WU-Journal

Volume 1 Issue 2

Print: ISSN 2226-7522

Online: 3005-7612

Published Biannually by the School of Law Wallaga University

April 2024

In this Issue:

Volume 1 Issue 2 The Official International Journal Of Wallaga WULJ

WU-LAW

The Official International Journal Of Wallaga

Volume 1 Issue 2

Wallaga University

Journal of Law

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Wallaga University Journal of Law (WUJL)

Volume 1, Issue 2

Published: April 2024

Nekemte, Ethiopia

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Wallaga University Journal of Law

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WUJL, March-April.2024,1(2), 1-18)
DOI: https://doi.org/10.20372/wujl.v1i2.1059
ISSN: 2226-7522 (Print) and 3005-7612 (Online)
Wallaga University Journal of Law
WUJL, March- April. 2024, 1(2), 1-18
Home Page: https://journals.wgu.edu.et

Original Article

Preventive Restructuring Procedure as an Alternative to Bankruptcy under the Revised Commercial Code of Ethiopia

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Abstract

Ethiopia recently adopted Proclamation No. 1243/2021, updating its decades-old Commercial Code. The previous legislation has been altered in several ways by the new one. Book III of the previous code governing bankruptcy is one of the books that has experienced significant revisions. The new legal regime recognizes alternatives to bankruptcy proceedings to address the lack of pre-bankruptcy debt collection options. The aims of these processes include, but are not limited to, ensuring legal clarity, maximizing the value of the estate, and fostering economic stability through prompt, efficient, and effective procedures. A court-supervised preventative procedure for financially distressed debtor firms is one of those processes. This procedure allows debtor businesses to enter into court-supervised debt restructuring negotiations and settlements with their creditors without having to interrupt their normal course of business. Looking at the content, spirit, and organization of the section of the Code governing preventive debt restructuring, it is not incorrect to argue that it is modeled after the European Directive on Restructuring and Insolvency of 2019 (EUR 2019/1023) and the UNCITRAL Legislative Guide on Insolvency Law. This contribution makes a systematic analysis of this procedure without going too technical, to create a general understanding of it and thereby contribute to its possible use in practice by potentially interested businesses.

Article Information

Article History:
Received: 20-10-2023
Revised: 15-02-2024
Accepted: 21-03-2024

Keywords:
Bankruptcy, ECC, RCC, PDRP, Ethiopia

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Abbreviations and Acronyms

Art-Article
ECC- Commercial Code of Empire of Ethiopia, 1960
IMF-International Monetary Fund
PDRP-Preventive Debt Re-Structuring Procedure
Pro.-Proclamation
RCC-, Commercial Code of Ethiopia, Proclamation No 1243/2021
UNCITRAL-The United Nations Commission on International Trade Law
EDRI-European Directive on Restructuring and Insolvency

1. Introduction

In the course of business; a commercial decision or a series of decisions made regarding the risk it takes may result in making or losing money.[1] And, it could be so vital that it may bring about the collapse of the firm which may raise the question as to whom is to blame for the collapse.[2] The bankruptcy law under the Old Ethiopian Commercial Code[3] maintains the position that when a firm goes bankrupt, it is to blame.[4] This position has appeared persistently in different parts of the law including the part that provides for the effects of a declaration of bankruptcy.[5] This approach is out of date as legal systems have long recognized that taking business risks should not *per se* entail a condemnation.[6] Besides, this approach causes the exit of viable businesses from the market and in effect contravenes the policy choice of keeping viable businesses. In the contemporary world, the policy objective of maintaining potentially viable businesses in the market is realized by recognizing alternatives to bankruptcy proceeding adequately. Based on their time of utilization, these alternative procedures may be characterized as pre-bankruptcy procedures or post-bankruptcy procedures. A pre-bankruptcy procedure may take many forms such as; a simple composition; continued trading of the business and its eventual sale as a going concern; transfer of all or part of the assets of the estate to one or more existing businesses or to businesses that will be established; a merger or consolidation of the debtor with one or more other business entities; rehabilitation and a restructuring of debt and equity.[7] A post-bankruptcy procedure is often accompanied by liquidation, a procedure that usually results in the dissolution of a debtor when it is a commercial legal entity and the discharge of a natural person debtor.[8] Unlike the liquidation of struggling businesses, rehabilitation provides numerous economic advantages such as preserving jobs with the ensuing social and political advantages as it encourages

