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Bahir Dar University Journal of Law

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

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Vol. 15 No. 1 December 2024

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A Biannual Law Journal Published by Bahir Dar University, School of Law, Since 2010
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Towards Addressing the Challenges of Holding or Postponing Elections during Emergencies: A Proposal for 'Election Emergency Laws' in Ethiopia

Misganaw Gashaw ♣

Abstract

This article explores the potential role of election emergency laws in effectively holding or postponing elections during emergencies within the electoral system of Ethiopia. Inspired by the legal and political challenges that arose due to the impacts of the COVID-19 pandemic on the eagerly anticipated 2020 election, the article essentially examines three key incidents: (1) how the federal government postponed the election through constitutional interpretation, despite opposition from politicians and scholars advocating for other alternatives within and outside the Constitution; (2) how the Tigray Regional Government, one of the federating units, held regional elections during emergencies in defiance of the federal government's decision to postpone the election; and (3) how the federal government later conducted national and regional elections while the pandemic was still ongoing. Findings from doctrinal examinations reveal that the decisions to hold or postpone elections during emergencies were driven by political interests and operationalized under the regular election laws and institutional frameworks, rather than by clear and specific laws and authorities to determine who should decide on holding or postponing elections and how to conduct elections during emergencies. This has attracted several legal questions and political tensions. Thus, based on experiences from other countries, the article proposes an amendment to the Constitution

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to incorporate holdover clauses and Proclamation No. 1162/2019 to include a provision that could address election emergencies and empower electoral bodies to manage the holding or postponement of elections during emergencies.

Keywords: COVID-19, Election Emergencies, Elections Emergency Laws, Ethiopia, Holding Election, Postponing Election

Introduction

The holding of a free, fair, genuine, and regular election has been one of the defining characteristics of modern political communities.[1] Electoral rights are recognized under major international,[2] regional,[3] and national[4] human rights instruments as part of the right to democracy and democratic government.[5] The foundational principles of these instruments, among others, require elections to be conducted periodically to ensure that power comes only from popular votes and no government remains in power indefinitely.[6] However, the

[1] International Institute for Democracy and Electoral Assistance, *International Electoral Standards Guidelines for Reviewing the Legal Framework of Elections*, The International IDEA, (2002), p. 21.

[2] Universal Declaration of Human Rights, United Nations, Treaty Series, Vol. 999, (1948), Article 21; International Covenant on Civil and Political Rights, United Nations, Treaty Series, Vol. 999, (1966), Article 25; Declaration on Criteria for Free and Fair Elections, Inter-Parliamentary Union, 154th Session, (1994), Article 1.

[3] African Charter on Human and Peoples' Rights (The Banjul Charter), Organization of African Unity, (1981), Article 13(1).

[4] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 38 (Hereinafter The FDRE Constitution).

[5] Ludvig Beckman, The Right to Democracy and the Human Right to Vote: The Instrumental Argument Rejected, *Journal of Human Rights*, Vol. 13, (2014), pp. 381–394.

[6] Patrick Merloe, Human Rights: The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections, In John Hardin Young (Ed.),

implementation of regular elections has faced obstacles in various communities affected by conflicts, warfare, terror attacks, natural disasters, and public health crises.[7] Such situations, making election administration impossible or compromising periodicity are generally known as 'election emergencies'.[8]

The outbreak of Coronavirus (COVID-19) has affected elections and referendums planned to take place worldwide since 2019.[9] This is mainly due to the fact that election preparations and election events naturally bring people together and risk the spread of the deadly virus. The optimal recommendation from international organizations such as the Association of World Election Bodies and the World Health

International Election Principles: Democracy & the Rule of Law, American Bar Association, (2010), pp. 3-40.

[7] Patrick Merloe, Authoritarianism Goes Global: Election Monitoring Vs. Disinformation, *Journal of Democracy*, Vol. 26, No. 3, (2015), pp. 79-93; Michael T. Morley, Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks, *Emory Law Journal*, Vol. 67, (2018), pp. 545.

[8] The September 11 terrorist attacks and Hurricane natural disasters on USA's elections, the Boko Haram attack on Nigeria's election 2014 and the Ebola outbreak on Liberia's election 2014 are some of the election emergencies that threatened elections. See Generally *Ibid*, Michael T. Morley; Martin Ewi, Was the Nigerian 2015 Presidential Election a Victory for Boko Haram or for Democracy? *African Security Review*, Vol. 24, No. 2, (2015), pp. 207–231; Erik Asplund and Toby James , Elections and Covid-19: Making Democracy Work In Uncertain Times, *Democratic Audit UK*, (30 March 2020), available athttps://www.democraticaudit.com/2020/03/30/elections-and-covid-19-making-democracy-work-in-uncertain-times/ last accessed on 06 June 2020.

[9] Richard Baldwin and Beatrice Weder di Mauro, Introduction, in Richard Baldwin and Beatrice Weder di Mauro (eds.), *Economics in the Time of COVID-19*, Centre for Economic Policy Research Press, (2020), pp. 1-31; See also The second meeting of the Emergency Committee convened by the WHO Director-General under the International Health Regulations (IHR) (2005) regarding the outbreak of novel coronavirus 2019 in the People's Republic of China, with exportations to other countries, World Health Organization, (30 January 2020), available at https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) last accessed on 06 June 2020.

Organization (WHO) for such situations was to run elections while lessening the virus's transmission.[10] Yet, it was unattainable for many countries, and they had to either postpone the election in the interest of public health or conduct the election for the sake of democracy, which has sparked several political and scholarly debates in the post-COVID-19 period.[11]

Many scholars have held that emergency time elections should not be run through the regular election law, election management bodies, and election procedures.[12] Furthermore, the decision to postpone the election should be made according to clear legal stipulations, in a way that effectively defers and avoids the possible power vacuum in the interim periods.[13] Hence, both the decision to hold and postpone require an election emergency law and authority that regulate who shall decide and how to manage consequential questions. Be that as it may, as of 26 April 2020, 68 countries and territories across the globe have decided to postpone national, subnational, or local (municipal) elections and referendums due to COVID-19, while 18 countries have decided to hold elections as originally planned and eight countries held national elections or referendums despite concerns related to COVID-19.[14] In most of the instances, the decision to hold or postpone elections was made with the help of election emergency laws and powers and, as a result, did not attract political tensions. Moreover, research reports

[10] The International IDEA, Global Overview of COVID-19: Impact on Elections, (01 December 2022) available at https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections last accessed on 30 April 2023.
[11] The International IDEA, Global Overview of COVID-19: Impact on Elections, (01 December 2022) available at https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections last accessed on 30 April 2023.
[12] *Ibid*; Michael T. Morley, *Supra* at 7, pp. 547.
[13] *Ibid.*
[14] *Supra Note 11*.

confirmed that most of the elections were held or postponed after proper consideration of prevailing public health and legal issues.[15]

In Ethiopia, the FDRE Constitution underscores that state power can only be assumed through elections and allows only the political party or a coalition of political parties with the greatest number of seats in the House of Peoples' Representatives (HPRs) to form the executive and exercise political power.[16] The term of the members of the HPRs, House of Federation (HoF), and the executive (the Prime Minister and cabinet) is the same five years.[17] Consequently, elections shall be held one month before the expiry of the term to avoid a grave power vacuum, as the entire government will leave office except for the president.[18] Accordingly, the country has held a series of elections since the Ethiopian People's Revolutionary Democratic Party (EPRDF) ousted the Derg regime in 1991. It has been largely established that, with the exception of the 2005 election, almost all the five rounds of elections are deemed to lack competitiveness, fairness, freedom, and representation.[19] However, periodicity has not been a problem until the sixth round. With the rise in COVID-19 cases, the National Election Board of Ethiopia (NEBE) was indecisive and in conversation with stakeholders on whether to hold or postpone the election. Later, however, the NEBE reported to the HPRs that it was unable to handle Election 2020, and the federal government declared a five-month State of Emergency (SoE),

[15] *Ibid*.
[16] FDRE Constitution, Articles 9 (3) cum 8 (3).
[17] *Ibid*, Articles, 56, 73 (1), and 58 (3)
[18] *Ibid*, Articles 70 (6) and 71
[19] Yonas Abiye, House Votes to Postpone City Council, Local Election, *The Reporter*, (3 Aug 2019) available at https://www.thereporterethiopia.com/article/house-votes-postpone-city-council-local-election last accessed on 30 April 2023. There were only a few adjournments of local elections, such as of Addis Ababa and Dire Dawa city councils in 2018 and 2019, because of the expanding ethnic clashes and political instability.

which forthwith suspends democratic and political rights.[20] Such actions were viewed as an indefinite postponement and sparked political tensions.

The FDRE Constitution, which impels elections every five years and defines emergencies as grounds for the declaration of SoE, failed to regulate the holding or postponement of the elections during emergencies. Similarly, the major election laws of the country, which are intended to govern elections during regular times, do not include provisions addressing elections in emergency situations.[21] Neither the preparatory documents nor the substance of the SoE proclamations and regulations cover the fate of elections and the government after its term ends.[22] It is also important to note that under the Ethiopian legal system, the legal frameworks for SoE and election administration exist independently, although the former immediately suspends the democratic and political rights to which the latter is grouped. This way, the absence of such an election emergency law had made Election 2020 a hub of grim legal and political questions and a looming constitutional

[20] The National Election Board of Ethiopia, Press Statement on the decision NEBE passed based on its analysis of the challenges posed by Coronavirus (COVID-19) on the 2020 elections operational plan and timetable (Amharic), March 31, 2020; Morris Kiruga, Ethiopia: Indefinite Postponement of Polls Raising Political Tempers, *The Africa Report*, (25 May 2020) available at https://www.theafricareport.com/28418/ethiopia-indefinite-postponement-of-polls-raising-political-tempers/ last accessed on 30 April 2023. FDRE Constitution, Article 93 (4-a); A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, No. 3/2020, *Federal Negarit Gazetta*, (2020).

[21] See generally The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019, *Federal Negarit Gazetta*, (2019) (Hereinafter Proclamation No. 1162/2019); A Proclamation to Establish the National Electoral Board, No. 1133/2019, *Federal Negarit Gazetta*, (2019) (Hereinafter Proclamation No. 1133/2019).

[22] See Proclamation No. 3/2020.

and legal crisis. Some political parties and scholars had strongly advocated the option of holding elections amid the pandemic as part of obeying the constitution and the rights of the people, while others appealed for postponement of the election due to the deadly nature of the virus and the heightening political animosity in contemporary Ethiopia.[23] The most critical and extra-politicized legal question was: who shall have power during the interim period as Election 2020 is postponed due to the COVID-19 pandemic? The government and some scholars in the field had suggested alternative options within the constitutional framework[24]: Dissolution of the Houses,[25] Declaration of State of Emergency,[26] Constitutional Interpretation,[27] and Constitutional Amendment.[28] Others politicians and scholars, on the other hand, pitted against the qualification 'within the constitutional framework' and claimed no government upon the expiry of its term in September 2020.The incumbent would stand on equal footing with opposition parties, clamouring for political dialogue and the formation of the

[23] Mistir Sew, Ethiopia Requires a Legal Solution to a Political Problem, *Ethiopian Insight*, (12 May 2020) available at https://www.et iopia-insight.com/2020/05/12/ethiopia-requires-a-legal-solution-to-a-political-problem/ last accessed on 30 April 2023.

[24] See for example, Zemelak Ayitenew, Analysis: Ethiopia's Planned Elections and #Covid19: Constitutional And Political Implications, *Addis Standard*, (31 March 2020) available at http://addisstandard.com /analysis-ethiopias-planned-elections-and-covid19-constitutional-and-political-implications/last accessed on 30 April 2023; See also Bantayehu Demlie, Analysis: Deferred Election, State of Emergency and #Covid19 – How Can Ethiopia Avoid an Impending Constitutional Crisis?, *Addis Standard*, (10 April 2020) available at http://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/ last accessed on 30 April 2023.

[25] FDRE Constitution, Article 60(1).

[26] *Ibid*, Article 93.

[27] *Ibid*, Articles 62(1), 83, and 84(1).

[28] *Ibid*, Articles 104 and 105.

transitional government.[29] Finally, the government took the case to HoF for interpretation, which decided in favour of postponing the election and extending the terms of the government.[30]

Despite the federal ruling, the TPLF-led Tigray Regional Government proceeded with regional elections by enacting election law and establishing its own election commission.[31] This is thought to be the direct trigger for the war in northern Ethiopia- a violent clash between federal forces and Tigray regional forces that resulted in the deaths of hundreds of thousands, displacement of millions, and atrocities by both sides. Later, amid the lingering effects of the pandemic and widespread conflicts, the federal government held a nationwide election in accordance with the regular election laws and the election commission.[32] Many scholars and politicians were concerned that these politically driven election decisions were made without clearly defined legal terms and, as a matter of fact, went against public health and democratic

[29] Neamin Ashenafi, ENM Calls For Creation of Transitional Government, *The Reporter*, (2 Nov 2019) available at https://www.thereporterethiopia.com/article/enm-calls-creation-transitional-government last accessed on 30 April 2023; ልደቱ አያሌው፣ ህዳሴ የእርቅና የአንድነት የሽግግር መንግሥት፣ ኢትዮጵያ ነገ፣ (መጋቢት 2012 ዓ.ም) available at https://ethiopianege.com/wp-content/uploads/2020/03/%E1%8B%A8%E1%88%BD%E1%8C%8D%E1%8C%8%20D%E1%88%AD-%E1%88%98%E1%8A%95%E1%8C%8D%E1%88%A5%E1%89%B5-%E1%88%98%E1%%2089%8B%E1%89%8B%E1%88%9D-%E1%8A%A0%E1%88%B5%E1%8D%88%E1%88%8B%E1%8C%8A%20%E1%8A%90%E1%89%B5.pdf last accessed on 30 April 2023.

[30] FDRE House of Federation, 5th Year Second Regular Session, 10 June 2020.

[31] The relationship between TPLF and the Prosperity Party (PP) has already soured since TPLF withdrew from the defunct Ethiopian Peoples' Revolutionary Democratic Party (EPRDF) and the formation of the pp.

[32] Zemelak Ayitenew, COVID-19 and Ethiopia's Sixth General Election, *The International IDEA Case Study*, (30 March 2022).

rights.[33] These decisions also resulted in intense political backlash, and the highly anticipated Election 2020 ended with polarized controversies.

The question that would naturally come to a sober mind is: why did Ethiopia fail to effectively postpone or hold elections unlike other countries that manage the same case with election emergency laws? While the Ethiopian electoral system and COVID-19 challenges have garnered interest from several politicians and academics, none of the inquiries have explored the idea and potential roles of emergency election laws amid crises like pandemics and conflicts.[34] This article aims to fill this void by exploring the potential use of election emergency laws to either postpone or hold elections during crises, based on the review of laws and practices in Ethiopia and other countries.

The contents in the body of the paper are organized in five sections. The first section briefly reviews the electoral laws and practices in Ethiopia. The second part explores at greater depth the election emergencies and the role of election emergency laws in ensuring elections are carried out effectively or postponed. The third section examines uncertainties and controversies with regards to holding and postponing elections in the

[33] Zemelak Ayitenew, s*upra* at 24; Neamin Ashenafi, *supra* at 29.

[34] Marew Abebe Salemot and Mequanent Dube Getu, The Constitutionality of Election Postponement in Ethiopia Amidst COVID-19 Pandemic, *Jimma University Journal of Law*, Vol. 12, No. 1, (2020); Zelalem K. Bekele, The Quest for Election and State of Emergency in Ethiopia: An Appraisal on Related Constitutional Issues in Focus, *Beijing Law Review*, Vol.11, No. 4, (2020); Marew Abebe Salemot, Constitutional Silence on Election Postponement in Ethiopia Amidst A Pandemic: A Critique of Constitutional Interpretation, *Rudn Journal of Law*, Vol. 25, No.2, (2021);Sileshi Fentahun, Impact of COVID-19 on Democratic Election and Development of Ethiopia, *International Journal of Basic & Applied Research*, Vol. 4, No. 1, (2024), p.16 ; Zemelak Aytenew, Yonatan Fessha, Beza Dessalegn, and Berihun Adugna, Ethiopia: Legal Response to Covid-19, in Jeff King and Octavio LM Ferraz *et al.* (eds.), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford University Press Online, (2021).

Ethiopian political landscape focusing on the sixth election. Finally, section four presents concluding remarks.

1. Electoral Laws and Practices in Ethiopia: An Overview

Ethiopia's political discourse is at odds with party-based politics and electoral procedures throughout its three thousand years of statehood history.[35] This democratic deficit is primarily caused by prior institutional and policy failures as well as a lack of political will. Even though the right to political association is provided in the Constitutions of 1931, 1955, and 1987, at no point over these periods were political associations and political parties made practicable for electoral democracies.[36] The Transitional Government of Ethiopia (TGE) Charter and the 1995 FDRE Constitution introduced multiparty democracy and associated rights more openly, with a clear legal and institutional framework.[37] To this effect, the federal government had enacted three sets of laws on the election and political parties[38] that are recently

[35] Eyob Amedie, The Impact of Electoral System on Political Representation in Diversified Society: An appraisal of National Elections of Ethiopia, LL.B Thesis, St. Mary's University College (2013). Parliamentary elections were begun in the period of Emperor Haile Selassie, especially after the revision of the constitution and the enactment of the first Electoral law (Proclamation No.152/1956). However, the senators were fully appointed while members of the House of Deputies were partly elected by the emperor himself. Despite the fact that the right to association is provided under the Constitutions of 1931, 1955 and 1987, in none of these periods were political associations and political parties made practicable. The establishment of the Workers Party of Ethiopia (WPE) during the Derg Regime (1974-1991) can be taken as a departure, though it was a one-party system.

[36] *Ibid.*

[37] Transitional Period Charter of Ethiopia, Proclamation No. 1/1991,__(1991), Art. 1; FDRE Constitution, Articles 31 and 38.

[38] Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia Proclamation with the Constitution of the Federal Democratic Republic of Ethiopia No. 111/1995, *Federal Negarit Gazetta*, (1995); Amended Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia with the Constitution of the

subsumed into a single legal document called the Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019 applicable to all elections conducted in Ethiopia and citizens.[39] The NEBE, formerly known as the Electoral Commission, was established as an autonomous entity responsible for overseeing the electoral activities and accountable to the HPRs.[40]

The FDRE constitution recognizes different forms of elections in Ethiopia: general election, local election, by-election, re-election, and referendum in line with the administrative decentralization in the country.[41] In all of these forms, the country follows the first-past-the-post system, where the candidate who receives more votes than other competitors within a constituency is declared the winner.[42] This system is criticized for being generally weak in promoting representation, as most of the votes are discarded.[43] Others also argued that such a single-winner system of positional voting is not feasible in countries like Ethiopia, where more than 80 ethnic and linguistic groups have differing

Federal Democratic Republic of Ethiopia No. 187/2000, *Federal Negarit Gazett*a, (2000); Amended Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia with the Constitution of the Federal Democratic Republic of Ethiopia No. 438/2005, *Federal Negarit Gazetta*, (2005); A Proclamation to Amend the Electoral Law of Ethiopia No. 532/2007, *Federal Negarit Gazetta*, (2007); A Proclamation to Provide for the Electoral Code of Conduct for Political Parties No. 662/2009, *Federal Negarit Gazetta*, (2009); Political Parties Registration Proclamation No. 46/1993, *Federal Negarit Gazetta*, (1993); Political Party Registration (as amended) Proclamation No. 82/1993, *Federal Negarit Gazetta*, (1993); The Revised Political Parties Registration Proclamation No. 573/2008, *Federal Negarit Gazetta*, (2008).

[39] Proclamation No. 1162/2019, Article 3

[40] Proclamation No. 1133/2011; See also FDRE Constitution, Article 102

[41] See for Example, Proclamation No. 1162/2019, Article 6.

[42] FDRE Constitution, Article 56.

[43] Temesgen Sisay, Enhancing the Representativeness of the Ethiopian Electoral System: A Case for a Mixed Member Proportional (MMP) Electoral System, *Bahir Dar University Journal of Law*, Vol.6, No.2, (2016).

interests.[44] As such, the system favours single-party dominance against minority voices - pampering EPRDF for the first five rounds and the Prosperity Party (PP) for the 6thelection.[45] The flaws of the Ethiopian electoral system in addressing the needs of the diaspora,[46] people with disabilities, [47]and prisoners[48] have been well articulated in different studies. To account for such deficits at least in the past three decades, the TGE hosted two notable elections: the 1992 election for the establishment of the Transitional Government at regional and district levels and the 1994 election for electing the members of the Constituent Assembly, which later ratified the 1995 Constitution.[49] These two elections were rejected and condemned by the opposition groups and international and local observers alike. They are fraught with partisan electoral institutions and processes unfairly favouring the incumbent EPRDF.[50] After the adoption of the FDRE Constitution, the first election was held in May 1995 for HPRs and Regional Councils. Other elections were conducted in 2000, 2005, 2010, and 2015, in which the

[44] Beza Dessalegn, The Right of Minorities to Political Participation under the Ethiopian Electoral System, *Mizan Law Review*, Vol. 7, No. 1, (2013) pp. 67-100.
[45] *Ibid.*
[46] Teguadda Alebachew, Extending Voting Rights to the Ethiopian Diaspora: Towards Institutionalizing Diaspora Political Participation in Ethiopia, in Wolfgang Benedek *et al*., *Implementation of International Human Rights Commitments and Implications on On-going Legal Reforms in Ethiopia*, Brill Publisher, (2020).
[47] Shimels Sisay, Electoral Participation as a Fundamental Political Right of Persons with Disabilities in Ethiopia; Critical Examination of the Law and the Practice, LL.M Thesis, Addis Ababa University (2011).
[48] Zemenu Tarekegn, Prisoners' Right to Vote in Ethiopia: Unconstitutionally stalled Human Right, *Elixir Law*, Vol. 99, (2016).
[49] Terrence Lyons, Ethiopian Elections: Past and Future, *International Journal of Ethiopian Studies*, Vol. 5, No. 1, (2010), pp. 107-121; Matthew J. McCracken, Abusing Self-Determination and Democracy: How the TPLF is Looting Ethiopia, *Case Western Reserve Journal of International Law*, Vol. 36, No. 1, (2004), pp. 183- 222.
[50] *Ibid.*

EPRDF, the single dominant party, claimed to have gained landslide victories, which, in turn, gave it a room to control the political power in the HPRs, HoF, and regional councils.[51] The 2005 parliamentary election was the only, most competitive election in which an incumbent party historically allowed the opposition to have a space of optimal competition until the conduct of the election.

Yet, this glimpse of a democratic move was later marred by systematic intimidation and weakening of the opposition and democratic institutions by the ruling party apparatus.[52] Such repressive moves of the ruling party drove the majority of the opposition out of the political sphere and resulted in the EPRDF's obsequious 99.6% and 100% wins in elections in 2010 and 2015 respectively.[53] At the end of every election, including the case in 2005, the oppositions continuously rejected the outcome, and the incumbent's combative reaction often led to mass arrest, unrest, bloodshed, hostility, etc. The entrenched authoritarian system that curtails the political space has moved to a level of claiming 100% win in the 2015 election. These developments cumulatively triggered recurrent anti-government mass protests and ethnic conflicts, resulting in the loss of thousands of lives, displacement of millions, and ransacking of properties and institutions.[54] This situation had continued despite two recurrent and even disastrous SoE declarations.[55]

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[51] *Ibid*.
[52] *Ibid*.
[53] *Supra* at 43.
[54] *Ibid*.
[55] See State of Emergency Proclamation for the Maintenance of Public Peace and Security Proclamation No.1/2016, *Federal Negarit Gazetta*, (2016); Constitution and Constitutional Order Defense from Threat State of Emergency Proclamation No.2/2018, *Federal Negarit Gazetta*, (2018.)

In April 2018, Prime Minister Abiy Ahmed came to power and initiated notable political and legal reforms. This was started with the dissolution of the EPRDF and the formation of the Prosperity Party with the hope of shambling the TPLF-led dominant-party system and associated democratic deficits. The government also implemented reforms, among others, targeting laws that restricted political freedom, such as electoral laws, civil society laws, and anti-terrorism laws.[56] Two of the most important electoral legislations were also enacted ahead of the 2020 elections.[57] Though some criticized the reform for being hurried and particular concerns raised in the laws, it astonished many and made the election of 2020 truly much anticipated.[58]

The NEBE announced that it undertook organizational reforms in consultation with political parties and civic associations and planned to hold the election in 2020 in the month of Mayas usual.[59] However, it was rescheduled for 16 August 2020 and later pushed to 29 August 2020.[60] The NEBE attributed the delay to the time needed to implement reforms and reregister political parties in accordance with the new law, despite facing criticisms.[61] Some claim that the month of August is not appropriate due to the climax of the rainy season and fasting day for the Ethiopian Orthodox Church, impairing freeness and fairness. Others

[56] Jon Temin and Yoseph Badwaza, Aspirations and Realities in Africa: Ethiopia's Quiet Revolution, *Journal of Democracy*, Vol. 30 No.3, (2019), pp. 139–53

[57] See generally, Proclamation No. 1162/2019 and Proclamation No. 1133/2019.

[58] Hereward Holland, Ethiopia's Opposition Parties Criticize Election Law Changes, *Reuters*, (24 Aug 2019) available at https://www.reuters.com/article/us-ethiopia-politics/ethiopias-opposition-parties-criticize-election-law-changes-idUSKCN1VE0OVlast accessed on 30 April 2023.

[59] Morris Kiruga, Ethiopia Passes New Laws Ahead of 2020 Elections, *The Africa Report*, (29 Aug 2019) available athttps://www.theafricareport.com/16693/ethiopia-passes-new-laws-ahead-of-2020 elections/ last accessed on 30 April 2023.

[60] *Ibid*.

[61] *Supra* at 58.

associate the consecutive reschedules and uncertainties with the board's reluctance to conduct the 2020 election. With the coming of COVID-19 and the declaration of SoE in the country, however, the NEBE declared that it could not administer the election and presented a proposal to postpone the election to the HPRs. The HPRs approved the proposal and postponed the election for an indefinite time. Though the board claimed that it tried to be participatory in all of the decisions, the much-anticipated election of 2020 has continued to receive fierce criticism from political parties and scholars. This has raised political temperatures as both the government and opposition parties started to accuse each other of attempting a power grab, leading to one of the deadliest civil wars in the post-2020 Ethiopia.

2. Emergencies and Election Emergency Laws

Throughout history, states experienced varieties of emergency situations ranging from natural disasters like earthquakes, floods, and epidemics, to social phenomena such as terrorism, war, and political turmoil. Scholars widely agree that such emergencies justify departure from norms expected during periods of normality, and, as such, governments enforce special emergency laws and assume extra powers.[62] Yet, such measures could endanger the rights of citizens and entail establishing systems of emergency power regulation and the formation of an independent supervisory body. Elections are no exception, and several natural and manmade disasters have impeded elections and frustrated the continuity of governance in many countries. In one of such cases, the terrorist attacks of September 11, 2001 (in the US, New York City) occurred on the same day as the New York Democratic and Republican

[62] Stefan Olsson, Defending the Rule of Law in Emergencies Through Checks and Balances Defending the Rule of Law in Emergencies, *Democracy and Security*, Vol. 5, (2009), pp. 103-126.

primary elections.[63] Similarly, natural disasters such as Hurricane Katrina (New Orleans, 2005), Hurricane Sandy (New Jersey and New York, 2012), and Hurricane Matthew (Florida and Georgia, 2016) occurred shortly before or during elections.[64] In Nigeria, the 2014 election was postponed due to the Boko Haram attack and terror.[65] In the same year, the public health crisis because of the Ebola outbreak critically threatened the election in Liberia, forcing the government to conduct it after two postponements.[66]

The COVID-19 pandemic, emerging as a new manifestation, yet with more magnitude of threat to elections, massively threatened various types of elections worldwide, especially those scheduled for 2020.[67] Election management bodies of several countries had to make between two hard choices: to postpone the election in the interest of public health or to conduct elections as scheduled in the interest of democracy.[68] Studies indicate that only countries that adopted and effectively implemented election emergency laws made sound choices and effectively responded to unexpected crises.[69] However, there are states lacking such laws empowering electoral bodies or governments to

[63] Michael T. Morley, Election Emergencies: Voting in Times of Pandemic, *Washington and Lee Law Review*, Vol. 80, No. 1, (2023).
[64] *Ibid*; see also Michael T. Morley, See *supra* at 7, pp. 553-586.
[65] Martin Ewi, *supra* at 8.
[66] Anthony Banbury, Opinion: Elections and COVID-19 — what we learned from Ebola, (08 April 2020) available at https://www.devex.com/news/opinion-elections-and-covid-19-what-we-learned-from-ebola-96903 last accessed on 30 April 2023.
[67] *Supra* at 63.
[68] Erik Asplund and Toby James, *supra* at 8.
[69] Michael T. Morley, *Supra* at 63; Michael T. Morley, *Supra* at 7; Ingrid Bicu and Peter Wolf, Elections during COVID-19: Considerations on How to Proceed with Caution, *The International IDEA*, (2020) available at https://www.idea.int/news-media/news/elections-during-covid-19-considerations-how-proceed-caution last accessed on 30 April 2023.

adequately respond to the crises.[70] In some countries, courts or other bodies are tasked with resolving the outcomes of election crises based on constitutional law, often using ambiguous, subjective, and politically charged proceedings.[71] Where elections are postponed through such institutional setups and procedures, they would curtail standards that protect the safety of people involved as well as the success of the electoral system.[72] This section assesses the role of laws and institutional arrangements in effectively postponing or holding elections during emergencies, using COVID-19 as a prime example.

2.1 Postponing Elections for Emergencies

Emergencies, while inherently posing challenges to elections, vary in their magnitude, and, postponing elections can be warranted depending on the nature of the emergency or the degree of disruption. Scholars such as Sloat and Morley ground such justifications on the need to ensure the safety of individuals, to uphold the integrity of elections, and to bolster public trust in the electoral process.[73] Emergencies like natural disasters, armed conflicts, civil unrest, epidemics, or other biosecurity threats can result in injury, loss of life, or other forms of calamities. Such situations require remedial actions and constitutions to provide authorities with special legal powers to declare SoE to safeguard citizens from peril. It is also important to note that the public stake associated with elections is so substantial in many ways that it deserves constitutional-level laws or emergency laws devised to protect such

[70] *Ibid.*
[71] Ingrid Bicu and Peter Wolf, *Ibid.*
[72] *Ibid*.
[73] Amanda Sloat, European Elections in a Time of Coronavirus, *Brookings Education*, (20 Mar 2020) available at https://www.brookin gs.edu/blog/order-from-chaos/2020/03/20/europeanelections-in-a-time-ofcoronavirus/last accessed on 30 April 2023.

stakes. For example, conducting an election in violation of the COVID-19 protocols would damage substantial public interests. First, it may put the public, election officials and other attendees at risk of contracting or transmitting the virus.[74] The election processes may also divert resources and focus from the prevention and control of emergencies.

Another downside of such a scenario is the democratic deficit likely resulting from it. Holding elections during emergencies would severely compromise the deliberation, participation, and election management quality. Emergency situations make electoral activities and processes such as voter registration, political campaigns, and poll worker trainings, distribution of ballots, ballot casting, and electoral dispute resolutions difficult, if not impossible. This may lead to mistakes, misunderstandings, or fraud, which ultimately erode the integrity of the election and public trust.

According to Morley, countries have the option to address emergencies by making modifications (introducing additional methods or time for voting), postponements (deciding to hold the election on a different date), and cancellations (nullifying the scheduled date without setting a new one).[75] Such decisions, however, should only be made after a careful assessment of circumstances and applicable laws, and rescheduling or annulling an election should only be decided as a last option. In this regard, election emergency laws are vital in empowering governments or election bodies to postpone elections as well as providing procedures that avoid arbitrary deferring of elections.[76]

[74] Elliot Bulmer, Emergency Powers, *The International IDEA*, (2018), pp. 26-27.
[75] Michael T. Morley, *supra* at 7, pp. 545 ff.
[76] *Ibid*; *supra* at 63.

There is usually a fear that postponing elections might lead to a situation of what Toby James and Sead Alihodzic call the "postponement paradox," where political actors might seek partisan advantages[77] and trigger democratic breakdown and institutional uncertainty.[78] While such unhealthy and discreet moves of incumbent political powers are expected, their impact depends on the design and clarity of constitutions or other statutes in dealing with the postponement of elections during emergencies.[79] For example, in France, as per the constitutional clause that deals with emergencies, the French Parliament, on 23 March 2020, adopted a law on urgent measures in response to the coronavirus pandemic.[80] This law stipulates that elections cannot be conducted during any SoE or within 90 days of its completion, and the term in office will be extended automatically.[81] Similarly, the constitutions of India,[82] Estonia,[83] and Afghanistan[84] provide generous stipulations

[77] For example, the incumbent might use the situation to reduce opportunities for rivals to campaign while continuing to political movements and using state resources.

[78] Toby James and Sead Alihodzic, When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations, *Election Law Journal*, Vol. 19, No. 3, (2020), pp. 344-362

[79] *Supra* at 66; see also Jacob Wallace and Darcy Palder, The Coronavirus Is Delaying Elections Worldwide, (22 May 2020), available at https://foreignpolicy.com/2020/05/22/coronavirus-elections-postponed-rescheduled-covid-vote/ last accessed on 30 April 2023. The Global State of Democracy Indices also associates it with the prevailing democratic culture, taking the cases of Mali, South Korea, and Poland, which recorded 2, 9241, and 1080 COVID-19 cases, respectively, as of 26 March. This argument, however, seems to hold no water, as countries with better democracies, such as Germany and Canada, have postponed elections for the same reasons.

[80] The French Constitution, 4 October 1958, Articles 16 and 36.

[81] The Emergency Law No. 2020-290, French Official Journal, 24 March 2020.

[82] The Constitution of India, 1950. Article 83 stipulates that, while a Proclamation of Emergency is in operation, parliament's term of office may be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

functional to the general emergencies, while the constitutions of Kenya,[85] Bangladesh,[86] and Malta[87] stipulate wartime emergency provisions.[88] In terms of design, the emergency provisions of different constitutions are designed differently.[89] For example, while some constitutions provide a defined list of emergency types (e.g., only war) to postpone elections, others provide general emergencies; some postpone elections in blanket, but others may set a time after which elections cannot be extended; in some constitutions, postponement of elections may follow automatically from the declaration of a SoE, yet in

[83] The Constitution of the Republic of Estonia, 2011. Art. 131 provides that during a state of emergency or a state of war, the parliament, the president of the republic, and the representative bodies of local governments shall not be elected, nor shall their authority be terminated.

[84] The Constitution of the Islamic Republic of Afghanistan, 2004, Art. 147, liberally provides that if the presidential term or the legislative term of the National Assembly expires during the SoE, the new general elections shall be postponed, and the presidential as well as parliamentary term shall extend up to amendable 4 months, and within two months after the termination of the SoE, elections shall be held.

[85] The Constitution of Kenya, 2010, Art. 102 provides that when Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time and the total period of postponement may not be more than 12 months.

[86] The Constitution of the People's Republic of Bangladesh, 1972. Art. 72 provides that the term of the parliament is five years, provided that at any time when the republic is engaged in war the period may be extended by Act of Parliament by not more than one year at a time, but shall not be so extended beyond six months after the termination of the war.

[87] The Constitution of Malta, 1964. According to Art. 76, when the country is at war, the five years of parliamentary terms of office can be extended for not more than twelve months at a time provided that the life of Parliament shall not be extended for more than five years.

[88] See Jacob Wallace and Darcy Palder, *Supra* at 79; *Supra* at 74; Krisztina Binder *et al*., *States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States*, European Union Briefing, (2020).

[89] *Ibid*.

other countries additional acts are required for the postponement of elections.[90]

In general, in countries where constitutions have incorporated holdover clauses or emergency provisions, electoral bodies effectively postponed elections thereby responding to crises and legally safeguarding democracy.[91] It is, however, important that such constitutional provisions must be buttressed by other enabling legislations (election emergency laws) that regulate not only election postponement but also the terms of office of the incumbent.[92] These laws are designed to serve two main purposes: to prevent a potential power vacuum and to stop the incumbent from abusing emergency powers to prolong power, harass dissidents, rig elections, and restrict the press.[93] In this regard, Elliot Bulmer highlights how Paraguay under Stroessner and Egypt under Mubarak both extended emergency powers to suppress peaceful protests.[94] He associates problems in these countries with a lack of detailed election emergency laws and procedural safeguards, despite constitutional guarantees.

At this juncture, it is worth noting the US experience. The US Constitution grants the states (for state-wide elections) and Congress the authority to postpone elections to a set date, but not indefinitely.[95] The

[90] *Ibid.*

[91] See Jacob Wallace and Darcy Palder, *Supra* at 79; *Supra* at 74, pp. 6-7; The ACE Electoral Knowledge Network, Planning for National Emergencies and Electoral Delays, (2014) available at http://aceproject.org/electoral-advice/archive/questions/replies/267553153 #258871910 last accessed on 30 April 2023.

[92] *Ibid.*

[93] *Supra* at 74, p.6-7; Krisztina Binder *et al.*, *supra* at 88.

[94] *Supra* at 74, pp. 12-15

[95] Scott Bomboy, Does the Constitution allow for a delayed presidential election?, *Constitutional Centre*, (10 April 2020) available at

Congress thus can change a statute through the regular legislative process as practiced, for example, in the delayed presidential election in the aftermath of the 9/11 terrorist attacks.[96]

Issues arise when constitutions do not specify whether and how elections can be postponed for emergencies. Constitutional muteness can occur in two ways. For example, the constitutions of Sri Lanka, Norway, and Canada do not mention emergency provisions at all, while the constitutions of the Netherlands and Maldives mention general emergency powers and leave the details to ordinary laws.[97] According to Bulmer, when there is silence in constitutions, governments should not be inactive or act outside the law, as both actions pose great dangers to democracy.[98] Instead, they should invoke the "doctrine of necessity" and postpone elections until the emergency is resolved. However, opposition parties and other interested parties may not readily embrace such measures. In the year 2020, the delay of the presidential election in Sri Lanka and the local election in the Maldives, as a result of the COVID-19 pandemic, has created a constitutional and legal crisis like what happened in Ethiopia during the same year.[99] In these countries, the

https://constitutioncenter.org/blog/does-the-constitution-allow-for-a-delayed-presidential-election, last accessed on 30 April 2023.

[96] *Ibid.*

[97] *Ibid.*

[98] The ACE Electoral Knowledge Network, *Supra* at 91.

[99] Alan Keenan, *Sri Lanka's Other COVID-19 Crisis: Is Parliamentary Democracy at Risk?*, International Crisis Group, Commentary, (29 May 2020) Available at https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lankas-other-covid-19-crisis-parliamentary-democracy-risk last accessed on 30 April 2023; Asian Network For Free Elections, Covid-19 and Elections: The Constitutional Crisis of the Delay in Local Council Elections in Maldives, Explained, (1 June 2020) available at https://anfrel.org/covid-19-and-elections-the-constitutional-crisis-of-the-delay-in-local-council-elections-in-maldives-explained/ last accessed on 30 April 2023

presidents of the two states had to dissolve the parliament, which triggered stiff contention over the interpretations of pertinent constitutional clauses.[100] In Sri Lanka, while many believe the constitution clearly empowers the president to dissolve the parliament, others, particularly oppositions from political parties and civil societies dispute this and request the government to amend the constitution and to include a holdover clause.[101]

2.2 Holding Election During Emergencies

As mentioned earlier, it is indisputable that postponing an election should be a last resort. In other words, countries should stick to their election schedules and ensure democracy remains on track by thoroughly evaluating risks and employing emergency coping mechanisms. Experiences from different countries also show that holding elections during emergencies is often difficult, though not impossible in any way. Thus, what is always decisive is how countries can better carry out elections during times of emergency and what the role of election emergency laws would be in guaranteeing and facilitating electoral processes during emergencies.

