation deleted any reference to access in the constitutive elements of illegal data interference.

Regarding the Article 7 misuse of tools offence, it is more difficult to be assertive as to whether there is or not a lack of proportionality. If we consider the preparatory nature of the offence, the punishment for the possession offence is proportionate. Possession of a tool attracts between a 5,000 to 30,000 Birr fine, or three years simple imprisonment, a lower maximum than for the others. It truly reflects the fact that the offender possessing the tools demonstrates less culpability: s/he has not yet undertaken any step towards committing any of the other offences, whether illegal access, illegal interferences or illegal interception, or distributing the tools in the black market as per Articles 7(1) and (2). Putting the possession offence aside though, the maximums chosen for Article 7(1), (2) and (4) appear

disproportionate. Their maximum of 50,000 Birr and 5 years imprisonment (simple for Article 7(1), rigorous for the other two) is undeniably equal to or higher than the punishment for the other completed offences. If we consider these offences to be preparatory to the completed offences of, for example, illegal access or interference, then their punishment is disproportionate. Nevertheless, the higher punishment for these preparatory offences may also reflect the harm done by the growth in the hacking tools black markets. It also accounts for the fact that those making money in the creation and distribution of the tools may never commit themselves further offences, while still helping the principal offenders committing these offences. After all, in general criminal law, the accessory helping the principal (here the offender selling the tool) would be subjected to the same penalties as the principal they are helping (here the offenders who commit illegal access and/or interference).[148] Nevertheless, except for explaining the liabilities of the offender in each sub-article,[149] the Explanatory Note to the Computer Crime Proclamation (maybe legislator) has not helped to interpret the provisions.

3.3. The need for a consistent ratio of imprisonment to fine

The 2004 Criminal Code was logical and consistent in its ratio of imprisonment to fine; yet there was no discernible pattern as to why three months of simple imprisonment equated to 2,000 Birr and five years of rigorous imprisonment to 20,000 Birr. By contrast, the 2016 Proclamation has a noticeable pattern of one year in prison equating to a 10, 000 Birr fine, with the choice between simple and rigorous

[148] The 2004 Criminal Code, *supra* note 9, Art. 37(4).

[149] *See* the Explanatory Note to the Computer Crime Proclamation, *supra* note 22, pp.17-19.

imprisonment depending on the seriousness of the considered base or aggravated offence.

Nevertheless, the Proclamation is not fully consistent, and without discernible explanations for it. For illegal access, the maximum imprisonment is three years of simple imprisonment, but the maximum fine is 50,000 Birr, instead of an expected 30,000 Birr.[150] It is difficult to understand why. Has the legislator considered increasing the maximum fine to allow the courts to reflect an offender's culpability for example if they demonstrate further intent to commit other offences but have not yet committed these offences? If it is so, it would be a legitimate concern and justification, but then the way forward is to be more explicit about this and expressly create an aggravating factor of further intent, as already indicated.

For system interference and data interception when the second aggravating circumstance is present, the punishment does not follow the general ratio, with 15 to 20 years equating to 50,000 to 100,000 Birr, instead of 150,000 to 200,000 Birr; and 10 to 15 years equating 100,000 to 200,000 Birr instead of 100,000 Birr to 150,000 Birr. These provision punishments of the Criminal Code were not covered in the Sentencing Guidelines.

3.4. The need for proportionality between physical and juridical persons

The Criminal Code allowed juridical persons to be held liable for crimes committed by their officials or employees, excluding state administrative bodies.[151] The fines could be complemented with additional penalties if necessary.[152] The system was complex, with its

[150] It is the same amount as for juridical persons, Art. 20(2)(a).
[151] *Id*., Art. 34.
[152] *Id*., Art. 90(3) & (4).

main characteristic being that the maximum fine threshold remained the same for individuals and juridical persons, ignoring the financial resources that juridical persons may have to pay a fine. For instance, a fine of 50,000 Birr (around USD 870)[153] may represent much less than a percentage of an Ethiopian company's turnover, while an individual's fine could represent an entire year's salary.[154] A system that tailors fines based on income would ensure that every person experiences a proportional penalty when they break the law, promoting equal treatment and punishment for all offenders.[155] The lack of special and proportionate provisions to punish juridical persons committing cybercrimes suggests that they were unlikely to be deterred from committing computer crimes. At least, in the 2012 Proclamation, the maximum fine was equal to ten times the stipulated fine for an individual, although it remained the same whichever offence was considered, thus not reflecting the seriousness of the offence considered.[156]

The 2016 Proclamation addresses the gap by setting a maximum fine threshold for juridical persons.[157] This threshold is determined by whether an individual can be sentenced to a fine only, or imprisonment and a fine.[158] For simple imprisonment up to 5 years,

[153] *See* National Bank of Ethiopia, Commercial Bank Exchange Rates, https://nbe.gov.et/exchange/banks-exchange-rates/ (accessed on March 3, 2024).

[154] *See* Federal Civil Servants Position Rating, Grading and Salary Scale Council of Ministers Regulation No.455/2019, *Federal Negarit Gazette*, Civil Servant Salary Scale Anex, (2019). For instance, the base salary for Grade-VIII government employee is 3934 Birr (before tax), which 47,208 Birr annually.

[155] Alec Schierenbeck, The constitutionality of income-based fines, The University of Chicago Law Review, Vol. 85, No. 5 (2018), p. 1869, 1871-1872.

[156] The 2012 Telecom Fraud Proclamation, *supra* note 19, Art. 11.

[157] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 20.

[158] *Id*., Art. 20(1).

the fine reaches 100,000 Birr, while for rigorous imprisonment above 10 years, it reaches 500,000 Birr.[159] The increase in fines for juridical persons between the base and aggravated offences seems to reflect the rise in punishment for physical cybercriminals. It also differentiates between individuals and juridical persons for all offences, except for the base offence of illegal access. Article 3(1) sets a maximum fine of 50,000 Birr for individuals and juridical persons when the fine is for individuals a year's salary whereas for juridical persons it may be a quarter's profit. To be proportional, the fine for a juridical person committing the base offence of illegal access should be twice the amount.

3.5. The difficult proportionality of punishments in the 2019 Draft Proclamation

The 2016 Proclamation establishes mostly proportionate punishments, whether these are considered: the base offences compared to their aggravating factors; the difference in seriousness between the different base offences; the ratio imprisonment to fine; and the difference between juridical persons and individuals. It would benefit from some of its deficiencies to be remedied, so that proportionality is entirely consistent across the offences and their aggravated forms. The 2019 Draft unfortunately does not address any of these deficiencies. Worse, its provisions would be more disproportional, particularly for illegal access, illegal interception, and system interference. The draft law would reduce the maximum simple imprisonment for illegal access crimes from 3 years to 2 years and increase the maximum fine from Birr 50,000 to 60,000, distorting the ratio imprisonment-fine even more.[160] It would also reduce the maximum rigorous imprisonment for illegal interception from 10 to 8 years.[161] The

[159] *Id*., Art. 20(2)(c)(d)(e).
[160] *Id*., Art. 3(1).
[161] *Id*., Art. 3(2) (b).

increase in the fine for illegal access could be a means of recognising the serious harm that mere illegal access can cause;[162] but the decrease in imprisonment, where imprisonment is a good deterrent, seems odd with the increase of the fine.[163] Similarly, the draft law would reduce the imprisonment for aggravated offences, respectively from 10 to 7 years,[164] and from 15 to 10 years.[165] In serious cases, 20 years of rigorous imprisonment under the existing law[166] would be reduced to 15 years under the draft law.[167] Furthermore, the current proportionality between imprisonment for serious cases of illegal data interference and the scenarios of a state of emergency would be lost, both being of a maximum of fifteen years.[168]

In that sense, the draft Proclamation would represent a return to a disproportionate punishment approach for cybercrimes. It is hard to see how the changes could be justified. They ignore the gradation in seriousness between base and aggravated offences, as well as between the different offences, thus negating the taxonomy established for computer-focused offences. And for juridical persons, the fines would become far less of a deterrent than they currently are! The 2019 draft reform is again not the way forward. Instead, it is recommended that the existing punishment for illegal access should be reduced to a fine not exceeding 30,000 Birr, with the reference to 50,000 Birr deleted,

[162] Ryberg, *supra* note 57.
[163]The 2019 draft Proclamation, *supra* note 10, Art. 3 (1) & 2 (a) ((b); the 2016 Computer Crime Proclamation, *supra* note 8, Art. 3 (1) & 2 (a) ((b).
[164] The 2019 draft Proclamation, *supra* note 10, Art. 5(2)(a).
[165]*Id*., Art. 5(2)(b).
[166] The 2016 Computer Crime Proclamation, *supra* note 8, Art. 5(2)(b).
[167] The 2019 draft Proclamation, *supra* note 10, Art. 5(2)(b).
[168]*Id*., Art. 8(b).

so that the ration imprisonment-to-fine used throughout the 2016 Proclamation remains adhered to.

Conclusion

With the digitisation of Ethiopia's telecommunication services since the 1990s, and broadband becoming available in 2004, the Ethiopian federal government had to grapple with the increasing threats of cybercrimes. In the space of two decades, Ethiopia experienced two sets of legislative responses: the first criminalisation of computer-focused crimes in the 2004 Criminal Code, complemented by the 2012 Proclamation for telecom infrastructures; and the modernisation of these crimes in the 2016 Proclamation which aimed to palliate the deficiencies of the first set. The dust has not yet settled on the latter that the Ethiopian legislator emphasised the inadequacy of the current Proclamation to justify its proposal of a new draft law in 2019.

To critically evaluate Ethiopia's successive legislative responses to computer-focused crimes, the authors reviewed the taxonomy that the legal community has agreed upon since the Budapest Convention. This taxonomy captures in techno-neutral language the different *modi operandi* of cybercriminals in five offences, from the least serious (misuse of tools, including possession) to the serious (illegal access) and most serious (system and data interferences; data interception). To be proportionate punishments would need to reflect this taxonomy and its implicit degree of seriousness.

The Criminal Code was a pioneer in criminalising computer-focused crimes but had some significant weaknesses. It notably did not criminalise illegal data interception and did not articulate well the constitutive elements of the system interference and misuse of tools offences. From inception, the legislator experienced difficulties in drafting a set of offences and their correlative penalties cognisant of

the taxonomy of cybercrimes. The law needed future-proofing, not because of technological advancement, but because of the initial difficulty in conceptualising computer-focused crimes with regard to their specific features and the existing international standards. In contrast, the 2016 Proclamation represents a welcome step forward. It significantly improves the structure of the offences to clarify their scope; and it establishes coherence in the proportionality of the penalties between the offences and with their aggravated forms, including with a consistent ratio between imprisonment and fines. Despite some gaps, the Proclamation demonstrates Ethiopia's legislative readiness concerning its substantive criminal law. There remains the need, of course, for adequate provisions in criminal procedure, such as trained professionals to prevent, investigate and prosecute cybercrimes in compliance with human rights. Nevertheless, the Proclamation has put Ethiopia in a strong position to fight cybercrimes over the coming decades.

The 2019 draft Proclamation would be introducing far fewer sweeping changes than the 2016 Proclamation did. Yet, these changes deserve careful consideration should the draft Proclamation be enacted. Too frequent changes in criminal law can be disruptive to the fight against cybercrime, unless this 2019 draft helps develop an even more sustainable response to cybercrimes, bridging the gaps highlighted in the 2016 Proclamation. The proposed reform addresses one of these gaps, by offering to repeal the misuse of tools offence when committed by negligence, thus protecting IT administrators from making mistakes. It also reinforces the strong protection currently offered to legitimate security researchers using dual-use hacking tools, a protection rarely implemented by other countries.

Besides these provisions, the 2019 Draft does not establish a future-proof legal framework for computer-focused crimes. It leaves intact the existing ambiguities as to the scope of the illegal system interference offence, as well as the over broad reach of the criminal law regarding attempts and illegal system interference. Worse, it creates further difficulties by introducing overlaps between the various offences, overlaps which cannot be justified by technological advancement and cybercrimes' specificities. Its proposal for punishments also represents an unwelcome return to the disproportionate approach that existed in the Code.

To bring sustainability to this anticipated third reform, the authors recommend that the legislator keep unchanged the positive elements of the current 2016 Proclamation and remedy the latter's weaknesses. For the reform not to create new gaps, the legislator, especially the drafting committee, should adopt an approach consistently tailored to the specificities of computer-focused crimes and the best experiences from international and regional standards. Coherence in the structure of the offences and strong proportionate punishments should be a priority to provide a more effective and long-lasting response to the challenges inherent to the field. Consequently, our most important recommendations are summarised as follows. Regarding the offences, firstly, the current offences of illegal access and illegally causing damage to data in the 2016 Proclamation should remain intact in their constitutive elements, except for a change of title to reflect the fact that the offence of causing damage criminalises more than damage and is, actually, illegal interference. Secondly, the 2016 Proclamation could be amended to: 1) clarify the offence of system interference to protect the availability of systems; 2) stop the artificial distinction existing between Article 7(1) and (2) on misuse of tools; and 3) exclude attempted illegal access and misuse of tools which represents a criminalisation of the thought process expressly rejected at

international level. Thirdly, articles 5 and 6 in the current 2019 Draft Proclamation should be abandoned, notably those that create overlaps between the two offences of data and system interferences. Conversely, the proposal to abolish negligent misuse of tools (current Article 7(5) 2016 Proclamation) should be adopted. It remedies the current gap in the 2016 Proclamation and promotes the use of tort law and regulatory measures on cybersecurity which are more effective than criminal law in pushing for better cybersecurity practices among IT professionals.

Regarding punishments, the authors would particularly recommend adding further intent as an aggravating factor to illegal access, for the courts to account for the increased culpability of those who commit illegal access with intent to commit further crimes, especially fraud. The reform should also ensure that ordinal proportionality applies to all fines, without exceptions, whether between a base offence and its aggravated forms, across the different base offences, or across their aggravated forms. Finally, it should ensure that the financial means of juridical persons, compared with those of individuals, inform the proportionality between the two.

By respecting the taxonomy of cybercrimes expressed in all international legal instruments, these recommendations aim to further strengthen Ethiopia's readiness to fight cybercrime. Their implementation would send a strong deterrent signal to cyber criminals while creating a space for good cybersecurity to help fight cybercrime. It would also facilitate Ethiopia's ratification of the Malabo Convention and the serious consultation of the Budapest Convention, should the country wish to do so.

Legislative Framework for Judicial Protection of Consumers in Ethiopia: The Case of the Amhara National Regional State.

Yosef Workelule Tewabe [ר]

Abstract

Judicial protection plays a critical role in safeguarding the fundamental rights of citizens. This protection encompasses both substantive and procedural elements. The substantive aspect involves the recognition of a right to judicial protection in laws and the provision of remedies for individuals whose rights have been violated. On the other hand, the procedural aspect focuses on establishing efficient pathways for individuals to access and benefit from these remedies. This article delves into a comprehensive analysis of the state of consumers' judicial protection arrangements in Ethiopia, specifically examining the Context in the Regional State of Amhara. Through a doctrinal research approach, the author evaluates relevant legal provisions, including the FDRE constitution, and identified shortcomings in the existing framework. The research revealed deficiencies in the explicit recognition of consumers' right to judicial protection and the inadequacy of rules governing this area. Recommendations are then offered to enhance consumers' access to judicial protection.

Key words: Consumers, Judicial Protection, Ethiopia

Introduction

In the wave of consumers' judicial protection there are two essential undertakings. Firstly, the judicial protection itself should recognize as a substantive right of the consumers with the stipulation of different

[ר] LL.B & LL.M, University of Gondar, Lecturer in Law; Email: yosyworkelule@gmail.com

liability spectrums for consumer rights violation. The second undertaking is concerned with creating an effective process for the execution of the substantive consumer's right to have judicial protection. Literature in the area of consumer rights, after firstly identify consumer rights and studying the judicial framework for its implementation at the substantive level then it focus on analysing the most efficient and effective processes of dealing with the consumer disputes before a jurisdiction that have a power to adjudicate.[1]

International instruments including the UN guidelines and consumers' international report also follow the same theme. By pointing out the basic rights of consumers, they are also requiring member states to build accessible, efficient, fair and effective procedure for consumer dispute settlement. Hodges, in his work on the European approach to justice and redress has suggested three pillar models of integrated policies for enforcement and redress: Setting standards for expected behaviour; Seeking to prevent things going wrong; and putting things right when they are going wrong.[2]

Accordingly, in order to ensure the consumer protection in the given state, there should be a clear identification of consumer protection standards and to tackle their violation, a preventive measure should be taken by a responsible organ, and to respond to any violation of such rights there should be a well-designed system of remedy. The system of remedy should include both stipulation of liabilities for the violation of rights and the process of seeking such liabilities against

[1] Scott, C.D., Enforcing consumer protection laws, in: G. Howells, I. Ramsay & Th. Wilhelmsson (ed.), and Handbook of Research on International Consumer Law, Cheltenham: Edward Elgar, 2010. See also Christopher Hodges, Current discussions on consumer redress: collective redress and ADR, ERA Forum, Vol. 13, 2012, pp. 11–33 DOI 10.1007/s12027-011-0245-5 and other similar sources referenced in this research.

[2] Hodges, 'The European approach to justice and redress', *Can Supreme Court Law Rev*. (2nd edition) Vol. 53, No.1, 2001.

the wrongdoer. According to Hodges, to deliver model two and three of the integrated policy for enforcement and redress, countries may use either private or public outlets.[3] Public actions include use of wide-ranging and powerful sanctions, with both public and private techniques, subject to democratic and court controls.

On the other hand, enforcement by private actors includes use of private actions through the courts, direct negotiation and resolution of issues, assisted by independent ADR pathways. International literatures, including the 2016 UN manual of consumer protection have identified the most commonly used pathways or outlets of consumer dispute settlements of the consumer dispute. These pathways are selected from the public and private arrangements. Those outlets of consumer dispute settlement have their own merits and demerits. By considering this characteristic, some countries have preferred to use a combination of two or more of them for consumers' redress in their jurisdiction.

Different criteria are applicable to test the competency of one or more of those pathways for delivering cheap, fast and effective redress for consumer disputes. According to Smith's test, consumer access to justice should be based on three dimensions; consumer capability, the availability and quality of information, and the level of choice or the opportunity to switch.[4] Geraint Howells & Rhoda James in their works on litigation in the consumers' interest, stated "the kind of criteria against which to judge mechanisms for individual consumer redress are well known, and there is a general consensus in the literature about the kind of points which need to be met, certainly for a non-court based resolution scheme". The benchmarks recently

[3] Id.

[4] Smith, N. C., 'Marketing strategies for the ethics era', *Sloan Management Review*, Vol.5, 1995, 85-97 Cited by Gretchen Larsen and Rob Lawson , 'Consumer Rights: An Assessment of Justice', *Journal of Business Ethics*, Vol. 112, No. 3, 2013, pp. 515-528.

adopted by the Australian Government are broadly representative of this consensus identifying considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness."[5] The European Commission also uses these criteria when analysing the procedural aspect of consumers' protection in member states.[6]

The primary objective of this article is to indicate the commonly used outlets of consumers' judicial protection in the world with their merit and demerits as discussed in the literature and identifying the pathways of the consumer's dispute that are established in Ethiopia, in particular, in the Amhara Regional state after describing the concept and its legislative backgrounds.

1. The Concept of Judicial Protection of Consumers

Judicial protection is the pillar of all forms of human rights protection. At the very idea of human rights as a legal concept based on the principle of *ubi jus ibi remedium*, where there is a right, there should be a system of protection. According to this principle, this protection system should also be incorporated into the law as a human right.[7] The right to judicial protection is a combination of the right to access justice, the right to a fair trial, and the right to execution of judgments.[8] The right to judicial protection is both substantive and procedural. To effectively analyze this right, it is essential to examine

[5] G. Howells, R. James, Litigation in the consumer Interest, *ILSA Journal of International and Comparative Law*, 2022, p. 12.

[6] European Commission, An evaluation study of the impact of national procedural laws and practices on the equivalence and effectiveness of the procedural protection of consumers under EU law, *National Reports* – Consumer Protection Strand, JUST/2014/RCON/PR/CIVI/0082.

7 Yulia Vladimirovna Samovich, 'An Individual's Right to Judicial Protection - Whether it Protects', *Middle-East Journal of Scientific Research*, Vol. 14, No.12,(2013), PP. 1613-1617.[herein after Yulia V. Samovich, An Individual's Right to Judicial Protection - Whether it Protects].

8 Id.

both aspects.[9] First, it must be recognized as a fundamental right under the national legal system, including the constitution and other legal instruments. Additionally, remedies should be available for any violations of this right. When evaluating the feasibility of this right in different situations, special attention should be given to the procedural aspects, including the availability of legal pathways, their competency and their practical implementation.

The notion of consumer rights has become popular and began to be widely used in business literatures since it was raised by President J. F. Kennedy, in his address to the United States Congress. Following this address, consumer rights received focus from various international organizations, including the EU, OECD, and UN.[10] Until recently, many countries considered consumer rights merely a moral obligation, often conflating them with social rights and neglecting them as distinct legal protections.[11] In recent decades, particularly following the UN guidelines on consumer rights protection, countries have increasingly prioritized consumer rights. These rights are now viewed as fundamental human rights because of their significant influence on citizens' civil, economic, and social well-being.[12]

However, a dedicated focus on consumer rights protection is ultimately ineffective without solid judicial protection. Like other rights, the protection of consumer rights depends on effective access to justice, the guarantee of fair trials, and the proper enforcement of

[9] Id.

10 The United Nations Conference on Trade and Development, Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Consumer Protection Law and Policy, Third session, Geneva, 9 and 10 July 2018, item 3 (d) of the provisional agenda, dispute resolution and redress, Note by the UNCTAD secretariat, (2018). [Here in after UNCTAD Conference Note].

11 Id.

12 Id.

final judgments.[13] Both substantive and procedural aspects of consumers' right to judicial protection should be presupposed in every aspect dealing with consumer rights protection. If the judicial protection framework of a country's consumer rights regime is poorly established, its enforcement will also be very limited.[14] A state-established, well-framed judicial protection arrangement (both in its legal and practical aspects) will allow for better enforcement of consumers' rights.

1.1. Consumer Judicial Protection under the FDRE Constitution

The FDRE Constitution is the supreme law of the land, and all substantive laws should be the extensions of its provisions. International agreements have also been recognized in the Constitution with substantive law status, except in the interpretation of the fundamental rights of the people under Chapter 3 of the Constitution.[15] The FDRE Constitution recognizes the right to access to justice rights, stating that everyone has the right to bring a justiciable matter to obtain a decision or judgment in a court of law or any other competent body with judicial power.[16] This right may be exercised by the person himself or through representation. To execute this constitutionally guaranteed judicial protection right, the Constitution declares the establishment of independent courts at both federal and regional levels of administration. Each tier of the

13 Geraint Howells & Rhoda James, 'Litigation In The Consumer Interest', *ILSA Journal of International & Comparative Law*, University of Sheffield, Vol. 9, No.1, (2002), pp. 2-56. [Herein after Howells and James, Litigation In The Consumer Interest].

14 Id.

15 Constitution of the Federal Democratic Republic of Ethiopia proclamation, (1994), *Federal Negarit Gazeta*, Proclamation No.1/1995, 1st Year, No.1[Here in after the FDRE Constitution]. Art 9 and 13(2).

16 Id Art. 37.

government has a First Instance Court, High Court, and Supreme Court.[17] Religious and customary courts are also recognized by the Constitution to adjudicate civil disputes based on the consent of the parties. The competent judicial bodies established by law are also recognized by the Constitution to adjudicate cases within their legal framework.[18]

These constitutional specifications are equally appropriate for consumer rights protection as a parcel of the citizens' right[19] to judicial protection in the Ethiopian legal system. Consequently, consumers have a constitutionally guaranteed right to access to justice. As a result of this guarantee, when there is a violation of their rights under the law, they can freely bring their cases before courts, either the regular courts or another competent organ for consumer disputes.

1.2. Consumer Judicial Protection under International Legal Instruments Ratified By Ethiopia

Effective judicial remedies are essential for the protection of human rights. Access to justice promotes equality before the law by ensuring that all individuals, regardless of their status, can seek legal redress.[20]

[17] Id Art. 79- Art. 81.

[18] Id Art. 34 & Art. 78(4) (5).

[19] Consumer rights are part of the fundamental rights of people, even if they are not explicitly recognized in a constitution. This concept is supported by various international frameworks and legal interpretations.

For instance, the United Nations Guidelines for Consumer Protection outline eight fundamental consumer rights, including the right to safety, information, choice, and redress. These guidelines emphasize that consumer protection is essential for ensuring the well-being and dignity of individuals.

In the European Union, consumer protection is integrated into the EU Charter of Fundamental Rights, which includes provisions for consumer protection under the "Solidarity" chapter. This demonstrates a growing recognition of consumer rights as fundamental rights within the EU legal framework.

Even in countries where the constitution does not explicitly mention consumer rights, these rights can still be protected through other legal mechanisms.

[20] Lima, V., Gomez, M., Access to Justice: Promoting the Legal System as a Human Right, In: Leal Filho, W., Marisa Azul, A., Brandli, L., Lange Salvia, A., Özuyar,

The right to judicial protection is widely recognized under international human rights instruments, including the Universal Declaration of Human Rights (UDHR)[21], the International Covenant on Civil and Political Rights (ICCPR)[22], and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[23]. These instruments require signatory states to establish enforcement frameworks recognizing access to justice as a basic human right. The 2030 United Nations Agenda for Sustainable Development, particularly Goal 16, emphasizes access to justice as both a fundamental right and a prerequisite for the enjoyment of other rights.[24]

Similarly, access to justice ensures that consumers can seek remedies for violations of their rights, such as defective products, misleading advertisements, and unfair contract terms. Access to justice is particularly important for vulnerable consumers who may face additional barriers, such as a lack of resources and awareness on their

P.G., Wall, T. (eds) Peace, Justice and Strong Institutions. Encyclopedia of the UN Sustainable Development Goals, *Springer*, (2021), Cham. https://doi.org/10.1007/978-3-319-95960-3_1

[21] Article 8 of the UDHR

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[22] ICCPR article 2(3) recognizes that people are entitled to seek effective redress for violations of their rights, which means they should be able to take their case to court to seek a judgment.

[23] While the ICESCR does not explicitly mention the right to access justice, it is implicitly supported through various provisions that require states to take appropriate steps to ensure the realization of the rights recognized in the Covenant. For instance, Article 2 of the ICESCR obliges states to take steps, including legislative measures, to achieve the full realization of the rights recognized in the Covenant.

[24] United Nations, Transforming Our World: *The 2030 Agenda for Sustainable Development* A/RES/70/1, 2015, Goal 16.

legal rights. Effective consumer protection laws and mechanisms ensure that such individuals can seek remedies.[25]

The UN resolution on consumer protection guidelines and UNCTAD notes on consumer redress urge member states to create effective judicial protection systems for consumers as part of their human rights. Section V.F of the resolution states:

Member States should encourage the development of fair, effective, transparent, and impartial mechanisms to address consumer complaints through administrative, judicial, and alternative dispute resolution, including for cross-border cases. Member States should encourage all businesses to resolve consumer disputes in an expeditious, fair, transparent, inexpensive, accessible, and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can assist consumers. Information on available redress and other dispute-resolving procedures should be made available to consumers. Member States should ensure that collective resolution procedures are expeditious, transparent, fair, inexpensive, and accessible to both consumers and businesses, including those about over-indebtedness and bankruptcy cases. Member States should cooperate with businesses and consumer groups in furthering consumer and business understanding of how to avoid disputes, dispute resolution, and redress mechanisms available to consumers and where consumers can file complaints.[26]

[25] Yuthayotin, S., Access to Justice: A Goal for Consumer Protection, In: Access to Justice in Transnational B2C E-Commerce, *Springer*, (2015), Cham. https://doi.org/10.1007/978-3-319-11131-5_3

26 Trade and Development Board , Intergovernmental Group of Experts on Consumer Protection Law and Policy, Dispute resolution and redress, Third session, Geneva, 9 and 10 July 2018, Item 3 (d) of the provisional agenda, (2018), pp. 3-4.

Ethiopia, as a founding member of the United Nations[27] and a ratifying state of many UN conventions, is committed to regulating citizens' right to access justice. Article 9(4) of the FDRE Constitution mandates the integration of international treaties into domestic law, reinforcing Ethiopia's commitment to honouring its international obligations.[28] In addition, the Constitution accords primacy to the principles outlined in international human rights instruments, ensuring that they inform national interpretations and implementations of rights.[29]

1.3. Consumer Judicial Protection under the Trade Competition and Consumer Protection Proclamation/TCCPP/

The evolution of consumer protection in Ethiopia has passed through various stages, initially grounded in contractual and extra-contractual liability frameworks. Subsequently, the focus has broadened to include competition law and regulatory arrangements. However, these frameworks alone do not sufficiently safeguard consumer interests. To address these limitations, separate consumer protection legislation has been enacted. The Trade Competition and Consumer Protection Proclamation (TCCPP) No. 813/2013 marks a significant advancement in the protection of consumers' rights.

[27] Access to justice is a fundamental principle under the United Nations Charter and is closely tied to the rule of law. The Charter emphasizes the importance of justice and international law in maintaining peace and security. In its preamble, the Charter affirms faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women. It aims to establish conditions under which justice and respect for international law can be maintained. Further, as per Article 1 of the convention, one of the purposes of the United Nations is to bring about by peaceful means, and in conformity with the principles of justice and international law, the adjustment or settlement of international disputes.

[28] The FDRE Constitution Art. 9(4).

[29] Id. Art. 13(2)

The TCCPP recognizes several foundational rights and protection instruments for consumers. After delineating consumers' rights and business responsibilities, the TCCPP establishes various remedies for violations of consumer rights, encompassing administrative, civil, and criminal remedies.[30] Consumers are granted redress in cases that affect their rights and can seek recourse through various legal avenues.[31] These remedies seek to ensure fair trade practices and enhance consumer trust in the marketplace. In cases of defective goods or services, as a preliminary measure, consumers are entitled to request replacement, refunds, or replacement within 15 days of purchase, in addition to claiming damages arising from defects or a seller's failure to comply with legal obligations.[32]

Moreover, the TCCPP establishes that any contractual agreement waiving consumer rights under the TCCPP is void, thus addressing the power imbalance between consumers and businesses. This provision is crucial because businesses often leverage their superior bargaining power to impose waivers of consumer rights. Unlike the Civil Code, which allows party discretion in contractual terms, the TCCPP is an exception, emphasizing consumer protection.[33]

1.4. Consumer Judicial Protection under the Amhara National Regional State Laws

Since 1991, Ethiopia has been a federal state with ten regional state administrations and two federal city administrations. Following the establishment of a federal state administration framework in the country, state power is divided between the federal and regional state governments.[34]Similar to federal governments, the regional states also have a legislative, executive and judicial power within their limited

[30] Art 27 and the ff.
[31] Id Art. 14(5).
[32] Id Art. 20.
[33] The Civil Code Art. 2272 & the TCCPPP Art. 21.
[34] The FDRE Constitution Art. 50.

jurisdiction. Furthermore, to determine the scope and the procedures of exercising these powers, the FDRE Constitution empowered the regional states to enact their own constitution. Under the FDRE Constitution, the legislative powers of the regional states and the federal government are clearly demonstrated.

Furthermore, they should exercise their own legislative power without interference from each other. The legislative power on the issue of consumers is the exclusive jurisdiction of the federal government.[35]Consequently, the federal legislative organ, the HPRs, has enacted two consumer laws that include proclamation no. 685/2010 and TCCPP no. 813/2013. The TCCPP is currently an active legislative framework for consumer protection issues at the current time. Under this proclamation, the regional states are delegated by the federal government to undertake three main activities. These are; administering the consumer issues within their jurisdiction except in those areas exclusively given to the federal authority, adjudicating cases involving consumer issues within their jurisdiction, and deciding for the establishment of a regional consumer adjudicative body when found necessary.[36]

The Amhara regional state has established bureaus to discharge its law enforcement duties. The new regional state proclamation, which repealed the earlier proclamation, proclamation No. 176/2010, to re-establish the state‘s executive organ, has mandated the regional Trade and Market Development Bureau to be responsible for consumer protection. Art. 15 of the same proclamation extensively enlisted the following as the major task of the Bureau:

[35] The FDRE Constitution Art 55(4).

[36] Trade Competition and Consumers Protection Proclamation, 2014, *Federal Negarit Gazeta*, Proclamation No. 813/2013, 20th Year, No. 28. [Here in after the TCCPP].Art 23(5), Art 32(1(c), and Art 34.