[1]Taddese Lencho, Ethiopian Bankruptcy Law: A Commentary: Part II, Journal of Ethiopian Law, V-24,No-2, 2010, p 78
[2] Ibid.
[3]Commercial Code of Empire of Ethiopia, 1960, referred to as 'ECC' herein after.
[4] Tadesse, *supra note* no-1, p 79
[5] Id, p-78
[6] Ibid
[7] Ibid
[8]The Guide generally provides for a public authority (typically, although not necessarily, a judicial court acting through a person appointed for the purpose) to take charge of the debtor's assets, with a view to terminating the commercial activity of the debtor, transforming non-monetary assets into monetary form and subsequently distributing the proceeds of sale or realization of the assets proportionately to creditors. Also see; UNCITRAL Legislative Guideline on Insolvency Law, United Nations Publication, 2005, 'UNCITRAL Legislative Guidelines' here in after

entrepreneurs to take risks.[9] There are multiple alternatives for rehabilitation of businesses and they go with multiple names in different legal systems.[10]

Under the ECC, businesses facing serious problems of financial default had a lesser chance of rehabilitation as the provisions obliged them to go through an involuntary bankruptcy process. [11]Besides, as the bankruptcy proceedings, scheme of arrangement, and composition under the ECC were costly, creditors like banks have largely relied on foreclosure laws.[12]In the course of its operation, a firm might sometimes find itself in the middle of financial distress that necessitates a bankruptcy procedure. Nevertheless, before resorting to bankruptcy procedures, there are different business rescue platforms, the aim of which is different from bankruptcy. These alternative procedures aim 'to maximize the possible eventual return to creditors' and 'to preserve viable businesses.[13] One of the major reforms in the RCC[14] concerning bankruptcy law is its clear recognition of pre-bankruptcy proceedings whose chief objective is the rescue rather than liquidation of struggling businesses. Preventive debt restructuring, reorganization, and sale of businesses as an ongoing concern are the three pre-bankruptcy proceedings introduced by the RCC. The preventive debt restructuring procedure allows debtor businesses to enter into court-supervised debt restructuring negotiations and settlements with their major creditors without having to interrupt their normal course of business.[15] A reorganization plan provides businesses with the opportunity to clear their debts and return to a healthy business life.[16] A sale of the business as a going concern is a scheme that comes into the picture where the re-organization plan fails to receive a majority of creditors' approval, leaving the new lease of life in the hands of third-party purchasers.[17]

This paper assesses a preventive debt restructuring procedure as an alternative to bankruptcy proceedings under the RCC by employing a doctrinal legal research method. It makes a systematic analysis of this procedure without going too technical, to create a general understanding of it and thereby contribute to its effective use in practice by potentially interested businesses. An overview of alternative proceedings to bankruptcy in general is provided, *albeit briefly*, before proceeding to the main theme of the paper.

2.An Overview of Alternative Procedures to Bankruptcy Proceeding

Traditionally, liquidation was the only solution available to a business that defaulted on its debts.[18] Liquidation often results in the

[9] Tewodros Meheret, An appraisal of the Ethiopian Bankruptcy Regime, *De Jure*, 2017, 111-135 p 117 Available at http://dx.doi.org/10.17159/2225-7160/2017/v50n1a7. Accessed on December 12- 2023

[10] Ibid.

[11] Tadesse, *supra note* no-1, p-78

[12] Asress Gikay, The Role of Workouts under the US and the Ethiopian Bankruptcy Law: A Comparative Analysis, LLM Short Thesis, CEU eTD Collection, Central European University, March 29, 2011, p-13, Available at; https://www.etd.ceu.edu/2011/gikay_asress.pdf Accessed on Jan-11-2024

[13]UNCITRAL Legislative Guidelines, *supra note* no-8, , at 209 Para 3

[14] Commercial Code of Ethiopia, Proclamation no 1243/2021, *Negarit Gazeta, Gazette Extraordinary* 27th year, No. 23, 12th April 2021,Addis Ababa [here after the Revised Commercial Code-RCC]