At the outset, conducting elections during emergencies, like postponing, requires special emergency time laws distinct from those used during normal times.[102] These laws are supposed to regulate election

[100] *Ibid*.

[101] Krisztina Binder *et al.*, *Supra* at 88; *Supra* at 74. A 'holdover clause' is a generic inclusion of a provision in the constitution that states that anyone occupying an elected or an appointed position with statutory terms shall remain in that position and continue to discharge their duties even after the end of their term until their successor has qualified, and it allows continuity and precludes a vacuum.

[102] Erik Asplund and Toby James (*supra* at 8) further cited the recent speech by Joe Biden '…We voted in the middle of a Civil War…We voted in the middle of World

administration by introducing alternative modes of voting and equipping polling stations.[103] In what Erik Asplund and Toby James call electoral innovation, election emergency laws introduced new options that mainly involve the use of electronic tools such as online campaigns and debates, mail-in, drop-off, or absentee ballot systems.[104] In countries or situations where internet facilities or online infrastructure are unaffordable, traditional media such as post offices are applied to run the election process remotely, and others apply health and safety routines (such as cleaning of polling stations, use of gloves and masks, hand hygiene, protective clothing, social distancing, temperature checks, and awareness education) to protect election staff, voters, and other participants.[105]

Such electoral practices are highly recommended by the International Foundation for Electoral Systems (IFES) to conduct elections in times of the COVID-19 pandemic,[106] and such innovative electoral practices are enforced in several jurisdictions, including the USA, South Korea, Germany, and New Zealand, among others.[107] For example, the USA has implemented mechanisms that reduce contact, cleaning, and disinfection of voting equipment as well as social distancing measures

War I and II … and so, the idea of postponing the electoral process just seems to me out of the question'.

[103] Robert M. Stein, Election Administration during Natural Disasters and Emergencies: Hurricane Sandy and the 2012 Election, *Election Law Journal*, Vol. 14, No. 1, (2015).

[104] *Supra* at 63; *supra* at 8.

[105] *Ibid*.

[106] The IFES Guidelines and Recommendations for Electoral Activities During the COVID-19 Pandemic, (March 2020) available at https://www.ifes.org/sites/default/files/guidelines_and_recommendations_for_electoral_activit ies_during_the_covid-19_pandemic_march_2020.pdf last accessed on 30 April 2023.

[107] *Supra* at 104

for in-person voting, and more importantly, its law permits absentee voting where the voter is under medical advice.

Similarly, South Korea has implemented special health and safety measures to ensure that COVID-19 patients exercise their right to vote. Citizens in this country could exercise their right to vote as far as they wore masks, used sanitizer, and hand gloves and got their temperatures checked upon arrival onsite for extra protection. Germany also employed postal voting mechanisms to exclude in-person voting and close contact. Some African countries, such as Benin, Cameroon, Guinea, and Mali, held elections amidst the pandemic with the same protective measures, though the WHO impugned it as inadequate and lacking technological and special voting arrangements.[108]

The decision of these countries to hold the election with special health and safety measures is quite heuristic to maintain the health of the people and democracy balance. The clarity of election emergency laws in many countries has made elections simple and attainable by, for example, specifying roles during emergencies. Obviously, such laws require an extraordinary commitment from governments at all levels and other stakeholders such as the media, political parties, and voters.

Finally, it's worthy to note that there is no one-size-fits-all solution with respect to the design and content of these laws. The above-mentioned IFES recommendation indicates that standards applied in developed countries may not be enforced in developing countries due to limited fiscal, health, technological, and legal infrastructure.[109] Yet, an

[108] Erik Asplund and Olufunto Akinduro, The COVID-19 Electoral Landscape in Africa, *IDEA Commentary*, (19 July 2020) available at https://www.idea.int/news-media/news/covid-19-electoral-landscape-africalast accessed on 30 April 2023.
[109] *Supra* at 74.

appropriate, transparent, accountable, and trusted regulation of holding an election under such situations is required in all systems. Many of these requirements can be unaffordable, and it may not be sinful for election emergency laws in developing countries to provide instances of postponing elections until a time when the threat of emergencies has dissipated.

3. Constitutional Issues Arising from Postponing Election 2020 in Ethiopia

Postponing elections and the resultant constitutional issues had not been major worries in the last five Ethiopian election rounds. In 2020, the NEBE declared it could not carry out electoral activities because of the COVID-19 pandemic and restrictions, leading the HPRs to approve postponing the sixth-round election indefinitely.[110] This decision, however, was not a simple deferral; rather, it had the effect of modifying the rigid constitutional provision on the election period and terms of the government. Under the FDRE Constitution, the two federal houses (HPRs and the HoF) and the executive are organized for the same five-year tenure,[111] and regional constitutions follow the same modality. Hence, the term of the parliament and government, which assumed power in September 2015, was going to end in September 2020.Apart from this, Art. 58(3) of the FDRE constitution boldly requires elections to be held every five years and, at the latest, a month before the expiry of the term of the incumbent Parliament. Yet, the FDRE Constitution, which requires periodic elections and defines the term of the parliament, falls short of dealing with emergencies. Further, while this same constitution foresees the possibility of pandemics and provides for the

[110] *Supra* at 32.
[111] FDRE Constitution, Article 53.

declaration of SoE, it does not anticipate the simultaneous occurrence of such emergencies with the time when the five-year general election is to take place. This has sparked a constitutional and legal crisis as well as grim political questions.

The questions were whether the decision was made after proper consideration of public health and legal issues and whether the possibility of holding elections amidst COVID-19 was properly assessed. These questions require an empirical assessment of the procedure that the board and the HPRs went through to postpone election 2020 in Ethiopia. Some political parties and scholars contended the executive was already behind the reschedule and postponing the election had posed a danger to the federal system and worsened the political tension.[112] Moreover, the legality of the decisions is questionable, for the country has no election emergency law that regulates the fate of elections during emergencies or determines which organ of government has the power to decide on the fate of elections, under what conditions, when, and how.

An important legal question here is how the HPRs got the power to postpone the election given the silence of the constitution and the election proclamation. Some argue that what the Electoral Board and the Parliament did is mere consent to the cessation of administrative tasks and do not rule on the fate of the election in 2020.[113] However, one cannot rule out the fact that the HPRs created power for themselves to postpone the election. This fact is clear from the statement 'the parliament has postponed the election as per the proposal of the NEBE'

[112] *Supra* at 32.
[113] *Ibid.*

that reverberated through the private and government media alike.[114] Moreover, the decision has the effect of postponing election 2020 and expanding government powers. In this regard, the search for alternatives within or outside the constitution is spurious while the HPRs have already hammered the final nail in the coffin of election 2020.

Secondly, the NEBE's decision and the HPR's approval had put the country between two unbearable options: a state with no government (if it stepped down as its term ends) or an unconstitutional and illegitimate government (if the incumbent stayed in power). In addressing this dilemma, the government, politicians, and scholars in the field have suggested several alternative options within the constitutional framework: dissolution of the house, declaration of a state of emergency, constitutional interpretation, or constitutional amendment.[115] Others seek extra-constitutional options such as prior political dialogue and establishment of a transitional government for different reasons.[116] This section briefly assesses the feasibility, legality, and legitimacy of these options to postpone elections during emergencies and illuminates ways to alleviate problem of power vacuum under such situations.

[114] For example, Capital on 3 May 2020, France24 on 31 March 2020, World Politics Review on 3 April 2020 and The Africa Report on 25 May 2020 are some of the major domestic and international media that published the issue of postponement. Scholars such as Adem Kassie and Zemelak Ayitenew also used the same terms. See generally, Adem Kassie Abebe, Ethiopia's Postponed Elections: Governing in the Interregnum, *The IDEA Commentary*, 2020; Zemelak Ayitenew, Federalism and the COVID-19 crisis: The Perspective from Ethiopia, *Forum of Federations*, 2020.

[115] *Supra* at 24.

[116] *Supra* at 29.

3.1 Dissolution of the Parliament

Dissolution of the Parliament is one of the options inferred from the constitution. The FDRE Constitution provides the possibility of dissolution of the house before the expiry of the five-year term by the Prime Minister (head of government) so that a new election can be held after the President (head of state) invites political parties. It's also common for other parliamentary democracies (such as the UK, Australia, the Czech Republic, India, and Canada) to provide for a premature dissolution of parliament for political need (for example, during times of crises or instabilities) or political opportunity (for example, when politicians find them opportune for partisan or personal reasons) in addition to the automatic (*per legem)* expiration of the term.[117] This option is considered during emergencies because it allows the incumbent government to serve as a caretaker until a new election is held and, in effect, block a power vacuum.[118]

The question, however, is whether such an option is viable and lawful during emergencies, where the situation needs a strong government. In other words, emergencies would get problems at hand worse for the interim government is authorized only for acts of management.[119] Moreover, the grounds to initiate dissolution are not statutorily stipulated, and emergencies such as COVID-19 can be considered insufficient. The other concern is that the intention of Article 60 is to end the term of office of a parliament before it ends *per legem*, not to extend the terms. It's also worth noting that it would set a bad precedent

[117] Kaare Strøm and Stephen M. Swindle, Strategic Parliamentary Dissolution, *The American Political Science Review*, Vol. 96, No. 3, (2002), pp. 575-591.
[118] FDRE Constitution, Articles 60 (3-5).
[119] See for Example, Elliot Bulmer, *Dissolution of Parliament*, The International IDEA Constitution-Building Primer 16, (2nd edn.) (2017), p. 12.

for politically motivated dissolutions in the future. Therefore, given these challenges and concerns, the use of the "dissolution of house" to disentangle election emergencies might be illogical and unworkable.

3.2 Declaration of State of Emergency (SoE)

Declaration of a state of emergency is the other option that can be considered to manage problems associated with election emergencies. This is considered with the assumption that SoEs are declared to manage emergencies, including election emergencies, and, *ipso facto*, suspends the normal functioning of government including election and the rights of citizens including the right to elect and be elected.[120] Declaration of SoE is one of the common practices to postpone elections in other countries even without election emergency laws.[121] Ethiopia declared a five-month SoE in response to the COVID-19 pandemic,[122] and some suggest that the government can use it to postpone elections and mange a constitutional crisis. Its importance is clear as it allows the government to continue exercising legislative, executive, and judicial powers (though reduced) and avoids governance fissures.

Yet, the issue at hand is whether the declaration of SoE can act as a practical resolution to postpone an election and address the constitutional crisis and power vacuum following emergencies. To go into this assessment, let us see the legality dimension. There seems to be no legal problem with the declaration of SoE as the Constitution

[120] See for example, ICCPR, Article 4(1); FDRE Constitution, Article 93. In Ethiopia, rights under articles 1, 18, 25, and 39 (1 & 2) have a non-derogable status while other rights can be suspended to the extent necessary to avert the condition that required the declaration of a SoE.

[121] *Supra* at 24.

[122] See Proclamation No. 3/2020.However, the election postponement by the federal governments was not legally associated with the SoE.

explicitly provides for such declarations when emergencies such as external invasion, a breakdown of law and order, a natural disaster, and an epidemic occur.[123] However, the problem is that the issuance of SoE is not well intertwined with election emergencies. In other words, both Article 93 of the Constitution and the SoE declaring the Proclamation are silent about issues of election. Furthermore, postponement through SoE could be politicized as self-serving decisions, which, in turn, may threaten legitimacy and attract conflicts, as is the case in post-2020 times. In fact, the country has no good records with SoE declared, especially after 2015,[124] which, according to several studies, suffered from gaps in the design and enforcement.[125] Extending power through SoE may also set a bad precedent in the political and legal landscape. Therefore, one could not see healthy fruits out of the declaration of emergency to postpone the election.

3.3 Constitutional Amendment

Many scholars recommended constitutional adjustment through amendment to unravel the 2020 constitutional crisis and effectively postpone the election.[126] The FDRE Constitution provides for substantive and procedural requirements for a constitutional amendment (under Articles 104 and 105), and some scholars, such as Bantayehu consider it as simple (like inserting an exception clause in the pertinent provision) and the safest remedy that avoids the risk of illegality or

[123] FDRE Constitution, Article 93 (2 & 3).
[124] Proclamation No.1/2016 and Proclamation No.2/2018.
[125] See Human Rights Watch, Legal Analysis of Ethiopia's State of Emergency, 2016 Available at http://www.hrw.org/report/2016 (last viewed on 12 May 2020) See also Amnesty International, Commentary on Ethiopian State of Emergency, (2018) available at https://www.amnesty.org/download/Documents/AFR_2579822018ENGLISH.PDF last accessed on 30 April 2023.
[126] *Supra* at 24.

unconstitutionality. However, this cannot be a panacea when it comes to the implementation.

First of all, amending a constitution in contention *ab initio* is not an easy and timely job in times of emergencies. It's good to note that the FDRE Constitution suffers from polarized views and a serious lack of legitimacy attributed to a constitution-making process that was not inclusive and also to the subsequent lack of integrity and vitality in the constitutional system.[127] Secondly, the procedural and substantive requirements for valid constitutional amendment are difficult to get to while the country is under SoE and the looming menace of emergencies such as COVID-19. Public consultations required under Article 104 and parliamentary deliberations at regional and federal levels required under Article 105 would contravene precautionary measures for emergencies. For example, it violates the SoE law declared for the COVID-19 pandemic. Moreover, the process may lack public trust. One would find this claim convincing given the party pressures and poor record of constitutional amendment in the country.[128] Finally, the constitution has

[127] Gedion T Hessebon, The Precarious Future of the Ethiopian Constitution, *Journal of African Law*, Vol. 57, No. 2 (2013), p. 227; See also Zelalem Eshetu The Scope and Limitation of the Amending Power in Ethiopia: Thinking beyond Literalism, *Mekelle University Law Journal*, Vol. 4, (2016), p. 16. Some political parties and other actors associate the Constitution with the TPLF agenda of Ethnic Federalism and then struggle for its revolutionary change, and those who sense of having an exclusive ownership on it struggles for its preservation and consider the Constitution as a sacred and untouchable document for a democratic order to usher, rights respected and ethnic-based oppression stalled.

[128] *Ibid* Zelalem Eshetu; Mequanint Dubie, Amendment of State Constitutions in Ethiopia in Comparison With Other Federations, LL.M Thesis, Ethiopian Civil Service University, (2015); Nigussie Afesha, The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application, Mizan Law Review, Vol. 10, No. 2, (2016). The poor record of constitutional amendment is well reflected from article 98 and 103 (2) of the FDRE Constitution as well as informal constitutional amendments.

to be protected from short-sighted and partisan amendments to extend the term limit of a single party, and such *ex post facto* amendments of laws may set a bad precedent. Hence, the quest for a constitutional amendment during emergencies seems not a feasible way out.

3.4 Constitutional Interpretation

Constitutional adjustment through interpretation is one of the alternatives to deal with election emergencies and subsequent constitutional crises.[129] The FDRE Constitution provides for constitutional interpretation by the HoF with the technical assistance of the Council of Constitutional Inquiry (CCI).[130] Scholars and politicians therefore argued that the constitution is 'a living document that provides safety valves to sustain the polity and protect it from collapse caused by its silence on certain matters,' and the involvement of experts in the CCI enhances the legitimacy, expediency, and nationwide applicability of the option in the face of the election emergencies.[131] Accordingly, the government also opts for constitutional interpretation, and the HoF, upon the recommendation of CCI and *amicus curiae* from experts in the

[129] FDRE Constitution Articles 62 and 83.

[130] See A Proclamation to Define the Powers and Functions of the House of the Federation, No 1261/2021, *Federal Negarit Gazetta*, (2021); A Proclamation to Re-Enact for the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia Proclamation No. 798/2013, *Federal Negarit Gazetta*, (2013). In particular, Article 3(c) of Proclamation No. 798/2013 provides that constitutional disputes on non-justiciable matters may be submitted to the CCI by one-third of members of the federal parliament or a regional council, or by executive organs at either tier.

[131] Mamo Mihretu, A Constitutional Path Towards Political Normalization, *Ethiopian Insight*, (2 May 2020) available at https://www.ethiopia-insight.com/2020/05/02/a-constitutional-path-towards-political-normalization/ last accessed on 30 April 2023; Abebe Abebayehu Crisis Looms Large but We Must not Forfeit Constitutionality, Strong State, *Fortune*, (2 May 2020) available at https://addisfortune.news/crisis-looms-large-but-we-mustnt-forfeit-constitutionality-strong-state/ last accessed on 30 April 2023.

field, provides an interpretation that extends the terms of the government up to 12 months.[132]

However, critics argued that applying constitutional interpretation for the problem is conceptually defective and what the government pursues is an unconstitutional attempt to stay in power.[133] It was, particularly, argued that the constitution is clear and the interplay of Article 93 with Articles 54(1) and 58(3) does not necessarily call for interpretation. Others also mentioned that no dispute had called HoF for adjudication.[134] This emanates from the confusion on what constitutes

[132] The main issue that was submitted to the HoF from the Parliament was: In light of the State of Emergency Proclamation Enacted to Counter and Control COVID-19 and Mitigate its Impact, Proclamation No. 3/2020, what do Articles 54(1), 58(3) and 93 of the Constitution indicate regarding the duration of the terms of office of the parliaments and executive organ? The HoF stated the textual reading of Article 58(3) of the Constitution implies the contingency of the Parliament's five-year term on whether an election is held at least a month before the expiry of the term, and the purposive reading of Article 93 of the Constitution indirectly recognizes that the incumbent government's term limit may exceed five years. It also held that the mandate of the regional councils and executive bodies shall also be extended as that of the federal parliament and government because election matters are federal issues. Finally, it gives the Federal Ministry of Health (FMOH) a central role in determining when the countdown to the upcoming elections date will begin.

[133] Jawar Mohammed, Opinion: Ethiopia's Impending Constitutional Crisis And Why We Need A Political Solution, *Addis Standard*, (3 May 2020) available at http://addisstandard.com/opinion-ethiopias-impending-constitutional-crisis-and-why-we-need-a-political-solution/ last accessed on 30 April 2023; Wondwossen Demissie, House of Federation should consider rejecting request for constitutional interpretation, *Ethiopia Insight*, (14 May 2020) available at https://www.ethiopia-insight.com/2020/05/14/house-of-federation-should-consider-rejecting-request-for-constitutional-interpretation/(Last last accessed on 30 April 2023; Mulugeta Aregawi, There's Only One Winner When Legislation Clashes With The Constitution, *Ethiopia Insight*, (12 May 2020) available at https://www.ethiopia-insight.com/2020/05/12/theres-only-one-winner-when-legislation-clashes-with-the-constitution/ last accessed on 30 April 2023.

[134] Some overemphasis on terms such as "…constitutional disputes ..."under Article 83 and "… contested as being unconstitutional …" under Article 84(2), and the reading of Proclamation No. 250/2001 and Proclamation No. 798/2013, seems to

constitutional disputes and constitutional interpretation. The power of dealing with these two issues is vested in HoF as read from Article 62(1) and Article 84(1).[135] There is no room to fall in the ambit of any institution, for example, the courts or HPRs. Further, there can be issues with the independence of HoF because it's a political chamber controlled by a single party.[136] In effect, HoF sitting to decide the fate of government means that it judges its own case in emergency situations. Given such contentions, it is difficult to employ constitutional interpretation as a viable solution to postpone elections and deal with associated constitutional problems.

3.5 Inclusive Political Dialogue and Transitional Government

Undertaking inclusive political dialogue and establishing a transitional government could be seen as a way to address the issue of a constitutional crisis arising from postponing elections.[137] In the

refer to a real case controversy and adverse parties, and the latter does not recognize the concept of a 'constitutional gap' as a basis for constitutional interpretation. For example, Article 62(1) of the FDRE Constitution and Article 3(1) of Proclamation No. 798/2013 do not recognize or specify a constitutional gap as a ground for constitutional interpretation.

[135] Assefa Fiseha, Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience, *Netherlands International Law Review*, Vol. 52, No. 1 (2005) p. 13.

[136] Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (Hof), *Mizan Law Review*, Vol. 1 No. 1, (2007), pp. 1-32. Broadly speaking, one can see two patterns regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. The practice of constitutional interpretation in Ethiopia follows a different pattern. FDRE Constitution, the preamble, Article 8 and 39(3) cum. Art. 61(1) and Article 53.

[137] See also Yossi Shain and Juan J. Linz, The Role of Interim Governments, *Journal of Democracy*, Vol. 3, No. 1, (1992), pp. 73-79; Jennifer C. Seely, The Legacies of Transition Governments: Post-Transition Dynamics in Benin and Togo, *Democratization*, Vol.12, No.3, (2005), pp.357–377. Transitional or interim government is a type of government formed with the consent of political forces in a

literature, forms of national dialogues have been used as an instrument to resolve deep political crises and ensure genuine political transitions. Following the crisis that happened with the postponing of election in 2020, politicians and scholars, particularly those who consider all the above options as legally and politically defective, propose the need to rethink out of the box of the constitution. This group stresses the importance of forming an interim government and holding a nationwide political dialogue to effectively tackle not only electoral problems but also other national political hurdles. For them, the problem is more political than legal, and all legally registered political parties are equally responsible for the problem at hand, and with the existing legitimacy deficit and decline in a monopoly of violence, the government should not be the sole decision-maker.[138] Yohannes and Marew argued that 'the constitution, which is the mother of all ills, cannot be relied upon as a supreme legal document, nor can it assist the country in times of crisis,' and 'as the legal roads closed, a transitional government should take the wheel.'[139]

country (not by-election) with a defined transitional mandate. It is associated with the cases of new nations or the collapse of the existing regime, and the key role of the transitional government is not power sharing but guaranteeing true transition through peace talks, political participation, institution-building, and transitional justice.

[138] Jawar Mohammed, *supra* at 133.

[139] Yohannes Woldegebriel, Confronting the Nightmare Posed by the FDRE Constitution, *The Reporter*, (2 May 2020) https://www.thereporterethiopia.com/article/confronting-nightmare-posed-fdre-constitution last accessed on 30 April 2023; Marew Abebe, With Legal Roads Closed, A Transitional Government Should Take The Wheel, *Ethiopia Insight*, (26 May 2020) available at https://www.ethiopia-insight.com/2020/05/26/with-legal-roads-closed-a-transitional-government-should-take-thewheel/?fbclid=IwAR1or2uTzqF0LnzWIMZX5BbaVxmx2ExWHREcxY X2f-NA3IogcoqP2WpC0fY last accessed on 30 April 2023.

However, one would see that this option is not viable as it seeks to attain a broad goal of healing all political ills of the country in times of narrow spaces for public participation and resources mobilization for the desired end.[140] Moreover, conducting inclusive dialogues and the formation of an interim government requires the consent of political forces and is difficult to achieve during emergencies, particularly in situations like Ethiopia with polarized views.[141] Most importantly, given the constitutional emphasis on election as the sole source of power, the attempt to assume power through consensus may not have constitutional backing or, at least, set a bad precedent.[142] All put together, political dialogue and the formation of a transitional government are not feasible way outs for dealing with election issues under those situations.

4. Legal and Administrative Issues in Holding Elections in Emergencies

As mentioned in the introduction section, there were significant voices that opposed the government's decision to postpone the election as a major setback for the democratization process and argued for holding the election in 2020 amidst COVID-19. Opposition political parties, in particular, accused the government of stalling elections through indefinite postponement and in defiance of its general duty to manage emergencies, protect citizens, and conduct the election as planned. Other interest groups had also exploited the absence of election emergency laws and subsequent constitutional crisis to advance their positions in

[140] Messay Kebede, On Transitional Government and Ethnic Federalism, *Ethiopia Observer*, (3 August 2018) available at https://www.ethiopiaobserver.com/2018/08/03/on-transitional-government-and-ethnic-federalism/ last accessed on 30 April 2023.
[141] Jennifer C. Seely, *supra* at 137.
[142] FDRE Constitution, Article 9(3).

the name of holding the election, similar to what happened with the postponement.

The TPLF, a political party based in Tigray, which had dominated Ethiopian politics for decades prior to 2018, announced a plan to conduct a regional election. Shortly after, the regional government enacted new regional election laws and organized an electoral commission in preparation for the regional election.[143] Further, this party, which was disbanded from the EPRDF coalition, conducted this election on September 9, 2020, in defiance of the federal government's decision to postpone national and regional elections.[144] Those who support the regional election resorted to the rights of the electorate and the right to self-determination stipulated under the FDRE Constitution.[145] However, numerous political actors, including the federal government, view the regional government's election activities as an acute threat to the stability, if not sovereignty, of the country.[146]

[143] Kjetil Tronvoll, Voting for War, to Secure Peace: Weaponising the Tigray 2020 Election in Ethiopia, The *Journal of Modern African Studies*, Vol. 62, No. 1, pp. 53-77; Mulugeta Gebrehiwot, Tigrai's Elections: Test of Ethiopia's Federal Democracy, *African Arguments*, (15 October 2020) available at https://africanarguments.org/2020/10/tigrais-elections-test-of-ethiopias-federal-democracy/ last accessed on 30 April 2023; Markos Debebe, Ethiopian Regions Cannot Hold Elections Without Federal Approval, *Ethiopia Insight*, (5 May 2020) available at https://www.ethiopia-insight.com/2020/05/05/ethiopian-regions-cannot-hold-elections-without-federal-approval/ last accessed on 30 April 2023.

[144] *Supra* at 32.

[145] FDRE Constitution, Articles 38 and 39.

[146] Mehret Okubay, The newly legislated regional election law of Tigray Regional State has stipulated that the highest body of appeal for regional elections is the regional cassation bench, *Addis Fortune*, (13 July 2020) https://addisfortune.news/council-mandates-regional-cassation-bench-preside-over-elections-appeal/last accessed on 30 April 2023. The HoF declared the election as "null and void," and the Prime Minister publicized the election as an illegal 'shanty election'. Later, the HPRs decides that the federal government should cut off

The NEBE and scholars in the field also rejected this regional move as against the constitution, which mandates solely the federal government to enact laws on the election and political parties (Article 51(15) and (55) (2) (d)) and the NEBE to administer elections nationwide (Article 51(15) and 102). Moreover, these pragmatist views also remind the obligations of federating units to respect the powers of the federal government (Articles 50 (8) and (9)) and the constitutional interpretations by HoF upon the CCI's recommendations. As mentioned above, the constitutional interpretation already extended the mandate of the incumbent at the federal and regional level, nine to twelve months after COVID-19 -19 is declared no more a public health threat-based on sound reasoning.

Evidently, there are only federal laws on the election and issues of political parties (i.e., Proclamation No. 1162/2019 and a federal institution established through Proclamation No. 1133/2019. A cumulative reading of Article 4 (2), 7 (2), and 8 (4) of Proclamation No. 1162/2019) confirms that elections shall be conducted throughout the country simultaneously, and a regional election would have no legal effect if it contradicts the federal election law and practice. Therefore, those acts of enacting regional election laws and organizing electoral bodies by the Tigray Regional State were blatantly unconstitutional. This situation, coupled with the two years of tit-for-tat, had put the country on a different political trajectory, including the outbreak of armed conflict between the federal and the Tigray regional governments. The war had lasted for two years and taken the lives of hundreds of thousands, displaced millions, and seriously aggravated the country's already disastrous humanitarian situation. Some analysts

contact with the deemed illegal regional government and continue to work with local institutions in providing basic services to the people.

also recognize it as a *sine qua non* for instabilities and conflicts in other parts of the country, including on-going conflicts in the Oromia and Amhara regions.[147]

Later, the federal parliament approved a proposal to hold the 6th general election after hearing the recommendation of the Ministry of Health (MoH) to conduct an election under special conditions in light of the previous HoF decision. This was highly criticized by those who believe that the previous decision to postpone the election is unconstitutional and there would be no legitimate federal government in Ethiopia thereafter. However, despite the concerns, the country conducted its 6thnational election on 21 June 2021. The NEBE conducted the 6th national and regional elections while the transition and impacts of the COVID-19 pandemic were not over yet and where the country was still plagued by civil wars and conflicts, including the disastrous northern Ethiopian war.

Both the Tigray region and federal government claimed to have conducted the election by taking every necessary precautionary measure to mitigate the transition and impact of the pandemic. In particular, the NEBE issued a directive that regulates and reduces the spread of COVID-19 during elections.[148] The points outlined in the last paragraphs illuminate the different legal and political questions following the holding of election by the Tigray regional state and the federal government. In the Tigray region, there was no evidence

[147] Atrsaw Necho and Yared Debebe, Briefing Paper: Understanding the Fano Insurgency in Ethiopia's Amhara Region, *Rift Valle Institute*, (1 February 2024), https://riftvalley.net/publication/understanding-the-fano-insurgency-in-ethiopias-amhara-region/last accessed on 30 December 2024.

[148] የኢትዮጵያ ብሔራዊ ምርጫ ቦርድ፣በምርጫ ወቅት የኮቪድ-19 ስርጭትን ለመቀነስ የወጣ መመሪያ ቁጥር 9/2013 (Directive No. 9/2020).

showing that the pandemic was checked as "no more a health threat"; rather, the virus was expanding. Similarly, the contentious recommendation by MoH did not say that the COVID-19 pandemic is no longer a public health, threat and, in fact, COVID-19 cases and deaths had shown an increasing trend. Moreover, the different parts of the country like Tigray, Amhara, Afar, and Oromia regional states, were either within an active war or with the grave impacts and threats of the war and conflicts. This is why the ballot was postponed in many areas of the country, including the Tigray and Oromia regions. Be that as it may, the NEBE conducted the sixth national and regional elections while the country was in SoEs due to COVID-19 and the Northern war.

The most important question of all this is whether these elections were conducted as per predefined election emergency laws that provide for necessary precautionary measures and standards to ensure the credibility of the election. Given that both elections were conducted amidst the COVID-19 pandemic, the election process is so risky to poll workers, voters, observers, and other partakers. Thus, election management bodies should have planned for a significant shift in the registration, balloting, and election disputes settlement systems unprecedented in the electoral history of Ethiopia.[149] It is obvious, for example, that election administration activates under Proclamation No. 1162/2019 such as establishing constituencies (Art. 13) and polling stations (Art. 15), voters registration (Arts. 18-21), distribution and handover of documents (Art. 23), closure of the electoral roll (Art. 25), displaying the electoral roll to the public (Art. 26), registration of complaints (Art. 27), cancellation of registration (Art. 28), registration and announcement

[149] Nathaniel Persily and Charles Stewart, III, Ten Recommendations to Ensure a Healthy and Trustworthy 2020 Election, *Law Fare*, (19 March 2020) available at https://www.lawfareblog.com/ten-recommendations-ensure-healthy-and-trustworthy-2020-election last accessed on 30 April 2023.

of candidates with symbols (Arts. 30-42), conducting an election campaign through media (arts. 43-46), managing voting process including security issues (Arts. 47-56) and vote counting and the announcement of results (Arts. 57-62) are designed to be applicable under the normal course of processes and no exception is provided for emergencies. The regional election law of Tigray Regional State is also similar in content.[150] Thus, the federal government and the Tigray Regional State should have enacted separate election emergency laws that set standards and requirements necessary to protect the safety of election participants and the trustworthiness of the election. For example, as the experience of other countries in Section Three depicts, election management bodies are supposed to implement online and postal balloting systems or strict observance to rules of social distancing and other precautionary rules when in-person voting is compulsory.[151] These are most lacking in the two elections for capacity and funding reasons as well as the absence of regulatory frameworks.

In this regard, it is worth mentioning here that the NEBE had adopted a directive with the aim of reducing the spread of Covid-19 in conducting the election,[152] and the same was announced by the Tigray regional election commission.[153] The directive and the press release, for example, required wearing of masks and gloves, the use of sanitizers, the maintenance of social distancing, the use of one's own pens, and caution in painting on thumbs and others to be adhered to during registration, campaigning, and polling.[154] These standards were not adequately

[150] See generally Kjetil Tronvoll, s*upra* at 143.
[151] *Ibid.*
[152] The National Election Board of Ethiopia, Directive No. 9, 2020, Article 6.
[153] *Supra* at 32.
[154] *Ibid.*

implemented for, among others, enforcing the protocols resulted in significant additional costs of the election, and elections were highly politicized and hurried.[155] The most critical problem in this respect is the lack of a general election emergency law, and such attempts to enact a directive or a guideline have no adequate legal foundation. The issues of conducting elections were neither stipulated in the constitution or election laws of the country nor by a state law with this purpose. To this end, the following section proposes a framework for election emergency laws in Ethiopia.

5. A Proposal Framework for Election Emergency Laws in Ethiopia

The scenarios explored and multi-dimensional analysis made across earlier sections clearly suggest an imperative need for establishing a legal framework strong enough to address unforeseen emergencies threatening the electoral process and stability of public governance. Particularly, as stated in Section Three of this article, countries with a clear constitutional and legal framework are able to effectively handle election emergencies. Conversely, those without such structures struggle to determine whether to hold or postpone elections, as well as how to hold elections during emergencies. Such countries are also exposed to constitutional crises and a looming power vacuum due to election postponement or holding of elections. Countries such as the USA, France, Kenya, India, and the UK successfully manage election emergencies through a combination of clarity in constitutional provisions, electoral laws, and emergency regulations.

However, as outlined in the earlier sections, the FDRE Constitution and election laws of the country do not specify who determines or how to

[155] *Ibid.*

postpone or conduct an election during emergencies. This situation cost the country and its people a significant political, economic, and social crisis. Therefore, it is important to draw lessons from other systems to deal with such situations in the future. As the first move to this effect, it is recommended to amend the FDRE constitution to incorporate holdover clauses or election emergency provisions.[156] This should be accompanied by amendments to the election laws of the country regulating election emergencies and safeguarding democratic rights. In other words, "a proposed framework for election emergency laws in Ethiopia" does not suggest a standalone election emergency law; rather, it can be incorporated as part of the existing election law. The amendment, however, should outline the key components of election emergency laws designed to ensure that elections are either effectively postponed or held without compromising the safety and rights of voters and other participants and the integrity of the election. On the basis of such national election law, additional legislation like regulations or directives can be issued depending on specific situations and emergencies.

The amendments in the national election proclamation should address key components of election emergency laws.[157] The first key component is the definition of an electoral emergency. The law should clearly define what constitutes an "electoral emergency," including natural disasters, public health emergencies, security threats, and significant

[156] The clause can be inserted in Article 93 in agreement with Articles 53 and 58 of the FDRE Constitution.

[157] The current electoral and political parties registration and election's code of conduct proclamation (No. 1162/2019) is divided into nine parts and 164 articles. A part can be added to regulate election emergency situations or incorporate election emergency rules.

disruptions, and establish criteria for determining when an emergency is too severe to trigger the activation of emergency election laws.

The second key issue relates to the emergency election authority of the NEBE. Designating a specific body with the authority to seek the declaration of an electoral emergency is important to independently examine and propose circumstances for either holding or postponing elections during emergencies. The law should indicate who shall decide to hold or postpone and outline the process for declaring an electoral emergency, including consultation with relevant stakeholders, such as government officials, political parties, and civil society organizations. Thirdly, the law may specify guidelines or procedures to be followed in cases of postponing or holding elections for emergencies. For example, in cases of postponing, it may provide clear guidelines to ensure decisions are transparent, justified by the circumstances, made with input from key stakeholders, and clear timelines are established. In cases of holding elections, the law may provide procedures for alternative voting methods, protection of voter rights, public communication and transparency, security and fraud prevention, legal recourse and dispute resolution, and post-emergency evaluation.

Regarding the first issue, the law may authorize the use of alternative voting methods in the event of an emergency, such as mail-in ballots, early voting, extended voting periods, or online voting, depending on the nature of the emergency, along with protocols to ensure the security, accessibility, and integrity of the methods. The law may also set out the need to ensure that alternative voting methods are available to all eligible voters, including those in remote areas, with disabilities, or otherwise disadvantaged. Further, implementation rules to protect the rights of voters during an emergency need to be devised. These rules may include special provisions for vulnerable populations, such as the

elderly, disabled, or those in emergency shelters. Protection of voter rights also implies the need to ensure that voters are informed of any changes to voting procedures, locations, or times through comprehensive public communication campaigns, and the voter identification and registration processes are maintained, with adjustments made as necessary to accommodate the emergency situation.

These laws shall also introduce enhanced security measures to protect the electoral process from fraud, manipulation, or interference during an emergency, such as strict oversight and monitoring mechanisms or penalties for individuals or entities. The integrity of the election can be further protected by mandating transparent, regular, and timely communication from election authorities regarding any changes to the electoral process and decisions during an emergency. Yet, it is important to note that, despite all these efforts, election disputes can be inevitable, and the laws shall devise legal recourse and dispute resolution mechanisms. In other words, the law shall provide legal avenues and expedited procedures for challenging decisions made under emergency election laws, including the postponement of elections or the use of alternative voting methods. Finally, the law may provide for post-emergency evaluation, which requires a comprehensive evaluation of the electoral process following an emergency, including an assessment of the effectiveness of the emergency election laws. This may encourage public feedback on the emergency process and help make necessary adjustments to the laws, ensuring that future emergencies are better managed.

6. Concluding Remark

In Ethiopia, neither the constitution nor other legislation anticipates emergencies during election times or elections during emergencies. The laws in place do not address associated legal questions such as when and how to postpone or hold elections, who shall decide, and who shall govern the country if elections are postponed during the interim period. While the impact of such gaps in the pertinent laws had not materialized into major problems in the first five rounds of elections held in the country, they caused substantial crisis in the six the election. The sixth election (Election 2020) which was surrounded by attendants of the COVID-19 pandemic left the country in a constitutional limbo and created a hub of serious legal and political questions. Politicians and scholars have been in constant indictment of one another for using the constitutional conundrum for a power grab, overlooking the imperatives of fighting the pandemic, consolidating democratic governance, and ensuring the continuity of a strong and effective state.

The article thus addresses why and how election emergency laws remain essential in Ethiopia by thoroughly analysing the notable gaps evident in three key incidents: the election postponed by the federal government, the election held by the Tigray Regional Government, and the election conducted by the federal government. It examines various proposals and their theoretical and practical defects, as well as how these have led to unnecessary politicization, uncertainties, and disagreements that further damage the already poor record of elections, democracy, and government legitimacy in Ethiopia. Finally, an attempt is made to review how other countries significantly mitigate the negative effects of holding or not holding scheduled elections through constitutional and legal mechanisms.