Shall control and take administrative and legal measures on illegal trade practices disrupting the competitive trading system and harming the interest of consumers; 2) Shall support and coordinate efforts for the protection of consumer rights; 3) Shall establish a public prosecutor department that will administer civil and criminal cases in violation of trade competition and consumer protection laws; 4) Shall establish procedure enable to resolve disputes ,arise between consumers and traders, by mutual agreement and negotiation; 5) will use the regional police force to control illegal trade practices and investigate related criminal matters; and to execute administrative measures accordingly; 6) organize administrative judicial organ with jurisdiction on civil matters of trade competition and consumers protection in accordance with the provisions of this Proclamation; 7) It has authority to investigate, prosecute and litigate before courts of law on criminal matters of trade practice and consumer protection of the FDRE criminal law, criminal procedure law and other laws;) Shall conduct investigations where there is sufficient ground to suspect that an offence has been committed against the fair trade practice and consumers rights; initiate or order discontinuance of investigation; and 9) Shall based on prices set for by the Federal Ministry of Trade, determine the conditions of distribution, sale and movement of basic goods and services within the Regional state, and, as may be necessary, order business persons to replenish stocks of same.[37]

This stipulation of the proclamation has constituted all the powers delegated by the TCCPP to the regional states trade Bureau. The empowerment of the Bureau is the first step in creating a system of consumers' judicial protection arrangement in the region. Among the mandates given to the Amhara Regional State Trade and Market

[37] The Amhara National Regional State Executive Organs Re-Establishment Determination of their Powers and Duties Proclamation, 2017, *Zikre Hig*, Proclamation No. 230/2016.

Development Bureau under this proclamation supporting the efforts of consumer rights protection, establishing a procedure for resolving consumer disputes through negotiation and creating an administrative organ for a consumer, civil case adjudicative body are the primary functions of the Bureau that have a direct link with the consumers judicial protection issue this study is largely concerned with. Support may be provided for consumers themselves or other authorities working in the area of consumer rights protection. To exercise their judicial protection rights, consumers must firstly be aware of their rights. Awareness creation activities should be addressed not only for consumers but also for businesses. Awareness creation activities may be undertaken either by the NGOs, public institutions, higher education's or the Trade Bureau itself. In addition to action by these groups, the Trade Bureau should always provide support for the proper execution of such activities.

Moreover, the Bureau is responsible for creating a procedure that enables the resolution of disputes arising between consumers and traders, by mutual agreement and negotiation. This responsibility of the trade Bureau mainly aims at reducing the unnecessary wastage of time and costs involved in taking every dispute before an adjudicative body. The arrangement of the Bureau is not a strict procedure that should be followed by the disputing parties. If the disputing parties fail to reach an agreement through negotiation or have chosen not to negotiate, they are free to bring their cases before a proper judicial organ. Subsequently, the Amhara Regional State Council empowered the Trade and Market Development Bureau to establish an administrative adjudicative body for consumer cases in their establishment proclamation.

Nonetheless, the Amhara Regional State Trade and Market Development Bureau does not make a decision to this effect. As

promised by the proclamation, there is no an administrative consumer court in the region.

2. Common Pathways for the Consumers' Judicial Protection

Consumers may make complaints for various reasons. In the consumer law regime of different jurisdictions, there are many specific grounds of claim that may include problems related with product standard, poor information, problems with the price, fees or bills, and the desire to apology or reassurance. In order to respond to these and other legal needs of consumers' countries may apply one or more pathways for dispute resolution.[38] According to the UNCTAD consumer's protection manual and different stipulations of consumers' dispute settlement, there are various forums for private or public consumer dispute resolution.[39]The most commonly known pathways of consumer dispute resolution include regular courts, public enforcement authorities, Alternative Dispute Resolutions/ADR/, ombudsmen, business customer care and complaint function/self- regulatory arrangements/, online dispute resolution, and special consumer court arrangements. These commonly used outlets for consumer disputes have unique features and differences. There are varying positives and negatives for each of these measures with respect to securing fast, cheap and effective consumer judicial protection. In this section, the main dispute settlement options for consumers and businesses are described.

I. Courts

The traditional means of upholding justice for violation of legal rules by individuals is to bring a private claim by an individual faced with injury before the civil court. In the earlier periods, before the

[38] UNCTAD, Manual on Consumer Protection, *UNITED NATIONS PUBLICATION*, 2016, pp.91-97.

[39] Ibid, UNCTAD Conference Notes, and Howells and James, Litigation in the Consumer Interest.

proliferation of the concept of consumer rights, the consumer disputes were assimilated with other civil claims of individuals. There was no specification of the juridical authority that has a competency to adjudicate the consumer cases.[40]With the development of the idea of consumer rights and incorporation of consumer rights as a specific area of legal protection in different jurisdictions, the issue of the pathways for judicial protection of those enumerated rights in the legislations is also becoming the concern of the regimes. In their formation stage of consumer rights protection framework, most of the countries was employed the traditional regular court approach as a pathway for the adjudication of consumer disputes in their jurisdiction.[41]

The traditional court approach for consumer dispute is all about resolving the parties' dispute through litigation. Litigation as one form of adjudication has both a mandatory and optional condition.[42]According to Lon fuller and Fekadu Petros, the mandatory elements include the conferring of the opportunity to present one's evidence and arguments; attention to such proof and arguments from the bench or the person to whom these presentations are made; and responsiveness of the decision. The parties' equality in all respects is also an optional requirement for litigation.[43]The traditional court

[40] Howells and James, Litigation in the Consumer Interest, pp.3-6.

[41] Id.

[42] Mandatory conditions are conditions which are necessary for the ordinary existence of the given underlying dispute settlement institution. Without having these conditions we can't talk about it. Without having essential conditions we can't talk about election, contract, or adjudication. While the optimal conditions are ideal requirements what we expected from a certain dispute settlement institution, but it is difficult to achieve in the real world because of different preventing circumstance. Unlike essential conditions, optimal condition doesn't have effects on the existence of the institution.

[43] Fekadu Petros, 'Underlying Distinctions Between ADR, Shimglina And Arbitration: A Critical Analysis', *Mizzan Law Review*, Vol. 3, No.1, March 2009, [here in after Fekadu Petros, 'Underlying Distinctions Between ADR, Shimglina

approach is a system of dispute settlement which is supported by the well framed procedures predetermined by a competent legislative organ and the government enforcement authority.

In addition, the appointment of the judges is preceded by well framed regulatory frameworks that entail liability for infringements of professional duties. Starting from initiation of claims up to the stage of enforcement of decisions, traditional courts have strict procedures and rules. By considering the procedural strengthens of the traditional courts with the presumption of consumer protection law, an imbalance between businesses and consumers, we may prefer the traditional court approach as a right pathway for consumer dispute resolution.

As stated in the UNCTAD conference note, "the information and bargaining power asymmetry between consumers and businesses justifies supplementing traditional civil court procedures with specific models to provide consumers with a level playing field for settling disputes and defending their rights."[44]However, the traditional court approach for consumer dispute is not a plain path for consumers. It is surrounded by significant barriers to consumers' cheap, fast and effective judicial protection. The cost of pursuing proceedings, including exposure to adverse costs if a case is lost, the lengthy duration of procedures, the complexity of the law and legal procedures, the costly requirements of legal assistance and, in particular, the low economic value of claims, are among the barriers

And Arbitration] See also Lon L. Fuller and Kenneth I. Winston, 'Forms and Limits of Adjudication', *Harvard Law Review*, Vol. 92, No. 2 (Dec., 1978), pp. 353-409. [Herein after "Fekadu Petros, Underlying Distinctions Between ADR, Shimglina And Arbitration".

[44] United Nations Conference on Trade and Development, Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Consumer Protection Law and Policy, Third session, Geneva, 9 and 10 July 2018, item 3 (d) of the provisional agenda, dispute resolution and redress, Note by the UNCTAD secretariat.[Here in after UNCTAD Conference Note].

that serve to deter consumers from undertaking ordinary judicial claims.[45]

To make judicial proceedings friendly to consumers, some countries have introduced different measures, starting from supporting consumers through consumers' legal aid and consumers claim insurance, up to referring consumer cases for special consumer courts, consumer authorities judiciary branch, small claim courts, arbitration and other ADR arrangements.[46]

II. Amicable Dispute Resolutions/ADR/

The disputes between 'Amicable and Alternative' in determining the scope of ADR between scholars of dispute settlement is unending. The current literature is starting to use Amicable over alternative by considering the different criticisms that may arise on it. According to Fekadu Petros, since the 'alternative to what question is not answerable' and the arbitration has characteristics shared with litigation as a family of adjudication, the term amicable should be used for ADR by excluding arbitration from the group. Arbitration should be constituted in the adjudication group of dispute settlement mechanisms and should be treated out of the scope of ADR.[47]The writer also prefers to use amicable for the purpose of this analysis. The Oxford Dictionary defines 'Amicable' as an activity characterized by friendliness or absence of discord."[48]Accordingly, amicable dispute resolutions are the pathways for disputes based on the parties' negotiation and agreement. ADR is characterized by the absence of influence from third parties. Even in cases where third

[45] Id.
[46] Supra Note 6.
[47] Fekadu Petros, Underlying Distinctions Between ADR, Shimglina And Arbitration.
[48] the Concise Oxford Dictionary, 10th Edition, s.v, "Amicable"

parties are involved, their role is delimited to facilitating the parties' negotiation process.

Unlike the case of adjudications (regular court procedure and arbitration), which begins from the initiation of proceedings to the final outcomes of the process, the parties' agreement has a major role. All processes are under the control of the parties. By referring to the role of negotiations and the parties' agreement in the process, Lon Fuller and Fekadu Petros categorized ADR as a contractual form of a dispute resolution mechanism.[49] Negotiation, mediation, conciliation, and compromise are the commonly known Amicable Dispute resolution/ADR/ mechanisms. Except negotiation, other actions may be undertaken at both institutional and private levels. In mediation, conciliation, and compromise, third parties are involved, although they have limited roles. The idea of resolving disputes through ADR arrangements may come into parties mind either before or after the point of controversy has been created. Furthermore, the business may create one department as a self-regulatory arrangement for consumer disputes. This method is also known as internal complaint-handling schemes.

Empirical research shows that direct negotiations between consumers and businesses are by far the most popular form in which consumer complaints are made.[50]Compared with the adjudicative approaches that include arbitration and litigation, ADR is characterized by a flexible procedure that is suitable for parties and the direct enrolment of the parties on the outcome of the process. Moreover, ADR arrangements can play a significant positive role in allowing consumers to make a complaint to a business in an inexpensive, rapid, and generally efficient manner.[51] On the other hand ADR arrangements are criticized by some as enabling fraud practices and

[49] Fekadu Petros, Underlying Distinctions between ADR, Shimglina And Arbitration.
[50] Id.
[51] The UNCTAD Conference Notes p. 7-8.

risks (i.e., delaying consumers' access to other forms of dispute settlement mechanisms, and prolonging the time for redress to be obtained). In addition, the bargaining power disparity between businesses and consumers may negatively affect the outcome of the parties' negotiation.

Some negotiations may require expertise and knowledge of the subject matter and due to illiteracy or other related factors; the consumers may be unable to persuade the business to provide remedies in these processes. In addition, third parties in mediations and conciliations may lack independence and impartiality. They may influence consumer decisions by supporting the business. These factors and other related factors may discourage consumers from using ADR as a pathway for dispute settlement. [52]

III. Arbitration

Arbitration is an adjudicative form of dispute settlement mechanism. Similar to court proceedings, arbitration also shares the mandatory and optional conditions of adjudication. Unlike court litigation, arbitration emanates from the parties' agreement. In arbitration, there is he involvement of third parties, namely arbitrators. Unlike third parties involved in mediation and conciliations, third parties have a major role in controlling the process and have power to order binding awards. Parties may agree to refer their disputes to an arbitration tribunal and to be bound by the decisions of the arbitrators either at the time of the contract or after a dispute has occurred. [53] According to the UNCTAD stipulation, "for commercial disputes, well-known arbitration 'courts' exist, but for consumer disputes a variety of systems exist. There may be a permanent dispute settlement board, or

[52] Id.
[53] Fekadu Petros, Underlying Distinctions between ADR, Shimglina And Arbitration.

less formal or nebulous arrangements."[54]Furthermore, they may be state sponsored, sectorial trade association funded or private industry.[55] Arbitration schemes may also vary on whether they are free to consumers (usually funded by business, but sometimes with State contributions) or require an access fee, which might or might not be refunded if the consumer wins.[56] Similar with the arbitration centers in commercial disputes, consumer arbitration also has merits and demerits. Most of their demerits are similar to the abovementioned ADR problems.

IV. Small Claim Courts

Smaller values for most consumer claims make access to justice very difficult given the high costs of litigation, difficult court procedures and formalities, and long lengthy procedural waiting times in the process of adjudicating the case. By simplifying court procedures and formalities, and reducing legal expenses and waiting times, small claims courts aim to make the legal proceeding more accessible to citizens with small amount of claims. The characteristics of small claim courts vary in different jurisdictions. However, in general, they are characterized by oral procedures, simplified rules of evidence, no obligation to be represented by a lawyer, and certain geographic proximity. Their jurisdiction is limited to proceedings under a certain financial level of claim.[57]

[54] UNCTAD Manual on Consumer Protection p. 93.

[55] The permanent consumer disputes board of Netherland and in Nordic states and less formal arbitration centres that are including the Tribunal for Consumer Complaints of Malaysia, the hierarchy of the consumers' arbitration tribunal in India, and the multi-sectorial matrix of Geschillencommissie operated by a single foundation in the Netherlands can be mentioned as an illustration to these.

[56] The Lisbon Arbitration Centre for Consumer Conflicts in Portugal is one instance of consumer arbitration centres serving the community free of charge.

[57] UNCTAD Conference Notes, and UNCTAD Manual on Consumer Protection, pp. 93-94.

In some jurisdictions, there is a clear prohibition of representation by a lawyer. Various states already have in place viable low-cost small claims tribunals for consumer claims [58] These procedures vary significantly from jurisdiction to jurisdiction in terms of type of procedure; type of dispute and claim that may be heard; monetary thresholds; financial costs to parties; and overall accessibility to consumers. Duggan distinguishes two types of mechanisms for processing small claims; court based mechanism and tribunal based mechanism. The court-based mechanism corresponds to an ordinary court proceeding with simple procedures, restricted use of legal representation in many cases, reduced costs, and less possibility of appealing a judge's decision. On the other hand, tribunal-based mechanisms differ from ordinary courts by sometimes limiting admissible actions to certain categories of litigants, by allowing consumers to launch an action simply by filling out a form, by prohibiting legal representation, by having waiting times counted in weeks rather than months, and by including tribunal members who do not necessarily have to be legal experts. The UN guideline on consumer rights protection and the 2007 OECD recommendations on the consumer dispute resolution and redress call for states to establish simplified court procedures for small claims.

Save the paramount importance of simplifying court procedures and reducing waiting times and cost of litigation, it is also characterized by many difficulties. For instance, the restriction of representation by a lawyer may make a legal proceeding remain complex to the layman consumer. According to M. J. Trebilcock, prohibiting legal representation sometimes has the disadvantage of leading to poor preparation, and thus to lost time, ineffective use of court resources,

[58] We find, in one form or another, small claims courts in Colombia, Brazil, Japan, France, Belgium, Italy, Malaysia, Malta, Australia, South Africa, Portugal, Pakistan and India.

and even bad decisions.[59] When there is a lack of resources, such as an experienced judge, the time of proceeding may be longer in small claim arrangements and the outcome of the proceeding may not satisfy parties to the proceeding. Even if it reduces direct costs such as representation, it raises opportunity, information, and emotional costs. The working hours of small claim courts should also be considered.

V. Collective Action

Collective action has been one of the most important developments in judicial law in recent years. Collective action in consumer proceedings also emerges from the small amount of claims common feature of consumer cases.[60] Collective action ensures that similar individual claims will be treated collectively in a single case. It is important for consumers' justice when they have no interest to provide individual claims because of its amount. Members of the group are not obliged to participate in the process. This demonstrates an extraordinary commitment by the person who is volunteering to represent the group. The indirect costs of organizing collective action are very high.[61] Collective action has an importance in distributing direct economic costs between individuals within the group. In addition to reducing direct costs to consumers proceeding, collective action has a deterrence or preventive function from the business person perspective. If there is a collective consumers' action practice in a given jurisdiction, since the outcomes of the proceeding would be burdensome, the business person will give due consideration to the consumers' rights protection.[62] Specific laws providing for collective action may vary substantially from state to state, depending on the overall legal framework. In addition to the difficulties in organizing

[59] Michael J. Trebilock, 'Rethinking Consumer Protection Policy', p. 88., in C. E. F. Rickett and T. G. W. Telfer, International Perspectives on Consumers' Access to Justice, op. cit.
[60] Howells and James, Litigation in the Consumer Interest, pp. 31-49.
[61] Id.
[62] Id.

consumers who have common small claims, the collective action is difficult for a juridical body to manage in a short period of time. This difficulty may lead the system to delay the time for proceeding, and lawyers may discourage to represent such a claim. Because of the principle of 'locus standing' collective action was limited to representative claims by individuals who have a direct and personal interest in the matter to be litigated.[63]

However, recently, different jurisdictions have started modifying this strict rule. France, India, the UK, China, and Thailand are among the jurisdictions that have established a system in which the consumers' interest can be represented by consumers' association before the court.[64] In addition, public authorities, i.e. the ombudsman and civil society organizations are also the competent organs in representing consumers' interests in collective actions.

VI. Online Dispute

With the development of electronic transitions, online consumers' disputes also require the construction of parallel pathway. According to the UNCTAD manual stipulation "many online traders have built-in 'online dispute resolution' (ODR) arrangements, which can vary between using panels of legally-qualified and verifiable individuals on an arbitration model, to algorithmic generation of automated proposals based on the statistically most likely sum that both parties would be most likely to accept, to crowd-based 'jury' decisions."[65] The United Nations Commission on International Trade Law (UNICTRAL) has also advised countries to build an online dispute

[63] Id.
[64] Id.
[65] UNCTAD Manual on Consumer Protection, p. 95.

resolution systems for a cross boarder e-commences.[66] However, this does not mean that the online dispute resolution system is limited to online transactions.[67] Countries like India and Mexico has created an online dispute resolution system, which is working for all types of consumer disputes.[68] This platform is created to reduce the barriers of regular courts and other informal systems of consumer dispute. In spite of this, an online dispute resolution has many prerequisites in relation to the literacy of the beneficiaries and the level of the technological development in the country. Creating a system without a competent system to implement is meaningless. Therefore, countries in establishing an online platform for consumer disputes they should have considered the level of the consumers' technological literacy.

VII. Public Authorities; Ombudsman and Consumer agencies

Another alternative platform for consumer disputes to reduce the problems of the regular court process in the consumer cases is creating the public authorities competent to adjudicate consumer cases. The most commonly known platforms are the Ombudsman and the Consumer Tribunal/Agency.

The ombudsman is inherently a public body responsible for representing the public interest when there is a maladministration practice. It had no adjudicative power. Its power was limited to investigating maladministration in public offices following the peoples' grievances. Its primary focus has been ensuring effective public service for people living in certain areas. In recent times countries are starting to use an Ombudsman as a system to adjudicate

[66] Review of the Guide for the Incorporation of Domestic Law, New Version of UNCITRAL Model Law, New York, 2012.
[67] The UNCTAD Conference Notes, p.9.
[68] Id.

private disputes.[69] The justification behind this new role of the Ombudsman is the existence of widespread problems of the regular court structure and other tribunals in ensuring cheap, fast and effective judicial protection. The ombudsman will play a gap filling role to other arrangements.[70] Unlike their earlier approach, here, they play a judiciary role. The judges mostly play inquisitorial role. The procedure they apply and the cost they charge against consumer is very less compared with other arrangements.

Based on this increasingly pivotal role, the ombudsman office is now widely recognized as being capable of making a significant contribution to human rights protections, both at the individual and wider societal levels.[71] International organizations such as the UN and the EU are supporting the expansion of this trend in their member states. With the development of consumers' rights protection private sector Ombudsman have spread rapidly to offer consumers new paths for their complaints. In addition, most Ombudsmen are freely accessible to consumers to assure their access to justice need. Small claims of the consumer, in particular, are the primary subject matter of the Ombudsman's adjudication. The private sector Ombudsman is a widely known arrangement in European countries.[72]

The other well-known public arrangement for the jurisprudence of consumer disputes in different jurisdictions is the establishment of a special administrative tribunal.[73] This form of consumer adjudicative body is mostly an arrangement within the executive branch of the

[69] Julinda Beqiraj and Lawrence McNamara, International Access to Justice: Barriers and Solutions, Bingham Centre for the Rule of Law Report, 2014. See also the UNCTAD Manual on Consumers Protection, pp.94-95.
[70] Id.
[71] Id.
[72] Id.
[73] The UNCTAD Manual on Consumer Protection pp. 93-94.

government. It is a branch of consumer authorities; it is accountable to an organ that regulates trade. Starting from deciding the on the procedure until the appointment of presiding judges, the involvement of executives is very high. Like other formal and informal arrangements for consumer redress, the establishment of a consumer tribunal is also a response to the problems of regular court arrangements in providing cheap, fast, and effective judicial protection.[74] However, it is not free from critics. The critics are related to the independence of the tribunal and judges, the process of adjudication, and bureaucratic bottlenecks.

The Ethiopian experience at the federal level can be taken as an example of special tribunals charged with consumers' dispute. As previously described, the breaking point of the special focus for the consumer protection in Ethiopia is the enactment of the trade practice and consumers protection proclamation No. 685/2010. Before 2010 the issue of consumer was governed by different scattered laws. Under this proclamation, the administrative authority, which was empowered to regulate the issue of consumer is the Trade Practice and Consumers Protection Authority/TPCPA/. Within this arrangement, there was a judicial sub-branch it has an authority to adjudicate the consumer claims. The amended TCCPP follows a similar approach with the repealed proclamation. The TCCPP authorized the Trade Competition and Consumer Protection Authority (TCCPA) to regulate the enforcement of the proclamation, which included the consumer protection stipulations.

TCCPA is accountable for ministry of trade currently restructured in within a consumer's protection department in the ministry. It is composed of three organs; Director General, judges, and Investigative officers. The latter two are responsible for administering the judicial aspect of the authority responsibilities. Protecting consumers from

[74] Id.

unfair acts of business and organizing judicial organs with a jurisdiction on issues of trade competition and consumer protection is among the power and responsibilities of the authority under Art 30 of the TCCPP. According to Art 23(5) of the TCCPP, the powers of the authority are limited to those entitlements within the proclamation; the rest is left to the ministry of trade and regional bureaus. This principle is working for all branches of the authority. According to Art 32 of the TCCPP the adjudicative branch of the authority has a power to take both administrative and civil measures. The administrative aspect of the adjudicative bench of the authority is delimited to the competition issue. In accordance with Art 23(5) stipulation, since it is not explicitly given to the authority, the ministry of trade and regional trade bureaus would have the authority to take administrative measures on consumer issues.

On the other hand the adjudicative branch of the authority has a jurisdiction on both the competition and consumers civil matters. The adjudicative branch of the authority power in consumer issues is limited to the allegations that may arise in the federal cities of Ethiopia. The consumer disputes that may arise in the regions are left to the regional states platform. In addition the proclamation entitled the regions to establish regional adjudicative branch when it finds necessary. The public tribunal arrangement of the consumer disputes at the federal level is not limited to the adjudicative bench; there is also an appellate tribunal which is authorized to review the decisions of the adjudicative bench. As stated in Art. 33(3) of the TCCPP the appellate tribunal has a power to confirm, reverse or vary the decision, or remand the case, with necessary instructions, to the Authority or the adjudicative bench of the Authority, as the case may be upon examining an appeal submitted to it. With regard to the composition of judges, both the adjudicative bench and appellate tribunals has one presiding judge and two judges appointed by the prime minister.

Professional qualification, educational background and experience are the criteria's in the selection process. Even if the proclamation declares independence of judges in the adjudicative bench or appellate tribunal, the appointment of the judges by the prime minister by itself has a negative impact on the independence of the adjudicative organs of the authority. In addition, since it is within the supervision of an executive organ TCCPA its independence is again at risk. Moreover, the proclamation is declared the appellate tribunal decision as a final decision except the error of law claims to the Federal Supreme Court bench. This would affect the consumers' judicial protection right by restricting the possibility of reviewing the tribunal decision by the regular courts.

Procedurally, the proclamation referred the adjudication body to use the civil procedure rules. This is also another obstacle for the consumer, which is restoring the consumers into the regular courts long and technical procedures. The non-existence of clear rules for the conduct of the judges and other bureaucratic issues are also the main challenging in ensuring effective and efficient consumer protection under this arrangement. In addition according to Art 40 of the TCCPP parties to the dispute except the government office are expected to pay adjudication fee. This is also may discourage the consumers with a small amount of the claim. These dynamics should be considered in measuring the Ethiopian administrative approach for consumer disputes settlement at the federal level and taking experience for regions.

VIII. Special Consumer Court

A special consumer court platform for consumer disputes has been the most recent development in consumer judicial protection and access to justice. The idea of a special consumer court is concerned with accommodating the merits and demerits of other pathways in consumer disputes and creating the most effective judicial protection

arrangement for the consumer.[75] Regular court arrangements have strengths such as clear procedures, rules of the conduct of judges and their composition process, the appellate process and other relevant things. From other informal adjudicative arrangements, it seeks to take their merits in relation to the cost and time of proceedings.[76] However, a special consumer court may require substantial sum of money and qualified professionals in the area.

2.1. Pathways for Consumer Dispute Resolution in the Amhara Regional State

As mentioned before, according to Art 23(5), Art. 32(1) (c), and Art. 34 of the TCCPP, the consumer dispute resolution process in the regions is left to each regional state platform. The regional states have the discretion to decide whether to establish a special adjudicative body or to use the existing platform. Following this stipulation of the TCCPP, as pointed out before, the Amhara National Regional State executive branches' re-establishment proclamation has entitled the Trade and Market Development Bureau of the region to regulate the implementation of the consumer protection rules of the TCCPP in the region. Support efforts to protect consumer rights protection by establishing a procedure for resolving consumer disputes through negotiation, and creating an administrative organ to adjudicate the consumers' civil cases are among the power and functions of the Bureau under the proclamation that concerning with the creation of consumer dispute settlement outlets in the region.

Under this entitlement, the Bureau has three basic powers and functions concerning the settlement of consumer disputes, such as;

[75] Simon Carreau, Consumers and Access to Justice: One-Stop Shopping for Consumers, Final Report of the Research Project Presented to Industry Canada's Office of Consumer Affairs, Union Des Consommateurs, 2011.
[76] Id.

supporting those entities that are working for consumers' rights protection, establishing a negotiation platform for consumer dispute resolution, and creating a public tribunal, like in case of the federal arrangement, for a consumer civil case dispute. According to this proclamation, the intended approaches for consumer dispute settlement in the region are negotiation at the first stage and administrative (public) arbitration for claims. This approach to the region is a combination of ADR and public authorities from those pathways the writer mentioned in the previous section. The proclamation does not say anything about the establishment of consumer arbitration, online dispute resolution, Mediation or conciliation centers, special consumer court, small claim court for consumers and others platforms in the region. Nevertheless, until the author has completed this work, no administrative, judicial bodies have been established in the region to adjudicate the consumers civil disputes. Therefore, the only choice for consumers in the Amhara Regional State to bring their claims before or after the negotiation is the traditional regular court arrangements. Under the regular court arrangement, since there is no special bench for consumer disputes; it would share all circumstances of the adjudication process with other civil matters.

Since the enactment of the 1995 FDRE constitution, regular courts have been established at both federal and regional levels. The jurisdiction of these two tiers of the court is limited to matters that may arise in their area. In both jurisdictions, there is a supreme court, high court, and first instance court arrangements. In addition to these three regional administrative arrangements, there are also city court and Kebele Social Court arrangements. City court arrangements are created to adjudicate city administration-related civil matters and to reduce the case flows of the Woreda courts. The Kebele social courts are comparable to small claim court pathways in other jurisdictions. The Kebele social court and city court arrangements are still subject to

constitutionality debate. Regardless of this fact, Kebele social courts and city courts are actively working in different regional and city administrations in the country including in the Amhara Regional State.

Similar to the FDRE Constitution, the Amhara Regional State revised constitution also stated various social and economic rights of citizens and established judicial protection arrangements for their enforcement. Art. 37 of the revised constitution recognizes the right to access to justice in a manner similar to the FDRE constitution. It also recognizes independent courts and other competent bodies as pathways to implementing this right. According to Art 46(3), Art 66(1) of the same statute a judicial power of the region is vested only in the courts. Art. 64 prohibits the establishment of special or ad-hoc courts that take the judicial power of the regular courts or institutions legally empowered to exercise judicial functions and that do not follow legally established procedures.

Even though, the customary and religious courts are remaining functional as per Art 34(5) and Art 65 of the constitution, this constitution recognized three categories of courts in different level: Supreme Court, High Court and first instance courts. The Supreme Court is the highest judicial body in the region, and the First Instance Court is the lowest judicial body in the region. The Amhara Regional State Courts establishment proclamation also acknowledges these three categories of courts and determined their jurisdiction.[77] Circuit courts at all levels are also recognized in this proclamation in order to make the courts accessible to the public and effective. According to Art.13 of this proclamation, the judicial power of the courts of the

[77] A Revised the Amhara National Regional State Courts' Establishment Proclamation, 2015, Zikre HIg, Proclamation No.223/2015, 20th Year, No. 4.[here in after The ANRS Courts Establishment Proclamation].

region is in such indicated regional matters directly or by appeal, as provided Art.80 of the FDRE constitution; as well in Art.66 and Art.67 of the constitution of the region except cases that are clearly and specifically stipulated under the jurisdiction of the courts of the federal government.

These three categories of courts have both civil and criminal jurisdiction. The civil jurisdiction of the three categories of courts in the region is stated in the proclamation from two perspectives: subject matters that have pecuniary value and non-pecuniary subject matters. The pecuniary subject matters are also further categorized into suits concerning movables and immovable. Each court level has criminal and civil divisions. According to Art 19(2) of the courts establishment proclamation of the region, courts have discretion to organize more divisions/benches for particular cases to make judicial activity accessible and effective. Accordingly, in practice, the civil division of the Woreda Courts has a family, labor and other civil matters benches. Furthermore, the Supreme Court of the region has a cassation division, which is empowered by the constitution to see and correct the legal errors in the final judgments of courts in the region.

In addition to these three categories of court structures in the region, there is also the Kebele Social Court and a city court arrangement in the region. The Kebele social courts in the region are established at the Kebele level and have jurisdiction to adjudicate civil suits not exceeding 15,000ETB for movables and suits not exceeding 25,000ETB for the immovable. [78] Whereas city courts are established in the three cities of the region such as; Gondar, Bahir Dar, and Dessie city administrations to adjudicate urban cases pursuant to Gondar, Bahir Dar and Dessie city administration regulations. The urban cases

[78] A Revised Social Courts Establishment and Determination of their Powers and Duties Proclamation of the ANRS, 2017, Zikre Hig, Proclamation No. 246/2017, 21th Year, No. 26.[Here in After the Revised Social Courts Establishment Proclamation]

are limited to those that facilitate the work of the city administration. Most civil cases, including consumer disputes are out of the jurisdiction of the city courts in the region.

Accordingly, the formal court structures for the adjudication of consumer disputes are include the regular court structures from Woreda Court to cassation benches and the Kebele Social Court arrangements in the region. In some cases, as Murado Abdu indicated in his article, the Federal Supreme Court cassation bench may have a cassation over cassation power over regional matters including the consumer dispute.[79] After establishing these judicial arrangements of the consumer dispute resolution in the region, the task of the writer in the coming sections of the study will be testing their competency and practical problems in ensuring cheap, fast and effective judicial protection for the consumers.

2.2. The Competency of the Available Pathways of Consumer Disputes Resolution in the Amhara Regional State

The existence of pathways for consumer dispute resolution in certain jurisdictions is a step toward ensuring consumers' judicial protection rights. Furthermore, competency in the available pathways should be tested using the commonly used judicial protection criteria. As stated in the earlier discussions, the most commonly known criteria for measuring the competency of judicial protection arrangements, in particular the consumer redress system, accessibility, independence, fairness, accountability, efficiency, and effectiveness are included [80] Based on these criteria, in this section, the author tested the

[79] Muradu Abdo, 'Review of Decisions of State Courts Over State Matters by the Federal Supreme Court', *Mizzan Law Review*, Vol. 1, No. 1, 2007, pp. 60-74.

[80] The UNCTAD Conference Notes, and Howells and James, Litigation in the Consumer Interest.

consumers' dispute resolution pathways in the Amhara National Regional State (the regular court arrangements including the Kebele Social Courts) as follows.