[15] Id, arts- 588/2 and 617/1

[16] Id, art- 588/3

[17] Id, art- 689

[18]IMF, Contact Group on the Legal and Institutional Underpinnings of the International Financial System, Insolvency Arrangements and Contract Enforceability, September 2002,p-9, Available at;

reduction of the insolvent firm's assets to cash and then the distribution of the proceeds to creditors by priority rules.[19] Eventually, the firm ceases to exist as an entity, although its business may be carried on by those who acquire its assets.[20] Today, in virtually all national jurisdictions, bankruptcy law provides solutions other than the mere liquidation of a debtor business faced with financial distress. This solution is realized through the recognition of alternative procedures for bankruptcy. In this regard, Chapter 11 of the United States Bankruptcy Code[21] has been influential in the development of pre-insolvency proceedings globally.[22] Alternative procedures for bankruptcy may take several forms. For instance, it may include a simple agreement concerning debts where the creditors agree to receive a certain percentage of the debts owed to them in full, complete, and final satisfaction of their claims against the debtor.[23]

It may also include a complex reorganization where debts are restructured; some debt may be converted to equity together with a reduction of existing equity; the noncore assets may be sold; and unprofitable business activities may be closed.[24] Chapter 11 of the United States Bankruptcy Code recognizes reorganization and workouts as the major pre-bankruptcy procedures.[25]

Re-organization is the financial restructuring of a corporation, especially in the repayment of debts, under a plan created by a trustee and approved by a court.[26] The finances of a business are restructured so that it can continue to function.[27] The business then continues not only to pay its debts but also to provide its employees with jobs and to provide a return to its stakeholders.[28] Reorganization emphasizes more on the prospects of the business, as the debts are to be repaid from the future income of the business. Such payment depends on how the business survives the crises it is facing.[29] Another prominent pre-bankruptcy procedure is 'workout'. The Black's Law Dictionary defines a workout as "a debtor's agreement, usu. negotiated with a creditor or creditors out

https://www.imf.org/external/np/g10/2002/pdf/120502.pdf , Visited; Jan-18-2024

[19] Id, p-10

[20] Ibid

[21]The US Bankruptcy Code is also referred to as Title 11 of the United States Code. It governs the procedures that businesses and individuals must follow when filing for bankruptcy in the United States Bankruptcy Court. I was enacted by Pub. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549 and is considered as one of the most developed and practically tested bankruptcy laws of the world. For more see; 11 U.S.C. United States Code, 2011 Edition Title 11 – BANKRUPTCY, Available at; https://www.govinfo.gov/content/pkg/USCODE-2011-title11/html/USCODE-2011-title11.htm Accessed on; Aug-24-2023

[22]Although Chapter 11 emphasizes on an insolvency proceeding, it was designed to promote restructuring by encouraging firm managers to negotiate and confirm a plan of reorganization under bankruptcy court oversight within the shelter provided by a statutory suspension—the automatic stay. See; Irit Mevorach and Adrian Walters The Characterization of Pre-insolvency Proceedings in Private International Law, European Business Organization Law Review, 2020, p 9 Available athttps://doi.org/10.1007/s40804-020-00176-x Accessed on Jan-10, 2024

[23]Ibid

[24] Id, p 29

[25] IMF, *supra note* no-18, p-10

[26] Brayn A.Garner (ed) Black's Law Dictionary (9th ed. Thomson Reuters 2009) p 1301

[27]Irit Mevorach and Adrian Walters, The Characterization of Pre-insolvency Proceedings in Private International Law, European Business Organization Law Review, 2020 , p-7, Available at; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448821 Accessed on Jan-3-2024

[28] Ibid

[29] Ibid

of court, to reduce or discharge the debt."[30]This definition reveals that a workout has a contractual nature, and it can either be an agreement between the distressed debtor and creditor or creditors to reduce the debt or an agreement that can be used to extend the time of payment. A workout is, in essence, similar to a composition or reorganization but proceeds outside of insolvency law.[31] A close perusal of the provisions of Book III of the RCC reveals that there is no explicit recognition of workouts. Neither does the RCC contain equivalent provisions through which workouts can be enforced.