It is argued that governments' choice to hold or postpone elections amid emergencies requires an election emergency law and proposes an amendment to the constitution to incorporate holdover clauses and Proclamation No. 1162/2019 to include a separate part addressing election emergency rules. This would help the NEBE conduct credible and legitimate elections and, if not, effectively and promptly postpone elections and prevent a power vacuum. By establishing a clear legal framework that addresses the unique challenges posed by emergencies, this proposal aims to ensure that democratic processes are preserved, voter rights are protected, and public trust in the electoral system is maintained. The implementation of these laws will provide election authorities with the tools and flexibility necessary to navigate emergencies while upholding democratic principles

Trade Unionism in the Ethiopian Industrial Zones: Bahir Dar Industrial Zone in Focus

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Abstract

Freedom of association of workers is expressly recognized as a human right in national, regional, and international human rights instruments. International Labour Organization (ILO) instruments, most notably Convention 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on the Right to Organize and Collective Bargaining, expressly recognize workers' freedom of association. Though Ethiopia recognizes freedom of association of workers, the country's trade unionism movement is quite restricted in practice. This study explored the trend of workers unionization in Bahir Dar Industrial Zone. To attain the goals of the study, normative and empirical data were generated through evaluation of legal documents, relevant literature review, and sustained conversations with workers, union leaders, and management of undertakings operating in the study area. The data were analyzed using descriptive and thematic data analysis techniques. The findings of the study reveal that the majority of workers in Bahir Dar Industrial Zone are not unionized due to the resistance of employers to allow workers to organize. Even the established unions fail to sufficiently protect the interests of their members due to inaccessibility of facilities, absence of cooperation on the part of employers, undue influence by employers against leaders of employees,

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limited collaboration among member workers, and low commitment on the part of union leaders. Based on such findings, the authors provide possible recommendations.

Key Words: Bahir Dar Industrial Zone, Freedom of Association, Unionism, Workers

Introduction

It is an accepted fact that unity is power. Unity has paramount importance to achieve common interests of members of a group. It gives a strong bargaining power for members of a group to negotiate with other bodies over their interests. To understand the power of unity, one should recall the Amharic proverb 'ድር ቢያብር አንበሳ ያስር'' that translates to "When spider webs unite, they can tie up a lion." This means that even the weakest persons can control the strongest if they get united. Cognizant of this, individuals in different sectors get united by establishing different forms of associations, including political and civic associations. Interestingly, freedom to associate is clearly recognized as a human right in national, regional, and international human rights instruments. At the international level, it is enshrined in Article 20(1) of the 1948 Universal Declaration of Human Rights (UDHR), Article 22 of the 1966 International Covenant on Civil and Political Rights (ICCPR), and Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] Freedom of association is also recognized under different regional human rights conventions, such as the 1950 European Convention on Human Rights, the 1969 American

[1] Mehari Redae, The Legal Framework for Trade Unionism in Ethiopia: A Historical Perspective, *Social Justice and Global Development Journal*, Vol.1, (2013), p.3.

Convention on Human Rights, and the 1981 African Charter on Human and Peoples' Right.[2]

In the context of labour relations, freedom of association is recognized in several ILO instruments, such as Convention No.87 on Freedom of Association and Protection of the Right to Organize and Convention No.98 on the Right to Organize and Collective Bargaining. These instruments exclusively deal with freedom of association in labour relations.[3]

In Ethiopia, freedom of association in general and freedom of association in the labour relation in particular are clearly recognized under the FDRE Constitution[4] and Labour Proclamation No.1156/2019 respectively.[5] Based on these laws, workers and employers in different industries establish their respective associations. The existence of workers and employers' associations helps to bargain over labour issues collectively. Collective bargaining, in turn, helps to bring "beneficial and productive solutions to potentially conflicting interests between workers and employers."[6] In effect, it helps to negotiate in good faith over the different interests of the negotiating parties[7] and to attain industrial peace.

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[2] *Ibid.*

[3] Andualem Nega *et al.*, Unionization in Industrial Park: The Case of Hawassa Industrial Park, *Hawassa University Journal of Law*, Vol. 7, (2023), p. 40.

[4] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995,Federal Negarit Gazetta, (1995), Article 31 & 42 (hereinafter, FDRE Const.).

[5] Labour Proclamation, Proclamation No.1156/2019, Federal Negarit Gazetta, (2019), Article 113 (hereinafter, Labour Proc. No.1156/2019).

[6] International Labour Conference, Freedom of Association in Practice: Lessons Learned, (2008), p. 5.

[7] *Ibid.*

Recently, Ethiopia has established different industrial parks and industrial zones in different parts of the country. Industrial park technically refers to "the particular regrouping of industrial facilities," whereas the word zone refers to "an area of land set aside for industrial facilities without the explicit purpose of facilitating or promoting the provision of common infrastructure and services."[8] So far, Ethiopia has established more than ten government and privately owned industrial parks: Bole Lemi, Kolento, Dire Dawa, Adama, Jimma, Hawassa, Mekelle, Bahir Dar, Kombolcha, and Debre Birhan industrial parks.[9] As part of this move, industrial zones are demarcated at the municipality level in different towns or cities.

Before the legal recognition of trade unions in Ethiopia, workers were organized in different locally adapted forms of associations, including *Idir*, *Equb* and *Meredaja*.[10] In the history of the country, trade unions were recognized for the first time during the imperial regime, and since then, a number of workers union have been established in different industries in the country.[11] Yet, in these courses of processes, the movement of trade unionism is very low as the movement of industrialization is a very recent phenomenon in Ethiopia.[12] Though the

[8] Selam Gebeyehu, the Challenges and Contributions of Industrial Park Development in Ethiopia: The Case of Eastern Industry Zone PLC, *Masters' Thesis*, (2017), p. 2.

[9] "Industrial Parks of Ethiopia," https://www.ethiopiatourisms.com/list-of-industrial-parks-of-ethiopia-and-its-competitive-advantage/ accessed on December 17, 2023.

[10] Mehari Redae, *Supra* note 1, p. 8.

[11] Adane Bezabih, The Formative Period of the Ethiopian Labour Movement, 1962-1974, *Policy Studies Institute*, (2022), p. 2.

[12] Andualem Nega *et al.*, *Supra* note 3, p. 30.

country is working towards industrialization, the labour rights, including the right to form associations, are much neglected and unprotected.[13]

A study conducted by Vincent Hardy and Jostein Hauge revealed that trade unionism, or collective voice, is very much limited in the Ethiopian textile and leather industries.[14] Workers have expressed their feelings only by terminating their employment contract when there is disagreement with the employer on working conditions.[15] Another study conducted by Andualem Nega *et al.* indicates that though most industries in the Hawassa industrial park have trade unions, such unions are not fully functional due to limited awareness about the role of trade unions on both the part of workers and employers.[16]

Bahir Dar city administration earmarked an industrial zone that covers a total of 922.101 hectares of land.[17] By doing this, the city is striving to expand the manufacturing sector, create job opportunities and promote exports. As of September 2023, there are 176 industries that are fully operational within Bahir Dar Industrial Zone.[18] In the Bahir Dar Industrial Zone, only 11(6%) out of 176 fully operational industries have unions.[19] A preliminary investigation into the operation of these few unions also shows that they are not effective in representing the collective interests of their members, mainly because of undue influence

[13] Mohammed Seid and Solomon Molla, Strong business–state alliances at the expense of labour rights in Ethiopia's apparel-exporting industrial parks, *African Journal of Business Ethics*, Vol. 17: No. 1, (2023), p. 2.
[14] Vincent Hardy and Jostein Hauge, Labour Challenges in Ethiopian's Textile and Leather Industries: No Voice, No Loyality, No Exit? (2019).
[15] *Ibid.*
[16] Andualem Nega *et al.*, *Supra* note 3, p. 55.
[17] First Quarter Report of Amhara National Regional State Industrial Parks Development Corporation, Bahir Dar Branch, (2016 E.C), p.15.
[18] *Ibid.*
[19] Annual Report of Ethiopian Workers Union Confederation, Bahir Dar Branch, (2015 E.C).

from employers.[20] While the subjects of unions are so critical in industrial socio-economic dynamics, such as one in Bahir Dar industrial zone, the world of worker union and the dynamics of their interaction with employers are unexplored. Except for these facts outlined earlier, there is no empirical evidence that illuminates the trend and challenges of unionization of workers in this industrial setting. Hence, this study is dedicated to filling this gap by examining the practice of trade unionism in this specific setting.

1. Concept and Significance of Trade Union

The notion of 'trade union' refers to any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workers and employers or among workers or employers, or for imposing restrictive conditions on the conduct of any trade or business.[21] As such, it is "a continuing long-term association of employees, formed and maintained for the specific purpose of advancing and protecting the interests of the members in their working relationship."[22] Workers come together under this organization to achieve common goals in areas such as working conditions and protecting and promoting their mutual interests through collective action.[23]

Trade unions have a primary objective of protecting the workers' interests against discrimination and unfair labour practices. They are

[20] *Ibid.*

[21] M. Vijay Kumar Sharma, Social Work Practice in Industrial Setting, (2010), p.9.

[22] David Card, Thomas Lemieux & W. Craig Riddell, Unions and the Wage Structure, USA, (2002), p.15.

[23] P. S. Rao, Human Resource Management (Text and Cases).1st Ed. Himalaya Publishing House Pvt. Ltd, (2010), p.15.

created for the purpose of securing economic and social welfare for their members. Also, it creates collective strength and unity that brings about guarantees to members of the association. It enables the members to fight against irrational, arbitrary, and illegal actions of employers. Members of the association can share their feelings, exchange notes, and fight the employers quite effectively whenever they go off the track. A trade union, through its leadership, bargains with the employer or the management on behalf of the union members and negotiates labour contracts, commonly known as collective bargaining.[24]

Historically, trade unions and collective bargaining enabled workers to achieve a stable working population in developed economies and empowered workers to struggle for gaining different advantages. It helped workers earn a more equitable share of the wealth that they participate in its generation, improved working conditions, and job security.[25]

Though unity is quite an important factor for the achievement of any objective aspired by a group of individuals,[26] it demands the freedom of individuals who intend to bring about a result in the stream that they want to organize.[27] Particularly, freedom within the realm of workers' unionism stands as a cornerstone of modern labour movements, embodying the rights and liberties of workers to organize, advocate, and negotiate for improved working conditions.[28] In today's globalized economy, workers' unions play a vital role in safeguarding the interests

[24] *Ibid.*
[25] *Ibid.*
[26] Ubeku, A. K. Industrial Relations in Developing Countries: The Cases of Nigeria. London: Macmillan, (1983), p. 25.
[27] *Ibid.*
[28] Munts, Raymond, Bargaining for Health: Labour Unions, Health Insurance and Medical Care Madison, WI: University of Wisconsin Press, (1967), p. 17.

of employees across diverse industries. The freedom to unionize empowers workers to address issues such as wage stagnation, workplace discrimination, and precarious employment arrangements.[29] By exercising their collective power, workers can negotiate with employers from a position of strength, striving for fair wages, decent working conditions, and equitable treatment.[30]

Freedom in workers' unionism extends beyond collective bargaining to encompass broader social and political objectives.[31] Unions often advocate for progressive policies aiming at addressing systemic inequalities, promoting social justice, and advancing workers' rights on a societal level.[32] Through political activism and community engagement, unions contribute to shaping public discourse and influencing policy decisions, thereby amplifying the voices of marginalized workers and promoting a more inclusive society.[33]

Despite its significance, freedom in workers' unionism faces numerous challenges in the contemporary landscape.[34] One notable obstacle is the rise of anti-union sentiments among some employers and policymakers, who view unions as impediments to corporate interests and economic growth. This hostility towards unionization has manifested in efforts to undermine labour rights, restrict union organizing, and erode collective

[29] Muhammad Tariq Khan, Social Role of Labour Unions, *Science Vision*, Vol. 14: No. 1, (2008), p. 6.
[30] Knowles, Caroline and Eade, Deborah (n.d.), Labour Unions and Development: An Annotated List of Selected Resources, (2008), p. 34.
[31] Muhammad Tariq Khan, *Supra note29*, p .7.
[32] *Ibid.*
[33] *Ibid.*
[34] Peter W. Jones, The Role of Labour Unions in a Changing World Environment: A Comparative Analysis, *The Economic Development Institute*, Vol. 2, (2004) p. 8.

bargaining power through legislative measures and judicial rulings.[35] In addition, the emergence of non-traditional forms of employment, such as gig work and remote freelancing, presents new obstacles to unionization efforts.[36] The transient nature of these employment arrangements, coupled with the lack of legal protections for gig workers, makes it difficult for unions to effectively organize and represent these individuals.[37] Furthermore, technological advancements and automation pose challenges to traditional union structures, necessitating innovative approaches to organizing and advocacy in the digital age.[38]

In general, freedom in workers' unionism remains indispensable to the advancement of labour rights and social justice in contemporary society. Through the historical struggles and triumphs of the labour movement, workers have asserted their rights to organize, mobilize, and demand fair treatment in the workplace. However, the journey towards achieving full freedom in workers' unionism is an on-going struggle, marked by persistent challenges and evolving dynamics in the modern economy.

1.1. Underlying Principles of Trade Unionism

Unionization stands as a foundation of modern labour movements. It embodies principles of collective bargaining, advocacy for workers' rights, and the pursuit of equitable treatment in the workplace.[39] At its core, the principle of workers' unionism emphasizes the immediate needs and grievances of its members and broader social justice

[35] *Ibid.*
[36] ILO, Productivity Improvement and the Role of Trade Unions, Workers' Education Manual, (2015), p. 36.
[37] Munts, Raymond, *Supra note*28, p. 26.
[38] Knowles, Caroline and Eade, Deborah, *Supra note* 30, p. 18.
[39] Development Cooperation Network, Trade Union Principles and Guidelines on Development Effectiveness, Appendix I - 8GC/E/11, p. 15.

concerns.[40] Early labour movements in the west laid the groundwork for workers' unionism by championing fundamental principles such as solidarity, collective action, workers' empowerment, and others. Principled workers' unionism is built upon a set of core principles that guide its actions and objectives. First, unionism adheres to the principle of solidarity, emphasizing unity and mutual support among workers. Solidarity transcends individual interests, fostering a collective consciousness and a sense of shared purpose in pursuit of common goals.[41] Second, it embraces equity and justice. Principled worker" unionism seeks to rectify systemic injustices and inequalities in the workplace. It advocates for fair wages, equal treatment, and dignified working conditions for all workers, regardless of race, gender, ethnicity, or socioeconomic status.[42] Unionism is also principally guided by the principle of collective bargaining. This principle serves as a cornerstone in the moves of the members and the institution to achieve their goals. As such, it enables workers to negotiate with employers collectively rather than as isolated individuals. Through these moves, trade unions secure tangible gains for their members, including wage increases, benefits, and workplace protections.[43]

Still another important principle in trade unionism is democratic governance. The underlying tenets of this principle hold that principled workers' unionism upholds democratic principles within its organizational structure, ensuring that decisions are made transparently and democratically. Members have a voice in union affairs, electing

[40] *Ibid.*
[41] *Id.*, p. 10.
[42] *Ibid.*
[43] ILO, the Labour Principles of the United Nations Global Compact: A Guide for Business, (2008), p.18.

leaders, shaping policies, and holding leadership accountable.[44] This principle is complemented by the ideas of social justice advocacy. Beyond the confines of the workplace, principled workers' unionism engages in broader social justice advocacy, addressing issues such as racial inequality, gender discrimination, immigration rights, and environmental justice. By aligning with other social justice movements, unions amplify their impact and contribute to the advancement of a more just and equitable society.[45]

Despite its enduring relevance, principled workers' unionism confronts a myriad of challenges in the contemporary landscape. Erosion of labour rights, precarious work, technological disruption, fragmentation and division, and political hostility are some of the major challenges that negatively affect workers unionism.[46]

In sum, the principles of workers' unionisms embody a vision of a more just, equitable, and democratic society, grounded in the principles of solidarity, equity, and collective action. As the labour movement confronts a changing economic landscape and formidable challenges, its ability to adapt, innovate, and build alliances will be critical to its continued relevance and effectiveness. By embracing these imperatives and staying true to its core principles, principled workers' unionism can remain a powerful force for social and economic justice in the 21st century and beyond.

[44] Development Cooperation Network, *Supra* note 39, p. 23.
[45] ILO, *Supra* note 43, p. 19.
[46] *Ibid.*

1.2. History of Trade Unionism

The history of trade unionism began in the 18th century in Britain and continued throughout the European industrial revolution.[47] Smaller worker associations were formed in Britain in the 18th century, but they remained irregular and short-lived for the majority of the nineteenth century, owing to antagonism from employers and the government.[48] This labour movement sought higher wages and fewer working days.[49] There was also a fight to buy labour in the cheapest market, similar to raw materials for manufacturers.[50] In the USA, the earliest worker strikes had occurred in 1768, when journeymen tailors opposed salary reductions.[51] Following the strike in 1794, Philadelphia shoemakers created the Federal Society of Journeymen Cordwainers, the first workers' union.[52] Since these events occurred, many trade unions were formed in Europe, the United States, and other continents.

In Africa, the trade union movement overlapped with the decolonization effort. Colonizing countries, notably France and Britain, advised workers in their colonies to refrain from participating in political issues and instead concentrate on economic relations by forming workers'

[47] "A brief history of unions," https://www.unionplus.org/page/brief-history-unions, accessed on 5 May 2024.
[48] "Trade Union: Definition, History, and Facts," https://www.britannica.com/topic/trade-union accessed on 18 May 2024.
[49] Sidney and Beatrice Webb, The History of Trade Unionism, 2nd ed., 1896, p. 39.
[50] *Ibid.*
[51] "The History of Unions in the United States," https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx, accessed on 18 May 2024.
[52] *Ibid.*

associations.[53] Workers' associations were formed throughout African history to protest, among other things, the "discriminatory treatment in general and discriminatory payment in particular between the foreigners and indigenous labour force."[54] Also, trade union movements were employed to combat labour exploitation and colonization.[55] After independence, most African trade unions lost their independence since they were dependent on their respective ruling parties.[56] At the end of the 1980s, trade unions struggled for independence alongside the struggle for democracy in the continent.[57] Following the fight, labour laws were amended, and industrial relations were liberalized, resulting in some significant changes in Africa's labour history.[58]

Similar to developments in other countries, the history of worker unionism in Ethiopia is closely associated with the industrial expansion of the country.[59] The introduction of capitalism into Ethiopia can be traced back to the beginning of the twentieth century, during which the then ruler, Emperor Menelik II, endeavored to bring about an industrial revolution in the country.[60] The issues of labour and capitalism began to emerge following the establishment of foreign-owned companies in the country, such as the Ethiopian-Franco Railway Company in 1889 and the Bank of Abyssinia in 1905.[61] Following the expansion of companies, workers were exploited, and their working conditions became poorer

[53] Kwasi Adu Amankwag and Kwabena Nyarko Otoo, Unity and Revitalization of Trade Unions in Africa, *International Journal of Labour Research*, Vol. 11, No. 1-2, (2022), p. 20.
[54] Mehari Redae, *Supra* note 1, p. 5.
[55] *Ibid.*
[56] Kwasi Adu Amankwag and Kwaben aNyarko Otoo, *Supra* note 53, p. 20.
[57] *Id.*, p. 21.
[58] *Ibid.*
[59] Mehari Redae, *Supra* note 1, p. 6.
[60] *Id.*, p. 5.
[61] *Ibid.*

and poorer over time. Because of this, workers started to meet and discuss their concerns.[62] As establishing trade unions and participating in labour movements were considered crimes, workers discussed their labour-related issues in social settings such as church compounds and other places.[63]

The workers struggle against capitalism in Ethiopia was started in 1943 by the workers of the Ethiopia-Franco Railway Company.[64] The workers of Ethio-Franco Railway started the labour movement in the country, demanding wage increments, reductions in daily working hours, and improvements to working conditions in the company.[65] On July 22, 1946, the workers of the Ethio-Franco Railway Company organized a labour strike at Dire Dawa.[66]

Even though there were some movements demanding an increment of wages, a reduction in working hours, paid leaves, and other labour conditions, there were no organized trade unions as such. Rather, workers use self-help social associations like Edder and Cooperative as a forum to struggle for better labour conditions. In May 1961, Abara Gamu, who was the coordinator of the cooperative association of fiber factory workers in Addis Ababa, started the initiative of establishing a nationwide self-help cooperative association of workers.[67] Fortunately, his initiative was realized, and the first national self-help workers

[62] Desset Abebe, Trade Union Rights of Government Employees in Ethiopia: Long Overdue, (2013), p. 111.
[63] *Ibid.*
[64] Yesuneh Aweke, Freedom of Association under Ethiopian Laws, *International Journal of Social Science and Humanities Research*, Vol. 6: No. 3, (2018), p.914.
[65] Mehari Redae, *Supra* note 1, p. 7.
[66] Adane Bezabih, *Supra* note 11, p. 12.
[67] *Ibid.*

cooperative association, known as "*YäIteyopiya Säratäňoče Yä Sera ena Yä Heberät Sändika,* (Ethiopian Workers' Development and Cooperative Syndicate)," was established on July 1, 1961.[68] Following the establishment of this national self-help cooperative association of workers, there was a hidden movement to form a national trade union.[69] Though the then ruler of the country, Emperor Haile Selassie, tolerated this hidden movement of forming national trade unions, the movement was not successful due to the absence of a legal basis that allowed the establishment of trade unions in the country.[70] There was some pressure on the Ethiopian government from the International Confederation of Free Trade Unions (ICFTU) to give legal permission for the establishment of trade unions in Ethiopia.[71]

In response to these movements, the Ethiopian government adopted, in 1963, Proclamation No. 210/1963, that allows the establishment of trade unions.[72] Following the promulgation of this law, about 109 trade unions consisting of 60,000–70,000 employees were established across the country within one year.[73] In addition, a national trade union known as the Confederation of Ethiopian Trade Unions (CELU) was established in April 1963.[74] However, the trade unions were not active

[68] *Ibid.*
[69] *Id.*, p. 12.
[70] Samuel Andreas, Dynamics of Assertive Labour Movementism in Ethiopia: Organized Labour, Unrest and Wages in a Socio-Historical Perspective, *PhD Dissertation*, University of Basel, p. 78.
[71] *Ibid.*
[72] Desset Abebe, *Supra* note 62, p. 111.
[73] Mehari Redae, *Supra* note 1, p. 11.
[74] *Ibid.*

and independent since the law favors employers.[75] The movement of trade unions was criticized as "weak, dormant, and inconsequential."[76]

While the imperial time sparked these spots of movements, the labour movement didn't show any improvement during the Dergue Regime, and instead, local trade unions were used as a means to propagate the socialist ideology of the regime.[77] During the era of the Dergue regime, the autonomy of trade unions was restricted; the political bodies repressed the leaders of CELU.[78] In the early 1980s, the CELU was changed to "All Ethiopian Workers Association (AEWA)," which was predominantly controlled by the ruling party.[79] In the aftermath of the fall of the Dergue Regime, the labour movement was revitalized in the early 1990s, and the Confederation of Ethiopian Trade (CETU) was re-established as a national trade union in 1993.[80]

In general, though the numbers of local unions show an increase over time, the labour movement has never been positively welcomed in Ethiopia by all successive governments.[81] There was not really an independent labour movement in the country, and rather, the labour

[75] Desset Abebe, *Supra* note 62, p. 111.
[76] Samuel Andreas, Cycles of Mobilization, Waves of Unrest: Ethiopian Labour Movement History, (2019), p.91.
[77] Desset Abebe, *Supra* note 62, p.111.
[78] "Ethiopian Labour Movement Confronts A New Era: Will it Thrive?" https://addisfortune.news/ethiopias-labour-movement-confronts-a-new-era-will-it-thrive/ accessed on April 24, 2024.
[79] *Ibid.*
[80] *Ibid.*
[81] Andualem Nega *et al.*, *Supra* note 3, p. 30.

movement "has been kept as a docile instrument of state policy by successive governments since the 1960s."[82]

Currently, movements of trade unions manifest in varying ways. Yet these movements are not seen as positive social moves on the part of the government and employers.[83] For example, the Confederation of Ethiopian Trade Unions (CETU) planned to hold a rally on May 1, 2023, to demand for regulation of the minimum wage floor in the country, an increase in the salary of workers, and improvements to other working conditions in the country. However, this rally was cancelled after incurring a huge amount of money for its preparation due to the pressure from the law enforcement officials in Addis Ababa under the pretext of security concerns.[84] Thus, this suggests that the labour movement is not welcomed, even by the current government of Ethiopia.

1.3. Legal Frameworks Governing Trade Unions in Ethiopia

1.3.1. International Legal Instruments

The right to organize is one of the fundamental rights recognized in international legal instruments. These instruments impose obligations on member states, among others, to recognize the right to freedom of peaceful assembly and association.[85] The UDHR, the cornerstone of the international legal instruments, provides that "everybody shall have the right to freedom of association and assembly so long as they freely

[82] Samuel Andreas, *Supra* note 76, p. 91.
[83] Andualem Nega *et al*., *Supra* note 3, p. 30.
[84] "Ethiopian Labour Movement Confronts A New Era: Will it Thrive?" https://addisfortune.news/ethiopias-labour-movement-confronts-a-new-era-will-it-thrive/ accessed on April 24, 2024.
[85] UDHR, Art. 20(1).

reach consensus to organize and form association".[86] This instrument presupposes free consent to organize. Human beings shouldn't be compelled to organize and assemble. Workers', as human beings, are, therefore, entitled to form associations, which are commonly known as trade union.

ICCPR similarly recognizes this right of workers. As per article 22 of this instrument, "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[87] This provision stipulates that everyone is entitled to freedom of association and other political interests. Industrial workers who are historically fighters for such rights are at the centre of the ICCPR. The covenant further inform the state parties that workers shall not be restricted to exercise this right unless it is so required for "the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others."[88] Therefore, the right to freedom of association of workers has been explicitly promoted and protected by the ICCPR.

Reflecting a similar position, the ICESCR, under Article 8, requires state parties to ensure the right of workers to form trade unions and an individual worker to join a trade union of his choice.[89] This right extends to forming and joining any national federation and confederation of workers.[90] Therefore, the right to organization of workers is sufficiently recognized under the major international legal instruments, and the workers shall exercise such right without any

[86] *Id.*, Art. 20(2).
[87] ICCPR, Art. 22 (1).
[88] *Id.*, Art. 22 (2).
[89] ICESCR, Art. 8 (1).
[90] *Id.*, Art. 8 (2).

restriction unless the restriction is prescribed by the law for exceptional grounds.

Apart from the major human rights instruments, ILO Convention No. 87, 1948, and Convention No 98, 1949, enshrine the right to freedom of association and the principle of organization.[91] The conventions, which consist of 16-21 provisions, are substantially dedicated to two interdependent rights and principles, which divulge freedom of association and organization of workers. The stipulations across the provisions promote and protect the right to freedom of association and the right to organize in any form of union. They further allow workers to form associations and organize themselves in order to realize their labour rights in the companies where they are working.[92]

As an integral extension of the convention, various ILO standards and recommendations, including Workers' Representative Recommendation No.143 (1971) and Workers' Representatives Convention No.135 (1971), were formulated. The documents recognize the principles and rights of freedom of association and organization of workers and set different standards and protections so as to realize labour rights and improve labour conditions.

1.3.2. Regional Legal Frameworks

There are different regional legal instruments recognizing freedom of association in general and the freedom of association of workers in particular. The Council of Europe, one of the institutions issuing such instruments, has so far enacted the following instruments: the 1950

[91] C87 Freedom of Association and Protection of the Right to Organize, 1948 and C98 Right to Organize and Collective Bargaining, (1949).
[92] *Ibid.*

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos.11 and 14 (Article 11); the 1961 European Social Charter as revised in 1996 (Part I/5); the 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (Articles 1-4); the 1995 Framework Convention for the Protection of National Minorities (Articles 7 and 8); the 2011 Convention on preventing and combating violence against women and domestic violence (Articles 7 and 8); the 2011 convention on preventing and combating violence against women and domestic violence (Article 9); and the Charter of Fundamental Rights of the European Union (Article 12).

The 1969 American Convention on Human Rights (Article 16), the African Charter on Human and Peoples' Rights (Articles 10 and 29), and the Arab Charter on Human Rights (Article 24) are other regional legal frameworks that deal with trade unions or freedom of association. All these regional instruments directly or indirectly incorporate the right of workers to form or join trade unions.

1.3.3. National Legal Frameworks

The issue of trade unionism was officially recognized, for the first time, by the 1955 Revised Constitution of Ethiopia.[93] The constitution recognizes workers' right to form or join occupational associations in accordance with the law. In particular, the constitution stipulates that "[e]very Ethiopian subject [has] the right to engage in any occupation and to form or join occupational associations, in accordance with the law."[94] This provision, however, was simply recognition of the right to

[93] Mehari Redae, *Supra* note 1, p. 8.
[94] The 1955 Revised Constitution of Ethiopia, Art. 47.

form an association of workers. There was not, however, any specific law that governed how workers formed or joined occupational associations until 1962. In fact, the 1957 Penal Code of Ethiopia, which was proclaimed two years after the Revised Constitution, considered the movement to form associations as a criminal act.[95]

According to Article 476 of the 1957 Ethiopian Penal Code, "whosoever founds, organizes, or commands the society, band, meetings, or assemblies forbidden, either generally or from time to time by law, by government, or by competent authority; or whosoever knowingly takes part in such activities is punishable with a fine not exceeding five hundred Ethiopian dollars."[96]

The first specific law, known as Labour Relations Decree 49/1962, was issued on September 5, 1962, granting the right to realize the constitutionally recognized labour right to form or join associations.[97] On October 2, 1963, by making some changes to this law, the decree was proclaimed as Proclamation No.210/1963.[98] These laws were a milestone for the labour movement in Ethiopia. The decree allows workers to unionize and defend their common interests.[99] The decree, in addition to allowing the establishment of trade unions, encourages workers and employers to settle their industrial disputes through collective bargaining mechanisms and provides for the establishment of a labour relations board to solve industrial disputes whenever the bargaining negotiation fails to settle the dispute.[100] Of course, though the adoption of the decree caused the establishment of a lot of trade

[95] Yesuneh Aweke, *Supra* note 64, p. 914.
[96] *Ibid.*
[97] Adane Bezabih, *Supra* note 11, p. 7.
[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*

unions, such unions were not "as strong and independent as they should have been, since the law was highly biased towards employers."[101]

This decree, however, was repealed during the Dergue regime and replaced by Proclamation No.64/1975.[102] Though this proclamation allowed workers to unionize, it didn't allow employers to form or join associations.[103] Similarly, the 1975 labour law of Ethiopia didn't bring tangible reform in the movement of trade unionism; the then military government used trade unions as a means to promote its socialist ideology. As such, the trade unions during the military government were not autonomous; rather, they served as a "conveyor belt" between the military government and labourers.[104] Evidencing such realities, the labour law makes lower unions subordinate to the higher unions, and leaders of higher unions were empowered to control the lower trade unions and to enact directives to unions to regulate their operation in accordance with the socialist ideology. In this proclamation, 'illegal strikes,' 'lack of good faith in a collective negotiation,' failure to immediately execute an 'agreement, decision, or order given at any level,' or 'to obstruct or be the cause of a delay in the speedy settlement of a trade dispute' were all considered criminal acts punishable with one year in prison.[105]

In 1982, Labour Union Organization Proclamation No.222/1982 was enacted. This proclamation was, however, a direct replica of the 1975 labour law of the country, except that it gives additional protection for

[101] Desset Abebe, *Supra* note 62, p. 111.
[102] Mehari Redae, *Supra* note 1, p. 15.
[103] *Ibid.*
[104] *Id.*, p. 16.
[105] Samuel Andreas, *Supra* note 70, p. 62.

state-approved trade union leaders not to be dismissed or transferred to another union without the approval of the then Ministry of Labour and Social Affairs.[106] Unlike the labour laws during the imperial regime, the labour laws during the military regime allowed workers to make political engagements.[107]

After the fall of the Dergue regime, the Transitional Government led by the Ethiopian People Revolutionary Democratic Front (EPRDF) enacted Labour Proclamation No.42/1993 in 1993. This proclamation was effective until it was replaced by Labour Proclamation No.377/2003 in 2003.[108] These two labour proclamations were almost similar, and they retracted the centralized feature of trade unions and the protection given to union leaders, which were the major features of the previous labour laws.[109] Unlike the labour law of the military regime, the 1993 and 2003 labour proclamations equally recognize freedom of association for employers.[110] The minimum number requirement to form a trade union was reduced to twenty and ten in the 1993 and 2003 labour proclamations, respectively.[111] More importantly, these laws try to ensure that trade unions are autonomous and free from political affiliation, unlike the previous laws.[112]

Currently, the FDRE Constitution recognizes workers freedom of association as a basic right. To this effect, the Constitution stipulates, using general terms, that "[e]very person has the right to freedom of

106 *Ibid.*
107 Yesuneh Aweke, *Supra* note 64, p. 915.
108 Desset Abebe, *Supra* note 62, p. 111.
109 Samuel Andreas, *Supra* note 70, p. 63.
110 Mehari Redae, *Supra* note 1, p. 18.
111 *Ibid.*
112 *Ibid.*

association for any cause or purpose."[113] It does this, of course, with a prohibition of organizations formed in violation of laws or illegally subverting the constitutional order.[114] Beyond this general stipulation, the constitution, specifically under first sub-provision of Article 42, allows workers to form associations. Clearly evidencing this, it provides:

> *[f]actory and service workers, farmers, farm labourers, other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well-being. This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests.*[115]

While the constitution in clear terms allows for the formation of unions in the first sub-section, it provides for the right to express their dissatisfaction by launching a strike.[116] Complementing these rights, it further requires the enactment of laws that establish procedures for the establishment of trade unions and for the regulation of the collective bargaining process.[117]

Based on this stipulation of the Constitution, the federal parliament enacted Labour Proclamation No.1156/2019, which regulates

[113] FDRE Const., Art. 31.
[114] *Ibid.*
[115] *Id.*, Art. 42/1/a.
[116] *Id.*, Art. 42/1/b.
[117] *Id.*, Art. 42/3.

procedures for the establishment of trade unions and the regulation of the collective bargaining process. As outlined in the preamble, one of the major objectives of the proclamation is to "lay down a working system that guarantees the rights of workers and employers to freely establish their respective associations and to engage, through their duly authorized representatives, in social dialogue and collective bargaining, as well as to draw up procedures for the expedient settlement of labour disputes, which arise between them."[118] Similar to Labour Proclamation No.377/2003, this proclamation explicitly recognizes the rights of both workers and employers to establish and organize their own associations.[119] Workers can form one or more than one trade union at an enterprise level, provided that the minimum number of members of a union is ten or more.[120] This low membership requirement would create opportunities to organize for those enterprises with few workers. The proclamation also allows workers who work in different undertakings but have similar activities that have less than ten workers to organize across enterprises and form a general trade union.[121]

Trade unions may also form trade union federations, which may then organize to form confederations.[122] This serves to preserve the interests of the country's member workers by establishing strong and organized trade unions. The current labour proclamation, like prior labour laws, requires that every worker association be registered with the Ministry of Labour and Social Affairs or an appropriate regional agency authorized to administer the labour legislation.[123]

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118 Labour Proc. No.1156/2019, Preamble, Para. 2.
119 *Id.*, Art. 113/1.
120 *Id.*, Art. 114/1.
121 *Id.*, Art. 114/2.
122 *Id.*, Art. 114/3.
123 *Id.*, Art. 119/1.

Trade unions work to protect the rights and interests of their members. They, in particular, represent members in collective bargaining and dispute resolution proceedings.[124] With the view of facilitating the smooth functioning of trade unions, the proclamation allows leaders to leave with pay for the purpose of presenting cases in labour disputes, negotiating collective agreements, attending union meetings, and participating in seminars or training courses.[125] Once formed, the trade union has the right to bargain with one or more employers or their associations and reach a collective agreement.[126] Furthermore, the proclamation, prohibits employers or managerial employees from "coercing or in any manner compelling any worker to join or not to join a trade union; or to continue or cease membership of a trade union; or to require a worker to quit membership from one union and require him to join another union or to require him to cast his vote to a certain candidate or not to a candidate in elections for trade union offices."[127] In general, the proclamation affirms workers' right to organize associations and outlines detailed regulations for association creation, collective bargaining, and collective agreement conclusion, among other things.

2. The Practice of Trade Unionism in the Bahir Dar Industrial Zone

This section is dedicated to presenting and interpreting the data collected through various research methods in this research site. The data was collected considering the research objectives and questions in order to unravel the existing situation in the Bahir Dar industrial zone from the

[124] *Id.,* Art. 115/1.
[125] *Id.,* Art. 82.
[126] *Id.,* Arts. 126 and 125.
[127] *Id.,* Art. 14/1(d).

point of view of works. To this end, the authors employed survey, interview, and observation data collection tools. The survey questionnaire has been distributed to 96 respondents randomly selected from those companies for which trade unions are available. 32 questionnaires were distributed in each selected company. The preliminary figures from the data show that 31 and 30 respondents were males and females, respectively, and the remaining 35 respondents didn't express their sex.

The data from questionnaires have been tabulated, codified, entered into SPSS software (version 21), analysed, and interpreted. Descriptive data from the SPSS output were taken as evidence of the investigation. This quantitative data were triangulated with the data obtained through semi-structured interviews, observations, and document analysis. The result are interpreted and discussed in the subsequent sections.

2.1. Workers and Employers Awareness and Interest

2.1.1. Workers' Awareness and Desire

One of the major themes of exploration in the investigation was workers' awareness and desire to use laws as a tool of protecting and regulating labour rights. The first question presented to the workers in this respect was whether the workers are sufficiently aware of the existence of laws governing the right of workers to organize. This question was framed in order to test awareness of the workers' about the existence of the laws supporting their rights to organize. The response denoted that there is an awareness problem on the side of the workers'. Only 33.3% of the respondents confirmed that they are fairly aware of the existing law. However, 13.5%, 27.1%, and 6.3% of the respondents replied, agree, somehow, disagree, and strongly disagree about the existence of the law. The response indicated in the table here below

generally shows that awareness of the workers' about the existence of the law regarding the right to organize is low.

Table 1: Workers Awareness about Laws Governing Workers' Association

Question	Options	Responses (%)
Workers sufficiently aware of the existence of laws governing the right of workers to organize	Strongly disagree	6.3%
	Disagree	27.1
	Fairly	33.3
	Agree	19.8
	Strongly agree	13.5

Similarly, the interview data result reveals that workers who have not established an association so far don't have a proper understanding of the laws governing freedom of association.[128] Employees are unaware that they have the right to form associations to fight for the protection of their work-related rights and interests.[129]

Although the awareness of the workers about the existing law is low, the table here below implies that the workers do have an interest to forming the association. 54.6%, 10.3%, and 8.2% of the respondents replied that they do have interest in being organized in the trade union. The remaining 2.1% and 24.7% of the respondents disagreed and strongly

[128] Interview with unorganized workers, 12th May 2024 (names of the respondents are not mentioned here as they preferred to be anonymous respondents).

[129] Interview with Experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, 16th May 2024 (names of respondents are not mentioned here as they preferred to be anonymous respondents).

disagreed on the question presented about their interest to forming an association in the company.

Table 2: Workers Interest in Unionizing

Question	Options	Responses (%)
Workers have an interest in forming a trade union	Strongly disagree	24.7
	Disagree	2.1
	Fairly	8.2
	Agree	10.3
	Strongly agree	54.6

This response of the respondents is comparatively smaller than the workers who responded that they do have no awareness about the existence of the law to the previous question. Hence, it is possible to infer that their ignorance about the existing law regarding the right of workers to organize is the problem of their disinterest. Of course, workers' lack of interest towards trade unionism is also exacerbated due to the undue influence on the part of employers. In this regard, participants have been asked whether union leaders are under pressure from employers, and 22.2%, 23.3%, and 24.2% of the respondents replied, strongly agree, agree, and somehow, respectively. This reveals the pressure of employers on the implementation of the right to organize in the undertakings. Thus, this implies that the oppositions of the employer negatively affect the workers' right to organize.