I. Independence

The independence of the judiciary is one of the most crucial characteristics of a competent consumer dispute settlement pathway. Judiciary independence requires institutional arrangements to be in place to guarantee the independence of the decision-making body and the impartiality of the decision.[81] In other words, these prerequisites refer to the necessity of both personal and institutional independence in the judiciary to achieve a fairer outcome at the final stage. The judiciary as an institution should be free from the influence of the parties in dispute settlement, and there should be a separation of power with the administrative bodies of the government. Institutional independence refers to the administrative and financial independence of the scheme. The parties should have no role in both the decision-making process of the judiciary and the administration of the scheme to guarantee institutional independence throughout the process of dispute settlement. In addition, to guarantee its institutional independence, a judicial body should not be received any financial or technical support from a party to the dispute.[82]

As far as law is concerned, the revised constitution of the Amhara Regional State, after declaring the establishment of an independent judicial organ in the region, has recognized the independence of any level of courts from any interference or influence of any governmental body, official, or any other sources.[83] Furthermore, the revised constitution clearly stated that judicial powers are vested exclusively in the courts of the region and any special or adhoc courts, which take

[81] Howells James, Litigation in the Consumer Interest, pp. 12-15.
[82] Id.
[83] The Amhara National Regional State Revised Constitution, Art 64-69.

the judicial powers away from the regular courts or institutions legally empowered to exercise a judicial function and which do not follow legally established procedures, shall not be established.[84] Stirring on to financial and administrative independence, the revised constitution also declares upon the Regional Supreme Court the power to draw up and submit to the Regional Council the budget of the regional courts. Upon approval of the budget by the council, the regional Supreme Court will administer the details.[85] Through these constitutional stipulations, we can conclude that institutional independence of the judiciary is constitutionally enshrined in the region. However, according to Tegaye Gedion, the constitutional guarantee of the court's independence in Ethiopia as a whole is not free from a limitation.[86] He mentioned the controversy on the power of courts in constitutional interpretation and the non-existence of a clear rule on the judicial review of other legally empowered institution's decision as obstacles of the judicial bodies' independence in the country. These limitations can also be equally mentioned as legal limitations of the regular court's independence in the regions.

In relation to the Kebele social court arrangements at the Kebele levels of the region, based on the revised constitution direction, the revised social court establishment proclamation No. 246/2017 stipulated that the judges of social court shall carry out their tasks free from the influence of any party; they shall not be directed either by other internal or external body influence without the law or local tradition and culture.[87] While it does not say nothing about what should be followed when there is a discrepancy between the law, local

[84] Id. Art 64(2) and 66.
[85] Id. Art 67(6).
[86] Tegaye G. Hailu, Amharic book on the Ethiopian Courts Civil Jurisdiction, Mega Printing PLC, 2019, pp. 27-34.
[87] The Revised Social Courts Establishment Proclamation, Art 16.

tradition and culture, and this may create uncertainty on the rules of the game in the system. In effect, it may significantly affect the independence of this pathway in the region. In particular, when consumers make small claims, the difficulty in choosing between these three categories of rules may intensify, and the final remark of judges on the controversy may endanger consumers' interest. Finally, this system may lose credibility from consumers. In relation to the budgetary issues also the proclamation has followed a loose approach. The Kebele offices take a responsibility to cover the costs of the Kebele Social Court.[88] The judicial powers of the Kebele Social Courts in the proclamation are more than enough at the Kebele level, and even if it is insignificant in amount, a parallel rule should be set with the judicial arrangement at the Woreda and above levels in the region to ensure their financial or administrative independence. Consequently, their budget should be decided at least by the respective Kebele councils and administered by themselves, not by executives.

With regard to the personal independence of the decision-maker, the principle of independence requires; the judicial appointment should be undertaken without the companies saying, the appointment of the decision-maker should be for a period of time sufficient to ensure independence, the decision maker should not be liable to be relieved of his duties without just cause and he should not be working for professional associations for a definite period of time. The Amhara Regional State first revised its constitution to declare the personal independence of judges and consequently mentioned the instruments to guarantee this principle, such as being solely guided by laws in making a decision, not removed from the tenure before the retirement age subject to exceptional circumstances,[89] and the appointment of

[88] Id Article 31.

[89] According to Art 66(4) of the ANRS revised constitution violation of disciplinary rules, gross incompetency, inefficiency and illness are the only grounds to remove the judges in the region from their tenure before their retirement age upon the

judges through a final saying of the state council. In this regard, the constitution has created a strong approach that can increase the personal independence of judges in the region. When we look at the Kebele Social Court situation from this perspective, we can face a different kind of condition. Only the appointment approach is set parallel to the regular court judge nomination approach, in which the Kebele Council is empowered to make a final statement on it. In other cases, judges are not expected to base their decisions solely on law. Cultural rules and local traditions can also be used by judges to make judgments.

The grounds for removal of judges from their tenure are also poorly constructed in the proclamation. The lists in the proclamation are difficult to consider illustrative or exhaustive. The most important grounds listed for a regular court judge's removal, such as incompetency, violation of disciplinary rules, and inefficiency, are not included in the proclamation lists.[90] These gaps in the Kebele Social Court framework may significantly affect consumers' judicial protection rights in the region when potential disputes are taken before it based on its pecuniary jurisdiction as provided in the establishment proclamation.

Furthermore, the principle of independence requires the decision-maker to possess the abilities, experience, and competence required,

judicial administration commission decision and approval of the state council by the majority vote.

[90] Art 17Removal from Social Court Judge

A judge of a social court may be discharged from his judiciary on the following reasons;

1. When the kebele council decides by majority vote based on the opinion collected from the residents to discharge him from the judicial power;
2. When the judge is sentenced in a criminal case;
3. When the judge submits request for resignation on his own will;
4. When the judge changes his kebele residence where he was elected;
5. When the judge dies.

particularly in the field of law, to perform this function. In ordinary courts in the region, holding a first degree in law is a primary requirement for a judge. There are also age- and other disciplinary requirements to be a judge in the region. To be a Woreda judge in the region, successfully graduating from a law, and completing the judicial training provided by the justice institute of the region are standard in relation to academic qualification. Experience in different positions in the highest courts is required. Even though consumer law is not included in the curriculum of undergraduate courses in law schools and there is no separate module for it at the time of judicial training, judges with a first degree in law and those not specialized in the consumer protection related area of laws may be challenged in applying the consumer protection law rules in their daily tasks of resolving consumer disputes. In addition to this, consumer disputes must have interdisciplinary knowledge, including economics, accounting, financing and other related filed of studies. Therefore, the qualification requirements for nominating regular court judge in the region are not sufficient in the consumers' dispute settlement perspective. To fill these gaps, intensive training should be provided to each judge in relation to consumer protection laws and interrelated disciplinarians. Such an arrangement may create by either of the concerned bodies in the region.[91] When we look the Kebele Social Courts from this perception we could observe an exceedingly funny occasion. For those judges who are empowered to adjudicate pecuniary matters up to 15,000 ETB and 25,000 ETB, their establishment proclamation sets the ability to write and read as the only qualification requirements to be appointed as a judge.[92] In particular, where a consumer cases are brought to this bench, we can imagine how they could be adjudicated the dispute. They had no capability to interpret consumer protection laws contained in different

[91] Universities, Justice Bureau, Trade Bureau and other governmental or NGOs may host this program.

[92] The Revised Social Courts Establishment Proclamation, Art 15.

legal instruments of Ethiopia and set out the dispute based on their findings.

II. Accessibility

Accessibility of the dispute settlement pathways can be envisaged in terms of their physical accessibility, cheapness and ease of use, as well as the availability of legal information or education on how to exhaust existing pathways.[93] The judicial body should be as physically accessible to the beneficiaries as possible. Physical accessibility has both a cost and psychological commitment implication for beneficiaries of the available arrangements. If the place of adjudication is very far from the place of residence of the consumer, who has a claim against a business person, he would be discouraged to go through the system of adjudication in fear of the high cost of transportation and loss of his commitment to seek justice due to the long distant walking necessity.[94] Physical accessibility is not enough by itself. In addition to making the system physically accessible for the consumers, the responsible organ should work to make the system too cheaply for the beneficiaries and ease the process of use.[95] The cost of legal advice, the cost of representation, court fees, and other direct or indirect litigation expenses should be reduced. If the cost of litigation is very high, the available judiciary arrangements will not be accessible to the beneficiaries. In most consumer cases, the number of claims is too small, requiring a system.

[93] Bedner A. and Vel, J.A.C., 'An Analytical Framework for Empirical Research on Access to Justice', Law, Social Justice & Global Development Journal (LGD), 2010, pp.14-18 Available at http://www.go.warwick.ac.uk/elj/lgd/20010_1/bedner_vel.
[94] Id.
[95] Id.

To ease the use of the system, the redress procedure should be well publicized, there should be appropriate assistance to the disadvantaged complaints, able to make an oral presentation of the claim even though the system requires written complaints; conciliation, mediation and negotiation should be used to attempt to settle complaints, and a legalistic and adversarial approach should be discouraged. In addition, providing consumers with legal information or education is a benchmark that they can use to use the dispute settlement system without difficulty. The government and other responsible bodies (i.e., NGOs) should have built a system of consumer education.[96] In this system, consumers should learn about the content of their rights and how they can claim their rights. A judicial arrangement for dispute settlement without a consumer education system is meaningless. To use the system of judicial protection without difficulty, the consumer should first have enough knowledge about his/her rights and the available remedies of its violation. In terms of accessibility, ADR and small claim courts are more preferable than other systems of adjudication in terms of accessibility.

Accessibility of the available pathways to consumer dispute settlement in the Amhara Region is diverse. Concerning their physical accessibility, both the revised constitution of the region and the revised court establishment proclamation declare the establishment of Woreda courts, High courts, and Supreme courts at the Woreda, Zone, and regional administration levels of the region, respectively. To reduce the difficulties of beneficiaries in accessing court services on normal platforms, a circuit court arrangement is recognized by the proclamation.[97] In addition, a Supreme Court branch is being established in some capital cities of zonal administrations. In the

[96] Id.
[97] The ANRS Revised Constitution, Art 67 and The Revised Courts Establishment Proclamation, Art 3 and Art 21(4).

regular court arrangements for consumer dispute settlement in the region, consumers' accessibility difficulties can be increased when the case approaches the highest level of court arrangements. Kebele social court arrangements are more physically accessible to consumers than regular court arrangements, although they are working only for a limited period of time in a week. This limitation of the Kebele Social Courts in terms of working days results from the non-existence of a system of recruiting judges for regular tenure. Judges in the Kebele social court are accessible to litigants only for two or three working days since it is unremunerated service and they may have other personal works to lead their life.

Consumers may incur direct and indirect costs in court proceedings. Direct costs include representation, document preparation, court fees, and reparation costs if the plaintiff loses court. Indirect costs include transportation, accommodation, and other expenses due to litigation. The existence of these cost modalities in the arrangements may greatly discourage consumers from making a commitment to provide a claim before the claim has been made. Concerning indirect costs, correcting physical accessibility problems is important and attempting to adjudicate cases within a short period. Direct costs, in particular representation and document preparation costs, can also be reduced through the provision of a free legal aid service. The Keble social courts are, again, more accessible in terms of settlement costs for settlement of consumer disputes than the other regional arrangements. In the Kebele Social Courts, there is no court fee; representation by the attorneys is not expected; statement of claims and statement of defenses can be provided orally or in a less formal written document, and because the place of adjudication is not very far from the place of residence, transportation and accommodation costs may not be an issue.

III. Accountability

Accountability is all about creating a system to publicly account for the judiciary's operations by publishing determinations and specifying liabilities for violations of duty without affecting the independence scheme. Individuals who participate in the decision-making process should be liable for the infringement of their legal responsibility regarding justice. Accountability schemes are crucial to guarantee the independence and impartiality of the judiciary, which agrees with the moral requirements. Without an accountability procedure, it is difficult for an individual to be sure of independence and fairness when making decisions. Even in systems with strong accountability schemes, it is too difficult to control the unduly acts of the judiciaries.[98]

According to Art 12(1) and (3) of the revised constitution of the Amhara Regional State the conducts of the regional state shall be transparent and any public official or an elected representative shall be accountable for any failure in official duties. Accordingly, the judges in the judicial framework are also subject to this constitutional accountability principle. As I mentioned before, judges are expected to undertake their duties as per the professional or disciplinary standards that are stipulated in the revised constitution and relevant proclamations. If the judges are failing to undertake their duties properly, they may face administrative, criminal or civil liabilities. The administrative measures may range from a preliminary warning up to removal from the tenure. The judiciary administrative council is empowered by the constitution to administer this process and the final saying is for the state council.[99] The civil liabilities of judges are in principle left within the structure of the government obligations. However, after compensating the claimant the government may

[98] Howells and James, Litigation in the Consumer Interest, pp. 25-26.
[99] The ANRS Revised Constitution, Art 69.

request the judge to replace it. This approach has an importance to guarantee the judges independent by reducing unnecessary claims and equally to create the opportunity for the injured individual to be compensated without affecting the judicial independence. This immunity protection is not always working. According to Art 2126(2) of the civil code this protection of the employee is working only for the professional faults. With regard to the criminal liability, according to Art 59 of the criminal code of Ethiopia, likewise of other public officials if the judges committed a crime either intentionally or negligently the principle of independence wouldn't shield him/her from a criminal liability.

IV. Efficiency

In addition to independence, accountability, and other criteria, a certain judicial arrangement to be considered as a competent pathway for consumer dispute settlement should be efficient. An efficient system is one that works productively with minimal wasted effort or expense. [100] In other words, a system can be considered efficient if it ensures a speedy, stream-lined, and simplified process and regular review of its performance under scrutiny by outside observers. Furthermore, an efficient judicial arrangement has a system for tracking complaints, timely notifying the parties' progress and provision for regular monitoring. Public authorities, such as ombudsmen and administrative tribunals are better off in satisfying these requirements compared with the other pathways.

In relation to efficiency, there is a huge problem with consumer dispute settlement arrangements in the region. Due to the duplication of cases and time-consuming procedures in the region, speedy adjudication of cases is not expected. It may take a significant period

[100] Howells and James, Litigation in the Consumer Interest, pp.26.

of time to begin providing a first instance claim before a competent judiciary arrangement; however, it may take a significant period of time until enforcement. It may take time to comply with each relevant rule in the civil procedure code of Ethiopia. In addition to the time-taking procedure, the available pathways for consumer disputes in the region are not subject to public scrutiny. In this region, there is no system for examining public opinion on the activities of courts and improving their failures. Problems of accessibility and independence affect court efficiency. In terms of procedure and time of adjudication, Kebele Social Court arrangements are more advantageous than regular court arrangements because they can use a simplified procedure throughout their adjudications. However, as I mentioned, the limited number of working days is another challenge to its efficiency. Moreover, because it is not their regular tenure, the judges of Kebele Social Courts may give less attention for its efficiency as well.

V. Effectiveness and fairness

Effectiveness refers to the act of producing a desired or intended result. It is closely related to the efficiency principle, but the former focuses on the operation of the scheme and the latter focuses on the final result (the capacity of the scheme to deliver the intended results). On the task of dispute settlement the final intended result in one or another way is always to deliver justice. In the work of measuring the effectiveness of a given judicial arrangement, we may use different criteria, including the capacity of the scheme to cover a wide range of consumer disputes, the fairness of the decisions, the enforcement frameworks of the decision, and the possibility of an appeal for further judicial review.[101] Fairness is an independent standard for measuring

[101] Garth Bryant G. and Cappelletti Mauro, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', Articles by Maurer Faculty, Paper 1142, 1978, Available at http://www.repository.law.indiana.edu/facpub/1142.

the performance of the available pathway of dispute settlement. In spite of this fact, the writer preferred to discuss it within effectiveness criteria because fairness is the pillar component of effectiveness, as I previously pointed out.

In the Amhara Region, even though there are no specific adjudicative bodies for consumer disputes, the available pathways are left to all forms of consumer disputes irrespective of the nature of the dispute as far as it is a justiciable matter. In both the ordinary court and the Kebele Social Court arrangements the consumer cases are within the broad category of civil matters and they are treated likewise of other civil disputes in the jurisdiction. However, this approach of treating consumer disputes with other civil matters and treating equally with others has its own impact on the effectiveness of the system. Because, as I mentioned before, consumer disputes are special in their nature and they are a result of day to day transaction of the societies they may require a more speedy trial than the others. If the adjudicative bodies treated them equally with the other and adjourned the case for a long period of time, even if the final judgment is just in its merit, it may not be satisfied the claimant since the time is going up. In addition, the approach has an impact in the number of consumer case to be adjudicated in a given bench. This may encourage consumers not to take the cases before the available pathways and tries to resolve the dispute through informal outlets as these institutions are physically accessible, cheaper and speedier. According to Kokebe W. Jemaneh, "Informal outlets/customary dispute resolution mechanisms have the potential to conflict with constitutional and human rights provisions and do not necessarily result in justice that upholds universally cherished human values[emphasis added]."[102] In effect, the

[102] Kokebe W. Jemaneh, 'Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach', In Access to Justice in Ethiopia: Towards an Inventory of Issue, Centre for Human Right, Addis Abeba University, 2014, p. 10.

consumers' judicial protection right would be at risk. Under this circumstance, it is difficult to conclude that consumer dispute settlement pathways in the region are covering a wide range of disputes even though it opens the door for all forms of disputes.

The fairness criteria of a judicial protection competency are requiring the system must produce decisions which are fair and seen to be fair by observing the principle of procedural fairness. The decision maker should consider only the information provided before it and the specific legal criteria upon which its decision is based on the decision making process. The decision should be based on fairness, reasonable approaches, good practices/precedents, and relevant laws. Procedurally, due process or natural justice requirements should be observed. The decisions must be free from personal biases and other unduly practices. In addition, the equality of parties before the court and public hearings are also important to guarantee fairness in the adjudication of consumer disputes. In general, as far as the fairness of the decision concerned, we have to consider at least the following three elements. These are included, giving equal opportunities for the disputing parties to present their factual and legal arguments; the adjudicators should have an objective position and avoiding any bias, and supporting the decisions with sufficient reasons. To fulfil these conditions the courts should equally invite the parties for a hearing. After the invitation of the parties, the court should allow the parties to the dispute to have an equal opportunity to present their arguments and evidence. Again throughout the hearing process the court should treat the parties equally irrespective of their status or other scenarios. Finally, the decision should be reasoned out by the parties' arguments and relevant laws in the area.

Both the regular courts and the Kebele Social Courts in the Amhara Regional State are also obliged to comply with these three conditions in the revised constitution and in their respective establishment proclamation. The civil procedure code of Ethiopia is the supportive

rule to properly undertake their tasks. Before starting the hearing of the case the courts should summon the defendant[103] and at the time of hearing they should be given equal chance to present their arguments. In addition, in all stages of the dispute settlement the judges should treat the parties equally. For instance amendment of claims as per Art 91, representation as per Art 38 and the ff., and other opportunities should be provided equally, when the circumstances so require. To avoid the conflict of interest problem, the CPC and the revised ANRS court establishment proclamation are further designed a change of venue or withdrawal of judge's procedure. Finally, the courts shall contain the point for determinations, the decision thereon, and the reason for such decision. Furthermore, the decision should be supported by the pertinent legal stipulation.

The CPC further provided procedures for review of judgment and enforcement of court decisions.[104] Review of judgment by the court of rendition, opposition of judgments, appeal and cassation review are the three available remedies for review of court judgment in different conditions. Consumers may also use one of these remedies against the judgment of the court as well. After the court rendered a judgment at the given point of dispute the debtor of the dispute is expected to perform his debt voluntarily. If the debtor of the judgment is not voluntary to perform his obligations in the judgment the CPC has also provided a clear procedure for enforcement of judgment.[105] To make the execution practicable the court may deliver different decree and orders, including the attachment and sale of the debtor's property.

[103] The CPC Art 111-121
[104] The CPC Art 6, 329, 358 and 418.
[105] The CPC Art 6, 329, 358 and 418.

Conclusion

A robust consumer judicial protection framework is certainly crucial for promoting a fair and efficient marketplace that upholds the interests of both businesses and consumers, thereby contributing to the overall economic and social development of the country. Ethiopia has made significant progress in establishing a legal framework to safeguard consumer judicial protection rights. The Trade Competition and Consumer Protection Proclamation (TCCPP) represent a significant step forward in this regard. However, the current system faces several limitations that hinder its effectiveness in protecting consumers.

The framework for judicial protection of consumers in the ANRS faces significant challenges that undermine its fairness, accessibility, and effectiveness. The substantive aspect of consumer judicial protection is hindered by the lack of explicit recognition of consumer rights in the constitution and other legislations. This absence creates a gap in ensuring access to justice because consumer rights are not clearly defined as fundamental rights.

Additionally, the fragmented nature of consumer protection laws, spread across various legal instruments such as the FDRE Constitution, the civil code, the TCCPP, and other legal codes, complicates the legal landscape. This dispersion makes it difficult for consumers and legal practitioners to navigate the system, thereby affecting the accessibility and practicability of these laws. On the procedural front, the existing court system, including Kebele Social Courts, is inadequate in terms of independence, accessibility, efficiency, accountability, fairness, and effectiveness. The lack of specialized training for judges in consumer law, combined with the loosely constructed rules of Kebele Social Courts, undermines the competence and independence of the judiciary. Furthermore, the

limited working days of these courts and the high costs of litigation pose significant barriers to accessing justice.

The efficiency of the judicial system is further compromised by the duplication of cases, lengthy procedures, and the absence of public scrutiny. These issues collectively hinder the delivery of timely and effective justice for consumers. Moreover, practical problems such as social stigma, low legal awareness, lack of knowledge about the legal system, budget constraints, and corruption exacerbate the situation. These factors contribute to a lack of trust in the judicial system and deter consumers from seeking legal redress. To address these challenges, a multifaceted approach is required. Structural changes, such as the establishment of specialized consumer courts and the development of a comprehensive consumer protection code, are essential. These measures would ensure that consumer disputes are handled with the specialized attention they require and provide a clear legal framework for consumer rights.

By implementing these recommendations, the ANRS can build a more robust and effective system that safeguards consumer rights and ensures fair, cheap, and effective consumer justice. This comprehensive approach will not only address the current shortcomings but also lay the foundation for a more equitable and accessible judicial system for consumers in the region.

የምርጫ ፍትህን በፍርድ ቤት ክርክር እውን ከማድረግ አንፃር በኢትዮጵያ የምርጫ ህግ ማዕቀፍ ውስጥ ያሉ ሥነ-ስርዓታዊ ተግዳሮቶች ምልከታ

በአቤኔዘር ናሆም መንገሻ

Examining Procedural Legal Challenges of Ethiopian Electoral Law Frameworks for Realizing Electoral Justice in Court Litigation

Abenezer Nahome Mengesha[ᵒ]

አጽርኦተ ይዘት/Abstract

የምርጫ ክርክር አፈታት ስርዓት የማንኛውም የዴሞክራሲያዊ ሂደት ወሳኝ ገጽታ ነው። በሚገባ የተነደፈ የምርጫ ክርክር አፈታት ሥርዓት ሁሉም ብቁ መራጮች በምርጫው እንዲሳተፉ ፣ ምርጫው ፍትሃዊ እና ግልጽነት ባለው መልኩ እንዲካሄድ ፣ ውጤቱም የመራጮችን ፍላጎት የሚያንፀባርቅ እንዲሆን ይረዳል። እንዲሁም ስርዓቱ ክርክሮችን ለመፍታት የሚያስችል ውጤታማ መንገድ በማመቻቸት በምርጫ ሂደትና በዴሞክራሲያዊ ስርዓት ላይ እምነትን

An effective electoral dispute resolution system is crucial to any democratic process. Such a system guarantees that all eligible voters can participate, that elections are conducted fairly and transparently, and that results truly reflect the voters' will.Furthermore, it fosters trust in both the electoral process and the broader democratic system

[ᵒ]LLB (Bahirdar University), LLM (Wollo University), MPM; Judge at Amhara National Regional State.The author extends his gratitude to Tigistu Belay (Public Prosecutor at Addis Ababa City Adminiatration) for his invaluable comments, helpful discussions and insightful suggestions on an earlier draft of this paper. The author is also grateful to the Editor-in-Chief of BDU Journal of Law and the anonymous reviewers for their contributions to the betterment of this piece. The author can be reached at: abene400@yahoo.com

ለመፍጠር ይጠቅማል። ስለሆነም ከዚሁ ጉዳይ ጋር በተያያዘ የኢትዮጵያ የምርጫ ሕግ ማዕቀፍ ምን ይመስላል እንዲሁም ተግባራዊ እየተደረገ ያለው የምርጫ ክርክር አፈታት ስርዓት ከዓለም አቀፍ ህግጋትና መልካም ተሞክሮዎች አንጻር በመመዘን የስርዓቱን ምንነትና አይነት እንዲሁም የምርጫ ፍትህን በፍርድ ቤት ክርክር እውን ከማድረግ አንጻር ያሉበትን ተግዳሮቶች በግልጽ ለይቶ ማስቀመጥና በሳይንሳዊ መንገድ በጥልቀት መመርመር ተገቢ ነው የሚሆነው። ይህ ጥናት በምርጫ ወቅት የሚነሱ ክርክሮችን በፍርድ ቤት በኩል እልባት ከመስጠት አኳያ በምርጫ ክርክር አፈታት ስርዓቱ ላይ ያሉ ሥነ-ስርዓታዊ ተግዳሮቶችን ምንነት ለመለየት ጽንሰ ሃሳባዊ ወይም ዶክትሪናል የምርምር ዘዴን የተጠቀመ ሲሆን በተጨማሪ አይነታዊ የጥናት ዘዴን ተከትሏል። በዚህ ጥናት በኢትዮጵያ የምርጫ ፍትህን እውን ለማድረግ ተግባራዊ እየተደረጉ ባሉ የህግ ማዕቀፎች ውስጥ በምርጫ ወቅት የሚነሱ ክርክሮችን በፍርድ ቤት በኩል እልባት ከመስጠት አኳያ ቀላል የማይባል ሥነ-ስርዓታዊ ተግዳሮቶች እንዳሉ ለማረጋገጥ ተችሏል። እነዚህም ልዩ የምርጫ ክርክር ስነ-ሥርዓት ህግ አለመኖር፣ በምርጫ አዋጁ ላይ በፍርድ ቤት የሚሰጡ ውሳኔዎች

by providing a clear mechanism for resolving disputes.This research examines how Ethiopian electoral law and the election dispute resolution system align with international standards and best practices. The study aims to identify the nature and type of the current system and to assess the challenges associated with achieving electoral justice through court litigation. The researcher employed a doctrinal research method to explore procedural legal challenges and analyzed selected court decisions to illustrate their practical effects. The findings indicate that significant procedural legal challenges exist within the current legal framework for ensuring electoral justice through court litigation. These challenges include: the absence of a specific procedural law addressing election

የመጨረሻ መሆን አለመሆንን በተመለከተ የተገለፀ ነገር አለመኖር፣ የምርጫ አዋጁ ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን ስልጣን ያላቸው የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚመለከቱት የሚገልፀው ነገር አለመኖር እንዲሁም የዕጩዎች ምዝገባን ተከትሎ በድሬዳዋና አዲስ አበባ ለሚነሱ ክርክሮች የትኛው የፍርድ ቤት በይግባኝ መመልከት እንደሚችል ግልጽ ድንጋጌ አለማስቀመጥ የሚጠቀሱት መሆናቸውን በመግለፅ እንዲሁ አነዚህ ተግዳሮቶች በተግባር ፍርድ ቤቶቻችን ላይ እየፈጠሩ ያሉትን ፈተና ለማሳየት ይረዳ ዘንድ የተመረጡ ውሳኔዎችን በመዳሰስ ለእነዚህ ተግዳሮቶች መፍቻ ይበጃል የሚለውን የመፍትሄ ሀሳቦች ያስቀምጣል።

ቁልፍ ቃላት፣*የምርጫ ክርክር አፈታት ስርዓት፣ የምርጫ ፍትህ፣ የምርጫ ዑደት።*

disputes, unclear provisions in the election proclamation regarding the finality of appellate court decisions, and a lack of clarity on jurisdiction for disputes, particularly those related to candidate registration, voter registration, and the voting process in specific jurisdictions such as Addis Ababa and Dire Dawa. Based on these findings, the study proposes recommendations to enhance the effectiveness of the electoral dispute resolution system in Ethiopia.

Keywords*; Electoral Dispute Resolution System, Electoral Justice and Electoral Cycles*

መግቢያ

ኢትዮጵያ በተለያዩ ህጎች እና ተቋማት የሚመራ ውስብስብ የሆነ የምርጫ ፍትህ ስርዓት አላት።[1] የምርጫ ስርዓቷም በአብላጫ ድምፅ (plurality) ላይ የተመሰረተ ነው።[2] በኢትዮጵያ ያለው የምርጫ ፍትህ ሥርዓት የኢትዮጵያ ብሔራዊ ምርጫ ቦርድ ፣ የፌዴራል ፍርድ ቤቶች ፣ የክልል ፍርድ ቤቶችና የተለያዩ የቅሬታ ሰሚ ኮሚቴዎች እንደየ ደረጃቸው የሚሳተፉበት ነው። ምርጫ ቦርድ ምርጫን ለማከናወን የሚያስችል አካል በአገር አቀፍ ፣ በክልል እና በአከባቢ ደረጃ የማደራጀትና የማካሄድ ኃላፊነት አለበት።[3] በተጨማሪምከፖለቲካ ፓርቲ ምዝገባና መሰረዝ ጋር የተያያዙ ጉዳዮችን እንዲሁም የሥነ-ምግባር ጥሰቶችን ተመልክቶ ውሳኔ የመስጠት ኃላፊነት ተሰጥቶታል።[4] የፌደራል ፍርድ ቤቶች በበኩላቸው በየደረጃው በተቋቋሙ ቅሬታ ሰሚ ኮሚቴዎች ሊፈቱ ያልቻሉትን የምርጫ ክርክሮች የመዳኘት ሃላፊነት አለባቸው። እንዲሁም ከምርጫ ቦርድና ከፌደራል ፍርድ ቤቶች በተጨማሪ በክልል ደረጃ የምርጫ ክርክሮችን የሚመለከቱ የክልል ፍርድ ቤቶችም አሉ። እነዚህ ፍርድ ቤቶች ከክልላዊ እና የአካባቢ ምርጫ ጋር የተያያዙ ቅሬታዎችን እና አለመግባባቶችን የመፍታት ሃላፊነት አለባቸው።[5] በኢትዮጵያ ያለው የምርጫ ፍትህ

[1] International Republican Institute (IRI) and National Democratic Institute (NDI), Ethiopia June 21, 2021 National Elections Report, August 05/2021, pp. 8

[2] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 79(2) (3), Federal Negarit Gazeta, Year 1, number 1. (here in after calledየኢፌድሪሀገመንግስት)

[3]ዝኒ ከማሁ፣በተጨማሪም የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ማቋቋሚያ አዋጅ፣1133/2011፣የኢትዮጵያ የምርጫ፣የፖለቲካ ፓርቲዎች የምዝገባና የምርጫ ሥነ-ምግባር አዋጅ፣1162/2011ን ይመልከቱ።

[4]የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ማቋቋሚያ አዋጅ፣1133/2011፣አንቀጽ 148።

[5]ዝኒከማሁ

ስርዓት ከግልጽነት ፣ ከገለልተኝነት እና ከተቋማት ነፃነት ጋር በተገናኙ ጉዳዮች ላይ ከዚህ ቀደም የተለያዩ አለማቀፍ የሰብአዊ መብት ተቋማት እንዲሁም በጸሃፍት ትችት ይሰነዘርበት ነበር።[6] ይሁን እንጂ ቅሉ ከቅርብ ዓመታት ወዲህ ስርዓቱን ለማሻሻል ጥረት ሲደረግ ቆይቷል፤ ለምሳሌ አዲስ የምርጫ ሕግ ማውጣት፣ የምርጫ ቦርድን አቅምና ነፃነት ለማጠናከር ማሻሻያዎችን ማድረግ የሚጠቀሱ ተግባራት ናቸው።[7] ሆኖም ግን የምርጫ ውዝግቦችና ግጭቶች በኢትዮጵያ የምርጫ ሥርዓት ውስጥ ያልተቋረጡ ችግሮች ሲሆኑ ፣ ይህ አይነቱ ተግባርም በርካታ አገራዊ ፈተናዎችን ሲያስከትል ይስተዋላል።

በኢትዮጵያ የምርጫ ፍትህን እውን ለማድረግ ተግባራዊ እየተደረጉ ያሉት የህግ ማዕቀፎች በምርጫ ወቅት የሚነሱ ክርክሮችን በፍርድ ቤት በኩል እልባት ከመስጠት አኳያ ብዙ ተግዳሮቶች አሉባቸው። ከእነዚህ ውስጥ በቂ እና ግልጽ ያልሆነ የህግ ማዕቀፍ መኖር አንዱ ሲሆን ይህም በምርጫ ሕጎችና ደንቦች አፈጻጸም ላይ ውዥንብር እና ወጥነት የጎደላቸው አተገባበሮችን አስከትሎ ተመልክተናል።[8] ከዚህ ጋር በተገናኘ በአሁኑ ሰዓት በኢትዮጵያ የምርጫ ህግ ማዕቀፍ ውስጥ እንደ ተግዳሮት ከሚወሰዱት መካከል ልዩ የምርጫ ክርክር ስነ-ሥርዓት ህግ አለመኖር፣ በምርጫ አዋጁ ላይ በፍርድ ቤት የሚሰጡ ውሳኔዎች የመጨረሻ መሆን አለመሆንን

[6]የግርጌ ማስታወሻ ቁጥር 1፣ገጽ 3-4 see also Merera Gudina, Elections and democratization in Ethiopia, 1991–2010, Journal of Eastern African Studies, Vol 5, No.4, 2011, pp. 664-680.