Another legal instrument that has affected the bankruptcy laws of many states is the UNCITRAL Guideline on Insolvency Law, which recognizes voluntary restructuring negotiations[32] and re-organization proceedings[33] as two distinct alternative procedures to bankruptcy proceedings. Yet, the use of voluntary restructuring negotiations has generally been limited to cases of corporate financial difficulty or insolvency in which there is a significant amount of debt owed to banks and financiers.[34] Although this procedure is not governed by insolvency law, its success depends upon the existence and availability of an effective and efficient insolvency law and a supporting institutional framework.[35]

According to Ethiopian laws**,** the ECC provides for composition and scheme of arrangement as alternatives to bankruptcy proceedings.[36]Composition is one of the out-of-court settlement mechanisms often utilized by a financially distressed debtor.[37] It is available when the debtor who has already been declared bankrupt makes a proposition to the commissioner specifying the percentage offered to unsecured creditors and the period required for payment.[38] The commissioner must, in such cases, seek the advice of the trustee and creditors committee to be notified through a registered letter.[39] The letter must show a period of not less than twenty days and not more than thirty days within which the dissenting creditors may file with the registry their refusal to accept the proposed composition.[40] The creditors would then take a vote, and the proposal for a composition would be of no effect unless it was approved by two-thirds of the creditors, representing two-thirds of the debts.[41]

The second procedure recognized under the ECC, i.e., the scheme of arrangement, comes into play when a trader who has or is about to suspend payment and has not been declared bankrupt applies to a court of law for the opening of the same.[42] The application for a scheme of arrangement can only be accepted by the court if it includes the balance sheet of the

[30] Ibid
[31] Ibid
[32]UNCITRAL Legislative Guidelines, *supra note* no-8, pars- 2-18
[33] Id, pars- 23-32
[34] Id, pars-2-3
[35]Ibid, Unless the debtor and its bank and financial creditors take the opportunity to join together and voluntarily enter into these negotiations, the debtor or the creditors can invoke the insolvency law, with some potential for detriment to both the debtor and its creditors in terms of delay, cost and outcome
[36] Arts-1081 and 1119 of the ECC
[37] Irit Mevorach and Adrian Walters, *supra note* no-27, p10
[38]Meaza Ayalke Demessie,The Ethiopian Law of Bankruptcy: Its Shortcomings In Comparison to Modern Laws of Bankruptcy and Areas of Concern for Its Revision, (Unpublished, LLM Thesis, School of Law, Addis Ababa University) Oct.2011, p 67
[39] Ibid
[40] ECC, *supra* note no-3, Art-1082(5)
[41] Id, art-1084/1/
[42] Id, art- 1119

firm, the profit and loss account, a list of commercial creditors and debts, and the names and addresses of the creditors and debtors.[43] The debtor must file these documents together with a report giving the reasons for his suspension or impending suspension of payments and the reasons for his proposing a scheme of arrangement.[44] The parties involved in the process of the scheme of arrangement are the debtor, the delegate judge, the commissioner, and the creditors.[45] The court is also involved in processing the application and giving the final confirmation for the scheme of arrangement.[46] The commissioner supervises the whole process, particularly; he must prepare the inventory of the debtor's estate, check the list of the debtor's estate, check the list of debtors and creditors, and prepare a detailed report on the affairs and conduct of the debtor, the proposed scheme, and the guarantees offered to creditors.[47] According to Article 1136(1), the creditors should consider the scheme in a meeting chaired by the delegate judge. The scheme of arrangement must be approved by a majority of creditors representing not less than two-thirds of all non-preferred or unsecured debts.[48]

One of the major departures of the RCC from the old regime under the ECC is the introduction of pre-bankruptcy proceedings that aim to rescue, rather than liquidate, struggling businesses.[49] The new regime seeks to encourage businesses to initiate business rescue proceedings as early as possible to enhance the chances of business rescue and prevent liquidation.[50] Those pre-bankruptcy proceedings introduced by the RCC are a court-supervised contractual debt restructuring procedure[51], a reorganization procedure[52], and the sale of business as a going concern.[53]

The objective of the preventive debt restructuring procedure is "to ensure that, with the unanimous consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating, or to prepare for the sale of the business as a going-concern.[54] The procedure affords debtor businesses the opportunity to enter into court-supervised debt restructuring negotiations and settlements with their major creditors without having to interrupt their normal course of business.[55]Preventive restructuring is believed to be the least intrusive proceeding as the ordinary business of the debtor is continued unaffected and the restructuring plan is approved by the court only if all affected creditors have agreed to the plan.