The qualitative data similarly shows that workers do have awareness and interest about the trade union. The interviewees confirmed this fact. One of the interviewees explained that "workers' do have a high desire to form an association and use it as a strategy for struggling for the

realization of their rights."[130] He further explained that workers do have adequate awareness about their rights to organize. Because experts of the workers and employers office of Bahir Dar City administration and the Confederation of Ethiopian Workers Association made tremendous efforts to create and increase the level of awareness of the workers about their rights to organize.[131] According to him, conciliators and inspectors of the office strictly follow and supervise the formation of the associations in each company allocated in Bahir Dar city industrial zones. Expert of the Ethiopian Workers Confederation Bahir Dar branch strengthened the response of the case team leader as well. In conclusion, workers' do know the existence of laws that provide the right of workers to organize, and they do have a desire to form a trade union.

Table 3: Employers' Influence Against Union Leaders

Question	Options	Responses (%)
Union leaders are under pressure from employers	Strongly disagree	15.8
	Disagree	14.7
	Fairly	24.2
	Agree	23.2
	Strongly agree	22.1

2.1.2. Awareness and Desire of the Employer

Likewise, questions have been provided in the questionnaire in order to test the awareness and desire of the employers regarding the formation

[130] Zewedu Desalegn, Case Team Leader at Bahir Dar City Employers and Employee Office, 12th May 2024.
[131] *Ibid.*

of workers' associations. In this test, recognition, assistance, and resistance of the employers as to freedom of workers to association have been presented to the employees. Accordingly, the workers replied that employers do not organize and assist the formation of associations. The following tables show that employers have no interest in recognizing and supporting the formation of associations. The table herein below denotes that employers don't recognize the workers' right to associate. According to the response indicated in the table, 28.9%, 32.0%, and 19.6% of the respondents strongly disagree, agree, and somehow respectively. 80.4% of the respondents confirmed that employers didn't recognize the formation of the association. In contrast, 19.6% of respondents responded conversely.

Table 4: Employers' Recognition of Workers' Right to Unionize

Question	Options	Responses (%)
Employers recognize workers' right to organize	Strongly disagree	28.9
	Disagree	32.0
	Fairly	19.6
	Agree	10.3
	Strongly agree	9.3

Besides, the employers did not provide assistance to the workers' association. The response given in the table here below tells that employers do not provide assistance to strengthen the associations. 50.5%, 23.2%, and 11.6% of the respondents responded that they strongly disagree, disagree and somehow respectively. Hence, employers don't give recognition to formation of the association. However, as the ultimate goal of trade unionism is to bring industrial

peace, employers shall give necessary support to enable workers right to organize.

Table 5: Employers Support Trade Unions

Question	Options	Responses (%)
Employers provide the necessary support for the exercise of the right of workers to organize	Strongly disagree	50.5
	Disagree	23.2
	Fairly	11.6
	Agree	9.5
	Strongly agree	5.3

In contrast, they resist the formation of associations. According to the response indicated in the table herein below, employers oppose the formation of association. 20.6%, 23.7% and 17.5% of the respondents replied that they strongly agree, agree, and somehow agree, respectively. This tells that 61.9% of the respondents confirmed the resistance of the employers against the movement of the workers towards association. Thus, the overall picture of the quantitative data strongly suggests that employers become an obstacle to the formation of associations, showing the interest to support or recognize their existence.

Concerning the evidence from the interview data, it shows that employers consider trade unions as entities that have been established to work against their interests.[132] One should in fact note that this tendency

[132] Interview with Experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, and Leaders of Labour Union Leaders, 16th May 2024.

of employers is against the benefits of trade unions to both employees and employers. Unions, while assisting employees in realizing their labour rights, enable employers to increase productivity, develop positive relationships with employees, raise workers' sense of ownership of the enterprise, and conveniently reach out to all workers through their union whenever needed.

It is important to note that such adverse impacts of employers on unions is compounded by the lack of commitment on the part of pertinent institutions such as employers' office of Bahir Dar City, to discharge their institutional obligations. This office is not effective enough to convince or influence employers not to resist against workers' moves to form trade unions. As participants revealed, the employees and employers' office of Bahir Dar City doesn't closely inspect and take appropriate administrative and legal measures to ensure the implementation of national and international laws in relation to workers' right to organize in the industrial zone of Bahir Dar city.[133]

Table 6: Employers' Resistance during Unionization

Question	Options	Responses (%)
Employers resist when workers move to organize	Strongly disagree	23.7
	Disagree	14.4
	Fairly	17.5
	Agree	23.7
	Strongly agree	20.6

In general, because of the set of problems highlighted in this section, many workers in the industrial zone of Bahir Dar City are not organized.

[133] Interview with unorganized workers, 10th May 2024.

The culture of forming a trade union is not well developed. Even if many workers are interested in forming labour associations, their employers do not want their workers to form a trade union in their undertaking. This is because employers fear that the union may instigate workers to claim their rights and to bargain strongly in respect to their working conditions. To the worst, employers even forbid the gathering of workers in the compound of the undertaking in the process of forming trade unions. Supporting stakeholders are not permitted to enter the compound of industries and to facilitate the formation of workers unions.[134] This protectionist moves of employers compelled workers to hold meetings in avenues outside of their places of undertaking.

2.2. Assessing Access to Trade Union Facilities

Trade unions shall have the necessary facilities in order to carry out their tasks properly. Such facilities may include, among others, becoming time off from work without losing payments, collection of members' fees, and access to relevant information, office, workplace, and meeting hall.[135] The 1971 ILO Convention Concerning Protection and Facilities to be accorded to Workers' Representatives in the Undertaking (No.135), under Article 2, requires employers to give necessary facilities to workers' representatives.[136] Of course, this convention doesn't provide the list of facilities to be given; rather, it states that such facilities shall be "appropriate in order to enable workers' representatives to carry out their functions promptly and efficiently."[137]

[134] Interview with unorganized workers, 10th May 2024.
[135] Filip Dorssemont, Facilities for Trade Union Officials and Members to Exercise their Rights- a Comparative Review, (2020), p. 35.
[136] The ILO Convention concerning Protection and Facilities to be afforded to Workers' Representatives in the Undertaking, No. 135, (1971), Art. 2.
[137] *Ibid.*

Further, in determining appropriate facilities, the Convention requires considering the industrial relation system of the country and the needs, size, and capabilities of the undertaking concerned and its impact on the efficient operation of the undertaking.[138]

Of course, Ethiopia has not yet signed this convention. However, many of the rights have significant implications for those stipulated under the ICCR and UDHR, to which Ethiopia is a member. As such, unions are a means to realize the fundamental rights enshrined in these documents. Providing access to necessary facilities to unions could be a minimum move to enable them to attain these ends.

The 1971 ILO Recommendation on the Convention Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (No.143), however, provides some recommended facilities to be given to the trade union leaders or representatives. These are time off from work, without loss of pay or social and fringe benefits, for carrying out their functions and attending trade union meetings, training courses, seminars, congresses, and conferences; access to all workplaces; access to the management of the undertaking; collection of workers contributions regularly on the premises of the undertaking; posting trade union notices on the premises of the undertaking; and distributing news sheets, pamphlets, publications, and other documents of the union among the workers of the undertaking.[139]

In the Ethiopian labour law regime, one may not find a comprehensive regulation about access to necessary facilities by trade unions or their leaders. There are only a few scattered rules under the Ethiopian Labour Proclamation No.1156/2019. The proclamation allows leaders of trade

[138] *Ibid.*
[139] *Id.,* Arts. 10-16.

unions to leave with pay for the purpose of presenting cases in labour disputes and negotiating collective agreements in seminars or training courses.[140] In addition, the proclamation imposes an obligation on employers to deduct union contributions from the worker's regular wage and deposit them into the trade union's account whenever the worker requests such a deduction.[141] These are the only issues of labour facilities that are directly and clearly regulated by the Ethiopian labour law regime.

2.2.1. Access to Office and Other Necessary Office Materials

One of the targets of investigation in the study was unions' access to office and relevant materials. The results of key informant interviews on this subject reveal that all trade unions in Bahir Dar Industrial Zone practically lack the necessary facilities to carry out their activities. They do not have an office for leaders to carry out their tasks within the undertaking.[142] They carry out their duties using the office that has been assigned to them for other regular organizational purposes. Trade union representatives do not have reasonable access to telephone, fax, internet, computing, and photocopying facilities. Similarly, in the survey data, the majority of respondents (45.3%) respond that trade union leaders in this same industrial zone don't get reasonable free use of telephone, fax, and email facilities, computing, and photocopying facilities from employers. Nonetheless, the trade union could carry out their functions properly, suggesting their level of commitment to attain their collective ends in the absence of offices or the necessary office equipment.

[140] Labour Proc. No.1156/2019, Art. 82.
[141] *Id.*, Art. 12(3).
[142] Interview with workers and labour union leaders, 10th May 2024.

Table 7: Access to Necessary Office Materials

Question	Options	Responses (%)
Union leaders get free use of telephone, fax, internet, computing, and photocopying facilities	Strongly disagree	45.3
	Disagree	16.8
	Fairly	7.4
	Agree	13.7
	Strongly agree	16.8

2.2.2. Trade Union Leaves

Trade union leaders take on and carry out leadership obligations in addition to their usual job duties. Without privileged leaves, trade union officials may be unable to carry out the union's obligations and protect its members' rights and interests. According to the survey results, the majority of trade union leaders do not take time off from their daily duties to carry out the organization's activities. While 26.8% of respondents agree that union leaders are given time off from work, the majority (43.3%) say that employers do not provide time for union leaders to do union duties.

This conclusion is reinforced by key informant interviews. Employers, according to key informant interviewees, do not allow trade union leaders to take time off to attend meetings, seminars, conferences, or other labour-related events. Union leaders, for example, were unable to attend several meetings organized by the Ethiopian Trade Unions Confederation because their employers refused to grant union leave.[143] In general, data show that union leaders are not granted union leaves,

[143] Interview with Labour Union Leaders, 10th May 2024 (names of the respondents are not mentioned here as they preferred to be anonymous respondents).

despite the fact that the law obligates it, and it is extremely unlikely that union leadership will be successful in achieving the union's goals unless leaders are given time off from work to carry out union functions.

Table 8: Trade Union Leave

Question	Options	Responses (%)
Union leaders are granted time off to carryout functions of the union	Strongly disagree	43.3
	Disagree	6.2
	Fairly	12.4
	Agree	11.3
	Strongly agree	26.8

2.2.3. Deduction of Members Contribution from Wage

Normally, trade unions must raise funds to cover their expenses while fulfilling their union's functions. Contributions from members are the primary source of funding for trade unions. To ensure efficient collection of member payments, the Ethiopian Labour Proclamation requires employers to deduct union contributions from the worker's normal wage and deposit them into the trade union's account.[144] In practice, however, the survey data, which is stated in the table below, reveals that employers do not deduct union payments from employees' regular wages and deposit them into the trade union's account. More than half of respondents (53.6%) said employers are not willing to withhold workers' monthly payments from their wages, though workers give their written consent. This demonstrates that companies do not cooperate in the process of funding and administering Trade unions.

[144] Labour Proc. No.1156/2019, Art. 12/3.

Table 9: Deduction of Members' Contribution from their Wage

Question	Options	Responses (%)
Employer deducts contributions of Trade union members from their regular wage	Strongly disagree	53.6
	Disagree	9.3
	Fairly	10.3
	Agree	11.3
	Strongly agree	15.5

2.3. Performance of Trade Unions towards the Protection of Labour Rights

2.3.1. Collaboration between Leaders of Trade Unions and Employers

As it is mentioned under the Labour Proclamation of Ethiopia, the primary function of a trade union is to observe the implementation of working conditions set under the proclamation, protect the rights and interests of their members, and, in particular, represent members in collective bargaining and labour disputes before the competent organ.[145] The trade union shall struggle for the actual implementation of the minimum working conditions that the Ethiopian labour law provides. It shall observe the enforcement of minimum conditions in respect to working hours, rest days, different leaves, rules of occupational safety and health, and other labour issues. Even if it is very encouraged, trade unions persuade employers to introduce a working condition that is

[145] *Id.*,Art.115(1).

more favorable to the member workers compared with what the law provides.

To perform this function, trade unions must collaborate closely with the employers or managers. The survey data collected from Bahir Dar Industrial Zone workers demonstrates that, while leaders of some trade unions attempt to collaborate with employers and supervisors to promote workers' rights, some unions do not work closely with employers or managers. As indicated in the table below, whereas 43.8% and 29.2% of respondents strongly and fairly agree, 15.6% say that trade union leaders do not work together with employers or managers. These divided viewpoints of the respondents imply that there is a limitation on the part of trade union leaders to work closely with employers or management of the undertaking.

The interview data also supports this finding. The interview participants confirmed that trade union leaders barely collaborate with employers or managers while executing the function of the union.[146] Employers are, rather than collaborating with them, using numerous pretexts to fire union leaders from work, unjustifiably taking disciplinary actions, and applying pressure on them.[147] For example, in one scenario, an employer has terminated the employment contract of a worker following his active participation as a chairperson in the workers' association. Fearing such a consequence, there are even no workers willing to be a leader of the union. Even employers are not willing to deduct the employees' union

[146] Interview with unionized workers and managers of undertakings, 14th May 2024.
[147] Interview with Labour Union Leaders, 14th May 2024.

contribution from the salary of the workers, though the law obligates employers to do so.[148]

Table 10: Collaboration between Trade Union Leaders and Employers

Question	Options	Responses (%)
The leaders of the union works in harmony with the employer and the supervisors to protect the rights of the workers	Strongly disagree	15.6
	Disagree	5.2
	Fairly	29.2
	Agree	6.3
	Strongly agree	43.8

2.3.2. Collaboration between Leaders of Trade Unions and Member Workers

Trade union leaders must not only collaborate with employers or managers of the endeavor but also work closely with member workers. However, there is no apparent trend of collaboration between union leaders and member workers. To this effect, 41.2% and 21.6% of respondents on this subject agree fairly or strongly, respectively, and 16.5%of them say that trade union leaders and member workers do not collaborate. Even though the majority of respondents say there is fair collaboration, sizable proportions believe there is no collaboration between trade union officials and members. Thus, it is very difficult to achieve the objective of the trade union unless leaders of the union and member workers work together.

[148] Interview with Experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, and Leaders of Labour Union Leaders, 16th May 2024.

Table 11: Collaboration between Trade Union Leaders and Member Workers

Question	Options	Responses (%)
The leaders of the association works closely with the member workers	Strongly disagree	16.5
	Disagree	8.2
	Fairly	41.2
	Agree	12.4
	Strongly agree	21.6

2.3.3. Achievement of Trade Unions

As stated before, the ultimate objective of trade unions is to protect the rights and interests of their member workers and thereby create industrial peace. Trade unions are expected to struggle to secure the best benefits for member workers, including payment of adequate salary, bonuses, and payment for overtime work. They shall also work to convince the employer to create conducive working environment for workers to carry out their duties. In this regard, the survey data reveals that the achievement of trade unions in protecting the rights and interests of member workers is not as such successful. The survey data shows that while 34.0% strongly agree that trade unions properly struggle for the protection of rights and interests of member workers, 27.8% of respondents believe that trade unions do not properly struggle for the protection of rights and interests of member workers.

Based on this data, though a relative majority of trade unions properly struggle for the protection of rights and interests of member workers, there are still extensive trade unions that are not actually working towards the protection of rights and interests of member workers. The

interview data similarly shows that even though a trade union is established to protect the interests of the union members, they do not work as expected. The struggles of the union do not bring a tangible positive result for unionized workers.[149] Mostly, the role of unions is limited to submitting complaints to the employer. Instead of bridging the gap between workers and employers to create a harmonious sector, unions file complaints with government agencies. According to the interview data, employers frequently violate national labour laws and collective agreements because of the poor performance of trade unions. Employers assign workers without safety materials, require workers to work overtime for no additional pay, unjustly terminate workers' employment contracts, and refuse to issue leaves when workers request them.[150]

Table 12: Union's Struggle for the Protection of Rights and Interests of Member Workers

Question	Options	Responses (%)
The union struggle for the protection of the rights and interests of member workers	Strongly disagree	27.8
	Disagree	9.3
	Fairly	20.6
	Agree	8.2
	Strongly agree	34.0

[149] Interview with unionized workers, 16th May 2024.
[150] Interview with Experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, 16th May 2024.

2.3.4. Conclusion and Enforcement of Collective Agreements

Most trade unions at Bahir Dar Industrial Zone have concluded a collective agreement with employers to govern their relationship.[151] Though employers hesitate to conclude collective agreements with trade unions, through time, under the influence of government bodies, almost all trade unions concluded collective agreements with their employers. The mere conclusion of a collective agreement is not, however, an end by itself. Collective agreements should be enforced both by employers and workers to achieve the ultimate objective of unionization as well as collective bargaining.

The practice, however, shows that employers do not abide by the collective agreements concluded with trade unions.[152] The problem is not limited only to the employers' side. Workers do not also know the content of collective agreements. The survey data collected from workers of Bahir Dar Industrial Zone demonstrates that the majority of respondents (36%) don't know the content of collective agreements concluded between trade unions and employers, whereas 28.9 % of them fairly know the content of collective agreements and only 15.5% properly knows the content of these documents. The existence of low awareness about the content of collective agreements on the workers' side and the absence of interest to abide by the collective agreement on the part of employers exacerbate the problem of non-enforcement of the terms of the agreement.

[151] Interview with experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, 16th May 2024.
[152] Interview with Experts from the Ethiopian Labour Unions Confederation, Bahir Dar Branch, and Leaders of Labour Union Leaders, 16th May 2024.

Table 13: Members know the Content of Collective Agreements

Question	Options	Responses (%)
Members know the content of collective agreements	Strongly disagree	36.1
	Disagree	10.3
	Fairly	28.9
	Agree	9.3
	Strongly agree	15.5

Though there is a trend of resisting the process of unionization and implementation of collective agreements on the part of employers, trade unions in Bahir Dar Industrial Zone do not initiate any industrial action so far. In order to convince the employer to accept certain labour conditions or to comply with existing labour conditions, it is common that trade unions initiate an industrial action known as a job strike, which may involve a slowdown of work by any member of workers in reducing their normal output on their normal rate of work or a temporary cessation of work by any number of workers acting as a move to persuade their employer to accept certain labour conditions in connection with a labour dispute or to influence the outcome of the dispute. Yet, union leaders in Bahir Dar Industrial Zone, instead of initiating strikes, devise strategies for discussions over issues of negotiation and spaces of bargaining. There were repeated attempts on the part of leaders to hold discussions with employers over these issues.

Despite such repeated attempts, the employers refused to seat and discuss with union leaders.[153] Even within this situation, trade unions in Bahir Dar Industrial Zone do not call any job strike so far despite the

[153] Interview with union leaders and member workers, 16th May 2024.

continuous resistance and rejections of questions of workers by employers. This shows that the overall performance of trade unions in the study area is characterized by too much tolerance, discipline, and patience, giving undue upper hand to employers.

Conclusion

This study is dedicated to exploring the trend of workers' unionization in the Bahir Dar Industrial Zone. Through the use of quantitative and qualitative data generation tools, the study revealed that workers of many undertakings in Bahir Dar city industrial zone have not formed trade unions. This is largely due to a lack of awareness on the part of workers and deliberate unwillingness on the part of employers.

Though some workers have awareness and interest to form a trade union, they could not afford to form such an association due to employers' influence. Even the existing associations are not well organized, active, and efficient in supporting member workers to realize their labour rights. Employers are reluctant and unwilling for the establishment of workers' association; they strongly oppose and resist freedom of association in different ways. The existing trade unions in the study lack the required facilities to carry out their functions and protect the rights and interests of member workers. Moreover, trade union leaders do not take time away from their regular responsibilities to perform the organization's activities as employers prohibit them from taking time off to attend meetings, seminars, conferences, or other labour-related events. They do this clearly contrary to the Ethiopian Labour law stipulations that require employers to offer union leaders leave to conduct union-related responsibilities.

Apart from such indigents, employers refuse to deduct union contributions from the worker's regular wage and transfer them into the trade union's account. Employers resist withholding contributions from workers' wages, despite the fact that the law requires it and workers consent to do so. All of these demonstrate that trade unions lack access to suitable union facilities, limiting their ability to achieve the association's goals.

Furthermore, the research revealed that trade unions are ineffective in protecting the interests and rights of their members. Particularly, trade union officials do not appropriately advocate for the rights and interests of their members. They could not persuade employers to adopt working conditions that are fairly suitable to member workers. They fail to influence employers to abide by the working conditions stated in the law. Though many trade unions in the Bahir Dar Industrial Zone have signed collective agreements, employers do not follow the terms of the agreement. Employers disregard the rules of the agreement regardless of the interest of workers. Union officials do not put pressure on employers to follow the terms of collective agreements. They have not taken any industrial action to persuade employers to follow the terms of collective agreements. Also, employees do not know the content of such agreements.

Hence, to ensure workers' right to form associations in the Bahir Dar Industrial Zone, both workers and employers should be trained to raise awareness about the freedom of association enshrined in various legal instruments. The employees and employers' office of Bahir Dar City should closely supervise and inspect the status of unions and working conditions of works. This should be followed by administrative and legal measures to ensure the implementation of national and

international laws in relation to workers' right to organize in the industrial zones.

Finally, to have a healthy industrial working environment and disciplined, fairly protected trade unions, employers must strive to provide the essential facilities to trade unions in their undertaking. They should also cooperate with unions by collecting membership fees from employees' monthly salaries, allowing union officials to take union leaves, and providing reasonable access to telephone, fax, and email facilities, as well as computing and photocopying facilities.

Trade unions must also endeavor to achieve the goals that they have set. They shall work vigorously to bridge the gap between workers and employers, thus defending workers' rights and interests. Union leaders must be committed to countering influence on the part of employers to the effect of making them implement the rules of the minimum working conditions stipulated under the law and collective agreements. They shall adopt various techniques, including strikes, to influence employer

Challenges and Opportunities of Consumer Protection in the WTO Legal Framework: Implications for Ethiopia's Accession

Saleamlak Yemane[♣]

Abstract

Consumer protection is a key aspect of modern economies that safeguards consumer rights against unfair practices and unsafe products, especially in the context of global business interactions. The World Trade Organization (WTO), widely charged with such responsibilities, has been criticized for being overly producer-centered. This paper examines such challenges of the consumer protection regulatory framework of the WTO, particularly targeting consumer protection provisions such as the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Sanitary and Phytosanitary Measures (SPS). In light of the examinations of these provisions, the paper critically assesses Ethiopia's legal and institutional capacity to implement these rules, considering its limited resources and infrastructure. Through qualitative analysis and an exploratory review of literature, and Ethiopia's trade-related laws, the paper found out that while the WTO offers some consumer protection mechanisms, they are often vague and impose stringent procedural requirements, which are difficult to fulfill for developing countries like Ethiopia. Finally, the paper concludes by offering policy recommendations for Ethiopia, emphasizing the need for a stronger legal and institutional framework, enhanced technical expertise, and effective dispute resolution mechanisms to ensure that

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trade liberalization benefits do not come at the expense of consumer welfare.

Keywords: Consumers Protection, Consumer Welfare, Accession, WTO, Trade Liberalization

Introduction

The World Trade Organization (WTO) is a global, member-based institution that governs the international trading systems. It is responsible for overseeing and regulating interstate trade relations, including consumer protection.[1] Consumer protection has become one of the major subjects taking the center stage in modern economic systems involving multifaceted interactions and actors.[2] As countries increasingly open their markets and engage in cross-border commerce, the need for robust consumer protection frameworks has become a necessity for many states. Consumer protection laws are designed to ensure that individuals are safeguarded from harmful products, deceptive practices, and unfair competition while promoting transparency, trust, and fairness in the marketplace.[3] Further, they are meant to promote economic efficiency, consumer confidence, and social justice. Without such safeguards, consumers may be exposed to

[1] Alan M. Rugman & Gavin Boyd (eds.), *The World Trade Organization in the New Global Economy: Trade and Investment Issues in the Millennium Round* (Routledge 2001), p. 2 [hereinafter Alan M. Rugman & Gavin Boyd, *The World Trade Organization in the New Global Economy.]*

[2] Wilkinson, Richard, The Role of Consumer Protection in a Globalized Economy (Oxford Univ. Press 2012), p. 6.

[3] Lim, H. K., & Choi, S. H. (2006). The WTO and the Protection of Consumer Interests: An Overview of Trade and Consumer Protection Measures. *Journal of International Economic Law*, 9(3), pp. 405-426.

substandard goods, environmental hazards, or exploitation by powerful market players, leading to potential market failures.[4]

While the free market is a defining feature of modern business transactions and is often seen as the most efficient mechanism for allocating resources, it does not always address the interests of consumers adequately.[5] This is especially true where citizens are affected by negligent or deliberate supply of harmful products or services and where consumers have to bear the consequences of such goods and services. In such cases, government intervention becomes necessary to address market imbalances, set safety standards, and ensure that consumers have access to accurate information. Such moves also play a crucial role in promoting sustainable development by addressing issues related to environmental impacts, health concerns, and ethical production practices.[6]

At the international level, institutions such as the World Trade Organization (WTO) have established frameworks for regulating trade while recognizing the right of nations to implement measures to protect consumer welfare. The WTO's agreements, such as the Agreement on Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) measures, provide member countries with the flexibility to introduce regulations that address consumer safety, health standards, and environmental concerns without unnecessarily restricting

[4] *Ibid*.

[5] John Goldring, Consumer Protection, Globalization and Democracy, (1998) Macquarie Law Journal, Vol. 8 (2008), Available at http://classic.austlii.edu.au/au/journals/MqLawJl/2008/6.pdf.Last accessed on 12 May 2024.

[6] UNCTAD, Manual on Consumer Protection 2 (2018), Available at https://unctad.org/webflyer/manual-consumer-protection last accessed on May 12, 2024 [herein after UNCTAD, Manual on Consumer Protection].

international trade.[7] However, aligning national consumer protection policies with international trade rules can be challenging, particularly for developing countries like Ethiopia. As Ethiopia seeks to accede to the WTO, it faces the task of harmonizing its domestic consumer protection measures with global trade obligations.[8] This balancing move represents both a challenge and an opportunity for Ethiopia as it navigates the complexities of international trade and domestic regulatory priorities.[9]

This paper examines the regulatory framework of consumer protection within the World Trade Organization (WTO) and analyzes how Ethiopia's regulatory framework aligns with WTO standards. It further explores Ethiopia's capacity to address existing gaps in consumer protection and the challenges it faces in meeting international trade obligations. The contents of the investigation are organized into four sections. In the first section, it revisits and discusses the major consumer's right in the globalized market with a special emphasis on the Ethiopian consumer protection laws. This is followed by an exploration of the regulatory schemes of consumer protection in the WTO regimes. This part examines the opportunities and challenges of the WTO system from the viewpoint of consumer protection. Finally, the paper presents concluding remarks and suggests the implication of the WTO system for the Ethiopian accession moves.

[7] *Ibid.*
[8] M. Melaku, Ethiopia's Accession to the World Trade Organization: Challenges and Opportunities for Development. Journal of World Trade, Vol.45, No.1, (2011), pp. 123-145.
[9] *Ibid.*

1. Consumers' Rights in the Globalized Market: A Comparative Analysis of Ethiopia's Legal Framework in Light of the UN Guideline

Consumers today face numerous challenges, both in national and international markets. These challenges include issues such as adulteration of goods, inaccurate weights and measures, misleading advertisements, and hoarding, all of which are frequently observed in many economies.[10] Studies shows that more than half of consumers (55%) in the world experienced at least one of these challenges in the past year, often related to poor product quality or services not matching their descriptions. Surprisingly, almost half of those affected (46%) did not take any action against the traders responsible.[11] Following these rising challenges, there is a growing movement to recognize consumer rights as part of broader human rights.

In consumer-oriented societies, protecting individual consumers is increasingly seen as a crucial mechanism for preserving human dignity, particularly against the influence of large business organizations.[12] In light of this, numerous international and national frameworks currently assert the need to acknowledge consumer rights as part and parcel of fundamental human rights. Fundamental consumer rights are enshrined

[10] Joseph E. Stieglitz, *Globalization and Its Discontents* (W.W. Norton & Co. 2002) available at https://www.researchgate.net/publication/4755241_Joseph_E_Stiglitz_2002_Globalization_and_Its_Discontents last accessed on 20 April 2024

[11] Key findings about problems consumers face in the collaborative economy, available at https://ec.europa.eu/info/sites/default/files/key_findings_about_problems_consumers_face_in_the_collaborative_economy.pdf. Last accessed on 12 April 2022.

[12] Irene Benöhr & Hans-W. Micklitz, Consumer Protection and Human Rights, in *Handbook of Research on International Consumer Law* 16, pp.16-34 (Geraint Howells, Ian Ramsay & Thomas Wilhelmsson (eds.), Edward Elgar 2010).

in both international instruments and national laws, marking significant progress in consumer protection.[13]

The United Nations set a key milestone in consumer protection law in 1985, when the General Assembly adopted the UNGCP, establishing for the first time a set of international consumer law principles. These principles now guide national consumer protection laws, setting minimum standards. As the global trade landscape evolves and consumers face new challenges, the UNGCP has been revised—first in 1999 and again in 2015—introducing provisions that address emerging concerns and provide a more comprehensive approach to consumer protection.[14] The next sections explore the minimum consumer rights recognized in the global trading system, as outlined by the UN Guidelines for Consumer Protection (UNGCP)**,** and analyze Ethiopia's consumer protection laws, comparing them with international best practices.

1.1. The Right to Access and Selection of Products

Economic interconnectedness has led to an increased diversity of goods and services, providing consumers with more options and better market access.[15] The availability of a wide range of products is a fundamental right of consumers, as recognized by the UN Guidelines for Consumer

[13] *Ibid.*
[14] *Ibid.*
[15] David Bigman, *Globalization and the Least Developed Countries: Potential and Pitfalls* 34 (Cambridge University Press, 2007). Available at https://www.cabidigitallibrary.org/doi/book/10.1079/9781845933081.0000.Last accessed on 20 April 2024.

Protection.[16] Consumers have the freedom to choose products and services based on their needs and preferences, provided they fulfill their obligations to sellers. However, various anti-consumer practices undermine this right in varying ways, such as Tie-in sales, hoarding, and other forms of violations. In a tie-in sale**,** a consumer is required to purchase a product (the "tied goods") only if they agree to buy another product (the "tying good") from the same seller.[17] While the tying product may be the consumer's primary choice, the imposition of the tied good limits their freedom to select the products they truly want.[18] Similarly, hoarding creates artificial scarcity, raising prices and limiting the availability of products. This can lead to shadow market practices, where hoarded goods are sold at inflated prices. Both practices restrict consumers' ability to freely access and select products in the marketplace.

The UN Guidelines on Consumer Protection advocate for an environment where consumers can exercise their right to access goods and services and make independent product selections.[19] States are encouraged to adopt regulations that support consumer choice and protect them from such exploitative practices. In Ethiopia, the right to access and select products is similarly recognized within the legal

[16] UN Guideline on Consumer Protection (2015), A/RES/70/186, Available at https://unctad.org/system/files/official-document/ares70d186_en.pdf. Last accessed on 12 April 2022.

[17] Liebowitz, S J, 1983. "Tie-In Sales and Price Discrimination", Economic Inquiry, Western Economic Association International, Vol. 21(3), available at https://www.proquest.com/openview/ Last accessed on 12 April 2024.

[18] *Ibid.*

[19] United Nations, *United Nations Guidelines for Consumer Protection* (1985), G.A. Res. 39/248, U.N. Doc. A/RES/39/248, Available at https://documents.un.org/doc/resolution/gen/nr0/462/25/pdf/nr046225.pdf. Last accessed on 12 April 2024.

framework.[20] The Ethiopian Consumer Protection Law guarantees this right in two key ways. First, it expressly acknowledges consumers' right to freely choose goods and services without being forced to purchase additional products during the bargaining process.[21] This freedom to choose is a fundamental part of consumer protection.

It is, however, commonly observed that some traders try to pressure consumers by linking product choice to price negotiations. This is often the first step in coercive sales tactics, which limits consumers' freedom to make independent decisions.[22] Secondly, Ethiopian law addresses anti-consumer practices, such as hoarding and tie-in sales, through its competition and consumer protection regulations. For instance, the law prohibits the diversion of essential goods and the use of tying arrangements, ensuring that consumers are not forced into unfavorable purchasing decisions. These provisions align with international standards by fostering an environment where consumers can access goods and services based on their own interests and preferences.

1.2. Consumer Information and Education

The concepts of consumer information and consumer education are often closely linked in academic literature, though they have distinct meanings. According to the UN Guidelines for Consumer Protection, consumer education refers to the process of gaining the knowledge and skills to manage consumer resources and taking steps to increase the competence of consumer decision-making. It focuses on the

[20] Trade Competition and Consumer Protection, Proclamation No. 813/2013, *Federal Negarit Gazeta* (2013), 20thYear No.28. Art.14 (2) [hereinafter Trade Competition and Consumer Protection, Proclamation No.813/2013].
[21] *Ibid.*
[22] *Id.*, Art. 22(17).

development of understanding and skills and the gaining of knowledge. Consumer information, on the other hand, refers to the provision of data relating to a particular product or transaction to enable decision-making concerning the purchase.[23]

Consumer education is essential for enabling consumers to exercise their right to information. It builds their ability to evaluate and interpret basic information about goods and services. Sufficient access to reliable information is a cornerstone of a well-functioning market and is widely recognized in the business world.[24] Consumers need objective and impartial information to make informed decisions that align with their interests, be it regarding price, quality, or other product attributes.[25] Such information directly enhances consumer welfare by facilitating better choices. Various methods are used to make information available to consumers.[26] These include advertising and promotional campaigns, media reporting, product labeling, online reviews, e-commerce platforms, personal experiences, and word-of-mouth from other users. While many of the mechanisms are used with some level of requirements in Ethiopia, labeling requirements are more detailed and comprehensive, mandating information such as the product's name, country of manufacture, net weight, volume, safety measures, quality indicators, expiry dates, and other technical specifications.[27] Additionally, the law prohibits false and misleading advertising that

[23] UNCTAD, Manual on Consumer Protection, *supra* note 6, p. 72.

[24] Howard Beales, Richard Craswell and Steven C. Salop, *The Efficient Regulation of Consumer Information* ,the Journal of Law & Economics, Dec., 1981, Vol. 24, No.3 P. 492. Available at https://chicagounbound.uchicago.edu/jle/vol24/iss3/10/ Last accessed on 15 April 2024

[25] UNCTAD, Manual on Consumer Protection, *supra* note 6, p. 73.

[26] Howard Beales, Richard Craswell, and Steven C. Salop, *supra* note 24, p. 493.

[27] Trade competition and consumer protection, Proclamation No. 813/2013, *supra* note 20, Art. 16.

could compromise consumer information, thereby safeguarding the integrity of the market place.[28]

1.3. The Right to Safety and Product Liability

Product safety and product liability are two closely interconnected consumer rights. Traders have a fundamental obligation to provide consumers with safe and healthy products. As international trade policies and instruments evolve, there is growing emphasis on ensuring product quality and safety.[29] The UN Guidelines for Consumer Protection also highlight the importance of product safety, urging states to establish facilities for testing and certifying the safety, quality, and performance of consumer goods.[30] This right is referred to as the right to safety, which guarantees that consumers are protected from goods and services posing risks to life, health, and property. The right to safety has been recognized as a fundamental human right and is central to the Montreal Declaration, which calls for the protection of consumers against unsafe products.[31]

Despite these efforts, unsafe products are still prevalent in the market for several reasons. The expansion of international markets and increased product exports has often led to a simultaneous rise in the risk of harm

[28] *Id.*, Art. 19.

[29] Global Panel on Agriculture and Food Systems for Nutrition, *Rethinking trade policies to support healthier diets*, POLICY BRIEF No.13, Available athttps://www.glopan.org/wp-content/uploads/2020/02/Global-Panel-policy-brief-Rethinking-trade-policies-to-support-healthier-diets.pdf. Last accessed on May 15, 2022.Recent shifts in global trade policy suggest that action in favor of sustainable food and nutrition systems could be feasible, and governments should move urgently to better align trade policies with their health and nutrition goals.

[30] UNCTAD, Manual on Consumer Protection, *supra* note 6, p. 61.

[31] Jane Roseman, Declaring the Right to Safety: Advancing Health and Human Rights?, 6 MINDY HEALTH & HUM. (2003). pp. 171-174.

caused by such products. Consequently, it is essential to ensure that consumer safety is protected through effective regulatory mechanisms. There are several reasons why this protection is necessary:

1. Complexity of Business Transactions: As global markets evolve, products become more complex, and the risks associated with them increase. It is inevitable that some products will have inherent defects or safety hazards.[32]
2. Consumer Uncertainty**:** Consumers are often unable to anticipate risks, especially when it comes to new products that may not yet have been fully tested or understood.[33]

3. Protection against Unsafe Imports: Economic globalization increases the likelihood of unsafe or substandard products entering markets, especially in developing countries, which may become dumping grounds for harmful goods.[34]

In Ethiopia, the Consumer Protection Law provides for both the right to safety and product liability in close alignment with international standards.[35] Although the law does not explicitly mention the right to safety, it implicitly guarantees it by prohibiting traders from offering defective products. Specifically, traders are barred from selling goods that do not meet established safety standards, and they are forbidden from marketing products that pose a risk to human health or safety. Products must be free from deficiencies such as substandard quality, contamination, expiration, or adulteration. Ethiopian law further

[32] UNCTAD, Manual on Consumer Protection, *supra* note 6, pp. 61-62.
[33] *Ibid.*
[34] *Ibid.*
[35] Trade competition and consumer protection, Proclamation No. 813/2013, *supra* note 20, Arts. 14(5), 20, and 22(10)(11).

empowers consumers by giving them the right to report defective products to the relevant authorities, such as the Trade Bureau or Consumer Protection Authority, particularly if a product endangers their safety. Despite these legislative moves on consumer protections, challenges persist. A 2020 report from the Ethiopian Food and Drug Authority revealed that it had seized products worth 6.4 million birr, including adulterated butter and honey, over the course of just six months.[36] Furthermore, dangerous products, such as those with expired dates or hazardous chemicals, continue to enter the local market from both domestic producers and international traders.

1.4. Availability of Consumer Dispute Resolution and Redress

Disputes are an inherent part of business transactions. As global trade interactions continue to grow, the types, number and manifestations of disputes increase over the last decades. This makes imperative for many governments and international institutions to devise dispute resolution mechanisms. The availability of such mechanisms is crucial, very generally, to redress conflicts of interests among consumers and other parties, enable consumers to have fair and efficient redress for any harm or losses incurred, and to obtain appropriate compensation without facing excessive costs, delays, or burdens.[37]

[36] Authority Seizes Adulterated Food Items, Addis Fortune newspaper, Available at https://addisfortune.news/authority-seizes-adulterated-food-items/. Last accessed on February 22, 2020. Although food adulteration has been criminalized under Art. 527 of the Ethiopian Criminal Code, it remains a serious problem in Ethiopia.