[7]ዝኒ ከማሁ

[8] NEBE vs Hareri Region, Federal Supreme Court Cassation Division, 2013, Case No 207036see also Balderas vs NEBE, Federal Supreme Court Cassation Division, 2013, Case No 207000

በተመለከተ የተገለፀ ነገር አለመኖር እና የምርጫ አዋጁ ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን ስልጣን ያላቸው የፌደራል ወይም የክልል ፍርድ ቤቶች ያስተናግዳሉ በማለት የሚያስቀምጥ ቢሆንም ፍርድ ቤቶቹ የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚገልፀው ነገር የለም። ከዚህ በተጨማሪ በኢትዮጵያ ምርጫ አዋጅ ላይ የዕጩዎች ምዝገባን ተከትሎ በድራዳዋና አዲስ አበባ ለሚነሱ አለመግባባቶች የትኛው ፍርድ ቤት በይግባኝ መመልከት እንደሚችል ግልጽ ድንጋጌ አያስቀምጥም።

ነገር ግን ምርጫ ተአማኒ ፣ ግልጽ እና ፍትሃዊ እንዲሆን ፣ ውጤቱም የመራጮችን ፍላጎት የሚያንፀባርቅ እንዲሆን ግልፅ የሆነ የምርጫ ክርክር የሚፈታበት ስርዓትና ግልፅ የሆነ የህግ ማዕቀፍ አስፈላጊ ስለመሆኑ ሳይታለም የተፈታ ጉዳይ ነው። ይህ ጽሁፍ በኢትዮጵያ ውስጥ የምርጫ ክርክርን በፍርድ ቤት ከመፍታት ጋር በተያያዘ በምርጫ ህጎች ውስጥ ያሉትን ሥነ-ስርዓታዊ ችግሮች ለመፈተሽና ለእነዚህ ተግዳሮቶች መፍትሄዎችን ለማስቀመጥ ያለመ ነው።

1. የምርጫ ክርክር አፈታት ስርዓት ጽንሰ-ሃሳብ አጠቃላይ እይታ

1.1. የምርጫ ክርክር አፈታት ስርዓት ምንነት

የምርጫ ክርክር አፈታት ስርዓት ማለት በምርጫ ሂደት ውስጥ ሊፈጠሩ የሚችሉ አለመግባባቶችን ለመፍታት የተቀመጡ ስልቶችንና ሂደቶችን በመጠቀም ከምርጫ በፊት ፣ በምርጫ ወቅት እና ከምርጫ በኋላ ለሚፈጠር አግባብ ያልሆነ ድርጊት ወይም አሰራር በህጋዊ መንገድ መቃወም የሚቻልበት ስርዓት ነው።[9] ምርጫ ተአማኒ ፣ ግልጽ እና ፍትሃዊ እንዲሆን ፣ ውጤቱም የመራጮችን ፍላጎት ማንጸባረቅ እንዲችል ይህ ስርዓት እጅግ በጣም አስፈላጊ ነው። በተጨማሪ የምርጫ ክርክሮችን በሰላማዊ መንገድ ለመፍታት የሚያስችሉ መንገዶችን በመፍጠር የምርጫውን ታአማኒነት እና ፍትሃዊነት በማረጋገጥ የዴሞክራሲያዊ አስተዳደር ወሳኝ አካል ሆኖ ያገለግላል።[10]

የምርጫ ክርክሮች ከመራጮች ምዝገባ ሂደት ፣ ከእጩዎች ምዝገባ ሂደት ፣ በድምጽ አሰጣጥ ሂደት ፣ ከድምጽ ቆጠራና ውጤት ጋር በተያያዘ ሊነሱ ይችላሉ።[11] እነዚህ አለመግባባቶች ግልጽና ውጤታማ በሆነ ስርዓት እልባት የማያገኙ ከሆነ ህዝቡን በምርጫ ሂደት እና በምርጫ ውጤት ህጋዊነት ላይ ያለውን እምነት ሊያሳጣው ይችላል። ስለሆነም የዴሞክራሲን መርሆዎች ለማስከበር ፣ የህግ የበላይነትን ለማረጋገጥ እና

[9] Lydia Apori Nakansa, Dispute resolution and electoral justice in Africa: The way forward, January 2015, pp.6 See also ACE Electoral Knowledge Network, The ACE Encyclopedia: Legal Framework, 2012, pp.19

[10] ዝኒ ከማሁ

[11] The International Institute for Democracy and Electoral Assistance, Electoral Justice: The International Idea Handbook, 2010, pp.37 see also Electoral justice; An Overview of the International IDEA Handbook, pp. 26 Venice Commission, opinions and reports concerning election dispute resolution, 2002, pp.31see also Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges, 2nd Edition, 2005, pp.28

የፖለቲካ መረጋጋትን ለማስፈን ውጤታማ የምርጫ ክርክር አፈታት ሥርዓት ወሳኝ ሚና አለው።[12]

የምርጫ ክርክር አፈታት ስርዓት ዋና ግብ አለመግባባቶችን ለመፍታት የሚያስችል ውጤታማ ዘዴ ማቅረብ ነው። ይህ ስርዓት እንዲሁ ነፃነትን ፣ ገለልተኝነትን ፣ ግልጽነትን ፣ ተደራሽነትን እና ወቅታዊነትን ጨምሮ ቁልፍ የክርክር አፈታት መርሆችን ያስጠበቀ መሆን አለበት።[13] ከዚህ በተጨማሪ በክርክሩ ውስጥ ተሳታፊ የሆኑትን ሁሉ ፍትሃዊ ፍትህ የማግኘት መብት ፣ ማስረጃ የማቅረብ መብት እና ውሳኔ ላይ ይግባኝ የማለት መብትን በተግባር ለማረጋገጥ የሚያስችል መሆን አለበት። በዋናነት ደግሞ ክርክሩን የሚመለከተው አካል በምርጫ ሂደት ውስጥ ለሚከሰቱ አለመግባባቶች ወይም ችግሮች እልባት ለመስጠት የሚያስችሉት ተገቢ የመፍትሄ አማራጮች የተደነገጉ መሆንና ይህን ተከትሎ ከክርክር በኋላ የሚሰጡ ፍርድ ፣ ውሳኔና ትዕዛዞች ተፈጻሚነት ያላቸው መሆናቸውን ማረጋገጥ መቻል አለበት።[14] በጠቅላላው የምርጫ ክርክሮችን ለመፍታት የሚያስችል አስተማማኝና ውጤታማ ስርዓት በማቅረብ በምርጫ ሂደቱ ላይ የህዝብ አመኔታን ለማጎልበት ፣ ሊከሰቱ የሚችሉ አለመግባባቶችን ለመቅረፍ ፣ የተጠያቂነት እና የግልጽነት ዲሞክራሲያዊ እሴቶችን ለማስጠበቅ ይረዳል።

[12]ዘኪከማሁ
[13] The Carter Center, Guide to Electoral Dispute Resolution, 2010, pp.32
[14]ዘኒ ከማሁ

1.2. የምርጫ ፍትህ፣ የምርጫ ዑደቶች እና በምርጫ ክርክር አፈታት ስርዓት መካከል ያለው ግንኙነት

የምርጫ ፍትህ በምርጫ ሂደቶች ውስጥ ፍትሃዊነትን ፣ ግልፅነትን እና ተጠያቂነትን የሚያረጋግጡ መርሆዎችን እና አሰራሮችን የሚያመለክት ጥቅል ፅንሰ-ሀሳብ ነው።[15] እንዲሁም የምርጫ ፍትህ ጽንሰ-ሀሳብ ከዲሞክራሲ መርሆዎች ጋር በቅርበት የተሳሰረ ነው። እነዚህም የመምረጥ መብት ፣ በመንግስት ውስጥ የመሳተፍ መብት ፣ ነፃ እና ፍትሃዊ ምርጫ መከወንን ያካትታሉ።[16] የምርጫ ፍትህ ስርዓት የምርጫ ህጎችና ደንቦችን ፣ የመራጮች ምዝገባና ትምህርትን ፣ የዘመቻ ፋይናንስንና የምርጫ አስተዳደርን ጨምሮ የተለያዩ ጉዳዮችን ያካተተ ማዕቀፍ ነው።[17] ስለሆነም የምርጫ ፍትህን ለማስፈን ግልፅ ፣ ነጻ እና ገለልተኛ የሆኑ እንዲሁም አስፈላጊ ግብአቶች የተሟላላቸው የምርጫ አስተዳደር አካላትን ማቋቋም አስፈላጊ ነው።

በመሠረቱ የምርጫ ፍትህ ስርዓት የምርጫው ሂደት ፍትሃዊና ግልፅ በሆነ መንገድ እንዲካሄድ እና ውጤቱም የህዝብን ፍላጎት በትክክል የሚያንፀባርቅ መሆኑን ማረጋገጥን ግብ ያደረገ ስርዓት ነው። ይህም ሁሉም ግለሰቦች ዘራቸው ፣ ጸታቸው ፣ ጎሣቸው ወይም ማህበራዊ ኢኮኖሚያዊ ደረጃቸው ምንም ይሁን ምን የምርጫውን ሂደት በእኩልነት

[15]የግርጌ ማስታወሻ ቁጥር 9፣ገጽ 9
[16]ዝኒ ከማሁ
[17]ዝኒ ከማሁ

እንዲገለገሉ ማድረግን ያካትታል።[18] ከዚህ በተጨማሪ የምርጫ ሂደቱ የሚመራባቸው ህጎች ግልጽና ወጥነት ያለው እንዲሆን ማድረግን ይጨምራል።[19] በጠቅላላው የምርጫ ፍትህ ስርዓት የዜጎች ድምጽ እንዲሰማና እንዲከበር ስለሚያደርግ ለዴሞክራሲያዊ ሥርዓት ግንባታ ወሳኝ ነው። የምርጫ ፍትህ መርሆችን በማክበር ዴሞክራሲን ማሳደግ እና ውጤቱም የህዝቡን ፍላጎት በትክክል የሚያንፀባርቅ እንዲሆን ለማድረግ ያስችላል። እንዲሁም የምርጫ ዐደቶች ደግሞ ከቅድመ-ምርጫ ጊዜ ጀምሮ እስከ ድህረ-ምርጫ ጊዜ ድረስ ያሉትን የተለያዩ የምርጫ ደረጃዎች ያመለክታሉ። እነዚህም የቅድመ ምርጫው ጊዜ እንደ የመራጮች ምዝገባ ፣ የእጩ ምዝገባ እና የዘመቻ እንቅስቃሴዎችን ያጠቃልላል። የምርጫ ጊዜ ደግሞ እንደ ድምጽ ቆጠራ እና የውጤት ገለጻ የመሳሰሉ ተግባራትን ያካትታል። የድህረ ምርጫው ጊዜ ክርክሮችን መፍታት ፣ የመጨረሻ ውጤቶችን ይፋ ማድረግ እና የስልጣን ሽግግርን ማከናወን ያጠቃልላል።[20]

የምርጫ ዐደት የምርጫ ፍትህ ስርዓት ውጤታማነትን ለመወሰን ወሳኝ ሚና አለው ተብሎ ይታሰባል።[21] በሌላ አነጋገር አስተማማኝ የሆነ የምርጫ ፍትህ ስርዓት ግንባታ ሶስቱን የምርጫ ዐደቶች ከግምት ያስገባና ትኩረት የሰጠ ሊሆን ይገባል ማለት ነው። ምክንያቱም የምርጫ ዐደት የምርጫውን ሂደት በፍትሃዊነት፣ በግልፅነት እና በታማኝነት እንዲካሄድ

[18] KATHMANDU, Report on Electoral Dispute Resolution and Electoral Justice, 2016, pp.13 see also Parliamentary Assembly of the Council of Europe, Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, 2000, pp. 28

[19] ዝኒ ከማሁ

[20] የግርጌ ማስታወሻ ቁጥር 11፣ ገጽ 8

[21] ዝኒ ከማሁ

የሚያስችል ተግባራዊ ማዕቀፍ በመሆኑ እንዲሁም የምርጫ ዐደት የምርጫ ፍትህ ስርዓት አንዱ አካል በመሆኑ ነው።[22] በጠቅላላው ፣ ምርጫዎች ነጻ ፣ ፍትሃዊ እና ግልጽ እንዲሆኑ የምርጫ ፍትህ ስርዓቱ ውጤታማ መሆን ወሳኝ ጉዳይ ነው። እንዲሁ የምርጫ ፍትህ ስርዓቱ ደግሞ ውጤታማ ለመሆን ሶስቱን የምርጫ ዐደቶች የምርጫው ሂደት በሂደቱ ላይ እምነት በሚያሳድር መልኩ እንዲካሄድ እና ውጤቱም የህዝቡን ፍላጎት በትክክል የሚያንፀባርቅ መሆኑን ለማረጋገጥ የሚያስችል ማዕቀፍ መዘርጋት ይጠበቅበታል።[23] ስለሆነም በምርጫ ዐደቱ በሙሉ የምርጫ ፍትህ መርሆችን በማክበር ዴሞክራሲን ማሳደግ እና የዜጎች ድምጽ እንዲሰማ እና እንዲከበር ማድረግ ያስችላል።[24]

ከዚህ ጋር በተያያዘ በምርጫ ክርክር አፈታት ስርዓት ፣ በምርጫ ዐደቶች እና በምርጫ ፍትህ መካከል ያለው ግንኙነት ውስብስብ እና ሰፋ ያለ ነው። ከላይ እንደተገለፀው የምርጫ ፍትህ በምርጫ ሂደቶች ውስጥ ፍትሃዊነትን ፣ ግልፅነትን እና ተጠያቂነትን የሚያረጋግጡ መርሆዎችን እና አሰራሮችን የሚያመለክት ጥቅል ፅንሰ-ሀሳብ ሲሆን የምርጫ ዐደቶች ደግሞ በምርጫ ፍትህ ስርዓት ውስጥ የታቀፉ ከቅድመ-ምርጫ ጊዜ ጀምሮ እስከ ድህረ-ምርጫ ጊዜ ድረስ ያሉትን የተለያዩ የምርጫ ሂደቶችን የሚያሳይ ነው። እንዲሁም የምርጫ ክርክር አፈታት ስርዓት ደግሞ በምርጫ ዐደት ውስጥ የሚታቀፍ ሆኖ በምርጫ ሂደት ውስጥ የሚነሱ ግጭቶችን ፣ ክርክሮችን

[22] ዝኒ ከማሁ
[23] ዝኒ ከማሁ
[24] ዝኒ ከማሁ

ወይም አለመግባባቶችን ለመፍታትና ለማስተካከል የተቀመጡ ስልቶችን እና ሂደቶችን የሚያመለክት ነው፡፡ ስለዚህም የምርጫ ክርክር አፈታት ስርዓት በምርጫ ዑደት ውስጥ ያለ የምርጫ ፍትህን ለማስፈን የማይተካ ሚናን የሚጫወት ስርዓት ነው ለማለት ይቻላል፡፡ ምክንያቱም በምርጫ ወቅት የሚነሱ አለመግባባቶች በምርጫው ሂደት ታማኝነት እና በምርጫው ውጤት ላይ ከፍተኛ ተጽእኖ ይኖራቸዋል፡፡ ስለሆነም እነዚህን ክርክሮች በጊዜ ፣ ፍትሃዊ እና ግልጽ በሆነ መንገድ የህግ የበላይነትን በተከተለ መልኩ መፍታት አስፈላጊ ነው የሚሆነው፡፡ ይህም መደረጉ ሁሉም ግለሰቦች በምርጫው ሂደት ውስጥ የመሳተፍ እኩል እድል እንዲያገኙ እና የምርጫው ውጤት በትክክል የህዝብን ፍላጎት የሚያንፀባርቅ እንዲሆን ይረዳል፡፡

ከዚህ በተጨማሪ በዋናነት የምርጫ ዑደቶች የምርጫ ክርክር አፈታት ስርዓትን ተፈጥሮ እና ስፋት በመቅረጽ ረገድ ጉልህ ሚናን ይጫወታሉ፡፡[25] ምክንያቱም የምርጫ ዑደት አንዱ ክፍል የሆነው የቅድመ ምርጫ የዝግጅት ምዕራፍ የምርጫ ሕጎችን ፣ ደንቦችንና ሥነ-ስርዓቶችን ፣ እንዲሁም ሊከሰቱ የሚችሉ ክርክሮችን መለየትና ለመፍታት የሚያስችሉ ዘዴዎችን ማዘጋጀትን የሚጠይቅ በመሆኑ ነው፡፡ ከዚህ በተጨማሪ የምርጫ ዑደት የትግበራ ምዕራፍ ደግሞ እነዚህን ሕጎች ፣ ደንቦች እና ሥነ-ስርዓቶችን መተግበር እንዲሁም በምርጫው ወቅት ለሚነሱ ክርክሮች መፍትሄ መስጠትን ያካትታል፡፡ እንዲሁ ደግሞ ከትግበራ ምዕራፍ ቀጥሎ

[25]ዝኒ ከማሁ

የሚመጣው የግምገማ ምዕራፍ የምርጫውን አጠቃላይ ሁኔታ ግምገማ ፣ ማንኛውንም ክርክሮች መፍታት እና የምርጫ ሂደቱን ለማሻሻል አስፈላጊ የሆኑ ማሻሻያዎችን ተግባራዊ ማድረግን የሚያካትት በመሆኑ ነው።[26]

ከዚህ ጋር በተገናኘ በምርጫ ዑደት ውስጥ የምርጫ ፍትህን ለማስፈን ፣ ውጤታማ የሆኑ የምርጫ ክርክር አፈታት ሂደቶች በሁሉም የምርጫ ዑደት ደረጃዎች ውስጥ መካተት አለባቸው። ይህም ክርክሮችን ለመፍታት ግልጽና ፍትሃዊ አሰራርን መዘርጋት ፣ እንዲሁም የመፍትሄውን ሂደት የሚደግፉ በቂ ግብአቶችን ማዘጋጀት ይጠይቃል።

በጠቅላላው ፣ በምርጫ ክርክር አፈታት ስርዓት ፣ በምርጫ ዑደቶች እና በምርጫ ፍትህ ስርዓት መካከል ያለው ግንኙነት ዘርፈ ብዙ ነው። በሁሉም የምርጫ ዑደት ደረጃዎች ውስጥ ክርክርን ለመፍታት የሚያስችል ውጤታማ ዘዴዎችን በማቅረብ እና የህግ የበላይነትን በማስከበር የምርጫ ክርክር አፈታት ስርዓት ሂደቶች ሁሉም ግለሰቦች በምርጫ ሂደት ውስጥ የመሳተፍ እኩል እድል እንዲያገኙ እና የምርጫው ውጤት በትክክል የህዝብ ፍላጎት የሚያንፀባርቅ መሆኑን ለማረጋገጥ ያስችላል።

1.3. የምርጫ ክርክር አፈታት ሥርዓት መርሆዎች እና ጥበቃዎች

አገራት የትኛውንም ዓይነት የምርጫ ክርክር አፈታት ስርዓት ተግባራዊ ቢያደርጉ ነፃ ፣ ፍትሃዊና እውነተኛ ምርጫ እንዲካሄድ ለማስቻል ይህ

[26] ዝኒ ከማሁ

ስርዓት የሚመራባቸውን መርሆዎችና ጥበቃዎችን በግልፅ ማስቀመጥና ተግባራዊ ማድረግ የግድ ይላቸዋል።[27] እነዚህ መርሆዎች እና ጥበቃዎች የምርጫ ክርክርን ለመወሰን ስልጣን የተሰጠው የመጨረሻ አማራጭ በሆነው አካል ብቻ ሳይሆን በምርጫ ክርክር ላይ ውሳኔ የሚያሳርፉ አካላት ማለትም ከመጀመሪያው ውሳኔ ሰጪ አካል ጀምሮ በየደረጃው ባሉት ውሳኔ ሰጪ አካላት ሊተገበሩ ይገባል።[28] ከመርህ ጋር በተያያዘ የምርጫ ክርክር አፈታት ሥርዓት ምርጫ ነፃ፣ ፍትሐዊና እውነተኛ በሆነ መንገድ መከናወን አለበት የሚለውን መርህ እንዲሁም ደግሞ ጠቅላላ የሆኑ በተለያዩ የህግ ሂደቶች ላይ ተፈጻሚ የሚደረጉትን እንደ ህገ-መንግስታዊነት፣ ህጋዊነት፣ የዳኝነት ነፃነትና ፍትሃዊ ዳኝነት መርሆዎችን እውቅና የሰጠ እና የተቀበለ መሆን አለበት።[29] ከዚህ በተጨማሪ ለምርጫ ክርክር ብቻ በልዩ ሁኔታ ተፈፃሚ የሚደረግ መርህ ያለ ሲሆን ይህም ፣ ያለመሻር መርህ(principle of irrevocability) በመባል ይታወቃል።[30] በዚህ መርህ መሰረት የምርጫ ሂደት ተከታታይ ደረጃዎች የሚጠናቀቁበት ቁርጥ ባለ የጊዜ ገደብ ተደንግጎ መቀመጥ አለበት የሚል ሲሆን ፣ የትኛውም የተለየና የተቀመጠ ደረጃና የጊዜ ገደብ ከተጠናቀቀ በኋላ (ለምሳሌ የምርጫው የቅድመ ዝግጅት ደረጃ) ፣ ከተወሰነ የጊዜ ገደብ በኋላ ቀጥሎ በሚመጣው ወይም በኋለኛው ደረጃ (ለምሳሌ በምርጫ ቀን ወይም

[27] Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges, 2nd Edition, 2005, pp.38 see also Electoral Dispute Resolution Discussion Paper Experts Meeting, Atlanta GA – February 2009, pp.63 see also ODIHR publication, Resolving Election Disputes in the OSCE Region 2000, pp.49

[28] ዝኒ ከማሁ

[29] ዝኒ ከማሁ

[30] የግርጌ ማስታወሻ ቁጥር 11

በድህረ-ምርጫ ደረጃ) ወቅት ስለ መጀመሪያው ደረጃ (የምርጫው የቅድመ ዝግጅት ደረጃ) ለተደረጉ ድርጊቶች ወይም ውሳኔዎች ምንም ተጨማሪ የመከራከር እድል ሊሰጥ አይገባም የሚል ነው።[31]

ነገር ግን፣ በአንዳንድ የምርጫ ክርክር አፈታት ስርዓቶች ውስጥ ለእንደዚህ አይነቱ መርህ ልዩ ሁኔታዎች ተቀምጠው ሲያገለግሉ ይስተዋላል። ለምሳሌየምርጫ ሂደትን የሚቆጣጠረው አካልምንም እንኳን በምርጫው ዝግጅት ወቅት እጩ ተመራጭ ለመሆን የሚያስፈልጉትን መስፈርቶች የሚያሟሉ መሆናቸውን በማረጋገጥ የመዘገበ ወይም በእጩነት የቀረቡትን እጩዎች ያሳለፋቸው ቢሆንም፣ ይህን በተመለከተ በእጩነት የተመዘገቡት ግለሰቦች ወይም ፓርቲዎች በእጩነት ሊመዘገቡ አይገባም የሚል ቅሬታ በድጋሚ ቀርቦ የምርጫው አሸናፊ ከመታወጁ በፊት በድህረ ምርጫው እንደገና ሊታይ እንደሚችል እና የምርጫ ክርክርን በሚመለከተው አካል በድጋሚ ውሳኔ እንዲያገኙ ሊደረግእንደሚችል ሲያስቀምጡ ይስተዋላል።[32]

የምርጫ ክርክር አፈታት ስርዓት ጥበቃዎች ማለት የመራጮችን መብት ለማስከበር ሲባልየምርጫ ተቋማት እሴቶችና መብቶችን፣ እንዲሁም ተቋማት ራሳቸውን የሚጠብቁበት፣ የሚደገፉበትና፣ ራሳቸውን የሚከላከሉበት ማንኛውም ህጋዊ ጥበቃ እና አሰራር ነው።[33] የምርጫ ክርክር አፈታት ስርዓት መዋቅራዊም ሆነ ስነ-ሥርዓታዊ ጥበቃዎች አላማ ምርጫዎች በህግ አግባብ እንዲካሄዱ እንዲሁም ነፃ፣ ፍትሃዊ እና

[31]ዝኒ ከማሁ
[32]ዝኒ ከማሁ
[33]ዝኒ ከማሁ

እውነተኛ እንዲሆኑ ለማስቻል ነው።[34] ከዚህ በተጨማሪ የመራጮችንም ሆነ የተመራጮችን የምርጫ መብቶች የማስጠበቅ አለማ እንዳለው ለመገንዘብ ይቻላል። ስለሆነም ከዚህ አንፃር ጥሩና ውጤታማ የሆነ የምርጫ ክርክር አፈታት ሥርዓት ለዴሞክራሲ ሥርዓት መጎልበትና የሕግ የበላይነት መከበር ዋስትና ይሆናል ለማለት ያስችላል። ከዚህ በተጨማሪ ዜጎች፣ እጩዎች፣ የፖለቲካ ፓርቲዎች፣ ሚዲያዎች፣ ባለስልጣኖች እና በምርጫ ሂደት ውስጥ ሚና የሚጫወቱት ሁሉ በጠቅላላው የምርጫ ህግን በራሳቸው ፈቃድ ማክበር የሚጠበቅባቸው ቢሆንም ቅሉ የምርጫ ህጉ እንዲከበር እና ህጉን የሚጥሱ ተግባሮችና አሰራሮችን ለመቅረፍ የምርጫ ክርክር አፈታት ስርዓት ቁልፍና የማይተካ ሚና አለው። ከምንም በላይ ደግሞ የምርጫ ተግባራት ክንውኖች፣ ሂደቶች እና ውሳኔዎች ከምርጫ ህጉ እና ከሌሎች ህጎች ጋር የተጣጣሙ መሆናቸውን ለማረጋገጥ የምርጫ ክርክር አፈታት ስርዓት እጅግ በጣም አስፈላጊ ነው።[35]

በምርጫ ወቅት የሚነሱ ቅሬታዎችን በህጋዊ መንገድ እንዲፈቱ ከሚያስችሉት ጥበቃዎች መካከል መዋቅራዊ እና ስነ-ሥርዓታዊ ጥበቃዎች ዋነኞቹ ተደርገው ይወሰዳሉ። መዋቅራዊ ጥበቃ ማለት የምርጫ ክርክሮችን ለመመልከት ስልጣን የተሰጠው አካል በነፃነት እና በገለልተኝነት መስራቱን ለማረጋገጥ የሚያገለግል የህግ ጥበቃና ከለላ

[34] ዝኒ ከማሁ

[35] International Foundation for Electoral System, Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections, 201, pp. 50see also, Parliamentary Assembly of the Council of Europe, Handbook for the Observation of Election Dispute Resolution, 2019

ነው።[36] እንዲሁም ስነ-ሥርዓታዊ ጥበቃዎች ማለት ደግሞ በምርጫ ወቅት በምርጫ ሂደቱም ሆነ ውጤቱ ላይ የሚፈጠሩ ቅሬታዎችን የምርጫ ክርክሮች ለመመልከት ስልጣን ለተሰጠው አካል ለማቅረብ እና የተፋጠነ መፍትሄ እንዲያገኙ ለማድረግ የተቀመጡ ስልቶች ሲሆኑይሕም የምርጫ ፍትህ እውን እንዲሆን መንገድ የሚጠርጉ እና የክርክር አፈታት ስርዓቱ ውጤታማ እና ቀልጣፋ መሆኑን ለማረጋገጥ የሚረዱ ህጋዊ ጥበቃዎች ናቸው።[37] በጠቅላላው የምርጫ ክርክር አፈታት ሥርዓት መርሆዎች እና ጥበቃዎች የምርጫውን ሂደት ታማኝነት ፣ ፍትሃዊነት እና ትክክለኛነት ለማረጋገጥ የተነደፉ ንድፎች ናቸው ለማለት ያስችላል። በመቀጠልም ከዚህ በታች ባለው ክፍል ከጽሁፉ ጋር ጥብቅ ቁርኝት ያለውን የምርጫ ክርክርን ለመፍታት የሚያገለግሉ ቁልፍ ሥነ-ስርዓታዊ ጥበቃዎችን በዝርዝር ለማየት እንሞክራለን።

1.3.1. የምርጫ ክርክር አፈታት ሥርዓት ስነ-ሥርዓታዊ ጥበቃዎች

ስነ-ሥርዓታዊ ጥበቃዎች የምርጫ ፍትህን የሚያጎለብቱና የሚጠብቁ ዋስትናዎች ሲሆኑበመሰረታዊነት ደግሞ ስነ-ሥርዓታዊ ጥበቃዎች በመደበኛነት የሚቀመጡትን የምርጫ ክርክር አፈታት ስርዓቶች ተደራሽ ፣

[36]ዝኒ ከማሁ
[37]ዝኒ ከማሁ

ውጤታማ እና ቀልጣፋ መሆናቸውን ለማረጋገጥ ነው።[38] ማንኛውም የምርጫ ክርክር አፈታት ሂደት የመራጮችንና የተመራጮችን የመምረጥ እና የመመረጥ መብታቸውን ለመጠበቅ ወይም ለመከላከል ለሚፈልጉ ሰዎች ወይም ፓርቲዎች ተደራሽ መሆን አለበት።ይህ ማለትምሂደቱ ከክፍያ ነፃ ወይም በአነስተኛ ክፍያ እንዲገኝ ማስቻል እንዲሁም በሂደቱ ውስጥ ቀላል ፣ ፈጣን እና ወቅቱን የዋጀ ጥበቃን በማድረግ ለመምረጥና መመረጥ መብት ዋስትናን መስጠት ወይም በአጠቃላይ ሁኔታ የምርጫ ህግ ማዕቀፎችን በመተላለፍ የሚጣሰው መብት ወደነበረበት መመለስ ከማይችልበት ደረጃ ከመድረሱ በፊት ለመመለስ የሚያስችል ስነ-ሥርዓታዊ ጥበቃን የሚያደርግ ነው።[39] ከእነዚህ ውስጥም በጥቂቱ፤

ሀ. ግልጽ፣ የማያሻማ እና ቀላል የሆኑ ድንጋጌዎች መኖር

ጥሩ የሚባል የምርጫ ክርክር አፈታት ስርዓት ንድፍ የድንጋጌዎችን በግልጽ፣ በማያሻማ እና ቀላል በሆነ መንገድ መቀመጥን ይጠይቃል። የምርጫ ሕግ ማዕቀፎች እና የምርጫ መብቶች መከበርን የሚጠብቁ የሕገ-መንግሥት፣ የአዋጆች እና ሌሎች ህጎች ድንጋጌዎች የፍትህ ተደራሽነት እና የተገማችነት መስፈርቶችን ለማሟላት ያስችላቸው ዘንድ በቀላል እና ግልጽ በሆነ ቋንቋ መዘጋጀት መቻል አለባቸው።[40] እንዲሁም

[38] ዝኒ ከማሁ
[39] ዝኒ ከማሁ
[40] Venice Commission, opinions and reports concerning election dispute resolution, 2002, pp.31see also Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges, 2nd Edition, 2005, pp.28 see also Electoral Dispute

ይዘታቸው ምርጫው በሚካሄድበት የማህበረሰብ ቋንቋ በሰፊው ተባዝቶ መሰራጨት የሚጠበቅበት ሲሆን ይህም ሁሉም ፍላጎት ያላቸው ሰዎች በግልፅ እና በቀላሉ እንዲረዱት እና ቀጣይነት ባለው መልኩ እንዲከተሉ ለማስቻል ነው።[41]