The second alternative procedure to bankruptcy incorporated under the RCC known as reorganization is 'a procedure that, with the consent of a qualified majority of affected creditors, to timely, efficiently, and effectively restructure the debts as well as the operations of the debtor in a reorganization plan or realize the sale of its business as a going concern to the benefit of its creditors.'[56] Businesses facing

[43] Id, art- 1120/1/
[44] Id, art 1120/2/
[45] Id, art 1125/2/(a) and (b)
[46] Id, art 1119 and 1131
[47] Id, art 1135
[48] Id, art 1140/1/
[49] Tadesse, *supra note*, no-1, p- 3
[50] Ibid
[51] RCC, *supra* note no-14, art-617
[52]Id, art-630
[53] Id, art-588/4
[54] Id, art-588/2/
[55] Ibid
[56] Id, art-588/3/

financial difficulties can propose a reorganization plan, which, if voted favorably by a qualified majority of creditors and approved by a bankruptcy court, can provide the businesses with the opportunity to clear their debts and return to healthy business life.[57] The last pre-bankruptcy proceeding provided by the RCC is a sale of business as a going concern. A going concern is an accounting term used to address a business that is financially stable as it can fulfill company liabilities as and when they fall due to no threat of impending liquidation, albeit a history of financial distress.[58] When it is unlikely for the reorganization plan to receive a qualified majority of creditors' approval, the new regime under the RCC provides for an alternative scheme of the sale of the business as a going concern in which the struggling business will have a new lease of life in the hands of third-party purchasers.[59] This procedure involves the debtor seller selling its business to the buyer, along with all of the things that are necessary for the latter to continue operating the business. The debtor seller must also keep running the business up until the day of sale.[60] The importance of the sale of going concern compared to liquidation is that the going concern value is, in principle, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders, and clients, continues to generate revenues, and limits the impact on workers.[61]

3.Preventive Debt Re-Structuring Procedure as Alternative to Bankruptcy Proceeding Under the Revised Commercial Code of Ethiopia

3.1. Opening of the Proceeding

A preventive debt restructuring proceeding is triggered by the sole application of a debtor who is not yet in cessation of payments or has been in cessation of payments for less than forty-five days and faces actual or foreseeable economic or financial difficulties.[62] The RCC authorizes only the debtor to initiate the preventive debt restructuring procedure.[63] Similarly, the European Insolvency and Restructuring Directive provides, as a principle, that preventive

[57]Ibid

[58]Jaul Williamson, What does it mean to sell a business as a going concern? Available at https://www.sellingmybusiness.co.uk/articles/financial-distress/what-does-it-mean-to-sell-a-business-as-a-goingconcern#:~:text=Transferring%20a%20business%20as%20a,such%20as%20equipment%20and%20premises accessed at 08/01/2024

[59] RCC, *supra* note no-14, art-588/3

[60]Joshua Elloy, What is a Sale of a Business as a Going Concern?, Senior Legal Project Manager and Lawyer at legal vision, Available at; https://legalvision.com.au/sale-of-a-business-as-a-going-concern/ Accessed on 08/01/2024

[61]Article 7 and 8 of European Insolvency and Restructuring Directive, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019

[62] RCC, *supra* note no-14, art-617/1

[63]The UNCITRAL legislative guideline that serves as a model law for modern insolvency law with voluntary restructuring negotiation empowered the creditor/s also for the initiation of the Voluntary restructuring negotiation. Similarly, the European Insolvency and Restructuring Directive under its article 4(7) and (8) stated that: Preventive restructuring frameworks shall be available on application by debtors. However, it further recommended that Member States may also provide that preventive restructuring frameworks shall be available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are micro, small and medium-sized enterprises (SMEs).