[37] OECD (2005-04-19), "OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace: Background Report," available at https://www.oecd.org/fr/publications.html Last accessed on 12 April 2024.

To this effect, different dispute resolution mechanisms such as court litigation, Alternative Dispute Resolution (ADR), consumer associations**,** consumer protection boards**,** ombudsmen**,** and business customer service centers emerged over the last hundred years.[38] As they come into use in the same period, these mechanisms play a substantial role in addressing consumer grievances though their accessibility and effectiveness vary depending on the circumstances and the nature of the dispute. For instance, court litigation, although a formal route, often presents significant challenges for consumers. Litigation can be expensive, time-consuming, and complex, especially for those without legal expertise. In many cases, the cost and duration of legal proceedings can outweigh the value of the dispute, making it an impractical option for many consumers.[39]

Courts can also handle collective actions, where consumer associations represent the interests of a group of consumers facing similar issues. However, collective actions are not commonly practiced in Ethiopia, as consumer associations are not formally recognized under Ethiopian law to address consumer abuses in a collective manner. Yet the Ethiopian civil society proclamation has some loopholes for the establishment of associations.[40] Although the CSO law is a step forward in terms of overall freedom for civil society organizations, Ethiopia still lacks a robust consumer protection framework that would allow consumer associations to directly intervene in issues of consumer abuse. Consumer groups face challenges in building the capacity needed to effectively challenge businesses and governmental entities in favor of consumer rights.

[38] UNCTAD, Manual on Consumer Protection, *supra* note 6, p. 83.
[39] *Ibid.*
[40] Organizations of Civil Societies Proclamation, 2019, *Federal Negarit Gazzeta*, Proc. No. 113, 25th year, No. 33.

In Ethiopia, Alternative Dispute Resolution (ADR) mechanisms, such as arbitration and mediation is an alternative to court litigation. However, under the current Ethiopian Arbitration and Conciliation Proclamation**,** consumer protection issues are excluded from the scope of arbitrable matters.[41] This means that consumers cannot submit their disputes to arbitration or conciliation processes, limiting their access to these potentially quicker and less expensive alternatives. As a result, consumers are left with fewer options for resolving disputes efficiently and without incurring substantial costs. The exclusion of consumer disputes from the scope of arbitration under Ethiopian law is likely intended to protect consumers, ensuring they have access to a more transparent and equitable legal process in court. It reflects broader consumer protection principles and access to justice while also addressing concerns about the potential inequalities inherent in arbitration processes.

However, the international experience, including the practices in African countries like South Africa and Nigeria, considers consumer disputes as arbitrable.[42] The ongoing legal reforms in many African countries may eventually lead to more rigorous approaches that introduce specialized arbitration systems for consumer disputes. The South African and Nigerian experiences allow for arbitration in consumer disputes, but consumer protection laws prioritize the role of regulatory bodies to handle issues related to consumer rights and disputes.[43] Moreover, many

[41] Arbitration and Conciliation, Working Procedure Proclamation No. 1237/2021, Federal *Negarit Gazeta*, 27th Year No. 21, Art.7(8).

[42] Akinwumi Olawuyi Ogunranti, Separating the Wheat from the Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa (2019), available at https://digitalcommons.schulichlaw.dal.ca/scholarly_works/534/Last accessed on 24 April 2024.

[43] *Ibid.*

countries in Africa, such as Ghana and Kenya, rather than totally excluding the matters from the ADR mechanisms, rely heavily on **c**onsumer protection agencies to handle disputes. These agencies are designed to offer accessible and affordable mechanisms for addressing consumer grievances.[44]

2. Regulatory Schemes for Consumer Protection under the WTO Regime

One of the major benefits of WTO membership is the ability to secure lower tariffs and guaranteed market access through trade policy commitments.[45] However, membership also requires careful consideration of how consumer interests and protective regulatory schemes are addressed in the context of global trade. While the WTO does not have a comprehensive or explicit framework for consumer protection, it does contain provisions that touch on aspects of consumer welfare, though these are limited and often ambiguous.[46] There is no clear, overarching reference to consumer rights in the main WTO agreements. Instead, consumer interests are addressed in fragmented provisions such as:

- The General Agreement on Tariffs and Trade (GATT),
- The Agreement on Technical Barriers to Trade (TBT),

[44] *Ibid.*

[45] Kent Jones, *Who's Afraid of the WTO,* (Oxford University Press 2004), p.46, available at https://global.oup.com/academic/product/whos-afraid-of-the-wto-9780195166163.Last accessed on 12 April 2024.

[46] Ecologic-Institute for International European Environmental Policy (EIIEEP),*Consumer Interest and Sustainable Development in international Trade Law,(2007),* P. 8,available athttps://www.ecologic.eu/. Last accessed on 12 may 2022).

- The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and

- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

These agreements refer to consumer interests in indirect ways, often with stringent preconditions for invoking consumer protections. For example, the TBT and SPS agreements focus on the technical and health standards of goods traded across borders, while TRIPS deals with intellectual property rights that can impact consumer access to certain products, such as medicines. However, the WTO framework often overlooks the relationship between trade liberalization and the protection of consumer rights.

In many instances, the liberalization of trade is prioritized over ensuring consumer safety and welfare.[47] This creates a challenge, especially for developing countries, where consumer protection standards may be weaker or less enforced and where trade policies can have disproportionate effects on vulnerable populations. This section will explore both the opportunities that exist within the WTO for consumer protection and the challenges faced by developing nations in safeguarding consumer interests in a liberalized global market.

[47] Kent Jones, *Who's Afraid of the WTO, supra* note 46.

2.1. Opportunities for Consumer Protection under the WTO Agreement

Protecting consumers' interests, though primarily a domestic concern, faces increasing challenges in the era of free trade and economic globalization.[48] However, this does not mean that the WTO legal framework completely overlooks consumer protection rights. As outlined earlier, consumer interests generally encompass rights such as access to reliable and accurate information about products, ensuring product safety (particularly protecting consumers' health and life), and ensuring product availability at fair prices.[49] This section examines the various WTO provisions that can help support consumer protection frameworks to this effect.

2.1.1. Conveying Truthful Information to Consumers within WTO Regimes

Consumers have the right to be informed about the quality, content, price, and quantity of goods, among other attributes, to make informed purchasing decisions. Several WTO agreements regulate the information that must be conveyed to consumers, though they do not explicitly require states to mandatorily provide such information.[50] Instead, these agreements offer an enabling framework for states to set domestic standards**.** For example, the TBT Agreement, the most relevant of all these instruments, explicitly endorses the prevention of deceptive practices in its preamble, recognizing that such practices can harm

[48] Sonia E. Rolland, '*Are Consumer-Oriented Rules the New Frontier of Trade Liberalization'.* (2014) Harvard International Law Journal Vol. 55, No. 2, p. 361-419 [Hereinafter Sonia E. Rolland].
[49] *Id.*, p. 376.
[50] UNCTAD, Manual on Consumer Protection, *supra* note 6, p. 73.

consumers.[51] The TBT agreement acknowledges that the prevention of deceptive practices is a legitimate objective for adopting domestic technical regulations. These regulations are crucial as they set out the standards, technical specifications, and conformity assessment procedures that define the characteristics of goods, including labeling, packaging, and production processes—all of which help convey truthful information to consumers.[52]

The WTO principles of national treatment and most-favored-nation (MFN) treatment also play a role in this respect. States must apply their technical regulations to both domestic and imported products in a non-discriminatory manner.[53] According to Article 12 of the TBT Agreement, developing countries are given special and differential treatment, although they are still required to comply with the core provisions of the agreement.[54] In addition to the TBT Agreement, the GATT and TRIPS also regulate consumer information. Under GATT Article IX (Rules of Origin), consumers are protected from misleading indications regarding the origin of goods, while TRIPS includes provisions on geographical indications**,** ensuring that consumers are not misled about the origin of a product.[55] As Sonia E. Rolland notes, TRIPS explicitly addresses the prevention of misleading geographical

[51] Marrakesh Agreement Establishing the World Trade Organization 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995) Annex 1A: Agreement on Technical Barriers to Trade [TBT Agreement, hereinafter, the TBT agreement].

[52] To clarify key terms: technical regulations are mandatory, while standard**s** are voluntary. Conformity assessment procedures are used to determine whether a product complies with a technical regulation or standard. This distinction allows domestic regulatory schemes to ensure that consumers receive truthful information about products in the marketplace.

[53] Agreement on Technical Barriers to Trade, *supra* note 51, Art. 2.

[54] *Id.*, Art. 12.

[55] Sonia E. Rolland, *supra* note 49, p. 376.

indications, reinforcing the role of information in consumer protection.[56] In cases like EC–Trademarks/GIs, the WTO's Appellate Body has affirmed that consumers have a legitimate interest in distinguishing between goods and avoiding confusion, particularly in the context of trademarks and geographical indications.[57] This demonstrates how labeling regulations under the WTO contribute to consumer protection by promoting truthful information.

2.1.2. Consumers' Health and Safety Rights in the WTO Regime

One of the most fundamental consumer rights is the protection of health and safety through product safety standards. Both the SPS and TBT agreements offer frameworks that allow states to set health and safety standards for products.[58] Moreover, Article XX of GAAT provides an exception that allows members to take measures to protect public health (Article XX (b)) and the environment (Article XX(g)).[59] The SPS Agreement specifically addresses the protection of human health from risks associated with food safety**,** animal health**,** and plant health**.** However, it does not prescribe specific SPS measures; instead, it sets general procedural requirements, such as ensuring that such measures are scientifically justified. For instance, any SPS measure must be based

[56] *Id*., p. 378

[57] Panel Report, *European Communities –Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, ¶ 7.676, WT/DS174/R, DSR 2005:VIII, 3499 (Mar. 15, 2005) (adopted Apr. 20, 2005) [hereinafter *EC – Trademarks / GIs*]).

[58] Sonia E. Rolland, *supra* note 49, p. 376.

[59] General Agreement on Tariffs and Trade, Oct. 30, 1947, as modified by General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994) Article XX:B (Hereinafter cited as General Agreement on Tariffs and Trade).

on scientific evidence and must be applied only to the extent necessary. In cases where there is a dispute regarding SPS measures, the WTO allows for the adoption of measures that are more stringent than international standards if they are scientifically justified.[60]

GATT Article XX(b) also provides a basis for countries to take measures to protect human life and health from unsafe products.[61] However, before such measures can be imposed, the country must demonstrate that they are necessary to protect human health and that they do not unjustifiably discriminate between countries with similar conditions.[62] These stringent requirements often present challenges, especially for developing countries that may lack the resources to conduct the necessary scientific research. In many WTO cases, the application of SPS interpreted in light of GATT XX(b) and the Chapeau clause and measures devised to protect the consumer against physical risks from consumption have been permitted so long as it is necessary

[60] Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 Food & Drug L.J. 81 (2000). pp. 83-84, and Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994. This SPS agreement under its Preamble set forth ("*Desiring* to improve the human health, animal health, and phytosanitary situation in all Members… *Desiring* the establishment of a multilateral framework of rules and disciplines to guide the development, adoption, and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade".)

[61] General Agreement on Tariffs and Trade, *supra* note 60, Art. XX (b).

[62] Rudiger Wolfrum, Peter Tobias Stoll and Anja Seibert-fohr (eds.), *WTO-Technical Barriers and SPS Measures*, (2007), pp. 64-67. The Chapeau formulates general limitations on the application of these measures, which in particular are meant to ensure that the application of a measure does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or constitutes a disguised restriction on international trade.

and scientifically justified.[63] The SPS Agreement encourages members to harmonize their SPS measures by adopting international standards,[64] guidelines, and recommendations developed by several international bodies.

The most notable standards and guidelines in this respect are the Codex Alimentarius Commission (Codex),[65] the International Office of Epizootics (OIE),[66] and the Secretariat of the International Plant Protection Convention (IPPC).[67] With a more committed intent to the desired, the agreement further affords that members can adopt more stringent standards if, based on scientific justification, the relevant

[63] Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R, WT/DS48/R, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R (Aug. 18, 1997) (*adopted* Feb. 13, 1998) [hereinafter *EC–Hormones*] Panel Report, *European Community —Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, as modified by Appellate Body Report, WT/DS291/AB/R, WT/DS292/AB/R, WT/DS293/AB/R (Sept. 29, 2006) (adopted Nov. 21, 2006) [hereinafter *EC–Biotech*].

[64] Kevin C. Kennedy, *supra* note 61, p. 85.

[65] UNCTAD Training Module on the WTO agreement on sanitary and phytosanitary measures UNCTAD/DITC/TNCD/2004/3Available at https://unctad.org/system/files/official-document/ditctncd20043_en.pdf. Last accessed on 12 March 2021.
The Codex Alimentarius Commission (CAC) is an intergovernmental body, established in 1963, under the co-sponsorship of two UN organizations: the World Health Organization (WHO) and the Food and Agriculture Organization (FAO). The CAC's primary mission is to administer the Joint WHO/FAO Food Standards Programme to protect the health of consumers and promote fair practices in the food trade.

[66] *Ibid.* Created in 1924, the International Office of Epizootics is an intergovernmental organization, based in Paris, engaged in the prevention and control of the spread of zoonoses (animal diseases).

[67] *Ibid.* The International Plant Protection Convention is a multilateral treaty that aims to secure common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote appropriate measures for their control.

specified international standards fail to provide an adequate level of protection for the intended purposes.[68]

2.1.3. Market Access, Pricing, and Product Selection Rights of Consumers in the WTO

One of the key goals of the WTO is to facilitate market access**,** which can benefit consumers by increasing the variety of goods and services available at more competitive prices.[69] The WTO's focus on reducing tariffs and eliminating trade barriers is intended to allow consumers access to a broader range of goods at lower prices, compared to a closed economy. The WTO agreements have set clear regulatory frameworks for prohibiting import quotas**,** reducing tariffs, and ensuring market access, all of which indirectly benefit consumers by increasing the availability of goods and services.[70] However, there is ongoing debate about whether trade liberalization actually benefits consumers. Some studies suggest that while developing countries that accede to the WTO experience increased trade, there is no clear empirical evidence linking WTO membership with significantly better trade patterns or consumer outcomes.[71] Anti-dumping measures in the WTO also have mixed implications for consumers. Dumping**—**the practice of selling goods at lower prices in foreign markets than in the domestic market—can

[68] Kevin C. Kennedy, *supra* note 61, p. 85, and the SPS agreement Art. 3.3.

[69] Ecologic-Institute for International European Environmental Policy (EIIEEP) *supra* note 4, p. 7.

[70] General Agreement on Tariffs and Trade, *supra* note 60.

[71] Andrew K. Rose Source, Do We Know That the WTO Increases Trade? The American Economic Review, Mar., 2004, Vol. 94, No. 1, (March 2004), pp. 98-114. A recent study shows in contrast with such a conclusion. On average, joining GATT or the WTO has led to about a 72% increase in the international trade of member countries relative to their domestic sales in our full dataset covering 178 trading partners over the period 1980-2016.

benefit consumers by providing access to cheaper goods.[72] However, dumping can also pose risks to product quality and safety. The WTO Anti-dumping Agreement allows importing countries to take action if dumping causes harm to domestic producer. The dumping effect may be so insidious that it benefit consumers in the short term by lowering prices, yet this could harm consumer welfare in the long run, leading to substandard products entering the market and eventually creating predatory pricing.[73] Thus, the anti-dumping rules of the WTO allow more far-sighted actions against such harms.

2.2. Challenges of Protecting Consumers Rights in the WTO Legal Framework

It is not easy to benefit from the consumer protection exceptions of the WTO legal framework. Especially for developing countries, it demands a lot of work to get familiar with the WTO regimes and economic and human capacities. This journey may sometimes be accompanied by challenges requiring strategic moves to overcome it. The producer-centered WTO principles and the Stringent Procedures of Consumer Protection exceptions are the major regimes cited as sources of such challenges in this respect. The next section explores the challenges associated with the processes understanding and employing these principles of such regimes.

[72] Karolina Andersson and Carin Thuresson, *The Impact of an Anti-dumping Measure, A Study on EU Imports of Chinese Footwear*, April2008, p. 6. Available at https://www.diva-portal.org/smash/get/diva2:3772/FULLTEXT01.pdf.Last accessed on 12 April 2022.

[73] P.K. Mathew Tharakan, *Market structure and competition policy*, Cambridge University Press (2000), pp. 1-3.

2.2.1. Producer-Centered Principles and Measures

Three notable principles of the WTO, namely the most-favored-nation (MFN) treatment obligation and the national treatment obligation[74] and eliminating discrimination are the other set of relevant, yet complex principles requiring conscientious examination to figure out the underlying intentions of the WTO to protect consumers. The most-favored-nation treatment concerns any advantages granted by any member concerning customs duties, other charges on imports and exports, and other customs matters, internal taxes, and internal regulations affecting the sale, distribution, and use of products should equally apply.[75] More specifically, MFN prohibits unfavorable discrimination between similar products or services from different producing countries.

Hence, the MFN treatment obligation requires that any privileges granted by a member to any product from or for another country be granted to all like products (goods and services) from or for all other Members.[76] In the case of national treatment, however, the principle prohibits members from treating imported products less favorably than alike domestic products once the imported product (goods and services) has entered the domestic market.

In contrast to producers' interest in the WTO regime, producers or sellers are not restricted from discriminating between domestic and

[74] Peter Van den Bossche, *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Cambridge University Press, (2005) p. 308.
[75] *Id.*, p. 312.
[76] Art. I of the GATT 1994 and Art. II:1 of the GATS recognized the MFN principles of WTO, which mainly concerned protecting the interests of producers.

foreign consumers to extract higher profits.[77] These consumer issues are typically not articulated as trade concerns but they are consumer-oriented trade barriers that the producer-oriented regime is not capturing in both national and MFN treatment. Moreover, producer-centeredness also transpires from trade remedies like safeguards, anti-dumping, and countervailing duties, all of which aim to protect mainly domestic producers from certain types of competition.[78] Consumers, on the other hand, might have welcomed cheaper foreign goods now made more expensive by the imposition of such duties.[79] It becomes a barrier to market access and product selection privileges of consumers. This directly or indirectly shows consumers, as a segment in the market, have little weight in the interpretation of WTO legal frameworks.

2.2.2. The Stringent Nature of the Consumer Protection Exceptions in the WTO

The WTO legal framework has some exceptions for consumers' interests. Such major exceptions have a prerequisite that becomes more onerous to developing countries from the viewpoints of human resources and technological advancements. Among others, Article XX of the GATT provides for human health and life exceptions that require stringent two-tier tests. Firstly, it requires scientific justifications for the policy objectives provided in the exception clause. Accordingly, the importing state should assure the objective of protecting human health and life as a policy goal, and they are duty-bound to prove the adverse effect of the products on consumers' health and life through scientific justifications.

[77] Sonia E. Rolland, *supra* note 49, p. 376.
[78] *Ibid.*
[79] *Ibid.*

Apart from the stipulation in this regime of the WTO, scientific evidence and expert reports that show the adverse effect of products on human health and life are a prerequisite for the state to benefit from this exception. It is predictable to understand the task of proving the impact of products in scientific ways, especially for developing countries like Ethiopia. International costs for such purposes are beyond the nation's capacity. Unless a nation proves the adverse effect in scientific ways, it becomes a disguised means for the international trading system.

The second element of the test under Article XX(b) is the 'necessity' requirement, which is more problematic to apply. Illustrating this test, the *Thailand –cigarettes* case shows that within the meaning of Article XX(b), only in cases where no alternative measure are available for GATT's consistent or less inconsistent treatment, and where a member could reasonably be expected to employ to achieve the public health or life objective pursued.[80] Further, the necessity tests as a precondition to employ the alternative measures, requires countries to have the required manpower and economic capacity to attain the desired ends. Hence, there may be alternative methods to avert the challenge in the eyes of the exporting country, assuming that the exporting state is more economically strong than importing nations. This would later have confirmation in the WTO panels. It also requires the same degree of conditions in the case of SPS measures.[81] SPS measures must be applied only to the extent necessary, based on scientific principles, and must not be maintained without sufficient scientific evidence not to become a

[80] Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines, Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm ,Last accessed on 12 April 2022.

[81] Kevin C. Kennedy, *supra* note 61, pp. 83-85.

barrier to the international trading system.[82] The SPS Agreement also identifies specific criteria to be used in evaluating the assessment of risk to the human, animal, or plant life or health in five parameters:1) available scientific evidence; 2) inspection, testing, and sampling techniques; 3) relevant ecological and environmental conditions; 4) the existence of pest- or disease-free areas; and 5) production processes and methods.[83] All these conditions require efficient state machinery both in institutional and human resources capacity as well as financial capability of trading nations.

3. Concluding Remarks and Implications for Ethiopia's WTO Accession

The establishment of a robust consumer protection framework is critical in the context of global trade. While the WTO has been criticized for focusing predominantly on producer interests**,** often overlooking consumer rights, its regulatory schemes still provide opportunities for protecting consumer interests, albeit in a manner that may be less feasible for developing countries like Ethiopia. Particularly, despite these challenges, consumers' rights—including access to information, product safety, and dispute resolution—are recognized globally and incorporated into Ethiopia's legal framework. Ethiopia's path to WTO membership should ensure that consumer protection remains central in the process of trade liberalization. While adhering to the WTO principles, Ethiopia must balance these global obligations with the protection of national consumer interests**.** Particularly, the evidence from the study suggests, as part of Ethiopia's move to WTO accession, the need for:

[82] *Id.,* p. 84.
[83] *Ibid.*

1. Development of a Comprehensive Consumer Protection Framework**:** Ethiopia should work towards creating a more comprehensive and clearer consumer protection framework, both domestically and within the context of WTO agreements. While the WTO agreements offer some consumer protection provisions (like those in the GATT, TBT, and SPS), they tend to focus more on facilitating trade rather than protecting consumers. Ethiopia's accession process can serve as an opportunity to harmonize national consumer protection laws with WTO rules, but also to push for clearer provisions within the global trade system that consider consumer interests.

2. Strengthening Institutional Capacity and Legal Infrastructure: To effectively implement WTO provisions on consumer protection, Ethiopia must significantly strengthen its legal and institutional frameworks. This may include establishing or empowering agencies responsible for overseeing product safety, fair trade practices, and consumer rights enforcement.

3. Addressing the Producer-Centric Nature of the WTO: The WTO's focus has been criticized for prioritizing producer interests over consumer protection: As Ethiopia joins the WTO, it will need to advocate for more consumer-friendly regulations that ensure global trade benefits consumers equally. This can be achieved by lobbying for stronger provisions on transparency, information accessibility, and the safe quality of imported products, which are currently under-regulated in many international trade agreements.

4. Improving the Procedural and Compliance Challenges: One of the key findings is that the consumer protection provisions in WTO agreements often come with complex procedural requirements. For developing countries, including Ethiopia, these can pose a significant challenge. Ethiopia may need to invest in specialized training for government officials, legal experts, and regulatory bodies to navigate these complexities. Additionally, Ethiopia might seek to negotiate flexibilities or transitional periods within the WTO framework to ensure it is not overwhelmed by the procedural burden while building its regulatory capacity.

5. Enhancing Consumer Awareness and Education: As Ethiopia opens its markets to international trade, the public's ability to understand and act on their rights as consumers becomes critical. The government could invest in public awareness campaigns and consumer education programs to ensure citizens are informed about their rights under both national law and international trade agreements.

6. Ensuring Effective Dispute Resolution Mechanisms: Ethiopia should establish accessible and efficient consumer dispute resolution mechanisms, including a clear framework for resolving consumer complaints regarding product safety, unfair trade practices, and breaches of consumer rights. While the WTO offers mechanisms for dispute resolution, these are often focused on intergovernmental disputes rather than consumer-level complaints. Thus, Ethiopia should consider developing its own consumer protection agencies or utilizing existing structures to handle these complaints in line with WTO requirements. Moreover, the arbitration law should enshrine ADR methods like mediation and

arbitration in Ethiopian law for consumer complaints, with a streamlined legal process that is both affordable and accessible to the public.

7. Leveraging International Support and Technical Assistance: Since developing countries like Ethiopia often face challenges in meeting WTO requirements, it is crucial for Ethiopia to actively seek technical assistance from international organizations, including the WTO, UNCTAD, and the World Bank. This support can help enhance Ethiopia's capacity in areas such as legal drafting, institutional capacity-building, regulatory compliance, and consumer protection mechanisms, making the WTO's consumer protection provisions more accessible and implementable.

A Comparative Analysis of Bank Security in A Letter of Credit Transactions: The Pledge of a Bill of Lading under English and Ethiopian Law

Adam Denekew *

Abstract

This article examines the security of banks using bills of lading as collateral in letter of credit transactions with a focus on proprietary and contractual rights. The exploration employs doctrinal tools of comparative analysis. Juxtaposing the features of English and Ethiopian laws, the investigation unraveled issues, such as proprietary and contractual rights, banks' ability to claim delivery or sue carriers, and the legal consequences of these issues. The evidences from the comparative analysis show that the English law clearly sanctions prejudicial legal consequences on banks whereas the Ethiopian law leaves outcomes ambiguous. Further, the exploration reveals that the validity of security interest may be challenged if goods are delivered before the bill reaches the bank. Yet this is treated as spent under Ethiopian law, in contrast to the case law under English law. Both jurisdictions require the transferor to hold title, potentially invalidating the bank's security if the seller lacks title. Besides, the English law considers the intention of parties in transferring title via bills, while Ethiopian law lack such clarity. The financing bank's temporary release of the bill of lading in return for trust receipts further undermines its security under both legal systems. Finally, pledging bills of lading as collateral may leave banks as unsecured creditors, questioning the perceived reliability of this security mechanism.

Key Words: Letter of Credit, Bank Security, pledge, Bill of Lading, Document of Title, Misdelivery Action

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Introduction

Letter of credit transaction is one of the key elements of international business interactions in which a buyer and a seller belong to different jurisdictions. In such transactions, a seller is generally unwilling to ship goods without first ensuring receipt of payment, while the buyer is similarly hesitant to pay without adequate assurance of receiving the goods.[1] A letter of credit, which makes banks a central actor, tries to strike a balance between these opposing interests.[2] Upon the buyer's request, a bank, which is more creditworthy than the buyer, will promise the seller that it will pay the contract price once documents evidencing shipment are presented. On the other hand, the buyer is only supposed to pay upon the arrival of a complying document in the hands of the bank, evidencing that the goods have been shipped as agreed.

By financing the sale contract, the bank is essentially assuming accountability for failure of the buyer to reimburse the sale price that it advances to the seller.[3] As such, its willingness to absorb the buyer's bankruptcy, for instance, is dependent on the strength of the securities that the letter of credit offers.[4] In the failure of the buyer, the bank can resort to these securities. In fact, financing banks can ask other alternative securities, such as requiring the buyer to present other collaterals; however, practically, a transferable bill of lading is

[1] Carole Murray, David Holloway and Daren Timson-Hunt, *The Law and Practice of International Trade* (13thedn, 2019) 11-001; See also, Charles Debattista, *The Sale of Goods Carried by Sea* (2nd ed, Butterworths 1998) pp. 1-14.
[2] Časlav Pejović, *Transport Documents in Carriage of Goods by Sea: International Law and Practice* (1st ed, Informa Law from Routledge 2020) p. 163.
[3] HC Gutteridge and Maurice Megrah, *The Law of Bankers' Commercial Credits* (7thed, Europa Publications Limited 1984) p. 210.
[4] Torsten Schmitz, 'The Bill of Lading as a Document of Title' (2011) 10 Journal of International Trade Law and Policy 255.

preferable. By holding the bill of lading by way of pledge, the financing bank can establish title to the underlying goods.

In an international carriage of goods by sea, a bill of lading is a document that functions as a receipt of goods, evidence of a carriage contract and a document of title to goods.[5] Its function as a "document of title" makes it an ideal option for banks to acquire security interests on the underlying goods. Its document of title function implies that a bill of lading serves as the symbol of the goods described in it, so its transfer can pass the constructive possession of the goods.[6] Further, though it does not by itself transfer title to goods, it can be part of the process of transferring title depending on the intention of parties to the sale contract.[7]

Revisiting the issue of bank security in a letter of credit and the financing bank's willingness to absorb risks associated with the potential bankruptcy of the buyer before being reimbursed for its payments depends on the security that the bill of lading provides. To that end, the bank may subject the goods described by the bill of lading as collateral by holding the bill of lading as pledge. The bank, as pledgee of the bill of lading, will have a special property on the underlying goods.[8] This gives the bank a power of sale and a priority

[5] Sir Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (1st edn, Sweet & Maxwell 2001) paras 1-3; See also, Frank Stevens, *The Bill of Lading Holder Rights and Liabilities* (Routledge 2018) p. 1.

[6] Enichem Anic Spa v Ampelos Shipping Co Ltd (The Delfini) [1990] CA 1 Lloyd's Rep 252; Michael D Bools, *The Bill of Lading: A Document of Title to Goods an Anglo-American Comparison* (LLP Limited 1997) pp. 1-18.

[7] The Delfini (n 6).

[8] Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th ed, Informa 2007) 6.19.

right in the proceeds of the sale of the underlying goods, in case the buyer becomes bankrupt before reimbursing the bank.[9]

Further, from a contractual rights perspective, the bank can also claim delivery of the cargo from the carrier upon the arrival of the goods at the port of destination if its client fails to reimburse the amount paid to the seller. Moreover, if the carrier has already delivered the cargo to a third party without the production of the bill of lading, the law entitles the bank to institute a "misdelivery action" against the carrier.[10] Finally, it important to note that a bill of lading as collateral for financing banks is not as robust as commonly perceived, as several variables limit its reliability.

This article aims to identify these factors and evaluate the strength of a bill of lading as collateral under English and Ethiopian law from a comparative perspective. The study employs doctrinal legal research methodology to analyze and interpret primary and secondary legal sources. By using statutory provisions, case law, and legal doctrines as target of juxtaposition, this method allows for a structured comparison of how English and Ethiopian laws treat the pledge of a bill of lading. The English law is chosen for comparison due to its well-established legal framework governing international trade and maritime commerce, its influence on global commercial law, and its extensive jurisprudence on the bill of lading, making it an ideal benchmark for comparative analysis.

[9] Edward Ivamy, Payne and Ivay`s, *Carriage of Goods by Sea* (Butterworths, London, 13thed, 1989) p. 72.

[10] The COGSA 1992, Art 2. A misdelivery action against a carrier arises when a carrier delivers goods to the wrong party or fails to deliver them according to the terms of the bill of lading or shipping contract. This action typically involves a claim by the party entitled to receive the goods (often the consignee or the holder of the bill of lading) against the carrier for breaching the delivery terms.

1. Overview of Pledging a Bill of Lading under English Law

1.1. The Nature of Bill of Lading as Document of Title

The function of a bill of lading as document of title has two implications. Firstly, a bill of lading designates goods under voyage. This makes the instrument a transferable key to the warehouse, allowing transfer of constructive possession of goods. Second, it is essential in transferring title to property. While its transfer alone cannot transfer title to goods, it remains a crucial part of the process. Thus, the document of title function of a bill of lading makes it a pledgeable asset.

Under English law, only the intention of parties to a sale contract can transfer property, not the transfer of a bill of lading.[11] If the intention to transfer property accompanies the transfer of a bill of lading, then the transfer of the bill of lading can effectively transfer the property. Thus, a bill of lading, being a document of title, does not necessarily indicate that the holder has title to the goods.

Under English law, for a bill of lading to serve its document of title function, it must be capable of transferring rights and liabilities. Section 1 (2) (a) of COGSA 1992 suggests that a bill of lading is said to be transferable only when it can transfer title either by delivery alone or endorsement followed by delivery. This implies that only bills of lading issued either in bearer or order form can be considered transferable and serve as a document of title.

[11] Sale of Goods Act 1979 (The Sale of Goods Act), s .17.

1.1. The Pledge of a Bill of Lading in a Letter of Credit Transaction

As a document of title, a party holding a bill of lading, which may also be the bank financing a sale contract, can acquire constructive possession of the goods under voyage. As a result, only this party has a contractual right to demand delivery of the cargo from the carrier or to take legal action if the carrier delivers the cargo to the wrong party.[12]

In this context, the bank's rights to claim delivery of the cargo or sue the carrier are only contractual rights available to it, like any other holder of a bill of lading. These contractual rights of the Bank come from its position as a consignee, endorsee, or bearer holder under Section 5(2) of COGSA 1992, not necessarily from being a pledgee of the bill of lading.

However, banks often choose to obtain title to the goods by taking the bill of lading as a pledge instead of exercising contractual rights, as this may require them to join the carriage contract and incur related costs.[13] This is because pledging the bill of lading subjects the underlying goods to the pledge, securing the bank's right to be reimbursed by its client, the buyer. This grants them the power of sale of the goods and priority in the proceeds of the sale. Besides, by obtaining title under the documents, banks can also realize their claim against their client by reselling the document.

Pledge is generally one of the possessory types of security interests under English law. Its possessory nature implies that the subject matter

[12] The COGSA 1992, s 5 (2).

[13] The COGSA 1992, s 3(1); See also, section 3.1 of this article about how the exercising of contractual rights might be a reason for the bank to be liable to different costs as if it is a party to the carriage contract.

of a pledge is only corporeal assets and documentary intangibles.[14] Because it is possessory, it will affect third parties only when the pledgee is in possession of the pledged asset.

Holding the bill of lading satisfies the possession requirement of a pledge, as it provides constructive possession of goods in transit until they reach the destination port.[15] However, this possessory requirement is not absolute. In certain circumstances, the bank may temporarily release the pledged bill of lading without relinquishing its rights as the pledgee. For instance, if the buyer is unable to pay the bank and take possession of the bill of lading, but the goods have already arrived at the port of destination, the bank might release the bill of lading to enable the buyer to receive the cargo from the carrier. In these situations, the bank may issue a trust receipt, enabling the buyer to obtain the cargo from the carrier while also demonstrating that the buyer holds the bill and the underlying goods on behalf of the bank.

[14] Goode RM, *Legal Problems of Credit and Security* (2nd ed, Sweet and Maxwell Ltd 1988) 11. Documentary intangibles are documents embodying title to goods, money, or securities such that the right to these assets is vested in the holder of the document for the time being and can be transferred by delivery with any necessary endorsement.

[15] *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53.

1. Overview of Pledging a Bill of Lading under Ethiopian Law

1.1. Understanding the Nature of a Bill of Lading under Ethiopian Law

The Commercial Code recognizes bill of lading as a negotiable instrument. Book IV of the Ethiopian commercial code regulates a negotiable instrument, which include commercial instruments[16], documents of title to goods, and transferrable securities.[17] Particularly, title I of book IV, in Articles 715 - 731, provides the general provisions applicable to all the three types of negotiable instruments. Except these general provisions, the code has no specific provisions governing documents of title to goods and what it calls transferable securities. The specific provisions of the code are limited to commercial instruments such as cheque, bill of exchange and promissory note.

As bill of lading is one of the most widely recognized documents of title to goods, the term 'documents of title to goods' under the Ethiopian commercial code encompasses a bill of lading.[18] One can therefore assert that the general rules of the Ethiopian commercial code mentioned above are applicable to a bill of lading as well. These provisions regulate the definition of a negotiable instrument, the form of issuance, its modality and effect of negotiation, and defenses.

Illustrating these evidences, Article 715(1) of the code, defines negotiable instrument I as "a document that incorporates a right of entitlement such that the rights cannot be enforced or transferred

[16] Commercial instruments are negotiable instruments incorporating the right to receive money such as cheques, bills of exchange, and promissory notes.

[17] The Ethiopian Commercial Code, Art 715(2).

[18] A bill of lading is one of the most widely recognized documents of title to goods, but other documents, such as warehouse receipts and dock warrants, also serve similar functions in different commercial contexts

independently of the document." This provision highlights two elements essential for understanding the document of title function of a bill of lading: the right of entitlement and the inseparability doctrine.

The notion of right of entitlement signifies that a negotiable instrument incorporates a right: the right to receive goods or a sum of money. In the context of a bill of lading, the right associated with it is the right to receive goods. Besides, the element of inseparability indicates that the rights associated with a negotiable instrument can only be transferred or enforced when accompanied by the document itself. This inseparability ensures that the document and the embodied rights are inextricably linked. In the context of a bill of lading, the holder has the right to receive the underlying goods from the carrier, but this right can only be exercised upon the presentation of the bill. The carrier can refuse anyone claiming the cargo without the bill of lading at hand. Further, to transfer the title to goods, one must also transfer the bill of lading.

The Movable Property Security Rights Proclamation (hereinafter the Security Rights Proclamation) also recognizes a bill of lading as a corporeal movable property. Generally, the Proclamation designates movable property as the sole object of security rights, further classifying it into corporeal and incorporeal categories. Within this framework, a bill of lading is categorized as corporeal movable property even though the right it bears is incorporeal.

One of the key elements, taken as new practices introduced in this Proclamation is its distinct approach to classifying documentary intangibles.[19] Unlike the traditional classification found in the

[19] A documentary intangible is a physical document that embodies an incorporeal right, meaning the document itself represents a legal claim rather than having intrinsic value. It serves as evidence of a right that can be transferred by transferring

Commercial Code, which broadly groups all documents entitling the holder to receive either money or goods under the term negotiable instruments, the Proclamation draws a distinction between negotiable instruments and negotiable documents.

Under the Commercial Code, consistent with the approach of many civil law legal systems, the term negotiable instrument applies to various documents incorporating rights to receive either money or goods. However, the Security Rights Proclamation adopts a narrower definition, limiting negotiable instruments to documents that strictly confer the right to receive money. This category includes instruments such as promissory notes, checks, and bills of exchange.

Simultaneously, the Proclamation introduces the term negotiable document to refer specifically to documents that entitle the holder to receive goods. This newly defined category includes bills of lading and warehouse receipts—documents that represent claims to goods rather than monetary payments. By drawing this distinction, the Proclamation provides a more structured classification, clearly separating financial claims from claims to goods.

The Proclamation appears to have intended to adopt the approach taken by the Uniform Commercial Code (UCC) of the United States, which distinguishes between negotiable instruments (Article 3) and documents of title (Article 7). Nevertheless, it is also somewhat different because it uses the term negotiable document for those documents that entitle the holder to receive goods, while the UCC refers to these as documents of title. This choice of terminology appears confusing as a negotiable

the document, making it distinct from purely intangible assets like intellectual property.

document could be any document incorporating rights be it the right to receive money or goods.

In a related context, the nature of the title a bill of lading represents is an issue that Ethiopian law does not seem to address. Until the 1992 Carriage of Goods by Sea Act resolved many interpretational dilemmas, the English law had also similar problems. Central to this discussion is whether the holder of a bill of lading is the owner of the goods or merely entitled to demand delivery. This also raises questions over the transferability of rights, such as whether the holder can pass ownership or entitlement to others by endorsing the document, and whether the holder can sue the carrier for damage to the cargo during transit. The way these issues are addressed determines how the bill of lading functions: whether it merely serves as a receipt and contract of carriage or confers proprietary rights.