አሻሚ፣ ግልጽ ያልሆኑና፣ ያልተሟሉ የሕግ ድንጋጌዎች መኖር በምርጫ ሂደት ላይ የሚነሱ ህገወጥ ተግባራትን በመቃወም በምን አግባብ እንደሚቀርቡና ለየትኛው አካል እንደሚቀርቡ ግራ መጋባትን ሊፈጥር ይችላል። እንዲህ ዓይነቱ ውዥንብር የምርጫ ፍትህ ስርዓትንይጎዳል፣ እናም በመጨረሻ ለማታለል እና ህገወጥ ለሆኑ ተግባራት በር ሊከፍት ይችላል።[42] ከዚህ በተጨማሪ የምርጫውን ሂደት እና ፍትህን ከማደናቀፍ በዘለለ የተመረጡ እጩዎች ሃላፊነታቸውን ተረክበው ስራቸውን ከመጀመር እንዲዘገዩ እና በህጋዊነታቸው ላይ ጥላ እንዲያጠላያደርጋል።[43]

ከላይ እንደተገለጸው የዳኝነት ስልጣኑ የማን እንደሆነ በህግ ግልጽ ካልሆነየምርጫ ክርክሮችን ለመመልከት ስልጣን የተሰጠው አካል ቅሬታ የሚያቀርበውን ወገን ለመስማት ስልጣን እንደሌለው የሚቆጥርበት ወይም ቅሬታውን ተቀባይነት እንደሌለው የሚቆጥርበት ሁኔታ ሊፈጠር ይችላል።

Resolution Discussion Paper Experts Meeting, Atlanta GAFebruary 2009፣ see also ODIHR publication, Resolving Election Disputes in the OSCE Region 2000

[41] Oliver Joseph and Frank McLoughlin the Electoral Justice System Assessment Guide, 2019, pp.50 see also Ellena, K., Elections on Trial: The Effective Management of Election Disputes and Violations (Washington, DC: International Foundation for Electoral Systems: 2018), <https://www.ifes.org/publications/elections-trial-effective-management-election-disputes-and-violations>, accessed 12 January 2024

[42] ዝኒ ከማሁ

[43] ዝኒ ከማሁ

ከዚህ ጋር በተያያዘየምርጫ ህግ የትኞቹ በምርጫ ቅሬታ ላይ የሚሰጡ ውሳኔዎች የመጨረሻ እንደሆኑ እና የትኞቹ ደግሞ በድጋሚ ስልጣን ለተሰጠው አካል ሊቀርቡ እንደሚችሉና የትኛው አካል ቅሬታዎችን በድጋሚ አይቶ የመጨረሻ ውሰኔ መስጠት እንደሚችል በግልፅ ማስቀመጥ ይጠበቅበታል።[44] በጠቅላላው የምርጫ ክርክር አፈታት ስርዓትን የሚመሩ ሥነ-ስርዓታዊ ሕጎች ስብስብ ወጥነት ያለው እና የተሟላ፣ ግልጽ በሆነ ቋንቋ የተዘጋጀ፣ የዘፈቀደ ትርጓሜዎች አደጋን የሚያስወግድ እና የምርጫ ክርክርን የሚመለከተው አካል ያለማቋረጥ ተግባራዊ የሚያደርገው መሆን አለበት።

ለ. የተሟላ እና ውጤታማ የምርጫ ፍትህ ማግኘት

በምርጫ ሂደት ውስጥ ማንም ሰው በምርጫ ሕጉ ዕውቅና ያለው መብትና ጥቅሙ በባለስልጣኑ ወይም በሌላ አካል በሚወሰደው እርምጃሲጎዳ እራሱንና መብቱን ለመከላከል የሚያስችለው ስርዓት ሊኖር የግድ ይላል።[45] ከዚህ ጋር በተያያዘ ዜጎች፣ እጩዎች፣ የፖለቲካ ፓርቲዎች እና የፖለቲካ ቡድኖች በፆታ እና በብሔር ላይ የተመሰረተ ልዩነት ሳይደረግባቸው ቅሬታና በደሎቻቸውን ማቅረብ እንዲችሉ የምርጫ ክርክር አፈታት ሂደቶች በጊዜ፣ ርቀትና ወጪ ተደራሽ መሆን አለባቸው። እንዲሁም ዜጎች ምክንያታዊ ባልሆኑ ስነ-ሥርዓታዊ ቅድመ ሁኔታዎች፣ መስፈርቶች

[44]ዝኒ ከማሁ
[45]ዝኒ ከማሁ

ወይም መሰናክሎች ሳይገደቡ ውጤታማና እና ፈጣን ውሳኔ ማግኘት መቻል አለባቸው።[46]

ከምንም በላይ የውጤታማ የምርጫ ክርክር አፈታት ስርዓት መገለጫ ባህሪያት ከሆኑት ውስጥ አንዱ መብቶችን በመተላለፍ ጥሰት ሲፈጸም ጥሰቱን መከላከል የሚቻልበት ቀልጣፋ ሂደት መኖሩ እና ከምርጫ ሂደት ጋር የተያያዘ እያንዳንዱ እርምጃ እና ውሳኔ በህግ ማዕቀፉ ውስጥ እንዲከናወኑ ማስቻላቸው ነው።[47]

ከዚህ ጋር በተገናኘ ገለልተኛ በሆነ ፍርድ ቤት ውጤታማ መፍትሄ የማግኘትመብት በባለ ብዙ ወገን አለማቀፍ የሰብአዊ መብት ሰነዶች እና በአብዛኛዎቹ የዲሞክራሲያዊ ስርዓት ተከታይ ሀገራት ህገ-መንግስት ውስጥ ተደንግጎ ይገኛል።[48] በተጨማሪም የምርጫ ፍትሕመሠረታዊ የሰብዓዊ መብት በመሆኑ በአንድ አገር ባሉ ህግጋቶች ውስጥ በበቂ ሁኔታ ካልተረጋገጠ ወይም እውቅና ካልተሰጣቸው እንኳን ያቺ አገር አባል በሆነችባቸው ዓለም አቀፍ የሰብአዊ መብት ሰነዶችና ስምምነቶች የተደነገጉትን ዓለም አቀፍ ስምምነት መሰረት በማድረግ ለማረጋገጥ ይቻላል። በጠቅላላው በምርጫ ላይ የሚነሱ ቅሬታዎችን ለሚመለከተው አካል ለማቅረብ ቀላልና ቀልጣፋ አሰራር መኖር አለበት። ከዚህ ጋር በተያያዘ ቅሬታዎች ሲፈጠሩ ቅሬታ ያለው አካል አቤቱታውን

[46] Katherine Ellena, Chad Vickery and Lisa Reppell, Elections on Trial: The Effective Management of Election Disputes and Violations, 2018, pp.13 see also KATHMANDU, Report on Electoral Dispute Resolution and Electoral Justice, 2016, pp.42

[47] የግርጌ ማስታወሻ ቁጥር 27

[48] ዝኒ ከማሁ

ለሚመለከተው ባለስልጣን ለማቅረብ እንዲችል፤ ክርክሩን የሚመለከተውን ባለስልጣን እዛው በአካባቢው ማግኘትና ቅሬታውን ማቅረብ መቻል አለበት፡፡ ይህም የምርጫ ፍትህ መብትን አካባቢያዊ በማድረግ ተደራሽነቱን ይበልጥ በማስፋት ጥበቃ እንዲሰጥ ያስችለዋል፡፡

ሐ) የምርጫ ፍትህን በነጻ ወይም በተመጣጣኝ ዋጋ ማግኘት

የምርጫ ፍትህ የማግኘት መብት ፍትሃዊ ውሳኔ የማግኘት መሰረታዊ መብት አካል እንደመሆኑ መጠን የምርጫ ክርክር አፈታት ስርዓት ሂደት ከክፍያ ነፃ ወይም በተመጣጣኝ ዋጋ መቅረብ አለበት ተብሎ ይታሰባል፡፡[49] ከዚህ ጋር በተያያዘ የምርጫ ክርክርን ለመመልከት ስልጣን ላለው አካል ቅሬታን ለማቅረብ ምንም ዓይነት የገንዘብ ክፍያ በቅድመ ሁኔታነት የማይካተት ከሆነ የምርጫ ፍትህ በነፃ ተደራሽ ሆኗል ለማለት ያስችላል፡፡ እንዲህ አይነቱ ጥበቃ የቅሬታ አቅራቢው የገንዘብ አቅምሁኔታ ምንም ይሁን ምን ፍትህ የማግኘት መብትን ያከበረ እንዲሆን ያደርገዋል፡፡

ብዙ ሀገራት የምርጫ ፍትህ የማግኘት መብትን እንደ ሰብአዊ መብት በመመልከት በህጋቸው ማንኛውም የሚቀርብ የምርጫ ቅሬታ ያለ ምንም ክፍያ በነጻ እንዲያቀርቡየሚያደርጉ ሲሆን የዚህንም ወጪ ከመንግስት ግምጃ ቤት እንዲሸፈን በማድረግ ጭምር ስለመሆኑ ለመረዳት ይቻላል፡፡[50] አንዳንድ ጊዜ ደግሞ ክፍያን በቅድመ ሁኔታነት በሚያስቀምጡ ስርዓቶች

[49] OSCE Office for Democratic Institutions and Human Rights, Handbook for the Observation of Election Dispute Resolution,2019, pp.80

[50] ዝኒከማሁ

ውስጥ እንዲሁ የሕዝብን ጥቅም የሚመለከቱ የምርጫ ክርክሮች በሚሆኑ ጊዜ ክፍያዎች መንግሥታዊ ባልሆኑ ድርጅቶች እና የሲቪል ማህበረሰብ ድርጅቶች ሲሸፈኑ ይስተዋላል።[51] ከዚህ በተጨማሪ የምርጫ ቅሬታዎችን ለማቅረብ የክፍያ ቅድመ ሁኔታ እንዲኖራቸው ሲደረግ የፍትህ ስርዓቱ ተገልጋዮች አገልግሎቱን በተመጣጣኝ ዋጋ እንዲያገኙ ወይም የሚከፈለው ክፍያ የተመጣጣኝነት መርህን ያገናዘበ ስለመሆኑ መረጋገጥ መቻል አለበት።[52] ይህ ማለትም የሚጣለው ክፍያ የምርጫ ፍትህ ለማግኘት እንቅፋት በሚሆን ደረጃ መጣል የለበትም ማለት ነው።

መ) ወቅቱን የጠበቀ መሆን

የምርጫ ክርክሮችን ለሚመለከተው አካል ቅሬታ ለማቅረብና ውሳኔ ለማግኘት በጠቅላላው ለፍርድ ቤት ሙግቶች እና ለሌሎች የአስተዳደር ነክ ክርክሮች ከሚቀመጡት ጊዜ ገደብ ያጠረ ምክንያታዊ የሆነ የጊዜ ገደብ መቀመጥ አለበት ተብሎ ይታሰባል።[53] እነዚህ የሚቀመጡት ጊዜ ገደቦች በአንድ በኩል በምርጫው ላይ የተነሱ ቅሬታዎችን ይዘቱንና አግባብነቱን በጥልቀት ለመመርመር እና ማስረጃዎችን ለመስማት የሚያስችሉ እንዲሁም በሌላ በኩል ደግሞ ጉዳት የደረሰበትን አካል የተፋጠነ ፍትህ

[51] ዝኒከማሁ
[52] ዝኒ ከማሁ
[53] ዝኒ ከማሁ

የማግኘት መብትን ባከበረ መልኩ ሚዛን ጠብቆ ለማስኬድ የሚያስችሉ መሆን አለባቸው።[54]

የምርጫ ክርክርአፈታት ስርዓት ሂደቶች ጊዜ ገደብ ያስቀመጡ መሆን አለባቸው ።ያም ማለት በህጋዊ መንገድ በተቀመጡት የምርጫ ሂደቶች ወይም ደረጃዎች ውስጥ በተቀመጠው ጊዜ ገደብ ውስጥ ውሳኔ መሰጠት አለበት ማለት ነው። ከዚህ ጋር በተገናኘ እንዲሁ በህግ ከተቀመጠው የጊዜ ገደብ ውጭ የሚሰጠው ውሳኔ ፍትሃዊ ላይሆን ይችላል። ምክንያቱም የሚሰጠው ውሳኔ ከዘገየ በእያንዳንዱ የምርጫ መብቶች ላይ የሚደርሰውን ጉዳት ለማስተካከል የማይቻል እንዲሆን ሊያደርገው ይችላል።[55]

የምርጫ ክርክር አፈታት ስርዓት የተለያዩ የምርጫ ሒደቶችን እጅግ በጣም ባጠረ ጊዜእና እያንዳንዱን ወደ ቀጣዮቹ መሸጋገር ከመጀመሩ በፊት መጠናቀቅ ያለበትን ሁኔታ ግምት ውስጥ ማስገባት ይኖርበታል።[56] የምርጫ ክርክሮችን ተመልክቶ ውሰኔ የሚሰጠው አካል የሚቀርቡትን ቅሬታዎችን በትክክል ለመፍታት እንዲያስችል በሚቀመጠው አጭር የጊዜ ገደብ እና ቅሬታው የቀረበበት ሰው ወይም አካል የመከላከል መብት እና አስፈላጊ በሆኑ ጉዳዮች መካከል ሚዛናዊ መሆን አለበት።[57] በተጨማሪም

[54]የግርጌ ማስታወሻ ቁጥር 27፣ገጽ 22see also Barry H. Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges, 2nd Edition, 2005, pp.25

[55]ዝኒ ከማሁ

[56]ዝኒ ከማሁ

[57] Parliamentary Assembly of the Council of Europe, Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, 2000, pp.

በአጠቃላይ የተከሰቱትን ቅሬታዎች ለመፍታት አጭር ጊዜ ማቅረቡ ጤናማ የሕግ አሠራር ነው።

ብዙ የምርጫ ክርክር አፈታት ስርዓቶች በሕግ በተወሰነ ጊዜ ውስጥ በጊዜው ያልተሟገቱትን ሁሉንም ድርጊቶች እና የምርጫ አስፈፃሚ ውሳኔዎች የማይሻሩ መርህን ይከተላሉ።[58] አንድ የተወሰነ የምርጫ ቅሬታ ላይ የሚሰጥን ውሳኔ ጊዜው ካለፈ በኋላ ባለው ደረጃ ትክክለኛነት ላይ ጥያቄ ለማቅረብ የማይቻል ያደርገዋል። ለምሳሌ እንደ ሜክሲኮ ባሉአገሮች በምርጫ ቅስቀሳ ወቅት የተፈፀመ ሕገ-ወጥ ድርጊት በተጎዳው ሰው ወይም በፓርቲውተቃውሞ ካልቀረበ በቀርውጤቱ በሚገለጽበት መድረክ ላይ ምርጫውን ለመሰረዝ ምክንያት ሆኖ ቢነሳ በሕግ አይፈቀድም።[59]

ይህ መርህ የሚሠራው ሕገ-ወጥነትን በወቅቱ ለመቃወም ሲቻል ብቻ መሆኑን ልብ ሊባል ይገባል። ቅሬታው በተነሳበት ጊዜ ቅሬታውን ለማሰማት የሚያስችል ስርዓት ካልተቀመጠ ውጤቱ ይፋ ሲሆን መቃወም መቻሉ ተገቢ ነው ተብሎ የሚታሰብበት ምክንያት ሊኖር ይችላል።[60] ስለሆነም በጥቅሉየምርጫ ሕጎች ሲወጡ ለሚነሱ የምርጫ ቅሬታዎች መፍትሄ ለመስጠት የሚያስችል ልዩ እና ስልታዊ ቀነ-ገደቦችን ማስቀመጥ መቻል አለባቸው።

[58]ዝኒ ከማሁ
[59]ዝኒ ከማሁ
[60]ዝኒ ከማሁ

ሠ) የመደመጥ መብትን የጠበቀ መሆን

የምርጫ ክርክር አፈታት ስርዓት የመደመጥ መብት እንዲሁም መከላከያ ማስረጃ የማቅረብመብትን ለቅሬታ አቅራቢውም ሆነ ቅሬታ ለቀረበበት አካል ማረጋገጥ ይገባዋል።[61] ይህም ግራቀኙ ክርክራቸውን የማቅረብ እድልን መጎናጸፍና የምርጫ ክርክርን ለመመልከት ስልጣን ያለው አካል የቀረበለትን ቅሬታ ተመልክቶ ተገቢ ውሰኔ መስጠትን ያካትታል።[62]

የምርጫ ክርክር አፈታት ስርዓት የቀረቡትን ቅሬታዎች የሚደግፉ ወይም የሚቃወሙ ማስረጃዎች በሁሉም ወገኖች ለጉዳዩ መቅረባቸውን ማረጋገጥ መቻል አለበት እንዲሁምይህንን የቀረቡትን ማስረጃዎች መዝኖ የተገለጸው ፍሬ ነገር ለምን ውድቅ እንደተደረገ ወይም ተቀባይነት እንዳገኘ ማረጋገጥ የሚያስችል መሆን አለበት።[63] በጠቅላላው ሁሉም ስነ-ሥርዓታዊ ሂደቶች የሁሉንም ወገኖች የእኩልነት መብት በጠበቀ መንገድ መመራት አለባቸው።

የምርጫ ህግ የሚቀርቡ ቅሬታዎች ተቀባይነት እንዲኖራቸው ቅሬታዎችን ማን ማቅረብ እንደሚችልና ህጋዊ እውቅና እንዳለው መስፈርቶቹን በግልፅ ማስቀመጥ አለበት።እንዲሁም የምርጫ ክርክርን የሚመለከተው አካል የቀረበው ቅሬታ ተቀባይነት ያለው ነው ወይስ አይደለም በሚለው ላይ

[61] African Union Panel of the Wise, "Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict," The African Union Series, New York: International Peace Institute, July 2010.

[62] The International Foundation for Electoral Systems, Bench Book on electoral dispute resolution 2nd edition, pp.24

[63] ዝኒ ከማሁ

ውሳኔውን ለሁሉም ለሚመለከታቸው አካላት በጽሁፍ ማሳወቅ አለበት፡፡ ከዚህ በተጨማሪም ምክንያቶቹ ግልጽ የሆኑና በበቂ አመክንዮ የተደገፉ መሆን ይጠበቅባቸዋል፡፡[64]

የምርጫ ህግ የምርጫውን ውጤት በመቃወም ለሚቀርብ ቅሬታ የትኛዎቹ የህግ መፍትሄዎች ሊሰጡ እንደሚችሉ በግልፅ ማስቀመጥ አለበት፡፡ በተለይም አጠቃላይ ወይም ከፊል እንደገና ቆጠራ እንዲታዘዝ ወይም የምርጫውን ውጤት ሙሉ በሙሉ ወይም በከፊል ውድቅ ለማድረግ የሚያስፈልጉትን ስልቶች ፣ ልዩ ምክንያቶች እና ማስረጃዎች መግለጽ እና የትኛው የምርጫ ክርክርን የሚመለከተው አካል የመወሰን ስልጣን እንዳለው መግለፅ አለበት፡፡[65]

ረ) ፍርድ እና ውሳኔዎች ተፈጻሚ የሚሆኑበት ሂደት መኖር

የምርጫ ክርክርን ለመመልከት ስልጣን ያለው አካል መርምሮ የሚሰጣቸው ውሰኔዎች ጊዜውን ጠብቀው ሙሉ በሙሉ መፈጸም መቻላቸው ለምርጫ ክርክር አፈታት ስርዓቱ መጎልበት ትልቅ ሚና አለው፡፡[66] የምርጫ ክርክርን ለመመልከት ስልጣን ያለው አካል የሚሰጣቸውን ውሳኔዎች ማስፈጸም የህዝብ ፖሊሲ ጥያቄ ሲሆን ሁሉም ባለስልጣናት ለዚህ ውሳኔ የተሟላ ተፈጻሚነት የበኩላቸውን አስተዋፅዖ የማድረግ ግዴታ አለባቸው፡፡ የምርጫ ክርክር አፈታት ስርዓት አንድ

[64]ዝኒ ከማሁ
[65]ዝኒ ከማሁ
[66]የግርጌ ማስታወሻ ቁጥር 35፣ገጽ 9

የፖለቲካ ድርጅት ወይም ዜጋ በአንድ ጉዳይ ላይ ያቀረበውን ቅሬታ ትክክል መሆኑን አምኖ ተቀብሎ የሚሰጠው ውሳኔ እና መፍትሄ ጊዜውን ጠብቆ ሙሉ በሙሉ ተፈጻሚ የሚሆንበትን ሂደት የማያረጋግጥ ከሆነ ውሳኔ መሰጠቱ ፋይዳ አይኖረውም፡፡

በምርጫ ክርክር ውስጥ የሚሰጡ ውሳኔዎች ወይም ፍርዶች ከተሰጡ በኋላ ሙሉ በሙሉ ተግባራዊ ለማድረግ ህግና ደንቦች መከበር አለባቸው፡፡[67] ለምሳሌ ግዴታው የአንድን ተግባር መፈጸም ሲያካትት በዚህ ግዴታ ውስጥ ያለ ሰው ወይም አካል እንደየ ሁኔታው ይህን ለማድረግ ተጨባጭ የጊዜ ገደብ ሊቀመጥለት ይገባል፡፡ ይህ የጊዜ ገደብ በፍርዶች ወይም ውሳኔዎች ውስጥ መቀመጥ አለበት፡፡ ይህ ጊዜ ካለፈ በኋላ ድርጊቱ ካልተፈፀመ ፣ የምርጫ ክርክሩን የተመለከተው አካል ግለሰቡን ወይም ተቋሙን በትዓዛዙ አግባብ እንዲፈጽም ለማስገደድ ተገቢ እርምጃዎችን እንዲወስድ ሥልጣን ሊሰጠው ይገባል፡፡[68]

ሰ) በምርጫ ሕጎች አተረጓጎም እና አተገባበር ላይ ወጥነት መኖር

የምርጫ ክርክር አፈታት ስርዓቱ ነፃና ገለልተኛ ስለመሆኑ አንዱ ማሳያ ተደርጎ የሚወሰደው የተለያዩ የፖለቲካ ጫናዎች ቢኖሩም በሕገ መንግሥት፣ በሕግ፣ በሥርዓት እና አስፈላጊ ሆኖ ሲገኝ ምርጫን የተመለከቱ ዓለም አቀፍ ድንጋጌዎች በመተርጎም እና በመተግበሩ ላይ

[67] Parliamentary Assembly of the Council of Europe, Handbook for the Observation of Election Dispute Resolution, 2019, pp.38

[68] ዝኒ ከማሁ

ያለው ወጥነት ሲረጋገጥ ነው።[69] እንዲሁም የነባራዊ ሁኔታዎች ተለዋዋጭ መሆንን መሰረት አድርጎ ተፈፃሚነት ባላቸው የምርጫ ድንጋጌዎች ላይ አዳዲስ ግንዛቤዎችና የአተረጓጎም ለውጥ የሚጠይቁ በሚሆኑበት ሰዓት፣ ለውጦቹ ሙሉ በሙሉ ትክክል መሆናቸውን ለማረጋገጥ ልዩ ጥንቃቄ መደረግ አለበት።[70] በዋናነት ደግሞ የምርጫን ክርክር እንዲመለከቱ ስልጣን የተሰጣቸው አካላት የሚሰጡት ውሳኔም ሆነ ትዕዛዛት ተገማች መሆን መቻላቸው ለህጋዊ እርግጠኝነት እና ለምርጫ ክርክር አፈታት ስርዓቱ ታማኝነት መሰረታዊ ጉዳይ ነው።[71] በአጠቃላይ የትኛውም የምርጫ ክርክር አፈታት ስርዓት ተፈጻሚ የሚደረጉትን ህገ-መንግስታዊና ህጋዊ ድንጋጌዎችን ወጥነት ባለው መልኩ ለመተርጎም እና የህግ ክፍተቶችን ለመሙላት ያስችለው ዘንድ ግልፅ እና ወጥ መስፈርቶችን በማዘጋጀት ጥረት ማድረግ ይኖርበታል።[72]

1.4. የምርጫ ክርክር አፈታት ሥርዓት አይነቶች

የምርጫ ክርክር አፈታት ሥርዓት በምርጫ ሂደት ውስጥ ወይም ከምርጫው በኋላ የሚነሱ አለመግባባቶችን ለመፍታት እንዲያስችሉ የተቀመጡ ዘዴዎች ናቸው። እነዚህ ስርዓቶች የሚነደፉት የምርጫው ሂደት ግልፅ ፣ ፍትሃዊ እና ተዓማኒ እንዲሆን እንዲሁም የምርጫው

[69]ዝኒ ከማሁ
[70]ዝኒ ከማሁ
[71] International Foundation for Electoral System, Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections, 201, pp. 50see also, Parliamentary Assembly of the Council of Europe, Handbook for the Observation of Election Dispute Resolution, 2019
[72]International Foundation for Electoral System, When Are Elections Good Enough? Validating or Annulling Election Results, 2018

ውጤት በሁሉም ባለድርሻ አካላት ዘንድ ተቀባይነት እንዲኖረው ለማድረግ ነው።[73] ከዚህ ጋር በተገናኘ በአለም አቀፍ ደረጃ በርካታ ዓይነት የምርጫ ክርክር አፈታት ሥርዓቶች ያሉ ሲሆን እነሱንም ከዚህ በታች አንድ በአንድ እንመለከታቸዋለን።

1.4.1. የምርጫ ክርክሮች በህግ አውጪው ምክር ቤት ወይም በሌላ የፖለቲካ አካል የሚፈታበት ስርዓት

ይህ በጣም ጥንታዊ የሆነ የምርጫ ክርክር አፈታት ስርዓት አይነት ነው።[74] ይህ ስርዓት በምርጫ ወቅት የሚነሱ ክርክሮችን አይቶ የመጨረሻ እልባት አንዲሰጥ ለህግ አውጭ አካል ወይም ለሌላ የፖለቲካ አካል የሚሰጥ ሲሆን ህግ አውጪው አካል ማንኛውንም ክርክሮችን ጨምሮ በምርጫ ትክክለኛነት ላይ የመጨረሻ ውሳኔ የመስጠት ስልጣን አለው።[75]በፈረንሣይ የህግ ስርዓት ይህ 'የስልጣን ማረጋገጫ' እና በአሜሪካ የህግ ስርዓት 'የምርጫ መመዘኛ ወይም ማረጋገጫ' ተብሎ ይጠራል።[76] ይህን አይነቱን የምርጫ ክርክሮች መፍቻ ስርዓት በብዛት ጥቅም ላይ ሲያውሉት የሚስተዋለው ፓርላሜንታዊ የመንግሥት ሥርዓት ባለባቸው አገሮች ሲሆን ሕግ አውጪው በምርጫ ሂደት ውስጥ ትልቅ ሚና ይኖረዋል ማለት ነው።[77] በመሆኑም የምርጫ ክርክሮችን እንዲመለከት ስልጣን የተሰጠውይህ የህግ አውጪ ምክር ቤት ምስክር የመጥራት፣

[73]የግርጌ ማስታወሻ ቁጥር 18፣ገጽ 12-14
[74]ዝኒ ከማሁ
[75]የግርጌ ማስታወሻ ቁጥር 11፣ገጽ 20
[76]ዝኒ ከማሁ
[77]ዝኒ ከማሁ

ማስረጃን የመመዘንእና በክርክር ላይ ውሳኔ የመስጠት ስልጣን ይኖረዋል ማለት ነው።[78]

ከዚህ ጋር በተያያዘ የምርጫ ክርክርን እንዲፈታ ለህግ አውጭ ምክር ቤት የሚሰጥበት ታሪካዊ ምክንያት በስልጣን ክፍፍል መርህ ላይ የተመሰረተ ነው።[79] በዚህ መሰረት እያንዳንዱ የመንግስት አካል ከሌላው አካል የፀዳ ስለሆነ የሌሎችን ስብጥር በሚነካ ውሳኔ ውስጥ መሳተፍ የለበትም ከሚል ሃሳብ የተነሳ ነው።[80] በተጨማሪም የምርጫ ክርክር አፈታት ስርዓት ለህግ አውጭው አካል መስጠትን የሚደግፉ ወገኖች የአብዛኛውን የፍትህ አካላት ዲሞክራሲያዊ ያልሆነ ባህሪ በማንሳት የነዚህ አካላት ውሳኔ ከህግ አውጭው አካል ውሳኔ የበላይ መሆን የለበትም ሲሉ ይከራከራሉ።[81]

እንደዚህ አይነቱ የምርጫ ክርክሮችን በምክር ቤት የሚፈቱበት ስርዓት የተለያዩ ጠቀሜታዎች ያሉት ሲሆን ከእነዚህ ውስጥ አንዱ እያንዳንዱ የሚነሱ የምርጫ ክርክሮችየበለጠ ፖለቲካዊ ትኩረት እንዲያገኙ የሚያደርግ ሲሆን ይህም አለመግባባቱ ከሰፋፊ ፖለቲካዊ ጉዳዮች ጋር በተገናኘ ጊዜ የበለጠ ትኩረት እንዲያገኙ ያስችላል። በተጨማሪም የምክር ቤት የክርክር አፈታት ስርዓት ለፖለቲካ ፓርቲዎች እና እጩዎች

[78]ዝኒ ከማሁ
[79]የግርጌ ማስታወሻ ቁጥር 18፣ገጽ 12-14
[80]ዝኒ ከማሁ
[81]ዝኒ ከማሁ

በጨዋታው ውስጥ ስላለው የፖለቲካ እንቅስቃሴ የበለጠ ግንዛቤ ሊኖራቸው ስለሚችል የበለጠ ተደራሽነት እንዲኖር ያስችላል።[82]

ሆኖም ግን በምክር ቤት የክርክር አፈታት ሥርዓት ላይም እንደ ደካማ ጎን የሚነሱ ትችቶች አሉ። ከነዚህውስጥም አንደኛው ስጋት በተለይ ገዥው ፓርቲ በህግ አውጭው ውስጥ አብላጫውን ወንበር ሲይዝ ለፖለቲካ ተጽእኖ ሊዳረጉ ይችላሉ የሚል ነው። በተጨማሪም የምክር ቤት የክርክር አፈታት ስርዓቶች የዳኝነት ወይም የአስተዳደር ስርዓት የህግ እውቀት ወይም የሚከተሉት ሥነ-ስረዓታዊ ጥበቃዎች ላይኖራቸው ስለሚችል ይህም ወደ ወጥነት የለሽ ወይም ፍትሃዊ ወዳልሆነ ውሳኔዎች ሊያመራ ይችላል።[83] በአጠቃላይ የምክር ቤት የክርክር አፈታት ሥርዓት ውጤታማነት በተመረጠው የምክር ቤት ኮሚቴ ነፃ እና ገለልተኝነት ደረጃ ላይ የተመሰረተ ነው የሚሆነው።

1.4.2. የምርጫ ክርክሮች በዳኝነት አካሉ የሚፈቱበት ስርዓት

የምርጫ ክርክርን የመዳኘት ስልጣኑን ለዳኝነት አካሉ መሰጠት አለበት በማለት የሚያነሱ አካላት ምርጫን የመዳኘት እና የማረጋገጥ ተግባር በመሠረቱ ተፈጥሮዊ የዳኝነት ባህሪ ያለው ነው በማለት ነው።[84] ከዚህ በተጨማሪ ምርጫው ነፃ ፣ ፍትሃዊ ፣ እውነተኛ እና ትክክለኛ እንዲሆን ለማድረግ ያስችል ዘንድ የምርጫ ክርክሮችን የመዳኘት ስልጣኑ ለዳኝነት

[82]ዝኒ ከማሁ
[83]ዝኒ ከማሁ
[84]የግርጌ ማስታወሻ ቁጥር 11፣ገጽ 21

አካል ሊሰጥ ይገባል በማለት ያነሳሉ።[85] በዋናነት ደግሞ የምርጫ ክርክሮችን የመፍታት ስልጣን ለመስጠት ህገ መንግስታዊነትን፣ ህጋዊነትን፣ የህግ የበላይነትን ፣ መሰረት በማድረግ ነው እንጂ ከፖለቲካዊ ጥቅም ጋር በማገናዘብ ላይ የተመሰረተ መሆን የለበትም በማለት ያነሳሉ።[86] በእንዲህ አይነቱ ስርዓት ከምርጫ ጋር በተገናኘ የሚነሱ ክርክሮች በፍርድ ቤት መፍትሄ እንዲያገኙ ይደረጋል።