In conclusion, the combined elements of the right of entitlement and inseparability under the commercial code, along with the possibility of subjecting a bill of lading to security rights in the security proclamation, make it possible to argue that a bill of lading is a document of title to goods, and its transfer can indeed transfer constructive possession of goods. However, while it provides a foundational understanding of negotiable instruments, which include a bill of lading, the commercial code lacks provisions addressing the unique features of bills of lading. Most importantly, key aspects regarding the nature of a bill of lading, such as identifying the holder of a bill of lading and the extent of rights, are left unaddressed. Recourse to the Maritime Code itself gives no better outcome. The maritime code governs a bill of lading in Articles 180-209, focusing only on its role as a contract of carriage. The role of a bill of lading as a document of title is unaddressed.

It was anticipated that the upcoming Financial Services Code would address the issues of ambiguity and gaps in the law governing negotiable instruments, including bills of lading. However, according to the code's drafters, its original provisions will largely remain unchanged, except for cheques, which will undergo significant legislative reforms.[20]

2.2 Security Rights[21] on a Bill of Lading in a Letter of Credit Transaction under Ethiopian Law

2.2.2 Pledging Endorsement under the Commercial Code: Real Security or Legal Fiction?

Security is the other subject requiring close scrutiny in Ethiopian commercial practices. Looking into both the Maritime Code and Commercial Code, one would see that both are not clear as to whether if financing banks in a letter of credit transaction can hold a bill of lading by way of security. Of course, one may argue that Article 729 of the Commercial Code allows negotiable instruments to be subjected to security through endorsement. However, this provision presents challenges if we interpret it as also allowing financing banks to hold a bill of lading by pledge.

[20] The Core Drafting Team, The Reform of the Banking Law of Ethiopia: Defining the Scope of the Reform (Policy White Paper, Ministry of Justice of the Federal Democratic Republic of Ethiopia, August 2022) 16 (unpublished, on file with the author). In addition to the white paper, the author personally consulted one of the drafters, who confirmed the same position regarding the scope of the reform. This direct confirmation supports the accuracy of the cited document and its conclusions.

[21] The writer intentionally used "security rights" in the context of bills of lading in Ethiopia, whereas English law refers to it as "pledge." This choice aligns with the approach taken by Ethiopian law. In Ethiopia, the Security Rights Proclamation adopts a universal approach to security rights, meaning it does not categorize security devices into specific types like pledge or mortgage. Instead, the law establishes a comprehensive security rights framework, regardless of the terminology used by the parties. Consequently, banks in Ethiopia establish security rights over a bill of lading, not pledge.

The issue is that an endorsement by way of pledge, under Article 729 of the commercial code, reduces the endorsee to an agent, not a principal acting independently. An endorsee, when acting as a pledgee, has restricted rights. Specifically, it cannot transfer full title to the underlying goods and is limited to transferring its security interests, like the abilities of an agent. However, in a letter of credit transaction, issuing banks mostly prefer to transfer the bill of lading to third parties to realize their claims in their capacity independently.

Thus, from this evidences one could see that, under Article 729, financing banks are relegated to mere agents, which hampers their ability to transfer rights and realize claims. Endorsement for pledge is not therefore a genuine security mechanism. True security rights should empower the holder not only to exercise the rights incorporated in the instrument but also to transfer those rights fully and independently.

1.1.1. Security Rights on Bills of Lading: The Approach of the Security Rights Proclamation

Unlike the commercial code, the Security Rights Proclamation explicitly allows for the possibility of establishing a full-fledged security right on a bill of lading. The Proclamation is generally the first comprehensive law to regulate the creation and enforcement of security rights in Ethiopia. It provides a platform for creating security rights on movable properties.

It adopts a unitary concept of security rights, abolishing the 1960 Ethiopian Civil Code's fragmented concept of security rights.[22] It does not specifically mention a particular type of security device such as

[22] Asress Adimi Gikay, *Ethiopian Law of Security Rights in Movable Property* (2021) pp. 46-48.

pledge, charge, or retention of title. It instead governs any transaction that aims to secure payment or the performance of contractual obligations, irrespective of the name parties ascribe.[23]

Under English law, a security right on a bill of lading takes the form of pledge, which is possessory as a principle.[24] However, in Ethiopia, whether parties call it a pledge, a security interest is created once all necessary conditions are met. Although the proclamation establishes non-possessory security as the principle, negotiable instruments are an exception since their perfection requires possession alone. The transfer of possession of the document is necessary for the security interest to be enforceable against third parties.[25]

Article 4 of the proclamation provides the modes of creating security rights. It prescribes that a security right must be created by a separate agreement. However, when it comes to a bill of lading, a security agreement alone is not enough for a bank to create security rights on a bill of lading. Unless the bank is mentioned in some capacity, such as an endorsee or consignee, it cannot claim delivery of the goods from the carrier, nor can it transfer its rights to third parties to realize its claims. Besides, it has no right to sue the carrier in cases of misdelivery or damage to the cargo, for which the carrier is responsible.

[23] Asress Adimi Gikay, 'Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US' (2017)11 Mizan Law Review 154. Article 3(1) stipulates that 'This proclamation shall apply to rights in movable property created by agreement that secure payment of credit or other performance of an obligation.'

[24] Possessory security is a type of security interest where the creditor takes physical possession of the debtor's asset as collateral for a loan. Common examples include pledges and liens, where the creditor holds the asset until the debt is repaid.

[25] The Security Rights Proclamation, Art 13 (2).

This limitation arises from the inseparability of the rights from the document in a negotiable instrument. Anyone wishing to enforce or transfer the rights incorporated in a negotiable instrument must present the document. Therefore, without being explicitly named in the capacity of endorsee or consignee, the bank's ability to exercise or transfer these rights is severely restricted. In essence, unless the bank is named in the bill of lading, it is left with an unenforceable power of sale in the security agreement, effectively rendering the agreement an empty shell.

In conclusion, the method of creating security rights in the proclamation does not adequately consider the unique characteristics of a bill of lading specifically and negotiable instruments in general.

2. Issues Surrounding Rights over Bill of Lading as a Security under English and Ethiopian Law

A bank financing a sale contract on behalf of a buyer may hold the bill of lading, which comes into its possession upon the seller presenting documents for payment, as a pledge. This grants the bank control over the cargo and, importantly, establishes title to the goods, serving as security against the possibility of the buyer becoming insolvent before reimbursing the bank.

From a contractual rights perspective, the pledge of the bill of lading entitles the financing bank to claim delivery of the cargo from the carrier or to institute a misdelivery action against the carrier if the goods are delivered to third parties without a bill of lading. From a proprietary rights perspective, on the other hand, the bank acquires special property in the underlying goods, granting it the power of sale and priority over the proceeds of the sale in the event of the buyer's bankruptcy.

However, there are issues that could potentially compromise the strength of a bill of lading as collateral for financing banks. The purpose of this section is therefore to critically appraise the strength of pledging a bill of lading in securing the reimbursement rights of the financing bank in a letter of credit transaction, considering English law and Ethiopian law from a comparative perspective.

In evaluating its strength, the next sections article addresses the conditions under which the bank may join the contract of carriage and its implication for bank security, the discharge of the underlying goods by the carrier before the transfer of the bill of lading to the bank, the transfer of title to the buyer before the seller transfers the bill of lading to the bank, the absence of intention to transfer possession on the part of the seller upon transferring the bill of lading, and the risks consequent to

the bank's temporary release of the bill of lading in return for a trust receipt.

3.1. The Role of Contractual Security Mechanisms

Under English law, as mentioned in earlier sections, a financing bank that holds a bill of lading by way of pledge has two sets of contractual rights against the carrier - the right to claim delivery of the cargo and the right to bring a misdelivery action.

The first right is straight forward directly derived from the nature of a bill of lading as a document of title entitling the bank the constructive possession of the goods all the way through the voyage. However, the second one, the right to suit is explicitly provided in COGSA 1992. This right entitles the bank to institute an action for compensation against the carrier for misdelivery or damage to the cargo for reasons the carrier is liable. This Act made the right of suit available for every lawful holder of a bill of lading. Section 2(1) (a) of the Act provides that 'a person who becomes the lawful holder of a bill of lading shall …be vested in him all rights of suit under the contract of carriage.'

Nevertheless, the bank's exercise of any of the above contractual rights may end up with the bank joining the carriage contract to which it is less interested. Under COGSA 1992, a lawful holder of a bill of lading joins the carriage contract with all the consequences attached when it claims to enforce its rights. If the bank wishes to enforce its contractual rights against the carrier, under section 2(1) (a), it will be liable 'under the carriage contract as if he had been a party to that contract.' Section 3(1) further clarifies what it means by a 'claim to enforce contractual rights' that the lawful holder of a bill of lading may be held liable as a party to the contract of carriage if it either takes or demands delivery of any of

the goods from the carrier or makes a claim under the contract of carriage against the carrier in respect of any of those goods.

Of course, section 3(1) of COGSA1992 is commendable for resolving the problem that financing banks falls under the 1855 Bills of Lading Act, which made banks liable under the carriage contract merely because they were mentioned as a consignee, endorsee or were in possession of a bearer instrument.[26] Under COGSA 1992; however, banks will not join the carriage contract and take contractual liabilities until they take some positive steps to enforce their rights. The bank will be a party to the carriage contract and be required to assume certain liabilities to the carrier, such as unpaid freight, demurrage, storage costs, and undeclared dangerous goods, only if it claims delivery from the carrier or brings a misdelivery action.[27]

Consequently, from the perspective of the bank's security, Section 3(1) of COGSA 1992 made the bank's contractual rights less enforceable because it treats banks as parties to the carriage contract if they choose

[26] Shane Nossal, 'Revision of the Legislation Relating to Bills of Lading and other Shipping Documents' (1993) 23 Hong Kong Law Journal 115.

[27] Kourosh Majdzadeh Khandani, 'Rights and Liabilities of the Consignees/Endorsees: A Comparative Study of the Rotterdam Rules and English Law' (PhD Thesis, The University of Manchester 2018) 100-103; When a bank becomes a party to the carriage contract by claiming delivery of goods or initiating a misdelivery action, it assumes specific liabilities to the carrier, including unpaid freight, demurrage, storage costs, and undeclared dangerous goods penalties. Unpaid freight represents the cost of transportation that the buyer has not yet settled. Demurrage charges accrue if the goods are not unloaded from the vessel within the agreed time, compensating the carrier for delays. Furthermore, storage costs are incurred if the cargo remains at the port or warehouse beyond the allotted free time. Additionally, if the goods are classified as dangerous and were not properly declared, the carrier may impose fines and additional handling fees to cover the risks and compliance costs associated with transporting hazardous materials.

to exercise such rights. This is unique in the world of pledge.[28] A pledgee normally acquires rights, not obligations, but a pledgee of a bill of lading will assume liabilities from the contract of carriage if he takes positive steps to enforce his rights.[29]

Furthermore, a bill of lading may sometimes include a merchant clause, which automatically makes every holder of a bill of lading, including financing banks, a party to the carriage contract merely by holding the document.[30] This clause further reduces the effectiveness of the bank's contractual securities by imposing additional liabilities and obligations on the bank, regardless of whether it exercises any rights under the bill of lading. As a result, the bank's position as a secured party is weakened, as it must accept the potential liabilities associated with being a contractual party to the carriage contract simply by holding the bill of lading.

Turning to the to Ethiopia legal regime, the relevant laws are silent as to when and how third parties, such as financing banks, acquire contractual rights and assume obligations in a bill of lading. The issue has been regulated neither in the Commercial Code nor in the Maritime Code, not even in the Security Rights Proclamation.

Looking into the definitions given for negotiable instruments under Article 715 of the Commercial Code and its transferability in both the Maritime Code and the Commercial Code, one would clearly see the legal basis for the document of title function of a bill of lading. From this it follows that banks have at least the right to claim delivery from the carrier if they are holding a properly constituted bill of lading. This

[28] Richard Zwitser, 'The Legal Position of the Pledgee of a Document of Title such as a Bill of Lading under Dutch Law' in Jeannie Van Wyk (ed), *Property Law under Scrutiny* (Juta and Company (Pty) Ltd 2015) p.79.
[29] *Id*., p. 79.
[30] *Id*., p. 80.

is because the right to claim delivery of the cargo is the right available to the bank as a holder of a bill of lading, which is the symbol of the goods under voyage.

A problem arises under Ethiopian laws when banks find that the carrier has already delivered the cargo or found the cargo in a damaged condition. In this case, a question arises as to whether banks in Ethiopia have the right to sue the carrier. The answer does not seem to be clear-cut. The relevant Ethiopian laws—the Commercial Code, the Maritime Code, and the Security Rights Proclamation—are silent as to whether the financing bank has a right to suit.

A reference to the general contract provisions of the civil code might be a good start to the solution. Because in Ethiopian law, if parts of any law governing special contracts are silent, the law allows for a reference to the general contract provisions.[31] Under the general contract provisions, unless parties to the carriage contract provides a stipulation to the benefit of third parties under Article 1957 of the Civil Code, banks wishing to sue the carrier may face a strong defense. The carrier may raise the defense of *privity of contract,* which is among the bedrock norms of the Ethiopian contractual framework.[32] As stated in Article 1952 of the Ethiopian Civil Code, 'contracts shall produce effects only as between the contracting parties.' As such, third parties to a contract may not derive rights or assume obligations. If the carrier raises this defense, it is unlikely that Ethiopian banks will have any viable defense before a court of law unless, as mentioned above, the carriage contract itself provides a stipulation to the benefit of third parties.

[31] Civil Code of the Empire of Ethiopia 1960 (The Ethiopian Civil Code), Art 1676 (1).
[32] *Id*., Art 1952.

In conclusion, under English law the position taken by COGSA 1992 ─ that exercising contractual rights on the condition of joining the carriage contract ─ made it less attractive for financing banks to exercise contractual rights as a security. However, in Ethiopia, it remains unclear whether financing banks have a contractual right against the carrier from the outset, particularly the right to sue the carrier in the event of misdelivery or damage to the cargo. As such, it is not clear what consequences will follow if financing banks take positive steps towards exercising their contractual rights.

3.2. Discharge of the Cargo before the Transfer of the Bill of Lading to the Bank

In an international carriage of goods, there are instances where the goods are discharged long before the seller transfers the bill of lading to the financing bank.[33] If the seller presents the bill of lading after the goods have been delivered, the bill of lading would no longer serve as a document of title. Consequently, the bank does not become the pledgee of the underlying goods upon receipt of the bill of lading.[34] Without being able to subject the underlying goods to a form of security, such as a pledge, it is hardly possible to say the financing bank is a secured creditor against the buyer.

The bill traditionally operates as a key to the warehouse, evidencing possession and control over the goods described. Nevertheless, this function ceases on delivery of the goods, and hence possession of the

[33] Michael Collett KC, 'Illusory Security of Banks in Trade Finance' [2023] Butterworths Journal of International Banking and Financial Law.

[34] Liew Kai Zee and Moses Lin, 'Bills of Lading as Title and Security for Financing Banks - the Certainty of Uncertainty' (7 June 2023) <https://www.lexology.com/library/detail.aspx?g=3a2dda58-7baa-4b1f-b2cc-8486bfe6d562> accessed 7 February 2024.

bill no longer entitles the holder to the possession of the goods against the carrier as the bill of lading becomes spent.[35]

The legal effect of a spent bill of lading presents a unique challenge for a bank holding a bill of lading as a security. The issue of a spent bill of lading affects not only the contractual rights of the financing bank but also its proprietary rights. From a proprietary perspective, if the goods are discharged before the transfer of the bill of lading to the financing bank, the bank cannot be able to become a pledgee of the cargo. This is because the discharge of the cargo before the bill makes the bill of lading spent, and if the bill is spent, it loses its quality, which makes it a document of title; thus, its transfer will not entitle the holder to constructive possession of the cargo, which is an indispensable step for a bank to pledge the cargo itself.

An important question then is: when is a bill of lading considered spent, influencing its pledgeability? Under English law, there is no case law directly addressing qualifying instances where a bill of lading is said to be spent.[36] However, the widely accepted view is that mere facts that the goods were discharged when the seller tenders the transport documents will not make the bill of lading spent.[37] For instance, Section 5(3) of COGSA 1992 acknowledges the rights of a person who comes into possession of a bill of lading through a legitimate transaction, even if the timing of that transaction means the bill no longer grants the right to take delivery of the goods.

[35] Michael Collett KC (33).
[36] Paul Todd, *supra* note, 7.84.
[37] *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyds's Rep.81; See also Paul Todd 7.86

Whether a bill of lading lost its quality as a document of title depends on whether the receiver who takes delivery is entitled to the goods.[38] If the person receiving the delivery cannot rightfully make such a claim of delivery under the bill of lading, the bill is not spent and thus can still transfer the title to the goods. However, if the receiver is entitled, the bill of lading will be considered spent once delivery has been made.

Who, then, is a lawfully entitled party for the purpose of a spent bill of lading? Under COGSA 1992, a lawfully entitled party can be an endorsee, the consignee of a bill of lading, or a holder of a bearer instrument.[39] The delivery of the cargo for one of these parties could make the bill of lading spent. However, this is not always the case. In the Erin Schulte[40] ─ where the underlying cargo was delivered to third parties who were not mentioned in the bill of lading as consignees nor endorsees ─ the UK Court of Appeal held, the bill of lading to be spent.

The fact show that Gunvor International B.V. sold gasoil to United Infrastructure Development Corporation (UIDC), which in turn had a contract to sell it to Cirrus Oil Services Ltd. Payment, was arranged through letters of credit, with SCB being the financing bank. Goods were shipped, and the bill of lading was issued, consigned to Société Générale or order.

Unfortunately, Cirrus and UIDC rejected the cargo on board Maria E due to issues of specification. The shipment on the Erin Schulte was also similarly rejected; however, UIDC secured third-party buyers, Chase Petroleum Ghana Limited and UBI Energy Petroleum Ghana Limited. Gunover then presented the documents on June 4, 2010, to SCB

[38] AH Hudson, 'The Exhaustion of Bills of Lading' (1963) 26 The Modern Law R eview 442 <https://www.jstor.org/stable/1093218> accessed 28 May 2024.

[39] Section 5 (2) a and b of COGSA 1992

[40] *Standard Chartered Bank v Dorchester LNG (*The Erin Schulte*)* (Rev 1) [2014] EWCA Civ 1382.

according to the letter of credit. Despite the insistence of Gunover, the bank, SCB, rejected the documents and preferred to hold the bill of lading on behalf of Société Générale. In the middle of this disagreement, the carrier discharged the cargo to the new buyers from June 15th to June 19th, 2010, after receiving a letter of indemnity issued by the seller, Gunover.

On July 7, 2010, despite its rejection by the 4th of June, the bank, SCB, changed its position and paid the seller the total amount under the letter of credit. The bank then instituted a misdelivery action against the carrier for delivery of the cargo without a bill of lading and argued that it acquired the right to suit against the carrier, Dorchester, on the bill of lading on the 4th of June. However, the court decided that the bank had only acquired a right to the bill of lading on July 7, 2010, when it paid the seller. However, by the time SCB acquired this right, the goods had already been delivered to Chase and UBI in mid-June, making the bill of lading spent.

The implication is that even though the carrier, Dorchester, delivered the cargo to new buyers, Chase Petroleum Ghana Limited and UBI Energy Petroleum Ghana Limited, which are not lawfully titled parties in the words of Section 5(3) of COGSA 1992, the bill of lading was spent by July 7, 2010, when the bank, SCB, paid the seller, Gunover.

Looking into the Ethiopian law in this light, it appears that it is not possible to transfer contractual rights once the carrier discharges the goods indicated in a bill of lading. First, the scope of the law governing the bill of lading in the Maritime Code (Articles 180-209), is limited from the moment of loading the cargo onto a vessel to its discharge upon arrival at the port of destination. The Maritime Code, under Article 180(3), provides that it ceases to apply to issues including the status of a

bill of lading once its underlying goods are discharged. This means that once the goods are delivered, the bill of lading is spent and can no longer be a document entitling the holder to exercise the rights against the carrier.

Apart from this, the Commercial Code, which recognizes a bill of lading as negotiable instrument, reinforces the position taken by the Maritime Code. Discharge is one of the real defenses available for a person sued under negotiable instrument.[41] In the bill of lading context, discharge implies the moment where the cargo is handed over to a party lawfully entitled to claim delivery. This brings the carrier's obligation under the contract of carriage to its end.

3.3. Transfer of Ownership Prior to the Transfer of Bill of Lading

The previous sub-section highlights how the discharge of the cargo before the seller tenders the bill of lading may affect the bank's ability to pledge the goods. However, there is still another factor before the bill of lading is transferred to the bank that could potentially impact the financing bank's capacity to pledge the cargo. Sometimes the seller may have already transferred title to the property for the buyer before tendering the bill to the bank.

The transfer of ownership to the buyer before the seller presents the bill of lading to the bank affects the security of the bank on the underlying goods. If title to the goods is transferred to the buyer before the seller presents the bill of lading to the bank that technically means the seller has no title, as a result he cannot create a pledge on a property to which he does not have a title. The fact that bankers normally deal only with documents but not with the underlying transactions, implies that the

[41] The Ethiopian Commercial Code, Art 717.

bank cannot refuse to accept a presentation merely because the seller has no title to the goods. This in effect makes the problem much worse.[42]

The present position under English law is that the seller must retain ownership of the cargo so that it can pledge the bill of lading to the bank financing the transaction. In the Future Express, the buyer and the seller had to delay the presentation of the document under the letter of credit.[43] Unfortunately, by the time the seller presents the documents to the financing bank, the cargo would have been delivered against the presentation of a letter of indemnity.

In cases involving such elements, both the Queen's Bench and the Court of Appeal held that the bank did not acquire pledge. In the first instance, Judge Diamond QC held that title in the goods had passed from seller to buyer long before the presentation of the bill of lading to the bank; hence, the transfer of the bill of lading did not entitle the bank to constructive possession of the underlying goods.

Furthermore, in the Court of Appeal, Judge Lloyd LJ pointed out that a seller must retain the title of the goods to be able to pledge a bill of lading. He upheld the claims of the carrier that the seller could not legally transfer the right to possession through the bill of lading as he did not have any property right over the cargo at the time of presenting the bill of lading for the financing bank. He concluded by saying that the security of the bank's position is in the capacity of the seller to transfer title upon presenting the bill on behalf of the buyer not on the contract between the bank and his client, the buyer.

[42] Uniform Customs and Practice for Documentary Credits (UCP 600) (International Chamber of Commerce Publication No 600, 2007), Art 5.
[43] The Future Express [1992] (QB) 2 Lloyd's Rep 79.

Paul Todd has also argued that 'the bank's legal title at any rate depends on the pledgor having property in the goods at the time of the pledge'.[44] That implies that the bank will acquire security by way of pledge only when the seller has retained property until it presents the bill of lading to the bank. A party who can pledge the goods is the "legal owner of the goods" and if the seller fails to retain property by the time of presenting the bill of lading to the bank, he can pass "no property to the bank as pledgee".[45]

Similarly, in Ethiopia, title is one of the conditions for creating a security agreement. Only a party with title to movable property can enter such an agreement. Evidencing this, Article 4(1) of the Security Rights Proclamation provides that 'A security agreement shall be created by a security agreement, provided that the guarantor has right in the asset to be encumbered'. Yet the English version of this sub-article fails to clarify the specific type of property right required for the guarantor to enter into a security agreement. It is not clear in the English version provision if the required title is ownership or mere possession.

In this regard, the Amharic version, which serves as a binding source of the law in cases of interpretative ambiguity, clearly defines the specific proprietary right required for the debtor to enter into a security agreement. The Amharic version says "ባለቤትነት", which is literally ownership. As a result, the debtor must have the ownership right to create a pledge over his property.

[44] Paul Todd, *supra* note 14, 6.11.
[45] *Id*., 6.22.

3.4. Absence of Intention to Transfer Possession with the Transfer of the Bill of Lading

The previous two sections of this article (sections 3.2 and 3.3) focused on factors that occur before the seller transfers the bill of lading to the bank. However, issues affecting the security of the financing bank are not limited to events happening before the transfer of a bill of lading; there are other factors, such as the intention of the parties to transfer title to the underlying goods during the moment of transfer. Such factors are important elements that substantially affect the party's position as a pledgee.

Under English Law whether the transfer of a bill of lading to the financing bank transfers title to the underlying cargo is dependent on the intention of the parties to the sale contract to which the financing bank can neither drive rights nor assume obligations.[46] As such, the bank could not obtain the constructive possession of the goods if parties did not intend to transfer possession of the cargo along with the transfer of the bill of lading.[47] The effect is the bank cannot acquire a pledgee status on the underlying goods if it was not the intention of parties to transfer constructive possession by the transfer of the bill of lading.

Among the instances where it was argued that the seller did not intend the transfer of a constructive possession with the transfer of the bill of lading is when the transferee (financing bank) receives the bill of lading as an agent. In a letter of credit transaction, if the seller transfers the bill of lading to the bank with the intention that the bank holds the bill as an agent, such a bank acquires only the custody of a bill of lading whereas

[46] Sale of Goods Act, S. 17.
[47] *East and West Corporation v DKBS* 1912 [2003] EWCA Civ 83.

the seller remains the possessor. In such instances, the bank will not be the pledgee of the underlying goods. [48]

In East and West Corp v DKBS, the court addressed whether a bank under such instances holds a sufficient possessory interest in goods under a bill of lading. In the Queen's Bench, Judge Thomas J noted that a bank never holds any security or interest in the goods because it holds the bill of lading as agent of the seller and the seller retains complete control over the bill of lading.[49]

Furthermore, Judge Mance LJ in this same case raised the issue of whether a transferee bank of the bill of lading vests in with a sufficient possessory interest to claim against the carrier. He held a position that property and possessory rights depend on the intention of the parties. He further cited Aliakmon where it was held that the delivery of a bill of lading to the buyer naming him as consignee did not confer possessory title since the seller did not intend to transfer such an interest.[50] He also cited Future Express where it was held that the passing of a possessory interest in common law is dependent upon the parties' intentions, emphasizing that mere physical possession of the bills of lading by the bank does not create a valid possessory title necessary to create pledge on the underlying goods.[51]

The three cases above show the position of English law that a mere transfer by the seller of the bill of lading to a bank does not confer an interest to the bank unless parties intend so. Inasmuch as the parties'

[48] Zeng Z, 'Banks' Security under Letters of Credit on Bills of Lading: Inherent Risks in Paper and Digital Contexts' (PhD Thesis, University of Southampton 2023) 88.
[49] The East West Corporation, *supra* note 47.
[50] *Ibid*.
[51] *Ibid.*

intentions matter, the bank's option to pledge the underlying goods is dependent upon the sale contract, to which the bank is not a party.[52]

In Ethiopia, the relevant laws are silent as to whether the intention to transfer title with the transfer of the bill of lading matters for the financing bank to establish security rights on a bill of lading. In this regard, Ethiopia should take lessons from the English system. In fact, the parties to the sales contract should decide when and how to transfer ownership or possession.

3.5. The Risk of Using a Trust Receipt in Exchange of Releasing the Bill of Lading

All the factors discussed so far impact the bank's security in a letter of credit transaction, but they only occur at or prior to the moment the seller transfers the bill of lading to the bank. This section focuses on a remaining factor that arises after the seller transfers the bill of lading to the financing bank— a risk consequent to the acceptance of trust receipts in return for releasing the pledged bill of lading. Such a risk happens in situations where a financing bank, as a pledgee of the bill of lading, re-delivers the bill to its customer, the buyer, in exchange for a trust receipt.

Under normal course of processes in a letter of credit transaction, the financing bank continues to hold the bill of lading as collateral until the buyer fully reimburses for the contract price paid and the commission. However, it may sometimes happen that the buyer has no assets other than the goods represented in the bill of lading, in which case the bank

[52] Richard Zwitser, *supra* note 28, p. 79.

may be forced to transfer the bill of lading to the buyer in exchange for a trust receipt.[53]

This arrangement allows the buyer to claim delivery of cargo from the carrier as he has the bill of lading. Once the buyer receives the goods from the carrier, he can sell them and retain the proceeds for the bank, thereby generating funds to settle the bank's claim for the principal debt, interest and commission.[54] Simultaneously, the bank holds the trust receipt as proof of its continued possession of the pledged item, the bill of lading, and is entitled to the proceeds of the sale of the cargo even in priority to other creditors in the insolvency of his client.[55] Therefore, using a trust receipt is beneficial not only for the bank but also for its customer, the buyer.

However, from the perspective of the financing bank's security, the use of trust receipts pose risks. Despite its obligation to hold the bill of lading and the cargo on behalf of the bank, the buyer may abuse its power by selling or pledging the bill of lading for a third party not for the bank's benefit but with intents of deriving self-interest out of this transaction.[56] Therefore, it could be very problematic for the bank, if, for instance, the buyer repledges the bill of lading to a third party as this third-party might have a better right than the bank under English law.

The Lloyds Bank Ltd. v Bank of America National Trust and Savings Association is a living testimony illuminating how the use of trust receipts in a letter of credit transaction might have a prejudicial outcome

[53] Karl T Frederick, 'The Trust Receipt as Security' (1922) 22 Columbia Law Review 395 <http://www.jstor.com/stable/1112487> accessed 3 March 2024.
[54] L Vold, 'Trust Receipt Security in Financing of Sales' (1930) 15 Cornell Law Review 543 <http://scholarship.law.cornell.edu/clr/vol15/iss4/2> accessed 30 April 2024.
[55] Zicong Zeng, *supra* note 48, p. 99.
[56] L Vold, *supra* note 54.

for the interest of financing banks.[57] The dispute in the case arose after Lloyds Bank, which financed a sale contract on behalf of Strauss & Co., released the bill of lading in its possession to Strauss & Co. in exchange for a trust receipt. Defrauding the pledgee bank, Lloyds Bank, Strauss & Co. repledged the bill of lading in its hand to the Bank of America which had no knowledge of the interest of Lloyds Bank in it. Upon the bankruptcy of Strauss & Co., the first pledgor, Lloyds Bank, claimed the delivery of the bill of lading or an award of compensation in conversion from the second pledgee, the Bank of America.

Finally, the English courts (both the High Court and the Court of Appeal) decided that the Bank of America was entitled to the underlying goods under Section 2(1) of the 1889 Factors Act. This section of the Act allows for title transfer by mercantile agents entrusted with possession of goods or documents of title. Courts considered the pledgor, Strauss & Co., as a mercantile agent for the first pledgee, Lloyds Bank, though there was no formal agent-principal relationship between them. The court held that for Section 2(1) of the Factors Act, there was no need for a formal agency-principal relationship. If it were not for the authority given by Lloyds Bank, Strauss & Co. could not have the power to dispose of the bill of lading to a third-party bank. That factual authority was enough to satisfy the requirement of "mercantile agent" under Section 2(1) of the Factors Act. This provision protects third parties who act in good faith and without notice of any lack of authority on the part of the agent.[58]

[57] *Lloyds Bank Ltd v Bank of America National Trust and Savings Association [1938] 2 KB 14.*

[58] Louise Merrett, 'The Importance of Delivery and Possession in the Passing of Title' (2008) 67 The Cambridge Law Journal 376 <https://www.jstor.org/stable/25166410> accessed 1 April 2024; see also PT

Looking into the Ethiopian laws in this light , one could see that they would have similar result, though there have been no case laws so far. The Security Rights Proclamation governs the effect of transfers, such as the sale or repledge of an encumbered property, to third parties.

With such evidences, Article 64(2) of the proclamation provides:

> *A transferee of an encumbered negotiable document that obtains possession of the document and gives value without knowledge that the sale or other transfer is in violation of the right of the secured creditor under the security agreement, acquires its right free of a security right in the document and the corporeal assets covered thereby that is made effective against third parties.*

Like the English law, the Ethiopian provision seems to favor the third-party pledgee who is in good faith and received the pledged property for value without notice of a preexisting encumbrance. This position seems consistent with the position taken by the proclamation regarding the perfection of security rights over a negotiable document, which includes a bill of lading. Article 13(2) limits the mechanism of perfecting a security right on a negotiable document to possession only. Thus, a bank holding a bill of lading as collateral for securing its right of reimbursement should possess the bill of lading. If, for any reason, the bank releases possession of the bill of lading in favor of its client, the buyer, and then the buyer disposes of the bill of lading to third parties, the law prefers to protect the interests of third parties who are in good faith than the bank, which has willingly lost control of its collateral.

Blckwell, *The Law of Relating to Factors* (1897, Effingham Wilson, Royal Exchange London) p. 64 ff.

The only thing different in Ethiopia is the requirement of a "mercantile agent" provided under Section 2(1) of the 1889 Factors Act. In Ethiopia so long as the third-party transferee took the bill of lading by way of sale or repledge without knowledge of the previous encumbrance, it is enough to give priority to third-party than the previous pledgor. Therefore, the absence of the requirement of agency under Article 64 (2) may put financing banks in a disadvantaged position in Ethiopia compared to English law. The absence of such a requirement implies that the third party is not required to prove the fact that the pledgor was given either factual or statutory power to dispose of the property on behalf of the first pledgee.

Further, it is not clear from Ethiopian law that banks holding a bill of lading could use trust receipts as security in exchange for the release of a bill of lading to the pledgor so that it can settle its debt through the sale of the underlying goods on behalf of the pledgee bank. In fact, the Security Rights Proclamation incidentally mentioned trust receipt under Article 2(27) and recognized it as movable property; however, it is not clear in what context trust receipt is adopted in the proclamation, except that it is characterized as a movable property.

Conclusion

The evidences explored from various sources in this investigation show that the English law and Ethiopian law recognize the document of title function of a bill of lading and the possibility that financing banks in a letter of credit could use it as collateral. Holding a bill of lading as security entitles banks to both contractual and proprietary rights. Contractual rights, including the bank's right to claim delivery of the cargo and bring misdelivery actions, are personal rights available only against the carrier and do not constitute securities in the strict sense.

However, the security interest which the bank establishes on the underlying goods is taken as security in proper and bears a right in rem. Nevertheless, the strength of a bill of lading as a security mechanism for financing banks in a letter of credit transaction is not sufficiently understood and receive due consideration. Unlike other forms of security interests in goods, a financing bank holding a bill of lading as collateral can quickly find itself in an unsecured creditor position under certain circumstances. This article, through a comparative analysis of these circumstances under English law and Ethiopian law, draws insights that inform both legislative moves and practices in maritime commerce.

First, the so-called contractual securities of claiming delivery and bringing misdelivery actions are less effective under English law, whereas it is not an issue in Ethiopia. Under English law, exercising these rights forces the bank to join the carriage contract and assume liabilities as if it were a party to the contract. This burden exposes the bank to unforeseen liabilities, compromising its secured creditor status and uniquely positioning a pledgee of a bill of lading in the realm of pledges. In Ethiopia, first, it is not clear if banks have the right to institute a misdelivery action against the carrier. Unless parties provide in their contract a stipulation in favor of third parties, the carrier may raise the relative effect of the contract as a defense under the rules of the general contract. As a result, it is not clear, under Ethiopian law, whether a bank claiming to enforce its contractual rights will become a party to the carriage contract unless the bill of lading clause itself contains a merchant clause.

Second, if the underlying goods are delivered before the seller transfers the bill of lading to the bank, the bill becomes spent and is merely an empty shell. In this context, the bill, while still existing as a document,

does not confer any rights regarding the goods it originally represents. Under English law, COGSA 1992 stipulates that the mere discharge of the cargo does not render the bill of lading spent. Therefore, the bill of lading retains its function as a document of title until the goods are delivered to those lawfully entitled to them. In this regard, Ethiopian law has no specific stipulation.

However, it is possible to discern the fate of a spent bill of lading from the close reading of the Commercial Code provisions and the Maritime Code. The Maritime Code limited its temporal application from the moment of shipment to discharge, leaving issues after discharging unaddressed. Furthermore, discharge of an underlying obligation is a general defense under Article 717 of the Commercial Code for a person, a carrier in a bill of lading, sued under a negotiable instrument. Hence, the position of the Ethiopian law seems unfavorable to financing banks as, once the goods specified on the bill of lading are discharged, makes it stops functioning as a document of title.

Thirdly, title to the goods might have already been transferred to the buyer before the bill of lading was transferred to the bank. If the title is transferred to the buyer before the seller transfers the bill of lading to the bank, the bank cannot establish a security interest in the bill of lading, even if it possesses the bill, as the transferor cannot encumber something to which they no longer have an interest. The position of the English law is that for a bank to have a valid pledge, the transferor, the seller in this context, needs to have a title. Thus, if the seller has no title by the time of the transfer of the bill of lading to the bank, banks will not have a valid pledge right over the bill of lading. When it comes to Ethiopia, the Security Rights Proclamation provides that for anyone granting its asset by way of collateral, it needs to have title, specifically

ownership, on it. As a result, it appears that the two legal systems regulate the system almost identically.

Fourthly, the intention of the parties in the sale contract to transfer title to the goods also impacts the security of banks in a letter of credit transaction. Even if the seller transfers possession of the bill of lading to the bank, the bank cannot establish a security interest in the underlying goods if the seller does not intend to transfer title with the bill of lading. Under English law, it is the intention of the parties to the sale contract that determines the transfer of title to the underlying goods. The Ethiopian law is not clear if the intention to transfer matters for the valid creation of security rights.

Finally, the use of trust receipts as security by banks in return for the release of the pledged bill of lading also presents a challenge for financing banks. The English law recognizes the use of trust receipts by financing banks. The issue under English law is that if the buyer fraudulently disposes of the encumbered bill of lading to third parties, under the 1889 Factors Act, the third-party transferee will be better protected than the bank that willingly released possession of the collateral, provided the requirements of good faith and factual or legal power of authority are fulfilled. In Ethiopia, the Security Rights Proclamation mentions a trust receipt as movable property, but it does not specify the context in which it can be used. However, targeting its legal effect, the proclamation provides that if an encumbered bill is transferred to third in good faith, the law gives priority to third parties over the first pledgee. Thus, if banks release possession of the bill of lading for any reason, the law in Ethiopia favors third parties in good faith over pledgee banks, like it is in English law.

Minimum Wage, Human Rights, and State Responsibility: The Case of Ethiopia

Michael Mengistu ♣

Abstract

Minimum wage is one of the major subjects of concern and debate for international institutions and national stakeholders. The primary objective behind the debate and concern over this subject is about protecting workers from poverty and exploitation. More than 90% of ILO member countries have set a minimum wage for their workers. However, the notion of minimum wage is not without controversies. Some developing States are reluctant to set a minimum wage and a few even argue against it stating that it would push away foreign direct investment (FDI) which has become a principal driving force behind job creation in these countries. On the other hand, the protagonists of minimum wage argue that minimum wage is a fundamental labor right which ensures adequate life for workers.

While Ethiopia has not set a minimum wage for its private sector workers, it adopted a legislative framework in 2019 to set up a Wage Board which would determine minimum wages. Nevertheless, the State is not realizing the envisaged activities of the Wage Board which are expected to lead to a minimum wage regime. This, among other factors, is due to the fear that setting a minimum wage would adversely affect flow of FDI, job creation, and the country's post war economy. Ethiopia is a party to the International Covenant on Economic, Social, and Cultural Rights where various rights including the right to a decent way of life, food, clothing, and housing are recognized as fundamental human rights. The paper raises the question as whether Ethiopia, by

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ignoring the question for a minimum wage law for private sector workers, is violating its obligations under international human rights law. The paper further tries to answer this question by looking into the nature of economic, social, and cultural rights and analyzing States' obligations under human rights instruments. In doing so, it employed a doctrinal approach to define the notion of minimum wage and to delineate the debate around the concept. It then analyzes the stance of the Ethiopian government on the issue mainly from official speeches and commentaries that are publicly available in line with international human rights law and provide recommendations.