ከዚህ ጋር በተያያዘ ክርክሮች በፍርድ ቤት የሚፈቱበት ስርዓት ጠንካራና ገለልተኛ የዳኝነት ሥርዓት ባለባቸው አገሮች ጥቅም ላይ ሲውል ይስተዋላል። ይህም ፍርድ ቤቶች ሕግን መሠረት አድርገው ገለልተኛ በሆነ መንገድ ውሳኔ እንደሚሰጡ ስለሚታመን ነው።[87] በእንደዚህ ያለው ስርዓት ክርክሮች ህጋዊ ሂደትን ተከትሎ እንዲፈቱ የሚያስችል ሲሆን ተከራካሪ ወገኖችም ክርክሮቻቸውንና ማስረጃዎቻቸውን በችሎት ፊት እንዲያቀርቡ እድል የሚሰጥ ነው። እንዲሁም የእንደዚህ አይነቱ ስርዓት አንዱ ጥቅም ክርክሮች ከሌሎች የምርጫ ክርክር አፈታት ሥርዓቶች የበለጠ ነፃ እና ገለልተኛ በሆነ አካል እንዲፈቱ ማስቻላቸው ነው። ይህም የሚመነጨው ዳኞች ከፖለቲካዊ ጉዳዮች ወይም ሌሎች ጉዳዮች ይልቅ ህጉንና ማስረጃውን ብቻ መሰረት አድርገው ውሳኔ እንዲሰጡ የሚጠበቅባቸው የሰለጠኑ የህግ ባለሙያዎች በመሆናቸው ነው።[88] በተጨማሪም ክርክሮች በፍርድ ቤት የሚፈቱበት ስርዓት በሚሰጠው

[85]ዝኒ ከማሁ
[86]ዝኒ ከማሁ
[87]ዝኒ ከማሁ
[88]ዝኒ ከማሁ

ውሳኔ የበለጠ እርግጠኝነት እና ተገማችነት ያላቸው ናቸው። ምክንያቱም በፍርድ ቤቶች የሚሰጡ ውሳኔዎች በተለምዶ አስገዳጅ እና በአገሪቱ የህግ ስርዓት ውስጥ ተፈጻሚነት ያላቸው በመሆናቸው ነው። ይህም ህዝቡ በምርጫ ሂደቱ ላይ ያለውን እምነት ከፍ ሊያደርግ እና መረጋጋትን እና ህጋዊነትን ሊያጎለብት ይችላል ተብሎ ይታሰባል።[89]

ይሁን እንጂ ክርክሮች በፍርድ ቤት የሚፈቱበት ስርዓት ላይ ሲነሱ የሚስተዋሉ ችግሮችም በዛው ልክ አሉ። ከእነዚህ ውስጥም የመጀመሪያው ይህ አይነቱ ስርዓት ከሌሎች የምርጫ ክርክር አፈታት ስርዓቶች በበለጠ ቀርፋፋ እና ውድ ሊሆንመቻሉ ነው።ይህም የውጤት መዘግየቶችን ሊፈጥር ይችላል።[90] በተጨማሪም ክርክሮች በፍርድ ቤት የሚፈቱበት ስርዓት ልዩና ከፍ ያለ የህግ እውቀት እንዲሁም ግብአቶችን መፈለጋቸው ነው። ይህም ለአንዳንድ ወገኖች የፍትህ ተደራሽነትን ሊገድብ የሚያስችል ውጤት ይኖረዋል። በአጠቃላይ ክርክሮች በፍርድ ቤት የሚፈቱበት ስርዓት ውጤታማነት የሚወሰነው ባለው የህግ ተርጓሚው አካል ጥንካሬ እና ጥራት ላይ ነው። የምርጫ ክርክሮች በፍትሃዊነትናበገለልተኝነት እንዲፈቱ እና የምርጫው ውጤት ህጋዊ ነው ተብሎ በሰፊው ህዝብ ተቀባይነት እንዲኖረው ጠንካራ እና ገለልተኛ የዳኝነት ስርዓት አስፈላጊ መሆን እንደሚገባው መዘንጋት የሌለበት ጉዳይ ነው።

[89]ዝኒ ከማሁ
[90] ዝኒ ከማሁ

1.4.3. የምርጫ ክርክሮች በአስተዳደራዊ አካላት የሚፈቱበት ስርዓት

በዚህ አይነት የምርጫ ክርክር አፈታት ስርዓት የምርጫ ክርክሮችን ተመልክቶ ውሳኔ እንዲሰጥ ሃላፊነት የሚሰጠው ነፃ ለሆነ የምርጫ አስተዳዳሪ አካል ነው።[91] ይህም አካልየምርጫ ሂደቶችን የማደራጀት እና የማስተዳደር ሃላፊነት ከመውሰድ በተጨማሪ የምርጫ ክርክሮችን የመፍታት እና የምርጫ ሂደቱን ትክክለኛነት በተመለከተ የመጨረሻ ውሳኔ የመስጠት ስልጣን ይኖረዋል።[92] እንዲህ አይነቱ ስርዓት በዋናነት በላቲን አሜሪካ ነው ጥቅም ላይ የሚውለው።[93] በተጨማሪ ይህ ስርዓት የምርጫ ክርክሮችን በተለመደው መንገድ አከራክሮ የመወሰን ስልጣን ብቻ ሳይሆን፤ የምርጫ ሂደቶችን ትክክለኛነት ጨምሮ የመጨረሻ ውሳኔዎችን ይሰጣል። እንዲሁም እነዚህን የሚሰጡ ውሳኔዎች ማንኛውም የፍትህ ፣ የአስተዳደር ወይም የሕግ አውጭ አካል ለመመልከትና ለመገምገም አይችልም።[94] ከዚህ ጋር በተገናኘ የምርጫ አስተዳዳሪ አካሉ ነፃ እና ገለልተኛ ነው ተብሎ በሚታሰብባቸው እና ክርክሮችን በጊዜ እንዲሁም ውጤታማ በሆነ መንገድ ለመፍታት የሚያስችል የህግ እውቀት እና ግብአት ባለባቸው ሀገራት ከፊል የዳኝነት ስልጣን ባለው የምርጫ አስተዳደራዊ አካል መመልከቱ

[91] Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, OSCE/ODIHR, Warsaw, 2000. See also Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 2002 See also Inter-Parliamentary Union's Declaration on Criteria for Free and Fair Elections, 1994, Paragraph 4 (9).

[92] የግርጌ ማስታወሻ ቁጥር 11፣ገጽ 22

[93] ዝኒ ከማሁ

[94] ዝኒ ከማሁ

የተለመደ ተግባር ነው።[95] በእንደዚህ ያለ ስርዓት ውስጥ ክርክሮች በአስተዳደራዊ ሂደት ይፈታሉ፤ ተከራካሪ ወገኖችም በምርጫ ኮሚሽኑ ፊት ማስረጃዎችን እና ክርክሮችን እንዲያቀርቡ ይደረጋል።[96]

ከዚህ ጋር በተገናኘ እንደዚህ አይነቱ የምርጫ ክርክር አፈታት ስርዓት አንዱ ጥቅማቸው ከፍ ያለ ነፃነትና ገለልተኝነትን በጠበቀ መልኩ ቀልጣፋና ተደራሽ አማራጭ ማቅረብ መቻላቸው ነው።[97] በተጨማሪም ከፊል የዳኝነት ስልጣን ባለው አስተዳደራዊ አካል ክርክሮች እልባት የሚያገኙበት ስርዓት የበለጠ ልዩ እና በምርጫ ሂደት ውስጥ ስላለው ውስብስብነት የበለጠ ግንዛቤ ሊኖራቸው ይችላል። ይህም የበለጠ በመረጃ የተደገፈ እና ውጤታማ ውሳኔዎችን ያመጣል ተብሎ ይታሰባል።[98] ይሁን እንጂ ቅሉ በእንዲህ አይነቱ የምርጫ ክርክሮች አፈታት ስርዓት ላይ የሚነሱም ችግሮች አሉ። ከእነዚህም ውስጥ በቀዳሚነት የሚነሳው ጉዳይ ጠለቅ ያለ የህግ እውቀት እና የሥርዓት ጥበቃዎች ሊጎድላቸው ይችላል የሚል ነው። ይህም ወጥነት ወደሌለው የክርክር ዘይቤ በማምራት ፍትሃዊ ያልሆኑ ውሳኔዎች እንዲፈጠሩ ሊያደርግ ይችላል ተብሎ ይታሰባል።[99] በተጨማሪም ከፊል የዳኝነት ስልጣን ባለው አስተዳደራዊ አካል ስርዓት በተለይም ገዥው ፓርቲ በምርጫ ኮሚሽኑ ላይ ከፍተኛ ተጽዕኖ በሚያሳድርበት ጊዜ ለፖለቲካዊ ተጽእኖ ወይም ማጭበርበር ሊጋለጥ

[95]ዝኒ ከማሁ
[96]የግርጌ ማስታወሻ ቁጥር 11፣ገጽ 20
[97]ዝኒ ከማሁ
[98]ዝኒ ከማሁ
[99]ዝኒ ከማሁ

ይችላል።[100] በአጠቃላይ ከፊል የዳኝነት ስልጣን ባለው አስተዳደራዊ አካል የምርጫ ክርክሮች አፈታት ሥርዓት ውጤታማነት የሚወሰነው በምርጫ ኮሚሽኑ የነጻነት እና የገለልተኝነት ደረጃ ልክ ነው። አለመግባባቶች በፍትሃዊ እና በገለልተኝነት እንዲፈቱ እና የምርጫው ውጤት ህጋዊ ነው ተብሎ በሰፊው ተቀባይነት እንዲኖረው የዳኝነት ስልጣን ያለው ጠንካራ እና ገለልተኛ የአስተዳደር አካል አስፈላጊ ነው።

1.4.4. የምርጫ ክርክሮች በጊዜያዊነት በሚቋቋሙ አካላት የሚፈቱበት ስርዓት

የምርጫ ክርክሮች የሚፈቱበት ስርዓት የምርጫውን ትክክለኛነት እና ፍትሃዊነት ለማረጋገጥ ወሳኝ ሚና አላቸው። እንደዚሁ ሁሉ የዚህ አይነቱ የምርጫ ክርክር አፈታት ስርዓት ባህሪ የምርጫ ክርክሮችን ተመልክቶ መፍትሄ የሚሰጠው አካል በጊዜያዊነት የሚቋቋም ነው።[101] ይህ ማለትም የምርጫ ክርክሩን የሚመለከተው አካል የሚቋቋመው ለአንድ የምርጫ ጊዜ ወይም ምናልባትም ከአንድ በላይ ለሆኑ የምርጫ ጊዜያት ሊሆን ይችላል። ነገር ግን ተግባራዊ የሚደረገው ቋሚ የምርጫ ክርክር አፈታት ስርዓት እስኪፈጠር ድረስ እንደመሸጋገሪያ እርምጃ ነው።[102]

[100] ዝኒ ከማሁ
[101] የግርጌ ማስታወሻ ቁጥር 18
[102] ዝኒ ከማሁ

ይህ በጊዜያዊነት የሚቋቋመው አካልም እንደ ዳኞች ፣ ጠበቆች ፣ ምሁራን እና ሌሎች በምርጫ ህግ እና አሰራር ላይ ያሉ ባለሙያዎችን ያቀፈ ሊሆን ይችላል። ነገር ግን እንደየ ምርጫው ልዩ ሁኔታ እና እንደየ ህግ ማዕቀፉ የሚመለከቱት አካላት ስብጥር ሊለያይ መቻሉን ልብ ሊባል ይገባል። የምርጫ ክርክሮችን የሚመለከቱት ጊዜያዊ አካላት ከምርጫው ጋር በተያያዙ ቅሬታዎችን መቀበል እና መፈተሽ ፣ የምርጫ ህጎችን እና የአሰራር ሂደቶችን መጣስን መመርመር እና በምርጫው ውጤት ትክክለኛነት ላይ ውሳኔ መስጠትን ያጠቃልላል። እንዲሁም አስፈላጊ ሆኖ ሲገኝ በድጋሚ ቆጠራን የማዘዝ ፣ ውጤቱን የመሻር ወይም አዲስ ምርጫ እንዲከናወን ስልጣን ሊኖራቸው ይችላል።[103] ከዚህ ጋር በተገናኘ የዚህ አይነቱ የምርጫ ክርክር አፈታት ስርዓት አንዱ ጥቅም ለአንድ የተወሰነ ሁኔታ ምላሽ ለመስጠት ፍጥነት ሊታከልበት ይችላል የሚል ነው። ይህም የምርጫ ክርክሮችን ወቅታዊ እና ውጤታማ በሆነ መንገድ ለመፍታት ይረዳል።[104]ይሁን እንጂ ቅሉ የምርጫ ክርክሩን የሚመለከቱት አካላት የሚሰጡት ውሳኔ ተአማኒነት እና ህጋዊነት በተለያዩ ሁኔታዎች ላይ የተመሰረተ ነው። ለምሳሌ በአባላቱ ገለልተኛነት እና እውቀት ፣ የአሠራሩ ግልጽነት እና አሠራሩን የሚመራ የህግ ማዕቀፍ በጥቂቱ ተጠቃሽ ናቸው።[105]

[103] ዝኒ ከማሁ
[104] ዝኒ ከማሁ
[105] ዝኒ ከማሁ

2. የምርጫ ክርክር አፈታት ስርዓት በኢትዮጵያ

ኢትዮጵያ ብሔራዊ ምርጫ ቦርድን ፣የክልልና የፌዴራል ፍርድ ቤቶችን እና የፌዴሬሽን ምክር ቤትን ያካተተ ባለ ብዙ ደረጃ የምርጫ ክርክር አፈታት ሥርዓት አላት።[106] ብሔራዊ ምርጫ ቦርድ ከምርጫ ሒደቱ ጋር ተያይዘው የሚነሱ አለመግባባቶችን የመፍታት ኃላፊነት አለበት።[107] እንዲሁም የክልል እና የፌደራል ፍርድ ቤቶች በበኩላቸው በይግባኝና በመጀመሪያ ደረጃ በምርጫ ክርክሮች ላይ የዳኝነት ስልጣን አላቸው።[108] የፌዴሬሽንምክር ቤት እንዲሁ ከምርጫ ጋር በተያያዘ የሚነሱ የምርጫ ክርክሮች ህገ መንግስቱን በቀጥታ ተግባራዊ ከማድረግ በዘለለ የህገ መንግስት ትርጉም የሚያስፈልጋቸው ከሆነ የመጨረሻ ተርጓሚ አካል ሆኖ ያገለግላል።[109] ስለሆነም በዚህ ክፍል ውስጥ በኢትዮጵያ የምርጫ ክርክሮች አፈታትን በተመለከተ ተፈጻሚነት ያላቸውን የህግ ማዕቀፎች ለመመልከት ይሞከራል።

2.1. የምርጫ ክርክር አፈታት የህግ ማዕቀፎች

የምርጫ ክርክሮች የሚፈቱበት ስርዓትና የህግ ማዕቀፎች እንደየ ሀገራቱ የህግ ስርዓቶቻቸው ይለያያሉ። ኢትዮጵያ የምርጫ ክርክሮችን ለመፍታት

[106]የግርጌ ማስታወሻ ቁጥር 3፣ በተጨማሪ የኢትዮጵያ የምርጫ፣ የፖለቲካ ፓርቲዎች የምዝገባና የምርጫ ሥነ-ምግባር አዋጅ፣1162/2011፣ የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ማቋቋሚያ አዋጅ፣1133/2011 ይመልከቱ።

[107]የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ማቋቋሚያ አዋጅ፣1133/2011፣አንቀጽ 7።

[108]የኢትዮጵያ የምርጫ፣የፖለቲካ ፓርቲዎች የምዝገባና የምርጫ ሥነ-ምግባርአዋጅ፣1162/2011፣አንቀጽ 153-158

[109]የግርጌ ማስታወሻ ቁጥር 2

የሚያስችል የህግ ማዕቀፍ አላት። ከእነዚህም ውስጠ በዋናነት የኢፌዴሪ ህገ መንግስት ለምርጫ ሕጋዊ መሠረት ያስቀመጠ ፣ የዴሞክራሲና የምርጫ መብቶች መሠረታዊ መርሆዎችን ያካተተ ፣ ነጻና ገለልተኛ የሆኑ ፍርድ ቤቶች እንዲቋቋሙ የደነገገ ፣ የመምረጥ መብትን እና የመመረጥ መብትን ያቀፈ እንዲሁም ምርጫን የማደራጀት እና የማካሄድ ኃላፊነት ያለበትን የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ነጻና ገለልተኛ ሆኖ ስራውን እንደሚያከናውን መሰረት የሚጥል ሆኖ እናገኘዋለን።[110] ከዚህ በተጨማሪ የወንጀል ህጉ በአምስተኛ ርእሱ ስር ምርጫን የሚመለከቱ ወንጀሎች ከአንቀጽ 466 እስከ 476 የተለያዩ የምርጫ ነክ ወንጀሎችን በመዘርዘር ያስቀምጣል።[111] ከዚህ ጋር በተያያዘ እንዲሁ ከምርጫ ጋር በተያያዙ የወንጀል ጉዳዮች ምርመራ እና የፍርድ ሂደት ላይ ፖሊስና ዐቃቤ ህግ የሚጠቀሙት ይህንንህግ ነው። ከሥነ-ምግባር ጥሰቶች በስተቀር ከምርጫ ጋር የተያያዙ የወንጀል ጥፋቶች በፖሊስና ዐ/ህግ የሚታዩ ሲሆን፣ በዚህም ረገድ የወንጀል ሥነ- ስርዓት ህጉ ድንጋጌዎችና ስነ ስርዓቶች ተፈፃሚ ይሆናሉ።[112] ስለሆነም ይህ እንዳለ ሆኖ ከዚህ በታች ባለው ክፍል ከምርጫ ክርክር አፈታት ስርዓት ጋር በቀጥታ ግንኙነት ያላቸውን ህጎች በጥልቀት አንመለከታለን።

[110]ዝኒ ከማሁ
[111]የኢትዮጵያ ወንጀል ህግ፣414/2004፣ከአንቀጽ 466 እስከ 476
[112]የኢትዮጵያ የወንጀለኛ መቅጫ ስነ-ሥርዓት ህግ፣185/1954

2.1.1. የኢትዮጵያ የምርጫ ፣ የፖለቲካ ፓርቲዎች የምዝገባና የምርጫ ሥነ-ምግባር አዋጅ[113]

በምርጫ አዋጅ ቁጥር 1162/2011 የተደረጉት ማሻሻያዎች እንደተጠበቁ ሆነው ይህ አዋጅበዋናነት በጊዜው የወጣው ሁሉም ኢትዮጵያዊ በሚስጥራዊ የድምፅ አሰጣጥ ስርዓት ድምፁን በነፃ ፈቃዱ የሚሰጥበት እንዲሁም ህዝብ በእኩልነት በየደረጃው በሚካሄዱ ሁሉን አቀፍ ፣ ፍትሃዊና ሰላማዊ ምርጫዎች ውስጥ እንዲሳተፉ ለማረጋገጥ ነው።[114] ይህ የምርጫ አዋጅ ምርጫ ቦርድን በገለልተኛነት በማዋቀር ምርጫን የማደራጀት እና የማካሄድ ፣ የመራጮች ምዝገባ ፣ የእጩዎች ጥቆማ ፣ የምርጫ ቅስቀሳ እና ድምጽ አሰጣጥ ሂደቶችን በዝርዝር አስቀምጧል።[115] ከዚህ በተጨማሪ ይህ አዋጅ አጠቃላይ የምርጫ ሂደቱን እና የፖለቲካ ፓርቲዎችን ምዝገባ ያስተዳድራል። እንዲሁም የምርጫ ሥነ-ምግባር ደንብና መርሆዎችን ያስቀምጣል። በዋናነት ደግሞ ማንኛውም የምርጫ እንቅስቃሴ አለም አቀፍ የምርጫ መስፈርቶችን በሚያሟላ የምርጫ ሂደት

[113]የምርጫ አዋጅ ቁጥር 1162/2011 በቅርቡ ሁለት ማሻሻያ የተደረገበት ሲሆን በአዋጅ ቁጥር 1235/2013 ከኮሮና ጋር በተያያዘ ለስድስተኛው ምርጫ ብቻ ተፈጻሚ የሚሆን እጩዎች ለህዝብ ተወካዮች ምክር ቤትም ሆነ ለክልል ምክር ቤት ሲወዳደሩ የሚያቀርቡትን የድጋፍ ፊርማ መጠን ዝቅ የሚያደርግ ማሻሻያ ሲሆን ሌላው አዋጅ ቁጥር 1332/2016 በበኩሉ አንድ የፖለቲካ ቡድን ሃይልን መሰረት ያደረገ የአመጽ ተግባር ላይ የተሳተፈ እንደሆነና ይህን ተግባር ማቆሙንና ህገመንግስታዊ ዲሞክራሲያዊ ስርዓቱን አክብሮ ለመንቀሳቀስ መስማማቱን ከሚመለከተው የመንግስት አካል ከተረጋገጠ ፓርቲውበ ድጋሚ ሊመዘገብ እንደሚችል የሚገልጽ ነው። ነገር ግን የተደረጉት ማሻሻያዎች በዚህ ጽሁፍ ከተያዘው ጉዳይ ጋር ግንኙነት የሌላቸው በመሆኑ ስለማሻሻያዎቹ በዚህ ክፍል ውስጥ የምንመለከት አይሆንም።

[114]የግርጌ ማስታወሻ ቁጥር 108

[115]ዝኒ ከማሁ

መመራቱን የማረጋገጥ አላማ አንግቧል። እንዲሁም የፖለቲካ ፓርቲዎችን የሚያቋቁሙ ወይም የፖለቲካ ፓርቲ አባል የሚሆኑ ዜጎችን መብቶችና ግዴታዎች ይደነግጋል፣ ፓርቲዎች የህግ ሰውነት የሚያገኙበትን አሰራር ይወስናል። እንዲሁም ፓርቲዎች እንደ ድርጅት በሚያከናውኗቸው ተግባራት ላይ ሊከተሏቸው የሚገቡ መሰረታዊ መርሆዎችን ያስቀምጣል። የፖለቲካ ፓርቲዎች ውህደትና ግንባሮች መመስረት ወይም ጥምረት መፍጠር የሚችሉበትን ስርዓት ያስተዳድራል። ምርጫ በሥነ-ምግባር እንዲመራና ነፃ፣ ሰላማዊ፣ ህጋዊ፣ ዲሞክራሲያዊና ታዓማኒ በሆነ መንገድ እንዲከናወን ፖለቲካ ፓርቲዎች፣ እጩዎች፣ የፖለቲካ ፓርቲ አባላትና ደጋፊዎች በምርጫ ወቅት መከተል የሚገባቸውን የሥነ-ምግባር ደንቦች ያስቀምጣል።[116] የምርጫ ክርክሮች ላይ አስተዳደራዊና ከፊል አስተዳደራዊ ውሳኔዎችን የሚሰጡ ተቋማትን ያቋቁማል።[117]

2.1.2. የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ማቋቋሚያ አዋጅ

ይህ አዋጅ የወጣው በህገ መንግስቱ አንቀፅ 102 መሰረት ነው።[118] ይህ ህግ ምርጫ ቦርድ በተለያዩ ደረጃዎች ነፃ ፣ ፍትሃዊና ሰላማዊ ምርጫዎችን በማካሄድ ዜጎች በመረጧቸው ተወካዮች አማካኝነት የራስን በራስ የማስተዳደር መብታቸውን እንዲጠቀሙ የሚያደርግ ገለልተኛ የምርጫ አስፈጻሚ አካል ሆኖ እንዲያገለግል ስልጣን የሚሰጠው ህግ

[116] ዝኒከማሁ
[117] ዝኒከማሁ
[118] የግርጌ ማስታወሻ ቁጥር 108

ነው።[119] ይህንን በማድረጉም ምርጫ ቦርድ የኢትዮጵያን ዲሞክራሲ በማጠናከር ረገድ ወሳኝ ሚና እንዲጫወት ይረዳል። ምርጫ ቦርድ ተጠሪነቱ ለህዝብ ተወካዮች ምክር ቤት ሲሆን በክልሎች ቅርንጫፍ ጽ/ቤቶችን ሊከፍት ይችላል። የቦርዱም ስልጣንና ተግባራት በአዋጁ አንቀጽ 7 ስር በዝርዝር ተቀምጠዋል።[120]

2.1.3. መመሪያዎች

የኢትዮጵያ ብሄራዊ ምርጫ ቦርድ ሃላፊነቱን ለመወጣት የሚያስችሉ መመሪያዎችን እንዲያወጣ በአዋጅ ቁጥር 1133/2011 አንቀፅ 7(11) ላይ ስልጣን ተሰጥቶታል።[121] በዚህ በህግ በተሰጠው ስልጣን መሰረት በርካታ መመሪያዎችን አውጥቷል። የምርጫ ክርክር አፈታት ሂደትን በተመለከተ ተፈፃሚነት የሚኖራቸው ዋና ዋና መመሪያዎች የምርጫ ቅሬታ ሰሚ ኮሚቴዎች አደረጃጀትና አሰራር መመሪያ ፣ የመራጮች ምዝገባ መመሪያ ፣ የእጩዎች ምዝገባ፣ የድጋፍ ፊርማ አሰባሰብና የእጩዎች ምልክቶች አመራረጥ መመሪያ፣ የምርጫ ዘመቻ፣ ቅስቀሳ ሥነ-ምግባር መመሪያ እና የድምፅ አሰጣጥ፣ የድምፅ ቆጠራና የምርጫ ውጤቶች ይፋ አደራረግ መመሪያ ናቸው።[122] በጠቅላላው እነዚህና ኢትዮጵያ ያፀደቀቻቸው አለም አቀፍ ስምምነቶች የምርጫ ክርክሮችን ለመፍታት ጥቅም ላይ የሚውሉ

[119]ዝኒ ከማሁ
[120]ዝኒ ከማሁ
[121]የግርጌ ማስታወሻ ቁጥር 107
[122]ዝኒ ከማሁ፣ በተጨማሪ የመራጮች ምዝገባ አፈጻጸም መመሪያ ቁጥር 6/2013፣የእጩ ተወዳዳሪዎች ምዝገባ፣ የድጋፍ ፊርማ አሰባሰብና የመለያ ምልክቶች አመራረጥ መመሪያ ቁጥር 7/2013 ይመልከቱ።

የህግ ማዕቀፎች ናቸው። የኢትዮጵያ የምርጫ የሕግ ማዕቀፍ ሁሉን አቀፍ ቢሆንምግልጽ ያልሆነና ለትርጉም ክፍት እንዲሆን ተደርጎ የተቀረጸ በመሆኑ በምርጫ ሒደት የሚፈጠሩ ክርክሮችን እልባት ለመስጠት ተግዳሮት እየፈጠረ ይገኛል። ስለሆነም የምርጫ የህግ ማዕቀፎችን ለማጠናከር እና በምርጫው ሂደት ውስጥ የበለጠ ግልፅነትና ተጠያቂነት እንዲኖር ለማስቻል የህግ ማሻሻያዎች ሊደረጉ ይገባል።

2.2. የምርጫ ክርክር አይነቶች በኢትዮጵያ

በምርጫ ሂደት የተለያዩ ደረጃዎች ውስጥ ሊነሱ የሚችሉ በርካታ የቅሬታ ፣ ክርክር እና የስነ-ምግባር ደንብ ጥሰት አይነቶች አሉ። እነዚህም በምርጫ ተወዳዳሪዎች መካከል፣ በምርጫ ተወዳዳሪዎች እና በምርጫ አስፈፃሚዎች መካከል የሚነሱ አለመግባባቶችን፣ እንዲሁም ከምርጫ ዝግጅት ጋር የተያያዙ ጉዳዮች፣ ከአሰራርና ማስፈፀሚያ ዘዴ ጋር የተገናኙ አስተዳደራዊ ጥሰቶችን ወይም ብልሹ አሰራሮችን፣ የሥነ ምግባር ደንብ ጥሰቶች፣ የውጤት ተቀውሞዎችን እና ከምርጫ ጋር የተያያዙ የወንጀል ጥፋቶችን ሊያካትቱ ይችላሉ።[123] በአጠቃላይ የተለያዩ የክርክር እና የቅሬታ አይነቶች በቅድመ ምርጫ፣ በምርጫ ቀን እና በድህረ ምርጫ የሚከሰቱ ተብለው ሊከፈሉ ይችላሉ።

2.2.1. የቅድመ ምርጫ ክርክሮች

[123]የግርጌ ማስታወሻ ቁጥር፣ 57

በምርጫ አዋጅ ቁጥር 1162/2011 ላይ ከተመለከቱት የቅድመ ምርጫ ክርክሮች መካከል ከመራጮች ምዝገባ ጋር በተያዘ የሚነሱ ቅሬታዎች ፣ በእጩ ምዝገባ ወቅት የሚነሱ ቅሬታዎች ፣ ከፖለቲካ ፓርቲ ምዝገባ ጋር በተያያዘ የሚነሱ ቅሬታዎች እንዲሁም በህዝብ ሀብት ላይ አላግባብ መጠቀምን ፣ ስም ማጥፋትን ፣ አመጽ ማነሳሳትን እና የሥነ-ምግባር ደንቡን የሚጥሱ መግለጫዎች ማውጣትን ጨምሮ ህገወጥ የምርጫ ቅስቀሳ ማካሄድን የሚያካትቱ ናቸው።[124]

2.2.2. የምርጫ ቀን ክርክሮች

በአዋጅ ቁጥር 1162/2011 ላይ ከተመለከቱት የምርጫ ቀን ክርክሮች መካከል ሌላ ሰው መስሎ መቅረብን ፣ ከአንድ ጊዜ በላይ መምረጥን ፣ የድምፅ አሰጣጡን ሚስጥራዊነት አለማክበርንና በምርጫ ጣቢያዎች ውስጥ የሚደረግ ህገወጥ የምርጫ ቅስቀሳን ጨምሮ የድምጽ አሰጣጥ ሂደቱ ግድፈቶች ነበሩበት የሚሉ ቅሬታዎች ፣ የአንድን ሰው የመምረጥ መብት በሚነፍጉ ውሳኔዎች ላይ የሚቀርቡ ወይም የአንድን ሰው የመምረጥ መብት የሚቃወሙ አቤቱታዎች ፣ ጥቃትን ፣ ዛቻዎችን በተመለከተ የሚቀርቡ ቅሬታዎች ፣ በምርጫ ቀን የምርጫ ተግባራቶች ለመገናኛ ብዙሃን ፣ ለታዛቢዎች ወይም ወኪሎቻቸው ተደራሽ እንዳይሆኑ ተደርጓል የሚል ቅሬታ ፣ በፀጥታ አስከባሪዎች ጣልቃ ገብነት ነበር የሚሉ ቅሬታዎች ዋና ዋናዎቹ ናቸው።[125]

[124]የግርጌ ማስታወሻ ቁጥር፣ 108፣አንቀጽ 152
[125]ዝኒ ከማሁ፣አንቀጽ 50(2)፣54(1)፣121(8)፣130(4)፣143(11)፣157(2)(3)(ረ)፣154(1)(5)

2.2.3. የድህረ ምርጫ ቀን ክርክሮች

ከምርጫ ቀን በኋላ ከሚነሱ ክርክሮች መካከል ምርጫው የድምጽ ቆጠራ ግድፈቶች ነበሩበት የሚሉ ቅሬታዎች፣ የውጤት ማዳመርና ማስተላለፉ ሂደቱ ግድፈቶች ነበሩበት የሚሉ ቅሬታዎች እና የውጤት ይፋ አደራረግ ሂደቱ ግድፈቶች ነበሩበት የሚሉት ቅሬታዎች ይገኙበታል።[126]

2.3. የምርጫ ክርክሮች ለመመልከት ስልጣን ያላቸው አካላት በኢትዮጵያ

በአዋጅ ቁጥር 1162/2011 በኢትዮጵያ የምርጫ ክርክሮችን እንዲመለከቱ ስልጣን የተሰጣቸው አካላት የኢትዮጵያ ብሔራዊ ምርጫ ቦርድ፣ በተለያዩ ደረጃዎች ያሉ የቅሬታ ሰሚዎች፣ የፖለቲካ ፓርቲዎች የጋራ መድረክ፣ የፖለቲካ ፓርቲዎች የጋራ ምክር ቤት እና ስልጣን ያላቸው የፌደራል እና የክልል ፍርድ ቤቶች ናቸው።[127]

2.3.1. የቅሬታ ሰሚ ኮሚቴዎች

የቅሬታ ሰሚ ኮሚቴዎች በምርጫ ጣቢያ ፣ በምርጫ ክልል እና በክልል ቅርንጫፍ ጽ/ቤት የተቋቋሙ ሲሆኑ ሶስት አባላትን ይዘው ይዋቀራሉ።

[126] ዝኒ ከማሁ፣ አንቀጽ 58(6)፣ 60(1)፣ 62(2)፣ 131(2) እና 155
[127] ዝኒ ከማሁ

የምርጫ ጣቢያ ቅሬታ ሰሚ ኮሚቴዎች ከመራጮች ምዝገባ ጋር የተያያዙ ቅሬታዎች፣ የመምረጥ መብትን ተግባራዊ ከማድረግ ጋር የተያያዙ ቅሬታዎች፣ ከድምፅ ቆጠራና ውጤቶች ጋር የተያያዙ ቅሬታዎችን የመመልከት የመጀመሪያ ደረጃ ስልጣን አላቸው።[128]

የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች ከእጩ ምዝገባ ጋር የተያያዙ ቅሬታዎችንበመጀመሪያ ደረጃ ስልጣን የመመልከት እንዲሁም ከመራጮች ምዝገባ ጋር የተያያዙ ቅሬታዎች፣ የመምረጥ መብትን ተግባራዊ ከማድረግ ጋር የተያያዙ ቅሬታዎች ከድምፅ ቆጠራና ውጤቶች ጋር የተያያዙ ቅሬታዎችን የምርጫ ጣቢያ ቅሬታ ሰሚ ኮሚቴዎች በመጀመሪያ ደረጃ ስልጣን አይተው የሚሰጡትን ውሳኔ በይግባኝ ይመለከታሉ።[129]

የክልል ቅርንጫፍ ጽህፈት ቤት ቅሬታ ሰሚ ኮሚቴዎች ደግሞ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች ከእጩ ምዝገባ ጋር የተያያዙ ቅሬታዎችን በመጀመሪያ ደረጃ ስልጣኑ መሰረትየወሰነውን ውሳኔ በይግባኝ ይመለከታል።[130]

2.3.2. የኢትዮጵያ ብሔራዊ ምርጫ ቦርድ

ከፖለቲካ ፓርቲ ምዝገባ ጋር የተያያዙ ቅሬታዎች፣ ማመልከቻ ሲቀርብለት የፓርቲን መተዳደሪያ ደንብ አፈፃፀም ጨምሮ የፖለቲካ ፓርቲ ውስጣዊ አለመግባባቶችን፣ የምርጫ ሥነ-ምግባር ደንብ መጣስ ወይም የሥነ-

[128]የግርጌ ማስታወሻ ቁጥር፣ 108
[129]ዝኒ ከማሁ
[130]ዝኒ ከማሁ

ምግባር ጥሰቶች ተከስተዋል በሚል የሚቀርቡ ቅሬታዎችን እንዲሁም የቆጠራና የውጤት ክርክሮች ላይ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን የማስተናገድ ስልጣን አለው።[131]

2.3.3. ፍርድ ቤቶች

የፌደራል ጠቅላይ ፍርድ ቤት ከድምፅ ቆጠራና ውጤቶች ጋር ተያይዘው ለሚነሱ ቅሬታዎች ምርጫ ቦርድ በሚሰጣቸው ውሳኔዎች ላይ የሚነሱ ቅሬታዎች የማስተናገድ ስልጣን ያለው ሲሆን የክልል ጠቅላይ ፍርድ ቤቶች ደግሞ ከእጩ ምዝገባ ጋር በተያያዘ የክልል ቅርንጫፍ ጽ/ቤት ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔዎች ላይ የሚነሱ ቅሬታዎችን የማስተናገድ ስልጣን ይሰጣቸዋል።[132]

የፌደራል ከፍተኛ ፍርድ ቤት ደግሞ አንድ የፖለቲካ ፓርቲ ለመመዝገብ ብቁ መሆን አለመሆኑንየሥነ-ምግባር ጥሰቶችን እና የስነ ምግባር ደንቦችን መጣስ እንዲሁም የእጩ ምልክት አቤቱታዎችን በተመለከተ በሚነሱ ክርክሮች ላይ የምርጫ ቦርድ በሚሰጣቸው ውሳኔዎች ላይ የሚነሱ ቅሬታዎችን የማስተናገድ ስልጣን ይኖረዋል።[133] እንዲሁም የምርጫ አዋጁ ለፌደራል ጠቅላይ ፍርድ ቤት፣ ለፌደራል ከፍተኛ ፍርድ ቤትና ለክልል ጠቅላይ ፍርድ ቤት የተወሰኑ ስልጣኖችን ከመስጠት በተጨማሪ በአንቀጽ 152(8) እና 154(4) ስር ስልጣን ያላቸው የፌደራል ወይም የክልል ፍርድ

[131]ዝኒ ከማሁ
[132]ዝኒ ከማሁ
[133]ዝኒ ከማሁ

ቤቶች ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን እንደሚያስተናግዱ የሚገልጽ ቢሆንም ፍርድ ቤቶቹ የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚገልጸው ነገር የለም።[134] በአጠቃላይ የኢትዮጵያ ምርጫና የፖለቲካ ፓርቲዎች አዋጅ ቁጥር 1162/2020 ከነችግሩም ቢሆን በኢትዮጵያ የምርጫ ክርክሮችን ለመፍታት ዝርዝር ማዕቀፎችን አስቀምጧል።የኢትዮጵያ ምርጫ ቦርድን፣ የፌዴራልና የክልል ፍርድ ቤቶችን፣ የቅሬታ ሰሚ ኮሚቴዎችን እንዲሁም በስምምነት የምርጫ አለመግባባትን እንዲፈቱ ስልጣን የተሰጣቸው የፖለቲካ ፓርቲዎች የጋራ መድረክና ምክር ቤትን ጨምሮ የበርካታ አካላት ተሳትፎ ፣ አለመግባባቶች እንዲፈቱ እና የምርጫ ሒደቱ ታማኝነት እንዲረጋገጥ ይረዳል።

3. የምርጫ ክርክርን በፍርድ ቤት ከመፍታት አንፃር በኢትዮጵያ የምርጫ ህግ ማዕቀፍ ላይ ያሉ ሥነ-ስርዓታዊ ተግዳሮቶች

3.1. ልዩ የምርጫ ክርክሮችን ለመፍታት የሚያገለግል የሥነ-ስርዓት ህግ አለመኖር

በኢትዮጵያ የምርጫ ስርዓት ውስጥ የዳኝነት አካላት የምርጫ አቤቱታዎችና ቅሬታዎችን ተመልክተው ውሳኔ ለመስጠት ከሚያጋጥማቸው የተለመደ ችግር አንዱ የምርጫ ክርክሮችን ለመፍታት

[134]ዝኒ ከማሁ

የሚያገለግል ልዩ የሥነ-ስርዓት ህግ አለመኖር ነው።[135] የምርጫ ክርክሮች ባጠረ ጊዜ ውስጥ መፍትሄ የሚሹ በመሆናቸው በምርጫ ህጉ ውስጥ በተቀመጠው አጭር ጊዜ ውስጥ ጉዳዮችን በአግባቡ ለማስተናገድ የሚያስችልልዩ የሥነ-ስርዓት ህግ ያስፈልጋል። ከዚህ ጋር በተገናኘ በኢትዮጵያ ውስጥ የሚነሱ የምርጫ ክርክሮችን ከሚመለከተው የምርጫ ቦርድ ወይም ቅሬታ ሰሚ ኮሚቴዎች ውሳኔ ተሰጥቶባቸው በይግባኝ መልክም ሆነ በቅሬታ መልክ ወደ ፍርድ ቤት ሲመጡ ጉዳዮቹን በሚታወቅ ፣ ግልጽና ፈጣን በሆነ መንገድ ለመዳኘት የሚያስችል ልዩ የምርጫ ሥነ-ስርዓት ሕግ አለመኖሩ በኢትዮጵያ ምርጫ ህግ ማዕቀፍ ላይ እንደ ችግር የሚነሳ ትልቅ ክፍተት ነው።[136] ይህም የምርጫ ክርክሮች የሚፈቱበትን ስርዓት ግልጽነትና ወጥነት የጎደለው እንዲሆን ስለሚያደርገው የምርጫ ሂደቱን እና ውጤቱን ህጋዊነት ሊያሳጣው ይችላል። ከዚህ ጋር በተገናኘ በዓለም አቀፍ ደረጃ ተቀባይነት ባላቸው መመዘኛዎች መሰረት የሚታወቅ እና ግልጽነት ያለው የምርጫ ክርክር

[135]ከምርጫ ክርክሮች ባህሪ አንጻር ከምርጫ ጋር ተያይዞ የሚነሱ ቅሬታዎችን የሚቀበልበትን፣ክርክሩን የሚመራበትን፣በክርክሩ ሂደት ተከራካሪዎች ስለሚኖራቸው ተነጻጻሪ የማስረዳት ግዴታ እና የማስረዳቱን ደረጃ እንዲሁም መሰል አግባብነት ያላቸው ዝርዝር ሂደቶችን በተወሰነ ጊዜና በአጭር ቀጠሮ እልባት ለመስጠት ይረዳ ዘንድ ልዩ የምርጫ ስነስርዓት ህግ እንደሚያስፈልግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ/ቁ 230207 በሰጠው ውሳኔ ላይ አጽኖት መስጠቱን ልብ ይሏል። ከዚህ በተጨማሪ ከምርጫ ክርክሮች ልዩ ባህሪ አንጻር የፌደራል ጠቅላይ ፍርድ ቤት ከስድስተኛው አገራዊ ምርጫ ጀምሮ ተግባራዊ የሚደረግ የምርጫ ክርክሮችን ለመምራት የሚያገለግል ልዩ የምርጫ ስነሥርዓትና የማስረጃ ህግ ረቂቅ ለህዝብ ተወካዮች ምክር ቤት አቅርቦ ውድቅ መደረጉን ልብ ይበሉ።

[136]ከዚህ ጋር በተገናኘ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎቱ የኦነግ ፓርቲ አባላት የሆኑት እነ አራርሶ ቢቂላ ከምርጫ ቦርድ ጋር ያደረጉትን ክርክር በተመለከተ መዝገቡ ከምርጫ ቦርድ ተወስኖ ካበቃ በኋላ በክርክር ሂደት በተንዛዛ አካሄድ ሲመላለስ ቆይቶ ሰኔ 28 ቀን 2013 ዓ.ም ስድስተኛው ሃገር አቀፍ ምርጫ ከተጠናቀቀ በኋላ ክርክሩ እልባት ያገኘ መሆኑን መመልከት ይቻላል።

የሚፈታበት ልዩ የሥነ-ስርዓት ሕግ ማዕቀፍ የምርጫውን ሂደት ትክክለኛነት ለማረጋገጥና የምርጫ ክርክሮችን ፍትሃዊ በሆነ መንገድ ለመፍታት አስፈላጊ እንደሆነ ለመረዳት ይቻላል።[137] ለዚህም እንደ ምክንያት የሚነሳው እንዲህ ዓይነቱ ማዕቀፍ ቅሬታዎችን ለማቅረብ እና ለማስኬድ ግልጽ ሂደቶችን፣ የማስረጃዎችን አቀራረብና አመዛዘን እንዲሁም ውሳኔ አሰጣጡን በተመለከተ በግልጽ ማስቀመጥ በመቻሉ ነው። ከዚህ በተጨማሪ ማዕቀፉ ሁሉም ወገኖች ከህጋዊ ሂደቱ እኩል ተጠቃሚ እንዲሆኑ፣ ክርክሮች በጊዜ፣ ፍትሃዊ እና ገለልተኛ በሆነ መንገድ እንዲፈቱ ያደርጋል።[138] ይህም የመወከልን፣ የመደመጥ መብትን ፣ ይግባኝ የመጠየቅ እና ምክንያታዊ ውሳኔ የማግኘት መብትን እንዲረጋገጥ ያደርጋል።[139] ስለሆነም እንዲህ ዓይነት የሥነ-ስርዓት ሕግ ከሌለ የምርጫ ክርክሮች በዘፈቀደ አካሄድና ልዩነት ባለው መንገድ ሊዳኙ ይችላሉ። ይህም ለአድሏዊና ህገወጥ ተግባራት በር ሊከፍት ይችላል።ይህ ደግሞ ህዝቡ በምርጫው ሂደት እና በውጤቱ ህጋዊነት ላይ ያለውን እምነት የበለጠ ሊሸረሽረው ይችላል። ስለሆነም ኢትዮጵያ በአለማቀፍ ደረጃ ተቀባይነት ያላቸው መመዘኛዎችንና በአገራት ያለን ጥሩ ተሞክሮ ከግምት ያስገባ የምርጫ ክርክሮችን ለመፍታት የሚያስችል ልዩ የሥነ-ስርዓት ህግ ማዕቀፍ መዘርጋት አለባት።ይህም የምርጫ ሒደቱ ፍትሐዊ ፣ ግልጽና

[137]Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, OSCE/ODIHR, Warsaw, 2000. See also Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 2002 See also Inter-Parliamentary Union's Declaration on Criteria for Free and Fair Elections, 1994, Paragraph 4 (9).

[138]ዝኒ ከማሁ

[139]ዝኒ ከማሁ

ተአማኒ እንዲሆን ፣ ውጤቱም በሁሉም ፓርቲዎችና ባለድርሻ አካላት ተቀባይነት እንዲኖረው ይረዳል።

3.2. ጥቅልና ያልተለየ የዳኝነት ሥልጣን አቀማመጥ

የምርጫ አዋጁ 1162/2011 ለፌደራል ጠቅላይ ፍርድ ቤት ፣ ለፌደራል ከፍተኛ ፍርድ ቤትና ለክልል ጠቅላይ ፍርድ ቤት የተወሰኑ ስልጣኖችን ለይቶ ከመስጠት በተጨማሪ በአንቀጽ 152(8) እና 154(4) ስር **ስልጣን ያላቸው የፌደራል ወይም የክልል ፍርድ ቤቶች** ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን ያስተናግዳሉ በማለት የሚያስቀምጥ ቢሆንም ፍርድ ቤቶቹ የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚገልፀው ነገር የለም። ከዚህ በተጨማሪ ከእጩ ምዝገባ ጋር በተያያዘ የምርጫ ክልል ቅርንጫፍ ጽ/ቤት ቅሬታ ሰሚ ኮሚቴ በሚሰጠው ውሳኔ ያልተስማማ አካል ወይም ቅሬታ ሰሚው ኮሚቴ ቅሬታው በቀረበለት በ7 ቀን ውስጥ ውሳኔ ካልሰጠው ይግባኙን ለክልሉ ጠቅላይ ፍርድ ቤት የማቅረብ መብት አለው በማለት አንቀጽ 153(8)ያስቀምጣል። ነገር ግን ቅሬታው የተፈጠረው በአዲስ አበባና ድሬደዋ ከሆነ ጉዳዩ ለየትኛው ፍርድ ቤት ይቀርባል የሚለውን ህጉ በግልጽ የሚለው ነገር የለም።

ከዚህ ጋር በተገናኘ በባልደራስ ለእውነተኛ ዴሞክራሲ ፓርቲና በምርጫ ቦርድ መካከል በተደረገው ክርክር ፓርቲው ለስድስተኛው አገር አቀፍ ምርጫ ለአዲስ አበባ የካ እና ንፋስ ስልክ ምርጫ ክልል እጩ አድርጎ

ያቀረባቸውን ግለሰቦች በወንጀል ተጠርጥረው በህግ ጥላ ስር የሚገኙ በመሆኑ በእጩነት ሊመዘገቡ አይገባም የሚል ውሳኔ በቅድሚያ በምርጫ ክልል አስፈፃሚ ኮሚቴው የተሰጠ ሲሆን ይህም ውሳኔ እስከ ምርጫ ክልል ቅርንጫፍ ጽ/ቤት ድረስ ጸንቶ በይግባኝ ወደ ፍርድ ቤት ሲሄድ የቀረበው ለፌደራል ከፍተኛ ፍርድ ቤት ነው።[140] ይሄው ጉዳይ መሰረታዊ የህግ ስህተት አለበት ተብሎ ለሰበር ችሎቱ ሲቀርብለት የሰበር ችሎቱም በተቃራኒ ተከራካሪ አካል ወይም ተጠሪ በሆኑት የምርጫ ቦርድ የፌደራል ከፍተኛ ፍርድ ቤት ጉዳዩን ለማየት ስልጣን የለውም የሚለው ክርክር አለመነሳቱንና በኢፌዴሪ ህገ መንግስት አንቀጽ 80(2) መሰረት የክልል ጠቅላይ ፍርድ ቤት የፌደራል ከፍተኛ ፍርድ ቤት ውክልና የተሰጠው አቻ ተቋም መሆኑን በመግለጽ አዲስ አበባ እና ድሬደዋ ላይ ከእጩ ምዝገባ ጋር በተገናኘ ለሚነሱ የምርጫ ክልል ቅርንጫፍ ጽ/ቤት የመጨረሻ ውሳኔ የሚሰጥባቸው ጉዳዮችን በይግባኝ ተመልክቶ የመወሰን ስልጣን የፌደራል ከፍተኛ ፍርድ ቤት እንደሆነ ድምዳሜ ላይ ደርሷል። እዚህ ጋር ልብ ብለን መመልከት ያለብን ጉዳይ ምንድን ነው ህገ-መንግስታዊ ውክልናው ለክልል ፍርድ ቤቶች ደረጃው ተለይቶ ሲሰጥ አንዱ ምክንያት ተደራሽነትን ለማስፋት በሚል ከፌደራል ፍርድ ቤቶች ለክልል ፍርድ ቤቶች እንጂ በተገላቢጦሽ ሰበሩ እንደደረሰበት የተሳሳተ መደምደሚያ ከክልል ፍርድ ቤቶች ለፌደራል ፍርድ ቤቶች አቻነትን መሰረት ባደረግ መርህ

[140] Balderas vs NEBE, Federal Supreme Court Cassation Division, 2013, Case No 207000

አለመሆኑን ነው።[141] ከዚህ በተጨማሪ የስረ ነገር ስልጣንን በሚመለከት ተከራካሪ ወገኖች ባያቀርቡም ክርክሩ የቀረበለት የበላይ ፍርድ ቤት ጉዳዩ ቀድሞ ቀርቦለት የተመለከተውና ውሳኔ የሰጠው የበታች ፍርድ ቤት ጉዳዩን የመመልከት ስልጣን የለውም ብሎ ካሰበ በራሱ ማንሳት እንደማይከለከል ከፍትህ ብሔር ስነ ሥርዓት ህግ አንቀጽ 9(2) የምንረዳው ጉዳይ ነው።ከዚህ በተጨማሪ በዋናነት እራሱ የሰበር ሰሚ ችሎቱ በክልልና በፌደራል ፍርድ ቤቶች መካከል የሚነሳን የስረ ነገር ስልጣን ጉዳይ በተመለከተ በየትኛውም ደረጃ ፍርድ ቤት ሲደርስ በተከራካሪዎች ባይነሳ እንኳን የስልጣን ጥያቄውን ፍርድ ቤቱ በራሱ አንስቶ ውድቅ ሊያደርግ እንደሚገባ በመዝገብ ቁጥር 151923ና 183483 ላይ አስገዳጅ የህግ ትርጉም ሰጥቶበታል።[142] በጥቅሉ በምርጫ አዋጅ 1162/2011 ውስጥ ከእጩ ምዝገባ ጋር በተገናኘ ድራዳዋና አዲስ አበባ ላይ ለሚነሳ ክርክር

[141]ከዚሁ ከምርጫ ጉዳይ ጋር በተያያዘ ቀድሞ ከደረሰበት መደምደሚያ ጋር በሚቃረን መልኩ የፌደራል ጠቅላይ ፍርድቤት በመ/ቁ 193714 በሰጠው ውሳኔ ላይ ለክልሎች በህገመንግስቱ ተሰጥቷቸው የነበረው ውክልና በአዋጅ ቁጥር 322/1995 መሰረት ከተወሰኑት ላይ የተነሳ ስለሆነ የአፋር ክልል ጠቅላይ ፍርድቤት የፌደራል ከፍተኛ ፍርድቤት ስልጣን የሆኑትን ጉዳዮች በውክልና የመዳኘት ስልጣን የለውም በማለት ውሳኔ የሰጠ ሲሆን ይህም በሌላ አነጋገር በክልል ጠቅላይ ፍርድቤቶች እንዲታይ በህጉ አንቀጽ 152(8) ላይ የተመለከቱትን ጉዳዮች የፌደራል ከፍተኛ ፍርድቤት ህገመንግስታዊው ክልናውን መሰረት በማድረግ መመልከት አይችልም ወደሚል መደምደሚያ ያመጣል። ምክንያቱም የተሰጠው ውክልና ከተነሳ የፌደራል ከፍተኛ ፍርድቤት የማየት ስልጣኑ ወደኋላ ስለማይመለስ ማለት ነው። ስለሆነም ይህ በጥቅሉ የሚያሳየን የህጉን ጉልህ ክፍተት ሲሆን ይህ ክፍተትም በተግባር ፍርድቤቶቻችንን እየፈተነና የበለጠ ጉዳዮችን ወደማወሳሰብና ኢተገማች ወደመሆን እየወሰዳቸው መሆኑን ነው።

[142]እዚህ ጋር አብሮ መታየት ያለበት ጉዳይ የ/ፍ/ስ/ስ/ህ/ቁ9(2) የሚያገለግለው ጉዳዩን በመጀመሪያ ደረጃ ስልጣኑ ለሚያይ ፍርድቤት ነው የሚል ክርክር ከህጉ አንጽር ቢነሳ ሚዛናዊ ቢሆንም ነገር ግን የስረነገር ስልጣን ጉዳይ ከሆነ በየትኛውም የፍርድቤት እርከን ላይ በባለጉዳዮቹ ባይነሳ እንኳን ፍርድቤቱ በራሱ አነሳሽነት አንስቶ ውድቅ ማድረግ ያለበት ስለመሆኑ በተጠቀሱት መዝገብ ቁጥሮች የተሰጠው የህግ ትርጉም በየትኛውም እርከን በሚገኙ ፍርድቤቶች ላይ አስገዳጅ ውጤት ያለው ስለመሆኑ ልብ ይሏል።

እንዲሁም ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን ለመፍታት ኃላፊነት የተሰጠው ፍርድ ቤት ግልጽ በሆነ መንገድ ይህ ነው ተብሎ አለመቀመጡ በምርጫ ወቅት ክርክሮች ሲከሰቱ ውሻቦንብርን ሊያስከትል እንዲሁም የምርጫ ክርክር አፈታት ሂደቱን ነፃነት እና ገለልተኝነት ሊያሳጣው ይችላል።ይህ ደግሞ በምርጫ ሂደቱ ላይ የህዝብ አመኔታ ማጣትና በምርጫ ክርክሮች አያያዝ ላይ ያለውን አድሎአዊ ግንዛቤን ሊያስከትል ይችላል። በተጨማሪም ፣ በዓለም አቀፍ ደረጃ ተቀባይነት ባላቸው መመዘኛዎች መስፈርቶች መሰረት የምርጫ ክርክር አፈታት ስርዓት ለሁሉም እጩዎች እና የፖለቲካ ፓርቲዎች ተደራሽ መሆን አለባቸው።የምርጫ ክርክሮችን ስለሚመለከተው ፍርድ ቤት ግልጽ ሥነ-ስርዓትና መመሪያ ከሌለ ከመንግስት በተቃራኒ የሚሰለፉ የፖለቲካ ፓርቲዎች የክርክር አፈታት ሂደቱን ለመጠቀም ከፍተኛ ፈተናዎች ሊገጥሟቸው ይችላሉ።

3.3. በፍርድ ቤቶች የሚሰጡ ውሳኔዎች የመጨረሻ መሆኑ አለመገለፁ

የኢትዮጵያ ምርጫ አዋጅ 1162/2011 ፍርድ ቤቶች በይግባኝ ሰሚ ደረጃ አይተው የሚሰጧቸውን ውሳኔዎች በተመለከተ የመጨረሻ ስለመሆናቸው የሚገልፀው ነገር የለም።በአለም አቀፍ ደረጃ ያሉ ጥሩ ተሞክሮዎች የምርጫ ህጎች ከምርጫ ሂደት ጋር የተያያዙ ክርክሮችን ለመፍታት ውጤታማ፣ ገለልተኛ እና ግልፅ ስልቶችን ማስቀመጥ እንደሚገባ

ይገልፃሉ።[143] ከዚህ ውስጥ አንዱ ይግባኝ ሰሚው ፍርድ ቤት የሚሰጠውን ውሳኔ የመጨረሻ አድርጎ መቀበልን ይጠይቃል።[144] ከዚህ ጋር በተያያዘ በይግባኝ ሰሚ ችሎት የሚሰጡ ውሳኔዎች የመጨረሻ ስለመሆናቸው በኢትዮጵያ ምርጫ አዋጅ ላይ በግልጽ አለመቀመጡ የምርጫውን ሂደት ተአማኒነት እና ህጋዊነት ላይ ጥያቄ ሊያስነሳ ይችላል።እንዲሁም ውሸርንብር እንዲፈጠር እና ክርክሮች እንደገና እንዲያገረሹ ሊያደርግ ይችላል። በዚህም የክርክር አፈታት ሂደቱን በማራዘም የምርጫውን ውጤት ይፋ ለማድረግ ያስቸግራል።

ከዚህ ጋር በተያያዘ በባልደራስ ለእውነተኛ ዴሞክራሲ ፓርቲና በምርጫ ቦርድ መካከል በተደረገው ክርክር ፓርቲው እጩ አድርጎ ያቀረባቸው እስክንድር ነጋ ፣ ሞገስ ቸኮልና ቀለብ ስዩም በወንጀል ተጠርጥረው በህግ ጥላ ስር የሚገኙ በመሆኑ በእጩነት ሊመዘገቡ አይገባም የሚል ውሳኔ በምርጫ ክልል አስፈፃሚ ኮሚቴው ተሰጥቶ እስከ ፌደራል ከፍተኛ ፍርድ ቤት ድረስ ጸንቷል።[145] ነገር ግን ጉዳዩ መሰረታዊ የህግ ስህተት ተፈጽሞበታል ተብሎ በአመልካች ለሰበር ሰሚ ችሎቱ ሲቀርብ ተጠሪ የሆነው ምርጫ ቦርድ ከክልል ጠቅላይ ፍርድ ቤት በላይ ጉዳዩን ሊመለከት የሚችል ፍርድ ቤት ስለመኖሩና ስልጣን ያለው ስለመሆኑ በህጉ አንቀጽ

[143]የግርጌ ማስታወሻ ቁጥር 43፣ገጽ 206 see also Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 2002.

[144]Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections, International Foundation for Electoral Systems, Washington DC, 2011, pp.96 See also Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 2002

[145]የግርጌ ማስታወሻ ቁጥር 140

153(8) ላይ የተመለከተ ነገር ስለሌለ ውሳኔው የመጨረሻ ነው፡፡ ስለዚህም ሰበር ሰሚ ችሎቱ ጉዳዩን የመመልከት ስልጣን የለውም በማለት የተከራከሩ ሲሆን የሰበር ችሎቱም በተቃራኒ ሌላ የይግባኝ እርከን ስለመኖሩ በህጉ ያልተመለከተ በመሆኑ በጉደዩ ላይ የፌደራል ከፍተኛ ፍርድ ቤቱ የሰጠው ውሳኔ የመጨረሻ ነው ተብሎ ይወሰዳል በሚል መላምት ጉዳዩ ለሰበር መቅረብ እንደሚችል መደምደሚያ ላይ ደርሷል፡፡ ስለሆነም እዚህ ጋር መመልከት ያለብን ነገር ምንድነው ከእጩ ምዝገባ ጋር በተያያዘ የክልል ጠቅላይ ፍርድ ቤት በይግባኝ የቀረበለትን ጉዳይ ተመልክቶ የሚሰጠው ውሳኔ የመጨረሻ መሆኑ በህጉ ላይ ተመላክቶ ቢሆን ኖሮ እንዲህ አይነት መፍትሄ አልቦ የክርክር አውድ የማይፈጠር መሆኑን ነው፡፡ እንዲሁም በተጨማሪ መታየት ያለበት ጉዳይ በኢትዮጵያ የህግ ስርዓት ውስጥ መሰረታዊ የህግ ስህተት ተፈፅሞብኛል የሚል ተከራካሪ ወገን ክርክሩን ለሰበር ሰሚ ችሎቱ የማቅረብ መብት አለው፡፡ እንዲህ ደግሞ ከሆነ ተከራካሪው በስር ፍርድ ቤቶች የመጨረሻ ውሳኔ ከተሰጠበት ቀን ጀምሮ የሚታሰብ ቅሬታውን ለሰበር ሰሚ ችሎቱ የማቅረቢያ 90 ቀን ጊዜን ይጎናፀፋል፡፡[146] ይህ ከሆነ ደግሞ የምርጫ ክርክሮችን እልባት ለመስጠት ከሚያስፈልጋቸው አጭር ጊዜ አንፃር አብሮ የሚሔድ አይደለም፡፡[147] ስለሆነም የምርጫ አዋጁ በይግባኝ ሰሚ ችሎቶች የሚሰጡ ውሳኔዎች የቱ ጋር የመጨረሻ እንደሚሆኑና በሰበር መታየትም

[146] Ethiopia federal court establishment proclamation,1234/2015, art 27(3)

[147]ከምርጫ ክርክሮች ባህሪ አንጻር ለክርክሮች በተወሰነ ጊዜና በአጭር ቀጠሮ እልባት ለመስጠት ይረዳ ዘንድ ልዩ የምርጫ ስነስርዓት ህግ እንደሚያስፈልግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚችሎት በመ/ቁ 230207 በሰጠው የህግትርጉም ላይ አጽኖት ሰጥቷል፡፡

ካለባቸው በአዋጅ ደረጃ የተፈቀደውን 90 ቀን ከምርጫ ልዩ ባህሪ አንፃር አሳጥሮ የሚደነግግ ማዕቀፍ በምርጫ ህጉ ውስጥ መቀመጥ ነበረበት፡፡ ምክንያቱም የምርጫ ጉዳዮች ለሰበር ይቀርባሉ አይቀርቡም እንዲሁም በምን ያህል ጊዜ ይቀርባሉ የሚሉትን ጉዳዮች በደንብ ወይም በመመሪያ ይመለስ/ይደንገግ ቢባል በአዋጅ ደረጃ የተሰጡ መብቶችን በደንብ ወይም በመመሪያ መሻር ነው የሚሆነው፡፡ ይህ አይነቱ ተግባር ደግሞ ከመሰረታዊ የህግ ተዋረድ ፅንሰ-ሀሳብ ጋር ይጋጫል፡፡ ከምርጫ ሂደት ጋር በተያያዘ የሚነሱ ክርክሮች ላይ ይግባኝ ሰሚው ፍርድ ቤት የሚሰጠውን ውሳኔ የመጨረሻ ስለመሆኑ በግልፅ ማስቀመጥ እንደሚገባ አሁን ላይ ያሉ አለም አቀፍ ጥሩ ተሞክሮዎች ያሳያሉ፡፡ይህም የሚያካትተው ይግባኝ የሚጠየቅበትን ጊዜ ፣ ይግባኝ የማቅረብ ሂደቶችንና ውሳኔዎች የመጨረሻ እና አስገዳጅ የሚሆኑበትን ደረጃ መግለፅን ይጨምራል፡፡[148] ለማጠቃለል ያህል በኢትዮጵያ ምርጫ አዋጅ 1162/2011 ይግባኝ ሰሚ ችሎቶች የሚሰጧቸው ውሳኔዎች የመጨረሻ መሆን አለመሆንላይ ግልፅ ድንጋጌ አለመኖሩ ከአለም አቀፍተሞክሮ አንፃር እንዲሁም በተግባርም ፍርድ ቤቶቻችን ላይ እየፈጠረ ካለው ውዝግብ አንጻር በምርጫ ህጉ ላይ ያለ እንደ ትልቅ ችግር ተደርጎ የሚነሳ ነው፡፡የምርጫ ሕጎች እና ስርዓቶች የክርክር አፈታት ሂደትን ግልፅነት ፣ ፍትሃዊነት እና ተአማኒነት ለማረጋገጥ እንዲሁም ሂደቱን ካልተፈለገ እርዝማኔና ንትርክ ለመከላከል ሲባል በይግባኝ ሰሚ ፍርድ ቤት የሚሰጡት ውሳኔዎች የመጨረሻ ስለመሆናቸው በግልፅ ማሰቀመጥ ያስፈልጋል፡፡