Keywords: Minimum Wage, Decent Way of Life, Health, Food, Clothing, Housing

1. Introduction

Minimum wage has been one of the subject of policy and metaphysical debate across societies over the ages. Plato, one of the well-known philosophers in history, advocated for what could be considered a living wage according to the standards of his time.[1] His contemporary, Aristotle, also advocated for the same standard.[2] This line of thinking on the subject was reinstated in Europe during the middle ages. Saint Thomas Aquinas asserted that "a wage rate that pushed workers below a subsistence level eroded their chances for being virtuous and is, therefore, unjust".[3] The Catholic Church of the period was also one of the proponents for what it called the just wage. Its argument for a just

[1] *Ibid.*
[2] *Id.*, p. 14.
[3] *Id.*, p. 15.

wage concerned poverty and the State's responsibility to care for the poor.[4]

Arguments for a living wage continued during the period of the Enlightenment. One of the prominent philosophers of the period and the pioneer of modern economics, Adam Smith, argued for a living wage from the perspective of maintaining the economy and, wrote, "a man must always live by his work and his wage must at least be sufficient to maintain him". According to this author, if workers do not earn a subsistence wage, the workforce and the economy would cease to function.[5]

Although the idea of a living wage was known for thousands of years, the term "living wage" was first used in the 1800s.[6] Scholars and activists of the period argued that "the spread of wage labour should come with a mandate for employers to pay employees wages high enough to support themselves".[7] New Zealand became the first country to set a minimum wage when it passed a decree in 1894.[8] It was followed by the Australian State of Victoria and the United Kingdom

[4] David Neumark and William L. Wascher, *Minimum Wages,* MIT Press, (2008), pp. 290-291.
[5] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, University of Chicago Press, (1977), pp. 100-101.
[6] Stephanie Luce, Living Wage Policies and Campaigns: Lessons from the United States, *ILO – International Journals of Labour Research*, Vol. 4 Issue 1 (2012). p. 12.
[7] *Ibid.*
[8] ILO, What is a Minimum Wage? https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439071/lang--en/index.htm#:~:text=New%20Zealand%20was%20the%20first,social%20partners%20would%20be%20established, (accessed on October 10, 2024).

who adopted a minimum wage system in 1896 and 1909, respectively.[9] New Zealand's Industrial Conciliation and Administration Act, enacted on August 31, 1894, set wage rates and conditions of work.[10]

In 1928, the newly established International Labour Organization (ILO) issued a convention on minimum wage, Minimum Wage Fixing Machinery Convention 26 (hereafter known as the "Minimum Wage Convention") which obligates members states to "create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of trades".[11] In subsequent years, ILO issued additional conventions that aimed at protecting disadvantage groups of wage earners. Among these conventions, the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951, and the Minimum Wage Fixing Convention of 1970 (No. 131) bolstered the introduction and protection of minimum wage regimes. Today, minimum wage is widely recognized with more than 90% of ILO's 187 member states having implemented minimum wage laws, and 105 States having ratified the Minimum Wage Convention.[12]

In line with this global push for wage standards, the concept of minimum wage has evolved differently across various countries. While the principles behind a fair wage are widely accepted, definitions of minimum wage vary depending on local economic and social

[9] *Ibid.*

[10] Elina Lee, From the Serial Set: The History of the Minimum Wage, https://blogs.loc.gov/law/2020/09/from-the-serial-set-the-history-of-the-minimum-wage/ (accessed on October 10, 2024).

[11] Minimum Wage Fixing Machinery Convention of the International Labor Organization, CO26/1928, (No.26), (1928) Article 1.

[12] ILO, Ratification of Co26 – Minimum Wage Fixing Ratification Convention, https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312171, (accessed on October 10, 2024).

conditions. For practical purposes, we will rely on the definition provided by the ILO. Accordingly, the Committee of the ILO defines minimum wage as:[13]

> The minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his or her family, in the light of national, economic and social conditions.

From this definition, it can be understood that minimum wage is a labor market regulation on the one hand and a social welfare policy on the other.[14] It is a tool which is intended to be binding with a view to combating poverty and ensuring social justice. Its establishment must take into account social and economic considerations.[15]

Despite the widespread adoption of minimum wage systems globally, a few countries remain hesitant to implement such policies. These countries, including Ethiopia, cite economic concerns to justify their reluctance. Ethiopia, notably, does not have a minimum wage system for its private sector workers. It has also not ratified any of the ILO

[13] *Ibid.*

[14] Jerold L. Waltman, *Minimum Wage policy in Great Britain and the United States*, Algora Publishing,(2008), p. 7.

[15] *Ibid*. See also Wendy V. Cunningham, *Minimum Wages and Social Policy: Lessons from Developing Countries*, The World Bank, *(*2007), p. XI.

conventions on minimum wage.[16] But is minimum wage not a human right? And if it is, is Ethiopia not obligated to implement a minimum wage regime?

This article seeks to address these questions in light of principles underlying the International Covenant on Economic, Social and Cultural Rights. It will first explore the objectives and arguments surrounding minimum wage systems. It then examines Ethiopia's reluctance to adopt one. Finally, it will consider whether minimum wage constitutes a human right and whether Ethiopia is bound by international obligations to establish such a system.

2. Minimum Wage: Objectives and Arguments

The concept of minimum wage has long been a subject of debate in contemporary legal and economic policy spheres. While many countries have adopted minimum wage laws to protect workers and promote economic stability, the issue remains a subject of debate, involving economic, moral, and legal considerations. This section explores the major objectives of a minimum wage regime. It then delves into the arguments for and against minimum wage policies, examining both moral and economic perspectives to provide a balanced understanding of the ongoing debate.

[16] ILO, Ratifications for Ethiopia, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11200:0::NO::p11200_country_id:102950#:~:text=Out%20of%2023%20Conventions%20ratified,in%20the%20past%2012%20months., (accessed on March 10, 2025).

2.1 Objectives of Setting Minimum Wage

The major objective of a minimum wage regime is protecting workers from poverty and exploitation[17] by redistributing income to the low paid.[18] Such objectives can be attained through legislative measures of setting a wage which ensures basic standard of living in light of national economic and social conditions that principally protects low skilled and low paid workers. This principle underlies many legislative documents seeking such objectives in different parts of the contemporary world. For instance, the Vietnamese Labour Code "provides that the minimum wage should be based on the cost of living…and no labour contract may stipulate a wage below that level."[19] This means that the Minimum Wage in Vietnam intends to ensure a basic standard of living for workers based on the cost of living of that country. In Kenya, setting minimum wage is used to reduce poverty and promote the living standards of worker.[20] In addition, the objective of setting minimum wage in Australia was to stop "payment by an employee to his work people of a wage that is insufficient to purchase for them the necessities of life."[21]

[17] Benedict Y. Inbun, *Dynamics of Wage Fixation in a Developing Economy: The Case of Papua New Guinea*, Nova Science Publishers, (2008), p. 2.

[18] Marteen Van Klavern, .), "Asia: A Comparative Perspective", in Maarten Van Klaveren, Denis Gregory, Thorsten Schulten (ed.), *Minimum Wage, Collective Bargaining and Economic Development in Asia and Europe*: A Labour Perspective, Springer, (2015), p. 11.

[19] Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu, *Law and Labour Market Regulation in East Asia*, Routledge, (2002), p. 135.

[20] Mabel Andalon and Carmen Pages, Minimum Wages in Kenya, *Inter-American Development Bank and IZA Discussion Paper*, No.3390, (2008), p. 4.

[21] Wambuga H, Does Uganda Need Minimum Wage Legislation? A critical review of Uganda's Minimum Wage Policy, *Policy Series Papers*, No.8, (2016), p. 5.

Minimum wage also has the goal of reducing income inequality.[22] The primary source of income for workers in many societies is wage. Where there is unbearable and unreasonable gap between high skilled highly paid workers and low skilled low paid workers, the economic and social inequality between the two groups looms large leaving the latter highly vulnerable to exploitation and poverty, by setting a minimum wage that ensures a basic standard of living, the income inequality. This phenomena of inequality that invariably prevails across societies of the world require actions such as setting minimum wage.[23]

In addition to reducing inequality, some argue that minimum wages can be used to deter industrial unrest.[24] In some countries, usually in the developed ones, wage disputes result in industrial strikes and work stoppages. This industrial unrest will be lessened if the wage setting is transferred to the government.[25] For example, one of the objectives to set a minimum wage in Australia was to "prevent strikes and lockouts."[26] Similarly, South Africa's practice shows that "[a National Minimum Wage] will lead to a reduction in industrial unrest."[27] Countries also set minimum wages to stabilize their labour market. In this regard, the Fair Labor Standards Act of the United States (FLSA), of which the minimum wage was a part, was intended to ensure labor

[22] Jarold L., *supra* note 14, p. 8. See also Benedict Y. Inbun, *supra note 17*, p. 2.
[23] Bangladesh Institute of Labour Studies (BILS), *National Minimum Wage for Bangladesh's Workers: Rational Standard and Rationality of National Minimum,* BILS, (2015), p. 11.
[24] Jarold L. Waltman, *supra* note 14, p. 9.
[25] *Ibid.*
[26] Wambuga H, *supra* note 21, p. 5.
[27] International Labor Organization, *Towards a South African National Minimum Wage*, ILO, (2015), p. 4.

market stability by ensuring that workers would receive a fair wage for a fair day's work.[28]

Finally, it is important to note that while Minimum Wage is aimed at achieving the aforementioned objectives, it has been a contentious issue since its inception and there are those who argue against it.

3. Arguments for and Against a Minimum Wage Regime

Minimum Wage has been debated for centuries. Scholars, economists, public servants, and lawyers raise economic and moral arguments for and against it.[29] The following sections present and critically examine these arguments in order to shade light on the essence of the subject.

3.1 Moral Arguments

As already mentioned earlier, the moral argument for minimum wage goes back to the time of the renaissance where the medieval scholastics and the Catholic Church argued for a just wage that targeted the poor.[30] In the current era, moral arguments for minimum wage base their stance on creating a decent standard of living for the poor, human dignity, addressing the demands of democratic citizenship, and justice.[31] In the United States, for example, it is reasoned that the minimum wage law is increasing the wage of society's lowest earners and will lift many

[28] Oren M. Levin Waldman, *The Case of the Minimum Wage: Competing Policy Models*, University of New York Press, (2001), p. 7.
[29] *Ibid.*
[30] *Id*, p. 10. See also David Neumark and William l. Wascher, *supra* note 4, pp.290-291.
[31] Jarold L. Waltman, *supra* note 14, p. 10.

individuals and families out of poverty.[32] Others argue that minimum wage is needed to allow workers to live in dignity by allowing them to be self-sufficient.[33] On the other hand, moral arguments that raise the issue of democratic citizenship raise the issue that people need to be economically independent in order to fight for their political rights and hence a wage floor that allows them to lead a decent way of life is needed.[34] Arguments of democratic citizenship also contend that minimum wage helps governments maintain public order by reducing economic inequality and social disparity.[35] Justice based arguments, the other perspective, focus on human dignity and the reduction of poverty as a subject of analysis. They hold that "people who work deserve a living wage for their efforts, and the criterion for this living wage was a minimal level of subsistence".[36] This reason for the minimum wage is, arguably, at the center of the moral arguments of minimum wage which suggest that the goal of public policies should be narrowing the gap between the rich and the poor.[37] By narrowing down inequality between citizens, minimum wage reduces the bargaining power gap in labor markets, which, in turn, allows a majority of citizens to "earn a living as an evidence of human dignity and social justice."[38]

Nevertheless, others argue that the minimum wage regime limits the freedom of both employers and employees. According to this group of

[32] Dallin Overstreet, Is Minimum Wage an Effective Anti-Poverty Tool? *Journal of Poverty*, Vol. 25 No.5, (2021), p. 453.
[33] *Id.*, p. 55.
[34] *Id.*, p. 11.
[35] Benedict Y. Inbun, *supra* note17, p. 11.
[36] Oren M. Levin-Waldman, Minimum Wage and Justice? *Review of Social Economy*, Vol. 58 No. 1, (2000), p. 44.
[37] *Id.*, p. 55.
[38] Robert E. Prash, In Defense of the Minimum Wage, *Journal of Economic Issues*, Vol. 30 No.2, (1996), p. 391.

scholars, "the role of the Government is to merely do what the marketplace cannot: maintain, arbitrate, and enforce the rules of the game" and not to limit the freedom of employers.[39] Consequently, the proponents of this argument contend that a government that dictates wages is a government that effectively limits freedom.[40] In this regard, it is argued, the minimum wage limits the freedom of contract in that it limits the ability to choose between jobs and accept a lower wage especially when this has an effect on the employment or non-employment of the individual.[41] It will, therefore, be against the right to liberty ─ liberty to freely engage in a market without the intervention of the State in any manner.

3.2 Economic Arguments

According to the economic argument for minimum wage, minimum wage increases purchasing power and productivity and as a result influences poverty.[42] Pertaining to this, Keynesian Theory states that the key to restoring or maintaining prosperity is to keep aggregate demand high so that by putting money in the pockets of consumers through minimum wage, the consumers' purchasing power will be increased and demand will increase as well.[43] In contrast, in order to reduce costs which directly or indirectly relate to minimum wage, producers will look for more efficient ways. They will give more trainings and supervisions for their employees and they will look for better techniques

[39] Oren Levin-Waldman, A Conservative Case for the Minimum Wage, *Challenge*, Vol.57 No.1, 2014, p. 25.
[40] *Ibid.*
[41] *Ibid.*
[42] Jarold L. Waltman, *supra* note 14, p. 12.
[43] ILO, *supra* note 27, p. 1.

to produce their goods and services.[44] These efficiencies, which are the foundation of increased productivity, drive economic growth and expand the availability of goods and services for all. Over time, they also contribute to the creation of more jobs with better wages.[45] It is also argued that minimum wage removes public subsidies from some businesses lessening the burden on the government and tax payers.[46] However, there are counter economic arguments. Accordingly, some scholars believe that minimum wage leads to unemployment, inflation, and that it would bring business failures.[47] The labour market, as a free market, the argument goes, must be left to determine wages without any interference from the government. Minimum wage, it is stated, does not have much significance in developing countries because most of the labor force lives outside the ambit of labour regulations.[48]

Moreover, some developing countries raise the issue that setting a minimum wage would push away foreign direct investment which has become the major economic drive behind job creation, skills transfer, and foreign exchange earnings. According to the ownership, location, and internalization paradigm, which is the dominant theory for explaining a company's decision to invest abroad, "a company will invest abroad if it has ownership specific advantages over competitors in prospective countries, if it is beneficial to internalize this advantage (rather than selling or licensing it), and if there are location – specific

[44] *Ibid.*
[45] Jarold L. Waltman, *supra* note 14, p. 13.
[46] Benedict Y. Inbun, *supra* note 17, p. 13.
[47] David Neumark and William Wascher, *supra* note 4, pp.14-15.
[48] *Id.*, p. 11.

benefits in moving production to the host country".[49] One of the criteria for assessing the advantages of a host country for setting up a company is its labour standards. As a result, Governments of developing countries opt for weaker labour standards to present themselves as more attractive than other competitors.[50] In this regard, developing countries made their stance on considering labour standards as competitive advantages during the first World Trade Organization's (hereafter WTO) Ministerial Conference in Singapore where they declared "we reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question".[51] Therefore, Governments and some scholars of the developing world argue against minimum wage citing its potential to reduce foreign direct investment inflows to these countries.

While the concept of minimum wage is surrounded with both supporting and opposing arguments, the overwhelming majority of the world including developed and developing States, have set minimum wages for their workers. However, Ethiopia is one of the few States that does not have a minimum wage regime for its private sector. The next sections discuss this in detail.

[49] Robert G. Blanton and Shannon L. Blanton, Labour Rights and Foreign Direct Investment: Is there a race to the bottom?, *International Interactions: Empirical and Theoretical Research in International Relations*, Vol.38, No.3, (2012), p. 269.

[50] John Mclaren and HyejoonIm, Foreign Direct Investment, Global Value Chains, and Labour Rights: No Race to the Bottom, *National Bureau of Working Paper Series*, Working Paper 31363, (2021), p. 2.

[51] Anita Chan, Racing to the Bottom: International Trade Without a Social Clause, *Third World*, Vol. 24, No.6, (2010), p. 1012.

4. Ethiopia and Minimum wage: Why the Wait?

In 2012, the United Nations Committee on Economic, Social, and Cultural Rights provided its concern over the absence of a minimum wage regime in Ethiopia. In its concluding observations on Ethiopia, the Committee stated that Ethiopia needed to take "legislative and other measures to introduce a national minimum wage … [which is sufficient] to provide all workers and their families with a decent standard of living".[52] It took seven years for this country to start acting on this recommendation. In 2019, Ethiopia issued a new labour proclamation which envisaged a minimum wage board with a power to revise minimum wage based on studies that consider the country's economic development, labour market, and other conditions.[53] A draft minimum wage law has also been submitted to the council of Ministers.[54]

Joining the call for a minimum wage system, the Ethiopian Human Rights Commission issued a statement on April 30, 2022, for the establishment of a minimum wage regime. The statement, which was given for commemorating International Workers' Day, provided that the average monthly wage in Ethiopia remained insufficient to guarantee the right to an adequate standard of living.[55] The statement reads:[56]

[52] Committee on Economic, Social, and Cultural Rights, Concluding Observation of the Committee on Economic, Social, and Cultural Rights on Ethiopia, E/c.12/ETH/CO/1-3, (31 May 2012), para. 11.
[53] FDRE Labour Proclamation, Proclamation No.1156/2019, Negarit Gazette (2019), Article 55 (2).
[54] Ethiopian Human Rights Commission, Call to Prioritize the Establishment of a Minimum Wage System, https://ehrc.org/call-to-prioritize-the-establishment-of-a-minimum-wage-system/ (accessed on October 10, 2024).
[55] *Ibid.*
[56] *Ibid.*

> While minimum wage is not a panacea to all the problems that workers are facing in Ethiopia, it is a crucial step that can ensure decent living for the workers and their families, in particular, if it is coupled with other necessary socio-economic measures.

Nevertheless, the country has not still established a minimum wage system. The government's reluctance to set a minimum wage is mainly based on economic and investment policy grounds.[57] Elaborating on these grounds, the Ministry of Labour and Skills stated that "setting a minimum wage amidst the economic crisis could backfire and exacerbate the situation".[58] According to the government, minimum wage "complicates job creation, investment and inflation. The economy is currently in crisis and cannot bear a minimum wage. Introducing a minimum wage at this time of economic crisis would exacerbate the situation".[59] Muferihat Kamil, the Minister of Labour and Skills, stated, "the post war economy would make it difficult to enforce [minimum wage]."[60]

The country's ambition to attracting Foreign Direct Investment (herein after referred to as "FDI") is also a factor in the delay for setting a minimum wage.[61] Ethiopia is currently working to attract

[57] The Reporter, Study to Weigh Pros and Cons of Minimum Wage as Ethiopia Hesitates, https://www.thereporterethiopia.com/35257/, (accessed on October 10, 2024).

[58] *Ibid.*

[59] *Ibid.*

[60] Addis Fortune, Labour Unions Premeditate a Rally on Labour Day, https://addisfortune.news/labour-unions-premeditate-a-rally-on-labour-day/, (accessed on October 10, 2024).

[61] Please note that Muferiat Kamil, Minister of Labour and Skills, stated in November 2024 while addressing the parliament that the government does not fear that minimum wage would impact FDI. However, the facts provided in this paper

FDI to boost its economic growth. FDI is believed to bring technologies, hire a bulk of the population and train the Ethiopian workforce, and bring in hard currency. Ethiopia, however, has competitors in Asia and Africa which are equally striving to attract foreign companies. The workforce in these competing countries, however, has more industrial experience and therefore higher productivity levels when compared to Ethiopian workers.[62] Accordingly, to beat the competition, the Ethiopian government has been promising cheap labour – workers who are willing to accept unusually low wages.[63] The State also uses the absence of a minimum wage in the country as one of its selling points. For example, an investment promotion brochure prepared in 2017 by the Ethiopian Investment Commission (EIC) provides that there is a flexible domestic labour law which does not have a minimum wage requirement for private sector employees.[64] In addition, the current website of the EIC provides Ethiopia has a competitive workforce by stating: "our relatively low wage rates and large industrial workforce offer significant labor-cost advantages for investors."[65]

The government was successful in attracting multinational companies by raising the availability of cheap labour as a competitive advantage. The establishment of PVH, the apparel giant,

show that the government provides cheap labor as a bait to attract FDI. See The Reporter, Government, Trade Union Confederation Again at Dead-End in Minimum Wage Saga, https://www.thereporterethiopia.com/42717/, (accessed on March 11, 2025).

[62] Paul M. Barrett and Dorothee Baumann-Pauly, *Made in Ethiopia: Challenges in the Garment Industry's New Frontier,* New York University – Stern, (2019), p. 8.

[63] *Ibid.*

[64] Ethiopian Investment Commission, *An Investment Guide to Ethiopia*, EIC (2017), p.3.

[65] Ethiopian Investment Commission, Why Ethiopia? https://investethiopia.gov.et/why-ethiopia/#young (accessed on March 11, 2025).

in Hawassa Industrial Park in 2017 is the most notable example of the successful use of this strategy. Rising labour and costs in Asia forced PVH to look for other alternatives in Africa. Ethiopia, Ghana, and Kenya presented themselves as best destinations for the international giant. Among other factors, "the cost of labor was an important consideration in PVH's decision-making process".[66] The company found power costs and quality in Ethiopia, Kenya, and Ghana to be equal. However, Ethiopia scored better on wage cost and hence PVH entered the country.[67]

As a result, it seems that the government's fear over the adverse effect of minimum wage on job creation and investment is based on practical challenges the country has faced in attracting foreign companies. The State, nevertheless, undertook a study to see if a minimum wage system is feasible in Ethiopia.[68] Even though the Ministry of Labour and Skills has not made the conclusions of the study public yet, I was able to learn that there currently is no law which is being developed based on its finding. The approach to conduct this study also received a vigorous rapprochement from the Confederation of Ethiopian Trade Unions (CETU) which stated that neither it nor the minimum wage board was represented in the study.[69]

[66] Mamo Mihretu and Gabriela Llobet, *Looking Beyond the Horizaon: A Case Study of PVH's Commitment to Ethiopia's Hawassa Industrial Park,* The World Bank, (2017), p. 22.
[67] *Ibid.*
[68] Addis Fortune, *supra* note 60.
[69] The Reporter, *supra* note 61.

To sum up, the government appears to be avoiding a minimum wage regime for private sector workers due to economic concerns and for the purpose of attracting foreign investment through low labor costs. But at what cost is the State neglecting a minimum wage? The following section will illuminate the status of wages in Ethiopia and its impact on varying segments of society.

4.1 Wages in Ethiopia: Decent or Inadequate?

Many workers in the country are paid wages that do not warrant a decent life, at least according to Ethiopian standards. The Ethiopian investment promotion website, the iGuide reports that the average monthly wage of unskilled Ethiopians in 2018 was USD 40.[70] Reflecting a similar picture, a 2019 research on the employment patterns and conditions of the Ethiopian construction and manufacturing sectors revealed that the average monthly wages for low-skilled workers in the manufacturing sector were ETB 1,217 for workers in Chinese companies, ETB 1,269 in other foreign companies, and ETB 1,450 in Ethiopian firms.[71] These wages did not show much change in 2023 even though the USD exchange rate

[70] iGuide Ethiopia, An Investment Guide to Ethiopia, https://www.theiguides.org/public-docs/guides/ethiopia, (accessed on October 10, 2024).

[71] Schaefer, F. & Oya, C. *Employment patterns and conditions in construction and manufacturing in Ethiopia: a comparative analysis of the road building and light manufacturing sectors*, IDCEA Research Report, SOAS, University of London, (2019), p. 30. At 2019 market exchange rates the wages are equivalent to about USD 38, USD 40 and USD 46, respectively. See National Bank of Ethiopia, *Quarterly Bulleting Second Quarter 2019/20*, Fiscal Year Series, Vol.36, No.2, (2020), p. 46.

increased by 70% from what it was in 2019.[72] In this regard, a study conducted in 2023 on female wage workers showed that "Women in selected farms earned an average wage of ETB 1841, while those working in cafes and restaurants, ETB 911 (plus tips), and in textile and garment factories ETB 2029."[73] Moreover, a study conducted by ILO in 2024 revealed that the median monthly wage in Ethiopia was Birr 3000.[74]

These wages are not enough to access basic necessities of life.[75] Consequently, trade unions constantly voice their dissatisfaction about the wage regime in the country. They planned to hold a rally on minimum wage and other labour issues under the leadership of the Confederation of Ethiopian Trade Unions (CETU) on May 1, 2023, which failed to materialize because it was not approved by the government.[76]

It could be seen, as a result, that there is a tension between the government and workers on minimum wage. On the one hand, the

[72] In 2019 1 USD equaled 31.8041 Birr while in 2023 1 USD equaled 54.2454 Birr. See National Bank of Ethiopia, *Quarterly Bulleting Second Quarter 2022/23 Fiscal Year Series*, Vol.39, No.2 (2023), p.6.

[73] Ezana Amdework and Belte Bizuneh (Eds.), *The State and Transformation of Female Wage Labour in Ethiopia: Lessons from the Textile/Garment, Floriculture and Hospitality Industries*, Forum for Social Studies, (2023), p. 4.

[74] ILO, Discussions Heightened Towards Setting Minimum Wage in Ethiopia, https://www.ilo.org/resource/news/discussion-heightened-towards-setting-minimum-wage-ethiopia (accessed on March 10, 2025)

[75] Kibur Engdawork and Frehiwot Sintayehu, *The State and Transformation of Female Wage Labour in Ethiopia: The Case of Textile/Garment Industries*, in Ezana Amdework and Belte Bizuneh (Eds.), *The State and Transformation of Female Wage Labour in Ethiopia: Lessons from the Textile/Garment, Floriculture and Hospitality Industries*, Forum for Social Studies, (2023), pp. 56-57.

[76] Addis Fortune, *supra* note 60.

government fears that a minimum wage regime would disrupt its plans of job creation and development, while on the other, workers demand a minimum wage that could allow them to lead decent life. Yet in addition to the moral and economic arguments it possesses, is minimum wage not a human rights on its own standing? If it is, then is the government of Ethiopia not obligated to set a minimum wage? These questions will be addressed in the subsequent sections.

5. Minimum Wage as a Human Right

Minimum wage is recognized under international human rights instruments as one of the rights that enable a person to lead a decent way of life. It is also an enabler of other rights which are fundamental to human life including the right to food, clothing, housing, and health. This section will discuss the correlation between minimum wage and human rights by analyzing international human rights instruments.

5.1 Minimum Wage under International Human Rights Law

The concept of fair wages is recognized by the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) and the Universal Declaration of Human Rights (hereafter UDHR). The ICESCR under Article 7 recognizes the right of everyone to the enjoyment of just and favorable conditions of work including fair wages which provide workers with a decent living for themselves and their families. It is also provided under Article 23 of the UDHR that "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity…". Fair wages are, as a result, remunerations that ensure the

worker would have a decent way of life. In this regard, the ILO denotes that a living wage is a "wage level that is necessary to afford a decent standard of living for workers and their families, taking into account the country circumstances and calculated for the work performed during the normal hours of work".[77]

The Committee on Economic, Social, and Cultural Rights (hereafter CESCR) has a similar stance on the concept of a living wage. It states that a "remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs."[78] Accordingly, CESCR requires States Parties to prioritize the adoption of a periodically reviewed minimum wage, indexed at least to the cost of living, and maintain a mechanism to do this.[79] Workers, employers and their representative organizations are also required to participate directly in the operation of such a mechanism."[80] The Committee further notes that minimum wage should be recognized by legislation and fixed with reference to a decent standard of living.[81]

[77] ILO, ILO Reaches Agreement on the Issue of Living Wages, https://www.ilo.org/resource/news/ilo-reaches-agreement-issue-living-wages, (accessed on October 10, 2024).
[78] Committee on Economic, Social, and Cultural Right, General Comment No.23 (2016) On the Right to Just and Favorable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, (27 April 2016), para. 18.
[79] *Id.*, para. 21.
[80] *Id.*, para. 20.
[81] *Id*., para. 21.

In this regard, the CESCR has forwarded several State Recommendations to members States of the ICESCR. For example, it urged Guatemala to "take the legislative and administrative measures necessary to ensure that all workers receive a minimum wage that enables them to achieve a decent standard of living for themselves and their families in keeping with Article 7 (a) (ii) of the Covenant."[82] It recommended El Salvador to "establish an effective mechanism for periodically reviewing the minimum wage, in accordance with Article 7 (a) (ii) of the Covenant, in which workers, employers and their representative organizations participate, in order to ensure that all workers receive a minimum wage that ensures a decent standard of living for themselves and their families". Further, it recommended Bahrain to "establish, in collaboration with the social partners, an appropriate and regularly indexed national minimum wage, regardless of the type of contracts, working hour arrangements and sectors, in order to guarantee decent living conditions for all workers and their families."[83] The right to a living wage also affects other areas of human rights. The right to food, clothing, housing, and health are all universally recognized human rights.

5.2 Minimum Wage and the Right to Food

The right to food is embedded in Article 11 (1) of the ISECR as part of the right to an adequate standard of living. According to the ICESCR, the right to food implies the following:[84]

[82] Committee on Economic, Social and Cultural Rights, Concluding Observations on the Fourth Periodic Report of Guatemala (2022), E/C.12/GTM/CO/4, (11 November 2022), para. 25.

[83] Committee on Economic, Social, and Cultural Rights, Concluding observations on the initial report of Bahrain, E/C.12/BHR/CO/1, (3 August 2022), para. 21.

[84] Committee on Economic, Social, and Cultural Rights, General Comment No.12: The Right to Adequate Food (Art. 11), E/C.12/1999/5, (12 May 1999), para. 8.

a. The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals,

b. free from adverse substances, and acceptable within a given culture; and,

c. The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

In this provision, availability refers to the ability to obtain food either directly from productive land or through effective systems that distribute, process, and market food according to demand.[85] Accessibility, on the other hand, includes both economic and physical aspects. Economic accessibility means that the cost of obtaining food should not compromise the ability to meet other basic needs, ensuring that even socially vulnerable groups, such as the landless and impoverished, can afford adequate food.[86] Therefore, economic accessibility envisages an environment where workers, among other classes of society, will be able to earn a decent amount of wage that will enable them to purchase an adequate amount of food. Emphasizing this, the CESCR states:[87]

> States have the obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for

[85] *Id.*, para. 12.
[86] *Ibid.*
[87] *Id.*, para. 21 and 26.

> everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger. This requires the adoption of a national strategy which works towards a decent living for wage earners and their families to ensure food and nutrition security for all.

As a result, in order to strictly observe the right to food, sufficient wages must be provided for individuals to enable them to afford adequate and nutritious food without compromising other basic needs. A minimum wage regime is the most effective mechanism to ensure this right.

5.3 Minimum Wage and the Right to Clothing

An adequate standard of living could not be complete without ensuring the right to clothing. With a clear recognition of this fact, both the Universal Declaration of Human Rights and ICESCR show commitment to the fulfillment and protection of this right.[88] Similarly, Article 27(3) of the United Nations Convention on the Rights of the Child states that "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing".

Further, Article 28(1) of the Convention on the Rights of Persons with Disabilities stipulates: "States Parties recognize the right of persons with

[88] International Covenant on Economic, Social, and Cultural Rights, (1966), Article 11(1). Universal Declaration of Human Rights, (1948), Article 25.

disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability". As a result, the right to adequate clothing is a right recognized by various human rights instruments and is essential for the right to adequate standard of living.

The CESCR has not discussed the elements of this right. Nor is there much case law on the issue. However, the committee has made a passing remark on the right to clothing when it described as to what conditions of work should be met for workers. In this regard, the CESCR has stated that "remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as … clothing".[89] Accordingly, the Committee's remark reiterates that fact that a person cannot have adequate clothing without a sufficient remuneration that enables him/her to do so.[90]

5.4 Minimum Wage and the Right to Adequate Housing

The ICESCR recognizes the right to adequate housing under Article 11 (1). As such it states that an adequate standard of living, which State Parties to the covenant agree to implement, includes an adequate food. CESCR has provided an authoritative interpretation of this right stating "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely

[89] Committee on Economic, Social, and Cultural Right, General Comment No.23, supra note 78, para. 18.
[90] *Ibid.*

having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[91] Hence, the right to live in dignity, which is the foundation of human rights, cannot be realized unless a person has a decent living place to live and raise a family. Affordability is one of the seven core elements of this right.[92] Accordingly, in order to realize the right to housing, States are required to "ensure that the percentage of housing-related costs is, in general, commensurate with income levels".[93] If a State is not able to establish income levels that will allow a person to live in a decent house, it is at least required to establish housing subsidies.[94]

5.5 Minimum Wage and the Right to Health

The right to health is protected under Article 12 of the ICESCR. It has been given an extensive explanation which is not binding, yet carrying an authoritative[95] interpretation by CESCR under General Comment No. 14 on the Right to the Highest Attainable Standard of Health (hereafter "GC 14"). Other human rights such as the right to life and the right to adequate food are also closely linked to this right. The Availability, Accessibility, Acceptability, and Quality (hereafter the "AAAQ")

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[91] Committee on Economic, Social, and Cultural Rights, General Comment No.4: The Right to Adequate Housing (Art. 11(1) of the Covenant), E/1992/23, (13 December 1991), para. 4.

[92] *Id.*, para. 8. The other elements are Legal Security of Tenure, *Availability of services, materials, facilities and infrastructure, Habitability, Accessibility, Location, Cultural adequacy.*

[93] *Id.*, para.8 (c).

[94] *Ibid.*

[95] Salman Rawaf and Sondus Hassounah, Codification and Implementation of the 'Right to Health' in the Arab World in Brigit Toebes, Rhonda Ferguson, Milan M. Markovic, Obiajulu Nnamuchi (eds.) The Right to Health: A Multi-Country Study of Law, Policy, and Practice, Springer, (2014), p. 136.

protection described under paragraph 12 of GC 14 elaborates how states are required to carry out their obligation towards the rights to health. Accordingly, this principle applies to ensuring quality health care services by making these services accessible, affordable and acceptable by the society. In this respect, states have to make quality health care services accessible, affordable, and acceptable to these patients, hence the AAAQ principle.[96] However the right to health is far bigger than access to health care. It also covers "a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[97] In order for a person to lead a healthy life to get proper nutrition, housing, adequate sanitation etc., he/she needs to have a decent income that enables him and his family attains a healthy life.

In light of the underlying principles of the binding instruments and non-binding documents, it can arguably be concluded that a minimum wage is a system through which the right to a decent way of living is enforced. Accordingly, States have the obligation to set a minimum wage that allows their citizens to access basic needs. Therefore, it can be firmly established that a minimum wage, is a human right and will be referred as such in the following paragraphs. However, one may ask, what exactly is the obligation of a State Party to the ICESCR such as Ethiopia towards fulfilling this right? The ensuing paragraphs illuminate this point.

[96] See Committee on Economic, Social, and Cultural Rights, General Comment No.14: The Right to the Highest Attainable Standard of Health (Art.12), E/C.12/2000/4, (11 August 2000), para. 12.
[97] *Id*., para. 4.

6. Minimum Wage and State Obligation under Human Rights Law

States are accountable for upholding human rights treaties starting from the date they ratify them. This is because international law puts States as the main duty-bearers when it comes to fulfilling treaty obligations and they are also required to implement the terms they have agreed to in good faith.[98] In addition, "States voluntarily acknowledge and accept obligations when they ratify human rights treaties. In doing so, they agree to implement these treaties and to be accountable for meeting the rights and providing for the needs of the people within their jurisdiction".[99] Therefore, "in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the [covenant] throughout the territories under its jurisdiction."[100] In this regard, Article 2/1 of the ICESCR requires States parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

[98] Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol.1155, (1969), Article 26. See also Committee on Economic, Social, and Cultural Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, E/C.12/2000/13, (27 November 2000), para. 7.

[99] John Tobin, Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs, *The International Journal of Children's Right*, Vol.14, (2006), p. 283.

[100] Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (ARTS. 4, 42 and 44, para. 6), CRC/GC/2003/5, (27 November 2003), guideline 41.

Given these stipulations, when do we say a State party to the ISECR is violating the Convention? The following argument tries to address this question by shedding light on the nature of State obligations enshrined under the ICESCR – especially in relation to the right to minimum wage.

6.1. State Obligation under the ICESCR

Obligations to implement economic and social rights are best explained by the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights (hereafter "Limburg Principles") and the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (hereafter "Maastricht Guidelines"). The Limburg Principles, developed by experts in 1986 aim to clarify the extent and nature of States' responsibilities regarding the implementation of economic, social, and cultural rights. These principles have "proven very useful to human rights advocates … and have been particularly instrumental as an interpretative adjutant of the norms of the ICESCR within domestic legal spheres".[101] In contrast, the Maastricht Guidelines build upon the Limburg Principles by introducing a violations approach to economic, social, and cultural rights, underscores that such rights can be violated just like civil and political rights.[102] This violations approach is important in that it affirms

[101] Committee on Economic, Social, and Cultural Rights, The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, E/C.12/2000/13, (2000) para. 1. See also Scott Leckie, Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights, *Human Rights Quarterly*, Vol. 20, No.1, (1998), p. 89.

[102] Committee on Economic, Social, and Cultural Rights, The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, supra note 101, Guideline 3.

economic, social, and cultural rights could be violated just as civil and political rights and, in the process, identifies what is expected of States in fulfilling economic, social and cultural rights.[103] Accordingly, the Maastricht Guidelines emphasize that "States are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights."[104] In addition, they clarify that the ICSECR similar to the ICCPR, imposes obligations to respect, protect, and fulfill.[105] Each of these obligations includes elements of obligation of conduct and obligation of result.[106] "The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right"[107] while "the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard."[108] And these tripartite obligations are to be realized progressively.[109] This means that economic and social rights are to be realized step by step.[110]

The obligations to respect, protect, and fulfill are adopted by the CESCR in its general comments and recommendations and have become the standard norm in defining and delineating States' obligations. What do these obligations entail in terms of the right to a decent way of life through minimum wage?

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[103] Victor Dankwa, Cees Flinterman, Scot Leckie, Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights , Human Rights Quarterly, Vol. 20 No.3, (1998), pp. 708-712.

[104] Committee on Economic, Social, and Cultural Rights, The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, supra note 101.

[105] *Id.*, Guideline 6.

[106] *Id.*, Guideline 7.

[107] *Ibid.*

[108] *Ibid.*

[109] Convention on the Rights of the Child, (1990), Article 4.

[110] See UN Committee on Economic, Social and Cultural Rights, General Comment No.3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant),E/1991/23, (14 December 1990), para. 2.

6.2 The Obligation to Respect, Protect, and Fulfill the Right to Minimum Wage

According to the Office of the High Commissioner for Human Rights (hereafter "OHCHR"), the duty to respect requires the duty-bearer to refrain from interfering with the enjoyment of any human right. The duty to protect requires the duty-bearer to take measures to prevent violations of any human right by third parties. The duty to fulfill also requires the duty bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights."[111] The OHCHR also noted that "resource implications of the obligations to respect and protect are generally less significant than those of implementing the obligations to fulfill, for which more proactive and resource-intensive measures may be required. Consequently, resource constraints may not affect a state's ability to respect and protect human rights to the same extent as its ability to fulfill human rights."

In light of the above, the CESCR has defined what the obligations to respect, protect, and fulfill constitute when it comes to the right to minimum wage. Accordingly, "States Parties have an obligation to respect the right by refraining from interfering directly or indirectly with its enjoyment".[112] This means, for example, that States are not allowed to introduce discriminatory salary scales or violate collective work agreements.[113] On the other hand, "the obligation to protect requires

[111] Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, OHCHR, (2005), para. 47.
[112] Committee on Economic, Social, and Cultural Right, General Comment No.23, Supra Note 78, para. 58.
[113] *Ibid.*

States parties to take measures to ensure that third parties, such as private sector employers and enterprises, do not interfere with the enjoyment of the [right] and comply with their obligations".[114] The obligation to fulfill, in contrast, "requires States parties to adopt the measures necessary to ensure the full realization of the [right]. This includes introducing measures to facilitate, promote and provide that right, including through collective bargaining and social dialogue".[115] These obligations are instrumentalized through laws, policies and regulations.[116]

6.3 Progressive Application of the Right to Minimum Wage

Even though the obligations to respect, protect, and fulfill the right to minimum wage have a generalized application, economic, social, and cultural rights have a progressive application. What does this mean? The progressive applicability of Economic, Social, and Cultural rights (hereafter "ESC Rights") has different stages. The statement of article 2(1) with regard to states obligations in the realization of the rights is that states "[undertake] to take steps… with a view to achieving progressively the full realization of the rights recognized in the Covenant.

According to the Committee, this is the main obligation of state parties towards fulfilling the rights enshrined in the covenant and that the progressive applicability embodied in the article reflects the fact that all ESC Rights cannot be applicable in a short period of time.[117]

114 *Id.*, para. 59.
115 *Id.*, para. 60.
116 *Id.*, para. 61.
117 UN Committee on Economic, Social and Cultural Rights, General Comment No.3, supra note 110, para. 2.

Nevertheless, as provided under Article 2 (1) of the covenant, States are required to take steps towards the realization of ESC Rights. In this regard, the Limburg Principles under paragraph 16 states that "all State parties have an obligation to begin immediately to take steps towards a full realization of the rights contained in the Covenant." It also adds under paragraph 23 that the inadequacy of resources should not be taken as reasons for a state not to take on steps towards the progressive realization of states. States under Article 2(1) of the covenant are required to work towards achieving the rights enshrined in the covenant by mobilizing available resources at home and those resources that could be acquired through international cooperation.[118] The duty to progressively achieve [ESC Rights] entails that states must take steps to the maximum available resources to achieve the rights without delay. In addition, even though most ESC Rights are rights that will be achieved progressively, according to paragraph 8 of the Maastricht Guidelines, this nature of ESC Rights "does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible." The CESCR has similar interpretation on the progressive realization of ESC Rights and provides the following under paragraph 10 of its general comment on Article 2(1) of the ICESCR:

> … realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country

118 Committee on Economic, Social and Cultural Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, supra note 98, para. 26.

> in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

In addition, the CESCR also mentions minimum core obligations that States should fulfill to ensure the right to just and favorable conditions of work. These obligations are considered minimum essential levels of the right and require States to adopt these obligations as soon as possible.[119] The minimum core obligations of each right are expected to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.[120] Nevertheless, the Committee has made it clear that any evaluation of whether a State has fulfilled its minimum core obligation must consider the resource limitations present within the country.[121] According to the Committee, "in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[122]

[119] See UN Committee on Economic, Social and Cultural Rights, General Comment No.3, *supra* note 110, para 10. See also UN Committee on Economic, Social, and Cultural Right, General comment No.23, *supra* Note 78, para. 65.
[120] UN Committee on Economic, Social and Cultural Rights, General Comment No.3, *supra* note 110, para. 10.
[121] *Ibid.*
[122] *Ibid.*

In light of the above, we may ask what the obligation of States towards the fulfillment of the right to minimum wage is. A right to minimum wage, as it has been mentioned, is a very crucial right that allows workers to lead decent life. As such, it not only allows workers to make ends meet, it also allows a wage earner to get a proper health care, clothing, education, housing, and food. Therefore, the fulfillment of the right to minimum wage is a stepping stone for the fulfillment of other rights that are essential to ensure a dignified life. Accordingly, the fulfillment of a right to minimum wage by itself is seen as a minimum core obligation. A state is expected to set a minimum wage when it starts taking steps towards fulfilling Article 7 of the ICESCR, the right to just and favorable conditions of work.[123] In this regard, the CESCR provides that States have the obligation to set minimum wages that are non-discriminatory and non-derogable. This legislative move is required to be done "in in consultation with workers and employers, their representative organizations and other relevant partners … fixed by taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families".[124] Further, a minimum wage is expected to be set and governments are required to respect, protect, and fulfill this right as soon as they ratify the ICESCR. A state is deemed to have discharged it obligations only if it could show that it has made every required effort under its disposal to fulfill its obligation. What does this mean for the Ethiopian government?

[123] UN Committee on Economic, Social, and Cultural Right, General comment No.23, Supra Note 78, para 65 (C).
[124] *Ibid.*

6.4 The Obligation of the Ethiopian Government in Setting a Minimum Wage

The Ethiopian government has the obligation to respect, protect, and fulfill the rights enshrined in the ICESCR and other human rights instruments to which it is a member. Of course, economic and social rights are progressive, and the government is required to meet the minimum essential level of the right. Also, the government is considered to have violated its obligations under the ICESCR if it failed to guarantee the fulfillment of such minimum level of the right in question. The violation may manifest in an action or omission of obligatory duties.

Looking into Minimum wage as a segment of right, one could see that it is a minimum core obligation by itself that needs to be fulfilled immediately after the ICESCR has been signed. In addition, minimum wage is also a stepping stone towards fulfilling other rights such as the right to food, housing, clothing, and health. Without a wage regime that ensures a decent standard of living, these rights would not be fulfilled. Setting a minimum wage, as a result, could also be seen as a minimum essential step that a state takes towards fulfilling these rights.

Nevertheless, as described above, in assessing whether an action or omission constitutes a breach of the right, even for minimum core obligations, it is crucial to differentiate between a State's inability and unwillingness to comply.[125] For example, in the case of the right to food, if a State claims that limited resources prevent it from ensuring access to food for those unable to secure it on their own, it must show that it has

[125] *Ibid.*

made every effort to allocate all available resources to prioritize meeting these minimum obligations.[126] This standard is applicable on every other economic and social right.

Ethiopia has ratified the ICESCR, and, hence, is required to set a minimum wage for its citizens as one of its minimum core obligations towards fulfilling the right to just and favorable conditions of work and other essential rights discussed in this paper. Nevertheless, the Ethiopian government, it seems, is reluctant to set a minimum wage because it fears it would push away foreign direct investment which is believed to contribute significantly to the country in job creation and foreign exchange. In addition, as described previously, the government fears that the post Tigray War (2020–2022) economy will not sustain a minimum wage regime. It also raises other economic arguments. Nevertheless, there is no empirical evidences (as far as the researcher's observations goes) that prove or disprove these claims of the government. Therefore, it is difficult to assess whether the government is unable or unwilling to set a minimum wage regime which will help to assess its devotion to the fulfillment of the right to a minimum wage and other ancillary rights under the ICESCR. However, what can be safely concluded is that the government has the obligation to set a minimum wage and is required to take every step available towards the fulfillment of the right. In this regard, the government has already established a minimum wage board and concluded a research on a minimum wage regime. While this is commendable, the board has not been able to act since its establishment in 2019. Moreover, the research is not open to the public. Therefore, the government, as a step towards setting a minimum wage, needs to fulfill the following:

[126] *Ibid.*

1. Make the research it currently conducted on the sustainability of a minimum wage regime public for public reflection. If need be, conduct additional research that involves the participation of CETU and other relevant stakeholders.
2. Set minimum wages across selected economic sectors that are highly affected by low wage rates. This includes setting a minimum wage for workers in sectors that generally pay substandard wages such as the hospitality and commercial agriculture sectors.
3. Implement strategies/policies that will enable the country to attract FDI without depending on the cheap labor rhetoric.
4. Take relevant and immediate steps towards the fulfillment of the above recommendations.

7. Conclusion

The argument for a just wage that enables workers to lead a decent life goes back to the era of Greek philosophers and spans across the middle ages. It is now solidified as a human right that needs an immediate attention because it is crucial to fulfilling other essential human needs such as food, clothing, and a decent shelter. Accordingly, member states to the ICESCR are required to take immediate steps towards fulfilling a minimum wage when they ratify the covenant. However, failure to observe this economic and social obligation is not instantly taken as an offense against human rights law. The State's ability and willingness towards fulfilling this right, even where the right is regarded as a minimum core obligation, will be put to the test before providing any conclusions. A State is deemed to have violated the covenant, or, in other words, the right to minimum wage, when it is unwilling while being able to fulfill the right. Moreover, if the State fails to take steps

towards fulfilling its obligations under the right, it will be deemed to have not fulfilled its international human rights obligations.

The Ethiopian government, to its credit, has established a minimum wage board which is tasked with overseeing the fruition of a minimum wage regime for the private sector workers of the country. Nevertheless, the government has made its positions towards setting minimum wage clear in several occasions after the board was established in 2019. In this regard, the government is reluctant to set a minimum wage for workers because, among other factors, it fears a minimum wage would drive away foreign direct investment and disrupt the post Tigray war economy. So far, economic arguments that corroborate or dismantle the government's stance have not been made public. However, it should be emphasized that the government, as a State Party to the ICESCR, is required to respect, protect, and fulfill the right to minimum wage. Even if it is unable to observe its obligations due to economic reasons, it is required to take the necessary steps towards the fulfillment of the right. These necessary steps range from making its research findings on the minimum wage issue public to setting a minimum wage in some industries where the salary forces workers to live in dire life situations. If the government fails to take these steps, it will have violated its obligation under international law. It, as a result, needs to observe its promise for its citizens which it solidified by signing and ratifying the ICESCR and take the necessary steps towards fulfilling the right to minimum wage of private sector workers.

Death Penalty in Theories and Ideologies of Criminal Justice: A Note on Ethiopian Criminal Law

Bebizuh Mulugeta *

Abstract

Death penalty is one of the most contentious subject of ethical, ideological and policy debate in criminal jurisprudence. This debate is largely reflected in the varying positions taken by schools of thought and ideological camps over the causes of crimes and purpose of criminal punishment. Two theoretical schools of thought namely, the classical and the positivist schools, and three political ideologies predominate the scholarly debate thereby including criminal justice polices and laws of different countries over the ages. This paper aims to briefly examine the Ethiopian criminal law on death penalty in light of the dominant theories and ideologies of criminal justice. While the existence of death penalty in Ethiopia is against the classical as well as positivist school, the legal limitations on the imposition and execution of death penalty exhibit a mixture of classical and positivist schools. On the ideological dimension, the Ethiopian criminal law blends conservative and liberal ideology.

Keywords: Criminal Justice, Death Penalty, Ethiopia, Theories, Political Ideologies

1. Introduction

The causes of crimes and purpose of criminal punishment has been a debatable issue for so long that gave rise to different school of thoughts, also referred to as schools of criminology. The classical and the positivist schools are among the dominant school of thoughts having different outlooks on what causes crime and what the purposes of criminal punishment should be .[1]

The classical school takes free will as the cause of crime and propone that the purpose of criminal punishment should be prevention of crimes.[2] On the other hand, the positivist school takes the view that crime is determined by biological, psychological and environmental factors that are outside of the control of the offender and recommend the purpose of punishment to be rehabilitating the offender.[3]

In addition three political ideologies with conservative, liberal and radical foundations underlie the criminal justice polices and laws.[4] As such, death penalty is under a dialectic influence of the theoretical and ideological lines of thought. In this respect, both the classical and positivist school of thoughts are against death penalty. And when it comes to political ideologies, conservatives are in favor of death penalty

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[1] Anderson Cincinnati, Criminal Justice Theories and Ideologies, in Francis T. Cullen and Karen Gillbert (eds.), Reaffirming Rehabilitation, (1982), p. 29.

[2] *Id.* pp. 29 & 30.

[3] *Id.* pp. 32 & 33.

[4] Walter B. Miller, Ideology and Criminal Justice Policy: Some Current Issues, J. Crim. L. & Criminology, Vol.64 (1973), p.142; Cincinnati, *supra* 1.

for dangerous offenders.[5] On the other hand, though the extent of their opposition differs, liberals and radicals are against the imposition of death penalty.

The presence of the theories and ideologies of criminal law can also be raised in relation to the Ethiopian criminal justice system. This paper therefore aims to briefly examine the Ethiopian criminal law on death penalty in light of theories and ideologies of criminal justice. As death penalty still exists under Ethiopian criminal law, this makes the Ethiopian criminal justice system against the classical as well as positivist schools of criminology. On the other hand, the restrictions on the imposition and execution of death penalty, together with its *de facto* abolishment, demonstrate a mix of classical and positivist schools of thoughts. On the ideological dimension, this paper argues that the Ethiopian criminal law is a mix of conservative and liberal ideology.

The rest of this paper is organized in to three main sections. Section two provides a general overview of theories and ideologies of criminal justice with special reference to death penalty. Section three, in its sub-sections; examines the Ethiopian Criminal Code in light of the theories and ideologies of criminal justice. Finally, Section four provides concluding remarks on the themes explored.

4 Death Penalty in Theories and Ideologies of Criminal Justice: An overview

Death penalty is the ultimate form of punishment that can be imposed for grave violation of criminal law and executed by denying the

[5] Cincinnati, *supra* 1, p. 37; Miller, *supra* 4, p. 157.

offenders' life.[6] Yet its application is complex and deeply contentious, fraught with moral, ethical, and legal considerations that have fueled debate for centuries. Beyond the immediate act of punishment, the subject touches upon fundamental questions of justice, fairness, and the role of the state in upholding societal values. This section of the paper explores how varying schools of thought and political ideology approach this contentious issue.

2.1 Death Penalty in Theories of Criminal Justice

2.1.1 Classical School

The classical school of thought, mainly represented by Beccaria and Jeremy Bentham, holds that law and punishment are necessary and justified to maintain the peace and security of the state and citizens.[7] In this view, the primary purpose of criminal punishment shall be deterrence of crimes.[8] The classical school aimed at adopting a general deterrence model (in contrast to a specific deterrence approach). The model rests on the assumption that the punishment would create fear on potential offenders to effect of refraining themselves from committing crimes. According to this school, punishment which contributes for the prevention of crimes can be achieved when it is swift, certain and severe.[9]

[6] Tainá Corrêa Barbosa Ramos, Capital punishment: a Theoretical and Cooperative Analysis, Vol. 6 Adam Mickiewicz University Law Review, (2016), pp. 150 &152. See also, Fasil Nahom, Punishment and Society: A Developmental Approach, Vol.12(1) Journal of Ethiopian Law, (1982), p.127.

[7] Cincinnati, *supra* 1, p. 29.

[8] *Id*., p. 30.

[9] *Id*., Ramos, *supra* 6, p. 153.

When it comes to death penalty (capital punishment), the classical school opposed death penalty and advocated for its abolishment. As this school, recommends for severity of punishment so as to deter crimes, its stand against death penalty might be perceived as self-contradictory. Despite this, according to Beccaria's thought based on social contract, the power that people give to the sovereign to administer law and impose punishment, does not include the power to punish offenders by death.[10]

Furthermore, for the classical school, punishment by death is retributive which is against the primary purpose of criminal punishment i.e. deterrence of crimes. Though punishment shall be severe, it shall be so only to the extent that it serves its purpose of deterring of crimes, punishment beyond what is necessary is unacceptable. In particular, Beccaria, opined that death penalty will adversely affect the deterrence of crimes because the brutality surrounding its administration will harden human souls.[11] Scholars advance this argument on the ground that the onlookers having the spectacle on the cruelty public execution would eventually get used to

[10] Bernard E Harcourt, Beccaria's On Crimes and Punishments: A Mirror on the History of the Foundations of Modern Criminal Law, in Markus D Dubber (ed.), Foundational Texts in Modern Criminal Law, Oxford University Press 2014), p. 46; see also Cincinnati, *supra* 1, p. 29; Simeneh Kiros & Chernet Wordofa, "Over-criminalisation": A Review of Special Penal Legislation and Administrative Penal Provisions, Vol. XXIX Journal Of Ethiopian Law, (2017), p. 54.

[11] Harcourt, *supra* 10, pp. 48 & 50.

it and this, in turn, would go against the deterrent goal.[12] In deterring crimes, Beccaria argues that the imposition of life imprisonment or penal servitude for life is more effective than death penalty.[13]

Generally, in the classical school, as deterrence of crimes can be realized by punishments other than death penalty, death sentence is an irrelevant and unjustified restriction of the rights of individuals.[14]

2.1.2 Positivist School

In the positivist school, criminal behavior is caused by a multitude of biological, psychological and sociological factors beyond the control of the offender.[15] Unlike the classical school that takes deterrence as the primary purpose of punishment, the positivist school holds that the primary purpose of criminal justice shall be rehabilitating the offender than punishing.[16] In addition, the positivists recommend for probation, parole and focusing on juvenile justice system.[17] Through rehabilitation, the positivist school shows its focus on the offender,

[12] This is somehow reminiscent of a story from an autobiography written by *Shibru Tedla*. As *Shibru* stated his childhood memory, he and his age-mates would regularly observe the public execution of the death penalty, from which they would have fun and laughter by noticing how the persons reacted while being strangulated or how the dead body looks after the execution. *Shibru* further stated that he and his friends would not develop any fear of the punishment and a feeling of being deterred from committing a crime. This made *Shibru* doubt the purpose that the death penalty serves in deterring the commission of crimes. (See, Sibru Tedla, *Ke Gureza Mariam Eske* Addis Ababa: *Ye Hiwote Guzo ena Tezetaye*, (Eclipse Printing Press, 2008 Ethiopian Calendar) pp. 16-17 (Amharic langauge).

[13] Harcourt, *supra* 10, p. 53.

[14] Cincinnati, *supra* 1, p. 29. Ramos, *supra* 8, p. 153.

[15] Cincinnati, *supra* 1, p. 33.

[16] *Id.*, pp. 33&34.

[17] *Id.*, p. 34.

while the classical school (through deterrence) is concerned with the offense (its harm).[18]

But when it comes to death penalty, rehabilitation is unimaginable in relation to death penalty because the imposition of such penalty means that the convicted person is impossible to reform.[19] As one cannot think of rehabilitating the offender by killing, this makes the positivists to be against death penalty. In the case of incorrigible offenders, the positivists recommend their life time confinement than punishment by death.[20]

2.2 Death Penalty in Political Ideologies

For the conservatives, excessive leniency towards lawbreakers is one of the crusading issues for the need to have reform in the criminal justice system in a way that criminal punishment shall serve the purpose of deterrence and incapacitation.[21] Accordingly, the conservative ideology recommends punishing habitual and dangerous criminals severely including the use of death penalty.[22]

On the other hand, the liberals consider discriminatory bias based on race, sex, age as one of the crusading issues in the criminal justice system. The driving force for crime is a misbalance in the conditions

[18] Dullbonline, George B. Vold, Thomas J. Bernard, Jeffrey B. Snipes, "Classical and Positivist Criminology", Theoretical Criminology (5th ed., 2002), available at https://dullbonline.wordpress.com/2020/08/24/george-b-vold-thomas-j-bernard-jeffrey-b-snipes-classical-and-positivist-criminology%E2%80%96-theoretical-criminology-5th-ed-2002/ last accessed on 2nd February , 2025.

[19] Fasil, *supra* 6, p.130.

[20] Cincinnati, *supra* 1, p. 33.

[21] Cincinnati, *supra* 1, p.36. Miller, supra 4, p. 43.

[22] Miller, *supra* 4, p. 157. See also Cincinnati, *supra* 1, p. 37.

of social orders and suggested for structural corrections of the misbalances as a long term remedy to prevent crimes.[23] But as short term measures, the liberals suggest for a piece-meal improvements on the justice system, including human treatment of offenders.

Furthermore, for the liberals, rehabilitation shall be the major concern of the criminal justice. To this effect, they specifically suggest a more realistic purpose of criminal punishment encompassing just desert and determinative punishment.[24]

5 Theories and Ideologies Underlying Policy of Death Penalty under Ethiopian Criminal Justice

5.1 The Classical School

The Ethiopian Criminal Code (here after referred as the Criminal Code) is founded on the primacy of preventing crimes through the instrumentality of criminal punishments including death penalty.[25] This can be inferred from the preface of the FDRE Criminal Code (here after referred as the Criminal Code) which, in its preamble, reads:

> The purpose of criminal law is to preserve the peace and security of society… by preventing the commission of

[23] Cincinnati, *supra* 1, p. 38 Miller, *supra* 4, p. 145.
[24] Cincinnati, *supra* 1, p. 38.
[25] The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Federal Negarit Gazetta, (2005), Art 1 & Preface, para.8.

> crimes, and a major means of preventing the commission of crime is punishment.[26]

Here lies one of the points of departure between the classical school and the Ethiopian Criminal Code. As noted earlier, the classical school is against death penalty because deterrence of crimes can be realized by other punishments, like life imprisonment, which makes death sentence irrelevant and unjustified restriction of the rights of individuals.[27] The utilization of death penalty as a means to deter crimes makes the Ethiopian Criminal Code against classical school of criminology.

Nevertheless, there are also elements in the Criminal Code that are reflective of the classical school. The classical school is against death penalty, among others, because of the brutality during its execution.[28] The Ethiopian Criminal Code, while it includes criminal acts punishable by death[29], prohibits public hanging and imposes duties to administer death penalty in humane means.[30] One can infer from this that administering death penalty by shooting and public hanging is found to be brutal and inhumane that the drafters of the Criminal Code chose not

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[26] *Id.*, Preface, para. 8

[27] Harcourt, *supra* 10, p. 53; Cincinnati, *supra* 1, p. 29.

[28] Cincinnati, *supra* 1, p. 28.

[29] There are crimes that are punishable by death in Ethiopia. In this respect, aggravated Homicide, High Treason, Espionage, Crimes against the Constitution or the State and military crimes are some of the crimes that may be punishable by death in Ethiopia.

[30] The Criminal Code, supra 25, Art 117(3). Unlike the Criminal Code, under the Penal Code of Ethiopia (1957) death penalty used to be, in principle, executed by hanging. And in case the offender is member of armed forces, the court may order his execution by shooting. The court may also specify in its judgment for the death sentence to be executed in public, if it finds it helpful to warn potential offenders. (see Penal Code of the Empire of Ethiopia, Proclamation No. 158, Negarit Gazeta, (1957) Art 116(1)

to incorporate the same under Art 117 of the Criminal Code.[31] Such underlying assumptions can be taken as one area in the Criminal Code that shows ideals of the classical school of thought. Finally, it is important to note that identifying humane ways to execute death penalty is left to be determined by "the executive body having authority over prisons".[32]

As per the tenets of the classical school, the punishment of a crime shall be preemptively set by the legislature and the task of the judiciary shall be determination of guilt and passing the punishment as it is stated in the text of the law.[33] Art 117(1) of the Criminal Code states that "sentence of death shall be passed only in cases of grave crimes and on exceptionally dangerous criminals, in the cases specifically laid down by law." This shows that crimes punishable by death are made known to the public by law enacted by the legislature. And because of the principle of legality[34], it is only in relation to the crimes that are prescribed under the Criminal Code as punishable by death that courts can pass death sentences.

Moreover, it is only in completed offences that death penalty can be imposed[35]; that attempt and other inchoate conducts to commit crimes are not punishable by death. Death penalty shall not be imposed on an

[31] Expose des Motif, Criminal Code of Ethiopia (2004), p. 69.

[32] The Criminal Code, supra 25, Art 117(3). But here, when Art 117(3) refers as "the executive body having authority over prisons", whether it is referring to the prison administration authorities (at federal and regional level) or the executive organ of the government to whom the prison authorities are answerable to is not clear. In addition, whether or not legal framework specifying the methods of administering death sentence determined by the "the executive body having authority over prisons" is not also clearly stated in the provision.

[33] Cincinnati, *supra* 1, p. 29.

[34] The Criminal Code, *supra* 25, Art 2.

[35] *Id*., Art. 117(1).

offender who did not attain the age of eighteen at the time of commission of the crime.[36] These legal limits on death penalty by predetermined rules, enacted by the legislature, show the classical school of thought under Ethiopian Criminal Code.

The neo-classical school is also reflected in the Ethiopian Criminal law on the imposition of death penalty. In the neo-classical school individual circumstances of a given case are considered during sentencing of offenders.[37] When this is brought to the case of Ethiopian criminal law, punishments shall be imposed by considering the offender's "degree of individual guilt, dangerous disposition, antecedents, motive and purpose, personal circumstances and standard of education."[38] This serves to determine the extent to which the punishment shall be mitigated or aggravated,[39] which is about individualization of punishment based on "individual guilt, gravity of the offence and material circumstance of the case."[40] This is practically implemented through the general as well as special mitigating and aggravating circumstances which are "…..elements of material and personal nature….that may or must be taken into consideration at the time of passing the sentence.

Thus, the determination of penalty pertain "both to the position of the actor as well as to the conditions surrounding the commission of the

[36] *Id.*
[37] Cincinnati, *supra* 1, p. 31.
[38] The Criminal Code, *supra* 25, Art. 88(2).
[39] Elias Nour, Principles of Ethiopian Criminal Law, St. Mary's University Center for Law in Sustainable Development (2022), p.361
[40] The Criminal Code, *supra* 25, Art 88(2).

offense."[41] This individualized determination of punishment based on the circumstances of the accused and the commission of the crimes, which is also applicable for crimes punishable by death, is manifestation of neo classical school of thought under the Criminal Code.

In addition, in most of the crimes that are punishable by death, the punishment is not stipulated as a sole punishment. Rather, death penalty is prescribed together with the range of imprisonment sentences that shall be considered before imposing death penalty.[42] In these types of crimes, different factors showing the degree of individual guilt of the convicted individual shall be considered before resorting to death sentence. These factors are stipulated as aggravating as well as mitigating circumstances under the general and special provisions of the Criminal Code.[43] When an individual is convicted for a crime that is punishable by death, the court shall pass the sentence by considering the limits set by the legislators and the personal circumstance of the defendant that are recognized as aggravating and mitigating circumstances. Especially, death penalty shall be imposed only when there is no mitigating circumstance in favor of the convicted individual.[44]

To this end, the general mitigating circumstances listed under Art 82 of the Criminal Code may be used as grounds to extenuation of the penalty within the limits prescribed under Art 179 of the Code. Specific to death

[41] Phillip Graven, An Introduction to Ethiopian Penal Law, Haile Selassie I University and Oxford University Press, (1965), p. 240.
[42] For example, Aggravated homicide is punishable by life imprisonment or in aggravated cases by death. (see, Criminal Code, supra 27, Art 539) Hence, the court shall justify its decisions while choosing death penalty than life imprisonment.
[43] The Criminal Code, *supra* 25, Art 82, Art 84, Art 182, Art 184 and the following.
[44] *Id*., Art. 117(1).

penalty, the fulfillment of one or more of the general mitigating grounds may lead to the extenuation of penalty form 'from capital punishment to rigorous imprisonment of twenty years to life."[45] In addition to the mitigating factors, the Federal Criminal Sentencing Manual further limited the possibility for the imposition of death sentence.[46] All these show the neo-classical elements in the Ethiopian criminal code that are related to death penalty.

Mitigated punishment due to limited criminal responsibility on grounds of age, insanity and feeblemindedness is the other outcomes of the neo-classical school.[47] According to the Ethiopian Criminal Code, there shall be mitigated punishment due to partial responsibility in cases where the offender is partially incapable to understand the nature or consequences of his act or regulate his conduct.[48] The partial responsibility and mitigated punishment also covers those crimes that are otherwise punishable by death. And in case when the death penalty has already been passed, it shall not be executed on a partially or fully irresponsible person.[49]

[45] *Id.*, Art. 179(a).
[46] The World Coalition Against the Death Penalty, Ethiopia's Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Suggested List of Issues Relating to the Death Penalty, Report 75th Session of the Committee Against Torture, (June 2022); available at < https://worldcoalition.org/wp-content/uploads/2022/07/Ethiopia-CAT-LOI-TAHR-WCADP.pdf >, last accessed on 2nd Feb 2025.
[47] Cincinnati, *supra* 1, p. 33.
[48] Criminal Code, supra 25, Art 48 Art 49.
[49] *Id.*, Art. 119.

Moreover, death penalty is not always imposed in all cases of homicide. The legislator of the Ethiopian Criminal Code classify the crime of homicide as aggravated homicide[50], ordinary homicide[51], extenuated homicide[52], negligence homicide (which is further divided in to three different types)[53] and infanticide.[54] This classification is based on differences in circumstances surrounding the commission of the act of killing; including the mental state and dangerousness of the accused. And hence, because of the recognition given to individual circumstances of the commission of the criminal act (as opposed to the mere act), it is only aggravated homicide which is punishable by death.

Such differentiated treatment of criminal acts based on circumstances related to commission of the act is also reflected in other types of crimes which show the elements of neo-classical school under the Ethiopian criminal law.

5.2 The Positivist School

In the positivist school of thought, the primary purpose of criminal justice shall be rehabilitating the offender than punishing him.[55] Rehabilitation is incompatible with death penalty because the imposition of death penalty means the assumption taken on the unreformed nature of the offender.[56] As a result, the positivists are against the imposition of

[50] Criminal Code, *supra* 25, Art 539.
[51] *Id.*, Art. 540.
[52] *Id.*, Art. 541.
[53] *Id.*, Art. 543.
[54] *Id.*, Art. 544.
[55] Cincinnati, supra 1, p. 33&34.
[56] Fasil, *supra* 8, p.130.

death penalty. In the case of incorrigible offenders, they recommend life time confinement.[57]

When it comes to the Ethiopian case, the existence of crimes punishable by death under Ethiopian law reflects the position of the legislator on the incorrigible offenders committing these types of crimes. This position makes the Ethiopian criminal code against the positivist school of thought. Nevertheless, even if death penalty is still maintained in the Ethiopian criminal law, the legal limitations on the imposition and execution of death penalty show the features of positivist school of thought. The following elements can be inferred in this respect.

According to the Ethiopian Criminal Code, death penalty cannot be imposed on those who haven't attained the age of eighteen at the time of commission of the crime.[58] Furthermore, if offender was above fifteen years and below eighteen years, the imposition of punishment (by imprisonment) shall be made by considering their age or dangerous disposition and the likelihood of his reform.[59] Accordingly, depending on the condition of the young offender, the punishment can be either a mitigated punishment or correctional measures stated under Art 166-168 of the Criminal Code.[60] The prohibition on death penalty on those under the age of eighteen at the time of commission of the crime and the preference to extenuated punishment or corrective measures shows the positivist feature of Ethiopian criminal law.

In the positivist school, criminal behavior is believed to be caused by a multitude of biological, psychological and sociological factors beyond

[57] Cincinnati, *supra* 1, p. 33.
[58] Criminal Code, *supra* 25, Art 117(1).
[59] *Id.*, Art. 56 (2).
[60] *Id.*

the control of the offender.[61] Accordingly, the primary purpose of criminal justice shall be rehabilitating the offender than punishing.[62] Looking into pertinent stipulation under the Ethiopian criminal code in this light, one could see some considerations of such policies. For example, as per the Criminal Code, infants and juveniles are spared from ordinary punishments even when they commit serious crimes, including those punishable by death.[63] If the offender is below the age of nine years, he shall be taken care by his family, school or guardian.[64] A crime of whatever gravity committed by an infant is attributable to his/her biological or physical condition.[65] And in cases where the offender is between the age of nine years and fifteen, s/he will be sentenced to the measures stipulated under Art 157-168 of the Criminal Code, which are curative and rehabilitative measures. In sum, the implicit attribution of delinquency to physical and biological conditions and the focus on rehabilitation even when infants and juveniles have committed crimes otherwise punishable by death shows the influence of positivist schools in Ethiopia criminal law.

In addition, when the offender is between the age of nine years and fifteen, the duration of the measures of treatment and supervised education specified under Art 158 and Art 159 of the Criminal Code shall be administered to the time it is believed to be necessary by medical or supervisory authority, so long as the offender doesn't attain eighteen years.[66] Positivists advocate for indeterminate sentencing

61 Cincinnati, *supra* 1, p. 33.
62 *Id.*, pp. 33&34.
63 Criminal Code, *supra* 25, Art. 52.
64 *Id.*, Art. 52.
65 Graven, *supra* 41, p. 145.
66 Criminal Code, *supra* 25, Art. 163.

according to the needs of the offender.[67] Indeterminate sentencing is a sentencing strategy in which judges are given wider discretion to choose the punishment from a range of sentencing options, so as to closely monitor the characteristics of the offender and serve the rehabilitative purpose of punishment.[68] Looking into the Criminal Code, one would argue that the wide discretion given to the medical or supervisory authority to determine the duration of the sentence (provided that it is with in the eighteen years old limit of the offender) is an indeterminate sentencing that reflect the recommendation of the positivist school of thought.

There are also measures applicable to irresponsibility or partial responsibility because of "age, illness, abnormal delay in development in mental faculties, a derangement or an abnormal or deficient condition or any other similar biological causes" that make the offender partially or fully incapable of understanding the nature or consequences of his act or regulating his conduct according to such understanding.[69]

Finally, in situations of partial or full irresponsibility, the Criminal Code requires the court to order for confinement and treatment of the offender.[70] Here the treatment and confinement of the offender may be for indefinite period of time.[71] The court shall, however, review its decision every two year.[72] Here, the treatment and confinement of the

[67] Cincinnati, *supra* 1, p. 34.
[68] Frank Schmalleger, Criminal Justice: A Brief Introduction, (2017, 12th ed.), p. 276.
[69] Criminal Code, *supra* 25, Art 48 and 49.
[70] *Id.*, Art. 129, Art. 130, Art 131.
[71] *Id.*, Art. 132.
[72] *Id.*, Art. 132.

offender for indefinite period of time shows the indeterminate sentencing which is advocated by the positivist school.

3.3 Political Ideologies and Ethiopian Criminal Law on Death Penalty

The conservative ideology recommends punishing habitual and dangerous criminals severely including by death penalty.[73] Such strict positions are explicitly or implicitly evident in the Ethiopian Criminal Justice system. For instance, as per the stipulation under the FDRE criminal code, a person who commits an aggravated homicide for the second time, while serving life sentence, shall be punishable by death.[74]

Moreover, "conservatives assume that the existing social arrangement is sound and reflective of the widespread consensus[75] as a result of which severe punishment is justified to minimize crimes against such arrangements. Looking into the Ethiopian legislative documents in this light, one would find varying contents with intents of social consensus. As a typical case in point, the constitutional order can be considered as the social arrangement which the criminal law seeks to protect and maintain by criminalizing acts against the constitution and constitutional orders punishable by severe penalty including death.[76]

This shows one of the conservative stands of the Ethiopian criminal law. When it comes to the influence of liberal ideology, the liberals assume that the driving force for crimes is a misbalance in the conditions of social orders and suggested for the structural corrections of these

[73] Miller, *supra* 4, p. 157.
[74] Criminal Code, *supra* 25, Art 539 (2).
[75] Cincinnati, *supra* 1, p. 37.
[76] Criminal Code, *supra* 25, See for instance Arts 238(2), 240-241.

misbalances as a long term remedy to prevent crimes. But as short term measure, the liberals suggest for a piece-meal, or a step by step, improvements on the justice system, including human treatment of offenders.[77]

In summary, though death penalty is still maintained in Ethiopian criminal law, there are a number of legal limitations on the imposition and execution of processes. As such, rather than abolishing death penalty, the Ethiopian criminal law prefers to regulate it through piecemeal measures that are intended to control or minimize the adverse impacts of death penalty. In this respect, this paper argues that the limitations stated under Art 117-120 of the Criminal Code can be taken as piece-meal measures that reflect liberal political ideology under Ethiopian criminal law on death penalty. [78]

6 Conclusion

The causes of crimes and purpose of criminal punishment has been a debatable issue for so long that gave rise to different school of thoughts.

[77] *Id.*

[78] Death penalty can be imposed only in completed serious offences and individuals who attained the age of eighteen at the time of the commission of the crime. In addition, death penalty can be imposed only in the absence of one mitigating circumstance favoring the offender. (Art. 117(1)) Death sentence shall be administered humanly (Art. 117(2)). The sentence shall not be executed unless confirmed by the nations president and all avenues for its commutation or remission are exhausted (Art. 117(2)). Death penalty imposed in a pregnant mother shall not be executed until she gives birth to a child. And the same holds true for partially or fully irresponsible person or on a seriously ill person (Art. 119) and the death sentence shall be commuted to life sentence if a pregnant mother gives birth to a viable child and the mother has to nurse such child. (Art. 120).

The classical and the positivist schools are among the dominant school of thoughts having different outlooks on what causes crime and what the purposes of criminal punishment should be.

In addition to criminal justice school of thoughts, there are also political ideologies underlying criminal justice polices and laws. In this respect there are dominantly three ideological camps namely the conservatives, liberals and radicals having their own outlooks on criminal justice and punishment; including on death penalty.

The classical as well as the positivist school of thoughts are against the imposition of death penalty. And hence, the mere presence of the death penalty under Ethiopian Criminal Code makes it against classical as well as positivism school of thoughts. But still, elements of classical and positivist school of thoughts can be discerned from the limitations on the imposition of death penalty that are prescribed under the criminal code.

In this respect, the prohibition on public hanging and the duty to administer death penalty in humane way that is stipulated under the Criminal Code is one of the features of classical school in Ethiopian Criminal Code. Moreover, the preemptively determined crimes that are punishable by death and the compliance of the principle of legality are the other features of classical school of thought. In the neo-classical aspect, the consideration of circumstances of a given case as mitigating circumstances including in crimes punishable by death; mitigated punishment due to partial responsibility on grounds of age, insanity and feeblemindedness shows the neoclassical school of thought.

On the other hand, the prohibition on the imposition of death sentence on young offenders below the age of eighteen at the time of commission of the crime and the preference given to the correction/rehabilitation of

the offender is in line with positivist school of thought. The semi-indeterminate mandate given to corrective authorities in determining the duration of correction time that the young and juvenile offenders have to pass through is also the other feature positivist school. In addition, the confinement and treatment order that the court shall pass in the case of partial or full irresponsibly may be for indefinite period of time (provided that it is reviewed every two years), which shows the indeterminate sentencing advocated by the positivist school.

When it comes to political ideologies, the conservative ideology is reflected under the provision of the Ethiopian Criminal Code that prescribes death penalty for a person who has committed an aggravated homicide for the second time while serving life sentence. The protection given to constitutional order by holding crimes against the constitutional order punishable by death is also conservative political outlook.

The Ethiopian Criminal Code prefers piece-meal reforms in the imposition and execution of death penalty, rather than abolishing it altogether. And the limitations and regulations stated under Art 117-120 of the Criminal Code show a liberal political ideology. As the radical ideology is against the criminal justice all together, there is no element of this ideology that is reflected under Ethiopian criminal law on death penalty.