[148]የግርጌ ማስታወሻ ቁጥር 144

3.4. ጠቅላላ ይርጋና ከአቅም በላይ የሆነ ችግር ከግምት አለማስገባት

በኢትዮጵያ ምርጫ አዋጅ 1162/2011 አንቀፅ 151(13) እንደተገለፀው ከመራጮች ምዝገባ ፣ ከእጩ ምዝገባ ፣ ከድምፅ አሰጣጥ እና በድምጽ ቆጠራና ውጤት ጋር በተያያዘ በአዋጁ አንቀፅ 152-155 ስር የተመለከቱት የይርጋ ድንጋጌዎች ካለፉ አቤቱታ የማቅረብ መብቱ በይርጋ እንደሚታገድ ይገልፃለ፡፡ ከዚህ ጋር በተያያዘ ለምሳሌ በህጉ የተቀመጠው የምዝገባ ጊዜ ካለፈ በኋላ አንድ መራጭ ሙሉ በሙሉ መመዝገብ እንዳይችል የሚከለክል ድንጋጌ ሲሆን ይህም ተቀባይነት ካላቸው አለማቀፍተሞክሮዎች አንጻር ሲታይ እንደ ትልቅ ተግዳሮት ተደርጎ የሚወሰድ ነው፡፡[149] ምክንያቱም እንዲህ አይነቱ የክልከላ ተግባር ከአቅም በላይ በሆነ ክስተት ምክንያት ሳይመዘገቡ የቀሩ መራጮችንም የሚከለክል በመሆኑ ነው፡፡ በአለም አቀፍ መመዘኛዎች መስፈርት መሰረት ሁሉም ብቁ መራጮች በምርጫ ሂደት ውስጥ የመሳተፍ እድል እንዲኖራቸው ማድረግን ታሳቢ ያደረጉየምርጫ ህጎች እና ሂደቶች እንዲነደፉ ይጠይቃሉ፡፡ይህም የመራጮች ምዝገባ አሰራር ተደራሽ ፣ ግልፅ እና ሁሉንም ያካተተ መሆኑን ማረጋገጥ እና ብቁ የሆኑ መራጮች

[149]The Carter Center, Election Obligations and Standards Database, <https://eos.cartercenter.org>, accessed 25 June 2023 see also Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections, Interna-tional Foundation for Electoral Systems, Washington DC, 2011. Pp.82 See also Code of Good Practice in Electoral Matters (Venice Commission's Code of Good Practice), The Council of Europe, Venice, 2002

እንዳይመዘገቡ ያደረጉ ከአቅም በላይ የሆኑ ምክንያቶችን ከግምት ውስጥ ያስገባ መሆኑን ማረጋገጥን ይጨምራል።

በኢትዮጵያ ምርጫ አዋጅ ውስጥ የምዝገባ ጊዜ ካለፈ በኋላ በማንኛውም ሁኔታ መራጮች እንዳይመዘገቡ የሚከለክለው ድንጋጌ ከአቅም በላይ በሆነ ምክንያት መመዝገብ ያልቻሉትንም የመምረጥ መብታቸውን እንዳይጠቀሙ ያደርጋል።በአለም አቀፍ ደረጃ ባሉ ጥሩ ተሞክሮዎች መመዘኛ መስፈርት መሰረት የመራጮች ምዝገባ ቀነ-ገደብ ሙሉ በሙሉ ዝግ መሆን እንዳሌለበት እና ከቁጥጥር ውጪ በሆኑ ሁኔታዎች እንደ የተፈጥሮ አደጋዎች ፣ ግጭቶች እና ሌሎች የአቅም ማነስ ክስተቶች ምክንያት የመመዝገቢያ ጊዜ ያለፈባቸውን መራጮች ሁኔታን ከግምት ያስገባ አማራጭ መኖር እንዳለበት ይገለፃል።[150] ይህ ሁሉም ብቁ መራጮች በምርጫው ሂደት ውስጥ ፍትሃዊ በሆነ መንገድ የመሳተፍ እድል እንደሚኖራቸው ያረጋግጣል።

3.5. ከመራጮች ምዝገባ ጋር የተያዙ ተግዳሮቶች

በዓለም አቀፍ ደረጃ ያሉ ጥሩ ተሞክሮዎች እንደሚጠቁሙት ከሆነ የምርጫ እና ልዩ የምርጫ ሥነ-ስርዓት ህግ ከእጩ ምዝገባ ጋር በተያያዘ

[150]ዝኒ ከማሁ

ለሚነሱ ክርክሮች መፍትሄ የሚሰጥበትን ሂደት በግልፅ ማስቀመጥ አለባቸው።[151]ይህም ክርክሮችን ለመፍታት ኃላፊነት ያለበትን ፍርድ ቤት የመለየት ፣ ክርክሮችን ወደ ፍርድ ቤት ሲቀርቡ የሚፈቱበት ግልፅ ጊዜ ፣ ቅሬታ የማቅረብ እና የማስተናገድ ሂደቶችን ማካተትን ይጠይቃል። ከዚህ ጋር በተያያዘ በኢትዮጵያ ምርጫ አዋጅ 1162/2011 አንቀፅ 152(8) ላይ ከመራጮች ምዝገባ ጋር በተገናኘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን በጥቅሉ ስልጣን ያላቸው የፌደራል ወይም የክልል ፍርድ ቤቶች ያስተናግዳሉ በማለት የሚያስቀምጥ ቢሆንም ፍርድ ቤቶቹ የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚገልፀው ዝርዝር ነገር የለም። እንዲሁም ከመራጮች ምዝገባ ጋር በተያያዘ የሚነሱ አለመግባባቶችን ለመዳኘት የሚቀርብለት ስልጣን ያለው ፍርድ ቤት በምን ያህል ጊዜ ውስጥ ክርክሩን ሰምቶ ውሳኔ ይሰጣል የሚለው የጊዜ ገደብ በአንቀፁ ላይ አልተቀመጠም። ከዚህ በተጨማሪ ስልጣን ያላቸው ፍርድ ቤቶች የሚባሉት ጉዳዩን የሚያዩት በይግባኝ ነው ወይስ በመጀመሪያ ደረጃ የሚለውን በግልፅ አያመለክትም።እንዲሁም በግልፅ አለመቀመጡ በራሱ ይዟቸውየሚመጣው ችግሮች አሉ። ለምሳሌ ጉዳዩ የሚታየው በይግባኝ ደረጃ ከሆነ ውሳኔው የመጨረሻ ስለመሆኑ መገለፅ አለበት ካልሆነ ክርክሩ ማብቂያ የሌለው እንዲሆን በር ይከፍታል። በተጨማሪ በፍርድ ቤት የሚታየው በመጀመሪያ ደረጃ ከሆነ የይግባኝ

[151] Handbook for Monitoring Administrative Justice, OSCE/ODIHR and Folke Bernadotte Academy, Warsaw, 2013, <https://www.osce.org/office-for-democratic-institu-tions-and-human-rights/105271>.

መብት እንዲጠበቅለት የሚያደርግ ቢሆንም የስርዓት መፋለስ እንዲፈጠር ያደርጋል፡፡

3.6. ከሥነ-ምግባር ጥሰቶች ጋር የተያዙ ተግዳሮቶች

ማንኛውም የፖለቲካ ፓርቲ ፣ የግል እጩ ተወዳዳሪ ወይም በድርጊቱ ቀጥተኛ ተጎጂ የሆነ ሰው ወይንም በጉዳዩ ላይ መብት ወይም ጥቅም ያለው አካል በማንኛውም የፖለቲካ ፓርቲ ፣ የግል እጩ ተወዳዳሪ ፣ የፖለቲካ ፓርቲ መሪ ፣ አባል ፣ ወኪል ወይም ተጠሪ የህግ ጥሰት ተፈፅሟል ብሎ ካሰበ ቅሬታ የማቅረብ መብት እንዳላቸው በህጎቹ የተቀመጠ ሲሆን የሚፈፀሙ የሥነ-ምግባር ጥሰቶች ተከስተዋል ተብለው ቀርበው የብሄራዊ ምርጫ ቦርድ ዋና ጽ/ቤት በሚሰጠው ውሳኔ ላይ የሚቀርቡ ቅሬታዎችን የፌደራል ከፍተኛ ፍርድ ቤት የማስተናገድ ስልጣን እንዳለው የምርጫ አዋጅ 1162/2011 አንቀፅ 149 ላይ ተመላክተዋል፡፡ ከዚህ ጋር በተያያዘ የአዋጁን አንቀፅ 148 ፣ 149 እና 150 በአፅንኦት ስንመለከት የፌደራል ከፍተኛ ፍርድ ቤት የሥነ-ምግባር ጥሰቶችን በተመለከተ በቅድሚያ በመጀመሪያ ደረጃ ስልጣኑ የማየት እንዲሁም በመቀጠል ጉዳዩን በይግባኝ ስልጣኑ መመልከት እንደሚችል ያመለክታል፡፡ ይህ ማለትም የፌደራል ከፍተኛ ፍርድ ቤት ቢቀርብለት ኖሮ በመጀመሪያ ደረጃ ስልጣኑ ሊመለከተው ይችል የነበረውን አንድን ጉዳይ ቦርዱ ተመልክቶ ውሳኔ ሲሰጥበት መልሶ በይግባኝ ይመለከተዋል ማለት ነው፡፡ ይህም አንድ ፍርድ ቤት እራሱ በመጀመሪያ ደረጃ ስልጣኑ ሊያየው የሚችለው ጉዳይን መልሶ በይግባኝ የማየት ስልጣንን ያጎናፅፋል፡፡ ይህም

መሰረታዊ ከሆነው የይግባኝ ዕንሰ ሃሳብና ይግባኝ ያሰፈለገበት ምክንያት አንፃር ውጤት አልባ የሆነ ድንጋጌ ነው። እንዲሁም ከዚህ በተጨማሪ በክልል ደረጃ የክልል ጠቅላይ ፍርድ ቤቶች ህገ መንግስታዊ ውክልና ስልጣናቸውን ተጠቅመው ጉዳዩን ማየት ስለመቻል አለመቻላቸው የሚገልፀው ነገር የለም። ከዚህ ጋር በተገናኘ በአመልካች የአርጎባ ሕዝብ ዲሞክራሲያዊ ድርጅትናበተጠሪ ሙሳ ያሲን[152] መካከል በተደረገው ክርክር አመልካች የተጠሪ አቤቱታ በመጀመሪያ በፓርቲዉ ዉስጥ በየደረጃዉ ላሉ አካላት ቀጥሎም ለምርጫ ቦርድ ቀርቦ ሳይወሰን በቀጥታ ክስ መልክ ለፍርድ ቤት ቀርቦ መታየቱ መሰረታዊ የሕግ ስህተት ነው በማለት ያቀረበ ሲሆን ተጠሪም በበኩሉ ፍርድ ቤቱ በአንቀጽ 150 ላይ በተደነገገዉ መሰረት በቀጥታ ክሱ ቀርቦለትም ሆነ ቦርዱ በሰጠዉ ዉሳኔ ላይ

[152] Argobal democratic party vs Musa Yasin, Federal Supreme Court Cassation Division, 2013, Case No 193714 በአመልካች በአርጎባ ሕዝብ ዲሞክራሲያዊ ድርጅትና በተጠሪ ሙሳ ያሲን ቡሎ መካከል በተደረገ ክርክር የሰበር ተጠሪ ለአፋር ክልል ጠቅላይ ፍርድቤት የፖለቲካ ድርጅት ሊቀመንበር ሆነዉ እያገለገሉ እያለ የድርጅቱ ሥራአስፈጻሚዎች በቀን 22/02/2012 ዓ/ም አካሄድን ባሉት ስብሰባ በድርጅቱ መተዳደሪያ ደንብ አንቀጽ 23/1 መሰረት የድርጅቱን ሊቀመንበር ገምግሞ የማገድ ሥልጣን የማዕከላዊ ኮሚቴ ሆኖ እያለ ከሥልጣናቸዉ ዉጭ ከኃላፊነት ሥላገዱኝ አገዳዉ የመተዳደሪያ ደንቡን አንቀጽ 16/5ን በሚቃረን አኳኋን ጭምር የተፈጸመ ስለሆነ የሥራአስፈጻሚዉ ኮሚቴ ያስተላለፈብኝ እገዳ እንዲነሳልኝይ ወሰንልኝ በማለት ጥያቄ ያቀረቡ ሲሆን የሰበር አመልካች በበኩላቸው ፍርድቤቱ ተጠሪ በቀጥታ ያቀረቡትን ክስ ተቀብሎ የመዳኘት ሥልጣን የለዉም የሚል መቃወሚያ በማስቀደም ተጠሪ ከድርጅቱ ሊቀመንበርነት እንዲታገዱ የተወሰነዉ በድርጅቱ መተዳደሪያ ደንብ መሰረት በሥራ አሥፈጻሚ ኮሚቴ አቅራቢነት በድርጅቱ ማእከላዊ ኮሚቴ በተሰጠ ዉሳኔ ስለሆነ እግዱ ሊጸድቅ ይገባል በማለት ነው። ክርክሩን በመጀመሪያ ደረጃ ሥልጣን ያየዉ የአፋር ክልል ጠቅላይ ፍርድቤት በመ/ቁጥር 4749 ላይ በቀን 28/07/2012 ዓ/ም በሰጠዉ ብይን ፍርድቤቱ ጉዳዩን የመዳኘት ሥልጣን እንዳለዉ በመግለጽ የአመልካችን ተቃዉሞ ዉድቅ አድረጓል። ፍሬ ነገሩን በተመለከተም የድርጅቱ ሥራአስፈጻሚ ኮሚቴ ተጠሪን ያገደበትን ዉሳኔ ለማእከላዊ ኮሚቴ አቅርቦ ቢያ ስጸድቅም ሥራአስፈጻሚ ኮሚቴዉ ተጠሪን ከሊቀመንበርነት ያገደዉ በሌለዉና ባልተሰጠዉ ሥልጣን ነዉ በማለት እግዱ የሕግ አግባብነት የለዉም በማለት ሽሮ ወስኗል።

የቀረበለትን አቤቱታ በመመልከት ተገቢውን ውሳኔ ለመስጠት ስልጣን ያለዉ በመሆኑ የተፈጸመ የሕግ ስህተት የለም በማለት ተከራክሯል።

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎትም መዝገቡን ከመረመረ በኋላ አንቀጽ 149 እና 150 ድንጋጌዎች የሚገኙት የምርጫ ሥነ ምግባርን በሚመለከተዉ ክፍል ስድስት ዉስጥ ባለዉ የሥነ ምግባር ጥሰቶችና ስለሚወሰዱ እርምጃዎች በሚደነግገዉ ሦስተኛ ምእራፍ ስር እንደመሆናቸዉ አፈጻጸማቸዉ ከክፍሉ አንጻር ሊሆን እንደሚገባ እንዲሁም በአንቀጽ 149 መሰረት የሥነ ምግባር ጥሰቶችን በተመለከተ ቦርዱ በሚሰጠዉ አስተዳደራዊ ዉሳኔ ቅሬታ ያለዉ ወገን አቤቱታዉን ሲያቀርብ ቅሬታዉ እየቀረበ ያለዉ አስቀድሞ በቦርዱ በተሰጠ ዉሳኔ ላይ በመሆኑ በድንጋጌዉ መንፈስ መሰረት የፌዴራል ከፍተኛ ፍርድ ቤት የቦርዱን ዉሳኔ እንደገና በዳኝነት የመመርመር ሥልጣን አለዉ። በተጨማሪም በአንቀጽ 150 ሥር የፌዴራል ከፍተኛ ፍርድ ቤት በቀጥታ ክስ ጉዳዩ ቀርቦለት የመዳኘት ሥልጣን የሚኖረዉ በማናቸዉም ከፖለቲካ ፓርቲ ጋር በተያያዙ ጉዳዮች ላይ ሳይሆን ይህ ድንጋጌ የሚገኝበት የሕጉ ክፍል ስድስት ከሚመለከተዉ የምርጫ ሥነ ምግባር ጋር በተያያዘ ቦርዱ ዉሳኔ በማይሰጥባቸዉ ጉዳዮች ላይ መሆኑን የክፍሉ አጠቃላይ ይዘት እና የዚሁ ድንጋጌ ይዘትና መንፈስ ያስገነዝባል በማለት ውሳኔ ሰጥቷል። በተጨማሪም እንዲህ አይነት አለመግባባትን በሚመለከት ዳኝነት ተጠይቆበት ቀጥታ ክስ ለክልል ጠቅላይ ፍርድ ቤት ሲቀርብ በአዋጅ ቁጥር 1133/2011ም ሆነ በአዋጅ ቁጥር 1162/2011 ክሱን ተቀብለው እንዲዳኙ ሥልጣን አልተሰጣቸውም። እንዲሁም ይህ ጉዳይ ለአፋር ክልል ጠቅላይ

ፍርድ ቤት በይግባኝ መልክ አልቀረበለትም እንጂ ቢቀርብለት እንኳን የአፋር ክልል ጠቅላይ ፍርድ ቤት የፌዴራል ከፍተኛ ፍርድ ቤትን ሥልጣን በወክልና እንዲኖኝ በሕገ መንግስቱ የተሰጠዉ ሥልጣን በአዋጅ ቁጥር 322/1995 ስለተነሳ የክልሉ ጠቅላይ ፍርድ ቤት በአዋጅ ቁጥር 1133/2011 አንቀጽ 17(1) መሰረት ጉዳዩን የመዳኘት ሥልጣን የለዉም በማለት ውሳኔ የሰጠ ሲሆን ከዚህ አንጻር መታየት ያለበት ዋናው ጉዳይ ሁለቱ አንቀጾች ግልጽ ካለመሆናቸው የተነሳ በተለያየ ደረጃ ያሉ ፍርድ ቤቶች ሊታረቅ የማይችል የተለያየ አይነት አተረጓጎምን እንዲከተሉ እንዳደረጋቸው ለመረዳት ይቻላል።

ከዚህ በተጨማሪ የፌደራል ጠቅላይ ፍርድ ቤት ይዘትና መንፈሱን ጠቅሶ የተረጎመበት አካሄድ ጥሩ ሆኖ ሳለ የደረሰበት መደምደሚያ ግን አሁንም ቢሆን በአንቀጹ ላይ ያለውን ብዥታ የሚያጠራ ሆኖ አልተገኘም። ምክንያቱም የሰበር ችሎቱ በአንቀጽ 150 ላይ የተመለከተው አንቀጽ 148ን የሚጠቅሰው ሁለተኛ ሃሳብ ተፈጻሚነት ድንጋጌው የሚገኝበት የሕጉ ክፍል ስድስት ከሚመለከተዉ የምርጫ ሥነ ምግባር ጋር በተያያዘ ቦርዱ ዉሳኔ በማይሰጥባቸዉ ጉዳዮች ላይ መሆኑን የሚገልጽ ቢሆንም የአንቀጽ 148 መግቢያ በበኩሉ ቦርዱ እንደየተፈጠረው የጥፋት ሁኔታ በመመልከት ለዐቃቢ ህግ ሊመራ የሚችል መሆኑ እንደተጠበቀ ሆኖ የተጠቀሱትን የቅጣት አይነቶች በህጉ ክፍል ስድስት ለተመለከቱት ሁሉም የዲስፕሊን ግድፈቶች ሊቀጣ እንደሚችል የሚገልጽ ሆኖ አንገኘዋለን። ከዚህ በተጨማሪ ከምርጫ ሥነ ምግባር ጋር በተያያዘ የሚነሱ ቅሬታዎች የወንጀል ተጠያቂነት ሊፈጥሩ መቻላቸው እንደተጠበቀ ሆኖ በመሰረታዊነት

ተፈጥሯዊ ባህሪያቸው አስተዳደራዊ እንደመሆኑ መጠን በቀጥታ ለፍርድ ቤት ሊቀርቡ ይችላሉ ወደሚል መደምደሚያ ለመድረስ የሚያስደፍር አይደለም፡፡ ነገር ግን ከዚህ በተቃራኒ ሰበር ሰሚ ችሎቱ የሕጉ ክፍል ስድስት ከሚመለከተዉ የምርጫ ሥነ ምግባር ጋር በተያያዘ ቦርዱ ዉሳኔ በማይሰጥባቸዉ ጉዳዮች ክሱ ለፌደራል ከፍተኛ ፍርድ ቤት በቀጥታ ይቀርባል ሲል የደረሰበት መደምደሚያ ፍጹም ስህተት ነው፡፡

3.7. የዕጩዎች የምርጫ መለያ ምልክት ጋር የተያዙ ተግዳሮቶች

ማንኛውም የግል እጩ ተወዳዳሪ ወይም የፖለቲካ ፓርቲ ከእጩ የምርጫ መለያ ምልክት ጋር በተያያዘ ቅሬታ የማቅረብ መብት እንዳላቸው በህጎቹ የተገለፀ ሲሆን ቅሬታው የሚቀርብበትን ሁኔታ በተመለከተ ለፖለቲካ ፓርቲዎች የፖለቲካ ፓርቲዎችን የመለያ ምልክት በተመለከተ በመጀመሪያ ደረጃ ቅሬታው የሚቀርበው ለብሄራዊ የምርጫ ቦርድ ስራ አመራር ቦርድ ሲሆን ለግል እጩዎች ደግሞ አማራጭ ባለው መልኩ ለብሄራዊ ምርጫ ቦርድ ክልል ቅርንጫፍ ፅ/ቤት ወይም ለዋናው መስሪያ ቤት ማቅረብ እንደሚችሉ ህጎቹ ይገልፃሉ፡፡ ከዚህ ጋር በተያያዘ የኢትዮጵያ ምርጫ አዋጁ 1162/2011 ከእጩ የምርጫ መለያ ምልክት ጋር በተያያዘ የሚፈጠሩ ክርክሮች በምን አግባብ ወደ ፍርድ ቤት መጥተው ይፈታሉ የሚለውን ጉዳይ በተመለከተ የሚገልፀው ነገር የለም፡፡ ሆኖም ግን የምርጫ ቦርድ ማቋቋሚያ አዋጅ 1133/2011 አንቀፅ 17(1) የምርጫ አዋጁን አንቀፅ 16 መሰረት አድርጎ ወጥቶ የፌደራል ከፍተኛ ፍርድ ቤት ጉዳዩን በይግባኝ ማየት እንደሚችል ይገልፃል፡፡ ከዚህ አንፃር የምርጫ

አዋጁ እንዲህ ያሉ ጉዳዮችን በግልፅ ማስቀመጥ ሲገባው አለመግለፁ እንደ ትልቅ ችግር የሚወሰድ ነው። ከዚህ በተጨማሪ 1133/2011 አንቀፅ 17 በራሱ ውሳኔው የሚሰጥበት ጊዜንና በይግባኝ ደረጃ የሚታይ ስለመሆኑ ቢገልፅም የውሳኔው መጨረሻ መሆን አለመሆንን እንዲሁም የሚቀርቡት ክርክሮች የሚፈቱበት ልዩ ሥነ-ስርዓት መኖር አለመኖሩን በተመለከተ ግን የሚገልፀው ነገር የለም።

4. ማጠቃለያና የመፍትሄ ሃሳቦች

4.1. ማጠቃለያ

የምርጫ ክርክር አፈታት ስርዓት በምርጫ ሂደት ውስጥ ሊፈጠሩ የሚችሉ ክርክሮችን ለመፍታት የተቀመጡ ስልቶችን እና ሂደቶችን በመጠቀም ከምርጫ በፊት ፣ በምርጫ ወቅት እና ከምርጫ በኋላ ለሚፈጠሩ አግባብ ያልሆኑ ድርጊቶች ወይም አሰራር በህጋዊ መንገድ የሚቃወሙበት ስርዓት ነው። ምርጫው ተአማኒ ፣ ግልጽ እና ፍትሃዊ እንዲሆን ፣ ውጤቱም የመራጮችን ፍላጎት የሚያንፀባርቅ እንዲሆን ይህ ሥርዓት አስፈላጊ ነው። ኢትዮጵያ ከቅርብ አመታት ወዲህ የምርጫ ስርዓቷን ለማሻሻል ከፍተኛ እርምጃዎችን የወሰደች ሲሆን ከእነዚህ ውስጥ በ2011 ዓም ተግባራዊ ያደረገችው አዲስ የምርጫ ህግ ማዕደቅ እና አዲስ ገለልተኛ የምርጫ ኮሚሽን ለማቋቋም መሰረት ማድረግ በዋናነት ከሚጠቀሱት ውስጥ ናቸው። እነዚህ ማሻሻያዎች የምርጫውን ሂደት ግልፅነት ፣ ፍትሃዊነት እና አካታችነትን ለማሻሻልና የምርጫ ክርክሮችን ለመፍታት ኃላፊነት

ያለባቸው ተቋማትን አቅም ለማጠናከር ያለመ ተግባር ነው ለማለት ይቻላል።

ሆኖም ግን በኢትዮጵያ ያለው የምርጫ ክርክር አፈታት ስርዓት ሂደት ፍትሃዊ ፣ ግልጽ እና ውጤታማ እንዲሆን በምርጫ ህግ ማዕቀፍ ላይ መሰረታዊ ማሻሻያ ማድረግ ለነገ የማይባል ስራ ነው። በአሁኑ ሰዓት በኢትዮጵያ የምርጫ ህግ ማዕቀፍ ውስጥ እንደ ተግዳሮት ከሚወሰዱት መካከል ልዩ የምርጫ ስነ-ሥርዓት ህግ አለመኖር ፣ በምርጫ አዋጁ ላይ በፍርድ ቤት የሚሰጡ ውሳኔዎች የመጨረሻ መሆን አለመሆንን በተመለከተ የተገለፀ ነገር አለመኖር ፣ የምርጫ አዋጁ ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ የሚነሱ ቅሬታዎችን ስልጣን ያላቸው የፌደራል ወይም የክልል ፍርድ ቤቶች ያስተናግዳሉ በማለት የሚያስቀምጥ ቢሆንም ፍርድ ቤቶቹ የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ የሚገልፀው ነገር የለም። ከዚህ በተጨማሪ የምርጫ አዋጁ አንቀፅ 149 እና 150 ስንመለከት የሥነ-ምግባር ጥሰቶችን በተመለከተ የፌደራል ከፍተኛ ፍርድ ቤት በቅድሚያ በመጀመሪያ ደረጃ ስልጣኑ የማየት እንዲሁም በመቀጠል ያንኑ ጉዳይ በይግባኝ ስልጣኑ መመልከት እንደሚችል ያመለክታል። እንዲሁም በኢትዮጵያ ምርጫ አዋጅ ከመራጮች ምዝገባ ፣ ከእጩ ምዝገባ ፣ ከድምፅ አሰጣጥ እና በድምጽ ቆጠራና ውጤት ጋር በተያያዘ በአዋጁ ከአንቀፅ 152-155 ስር የተመለከቱት የይርጋ ድንጋጌዎች ካለፉ አቤቱታ የማቅረብ መብቱ በይርጋ እንደሚታገድ ይገልፃለል። ይህም ከአቅም በላይ የሆኑ ምክንያቶች ቢኖሩም

ባይኖሩም የሚፈፀሙ ናቸው፡፡ ከዚህ በተጨማሪ በኢትዮጵያ ምርጫ አዋጅ ላይ የዕጩዎች ምዝገባን ተከትሎ በድሬዳዋና አዲስ አበባ ለሚነሱ ክርክሮች የትኛው የፍርድ ቤት በይግባኝ መመልከት እንደሚችል ግልጽ ድንጋጌ አያስቀምጥም፡፡ ይህም በምርጫ ሂደቱ ግራ መጋባትን ሊያስከትል እና እጩዎች ያለ አግባብ ከምርጫ ሂደቱ እንዲገለሉ ሊያደርግ ይችላል፡፡

በሚገባ የተነደፈ የምርጫ ክርክር አፈታት ሥርዓት ሁሉም ብቁ መራጮች በምርጫው እንዲሳተፉ ፣ ምርጫው ፍትሃዊ እና ግልጽነት ባለው መልኩ እንዲካሄድ ፣ ውጤቱም የመራጮችን ፍላጎት የሚያንፀባርቅ እንዲሆን ይረዳል፡፡ሥርዓቱ አለመግባባቶችን ለመፍታት የሚያስችል መንገድ በማመቻቸት በምርጫ ሂደትና በዴሞክራሲያዊ ሥርዓቱ ላይ እምነትን ለመፍጠር ይረዳል፡፡ ስለሆነም በጠቅላላው እነዚህ በህግ ማዕቀፍ ውስጥ ያሉ ተግዳሮቶች ነቅሶ በማውጣት ለማሻሻል መሞክረ በምርጫ ክርክር አፈታት ሥርዓት ላይ ዘርፈ ብዙ ተፅኖችን የሚፈጥር ሲሆን እነሱም፤ **አንደኛው** የተሻሻለ የተጠያቂነት ስርዓትን ይፈጥራል፡፡ **ሁለተኛው** ደግሞ ግልጽነት የሚጨምር ሲሆን ይህም ክርክሮችን ለመፍታት ግልጽ የሆነ የጊዜ ሰሌዳ መስጠት ፣ ሁሉም አካላት ስለ ሂደቱ እና ስለተደረጉ ውሳኔዎች መረጃ እንዲያገኙ ማረጋገጥ እና የክርክር አፈታት ሂደቱን የበለጠ አሳታፊ ማድረግን ይጨምራል፡፡ **በሶስተኛ** ደረጃ የተሻለ ህጋዊነትን ይፈጥራል፡፡ በግልፅ አስቀድሞ የተደነገገ የህግ ማዕቀፍፍትሃዊ እና ግልጽነት ያለው የምርጫ ክርክር አፈታት ሂደት የምርጫ ሂደቱን ህጋዊነት ለማሳደግ ይረዳል፡፡ በምርጫው ውስጥ የሚሳተፉ ሁሉም ወገኖች በክርክር አፈታት ሂደት ላይ እምነት ካላቸው የምርጫውን ውጤት

ለመቀበል የበለጠ እድል አላቸው፡፡ ከዚህ በተጨማሪ በዋናነት የተሻለ እምነት እንዲፈጠር ይረዳል፡፡ ይህም በፖለቲካ ፓርቲዎች ፣ በህዝብ እና በምርጫ አስተዳደር ኃላፊነት ባለው የምርጫ አስፈፃሚ አካል መካከል መተማመን መፍጠርን ይጨምራል፡፡ እንዲሁም ዴሞክራሲን ያጠናክራል፡፡

4.2. የመፍትሄ ሃሳቦች

የምርጫ ክርክር አፈታት ስርዓት የማንኛውም የዴሞክራሲያዊ ሂደት ወሳኝ ገጽታ ነው፡፡በኢትዮጵያ የምርጫ ክርክሮች አፈታት ሂደት ላይ ለውጥ ለማምጣት በርካታ ተግባራ ሊከናወኑ ይገባል፡፡ ከእነዚህም ውስጥ

- ልዩ የምርጫ ክርክር መፍቻ ሥነ-ሥርዓት ሕግ ተግባራዊ ማድረግ ይገባል፡፡አጠቃላይ የምርጫ ክርክር የሚመራበት ልዩ የሥነ-ሥርዓት ሕግ ተግባራዊ ማድረግ ክርክሮችን ለመፍታት ሂደቶችን ፣ አካሄዶችን እና ዘዴዎችን በግልፅ ያስቀምጣል፡፡ይህም ወጥነት ያለው ፣ ግልጽነት የተላበሰ እና ፍትሃዊነትን ለማረጋገጥ የሚያስችል ስርዓት ለመገንባት ይረዳል፡፡
- የምርጫ ክርክሮች ወደ ፍርድ ቤት የሚመጡበት አግባብ ግልጽ በሆነ መንገድ ሊቀመጥጡ ይገባል፡፡ የምርጫ ክርክሮች ወደ ፍርድ ቤት መጥተው ሲታዩ የሚመጡበት አግባብ በይግባኝ ነው ወይስ አይደለም እንዲሁም የምርጫ ክርክሮች ስልጣን በተሰጠው ፍርድ ቤት ታይተው ውሳኔ ካገኙ በኋላ ለሰበር መቅረብ ይችላሉ ወይስ አይችሉም እንዲሁም ከመራጮች ምዝገባና ከድምጽ አሰጣጥ ጋር በተያያዘ የምርጫ ክልል ቅሬታ ሰሚ ኮሚቴዎች በሚሰጡት ውሳኔ ላይ

የሚነሱ ቅሬታዎችን ስልጣን ያላቸው የትኞች የክልል እና የትኞቹ የፌደራል ፍርድ ቤት እንደሆኑ እንዲሁም የዕጩዎች ምዝገባን ተከትሎ በድሬዳዋና አዲስ አበባ ለሚነሱ ክርክሮች የትኛው የፍርድ ቤት በይግባኝ መመልከት እንደሚችል ግልጽ በሆነ መንገድ የአዋጁን ድንጋጌዎቹን በማሻሻል ሊቀመጡ ይገባል፡፡

- ግልጽ የሆነ የዳኝነት ስልጣን ድልድል ሊኖር ይገባል፤

የምርጫ ክርክሮችን ለመፍታት ኃላፊነት በተሰጣቸው የተለያዩ ፍርድ ቤቶች መካከል ያለው የዳኝነት ስልጣን አቀማመጥ ግልጽ መደረግ መቻል አለበት፡፡ ይህም የምርጫ ክርክር አፈታት ሂደቱን ለማሳለጥ እና ውዥንብርን ለመከላከል ያስችላል፡፡

Bahir Dar University Journal of Law

ISSN (e): 2709-5827 **ISSN (P): 2306-224X**

A Biannual Law Journal published by Bahir Dar University, School of Law, Since 2010
በባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት፣ ከጥቅምት ዓ.ም. ጀምሮ