restructuring frameworks provided for under this Directive shall be available on application by debtors.[64] There are basic preconditions, often called a viability test, for a debtor to initiate a preventive debt restructuring proceeding. A cessation of payments should last for more than 45 days. [65]Cessation of payments shall occur when the debtor is unable to pay its debts, which are due and payable with its liquid assets.[66] In addition, the debtor must face actual or foreseeable economic or financial difficulties. The RCC does not impose any further viability requirements on a debtor. It, for instance, does not limit debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations from accessing a restructuring framework. In this regard, the European Insolvency and Restructuring Directive recommends that the member states require debtors to prove their viability at their own cost, which means adhering to the obligations of bookkeeping and accounting.[67] This position promotes the preservation of the rule of law and has an economic benefit for states. Furthermore, obeying the obligation to keep books and do accounting serves as an early warning tool that can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. Early warning tools, which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments, could be triggered by, for example, non-payment of taxes or social security contributions.[68]

Alongside the petition for the initiation of the proceeding, the debtor shall provide the bankruptcy court with its latest financial statements, a memorandum outlining the circumstances of its financial difficulties and means to resolve them, as well as cash-flow projections.[69] The Court may order the debtor to provide any further documentation and information it deems necessary and may order third parties, such as banks or tax authorities, to provide them.[70] Once the viability test to initiate a preventive debt restructuring proceeding is met and the proceedings are initiated, the matter of the duration of the proceeding comes to attention. The very objective of this proceeding is to promote economic stability, maximize the value of the estate, and ensure legal certainty through efficient, effective, and timely procedures.[71] By timely procedures, it means concluding within a short period of time to rescue a distressed business from getting liquidated or leaving the market. Under RCC, the duration of the preventive debt restructuring proceeding is set to be completed within four months.[72] However, the court may grant an extension provided that the debtor demonstrates that it is

[64]Article 7 and 8 of the Directive. However, Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor

[65]Ibid

[66]RCC, *supra* note no-14, art-590/1

[67]Article 4(2) of the directive reads as: Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

[68] Ibid

[69] RCC, *supra* note no-14, art-617/2

[70] Ibid

[71] Id, art-588/1

[72] Id, art-618(1)

likely that the restructuring plan would be accepted unanimously by the affected creditors.[73]Yet, the total duration of the plan to be concluded, including extensions and renewals, shall not exceed eight months.[74] Hence, the duration of the proceeding shall not exceed eight months in any case.

3.2. Objectives and the Material Scope of the Proceeding

PDRP, unlike the traditional approach of liquidating a business in financial difficulties, has the aim of restoring it to a healthy state or, at least, saving those of its units that are still economically viable.[75] Article 588(1) of the RCC states a common objective for preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings. Their common objectives are to promote economic stability, maximize the value of the estate, and ensure legal certainty through efficient, effective, and timely procedures.[76]The specific objectives of the preventive debt restructuring proceedings are explained under Article 588(2) of the RCC. The provision states that 'the objective of preventive debt restructuring proceedings is to ensure that, with the unanimous With the consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating, or to prepare for the sale of the business as a going concern.[77]

Concerning the scope of the proceeding, in principle, a restructuring framework should be available to debtors, including legal entities, natural persons, and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. In this regard, Article 589 of the RCC generally enumerates to whom the proceedings under Book III, *i.e.*, preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings, shall apply. By this provision, 'the proceedings referred to in this book shall apply to traders and business organizations, other than joint ventures having no legal personality, as well as craftsmen and natural persons exercising independent professional activities.[78] Thus, the preventive restructuring proceedings shall apply to traders as defined under Art. 5 of the RCC, business organizations, craftsmen's, banks, and other financial institutions (if no other special laws are applicable) and to state-owned enterprises (if no other special laws are applicable).[79]

3.3. Court Having Jurisdiction

As pointed out at the beginning, a preventive restructuring proceeding is subject to supervision by a court of law. Hence, it is imperative to identify which court has jurisdiction to entertain certain preventive restructuring proceedings under Ethiopian laws. The RCC states that the Ethiopian Court has jurisdiction in preventive restructuring proceedings, Reorganization proceedings, and bankruptcy proceedings shall be in the Federal High Court of the place where the individual's principal place, the registered office of the

[73] Id, art-618/2
[74] Ibid
[75] European Insolvency and Restructuring Directive, *supra* note no-61, p-19
[76] RCC, *supra* note no-14, art-588(1)
[77] Id, art-388(2)
[78] Id, art-589(1)
[79] Id, arts-589(1) (2) (3) (4)

company, or the legal person is situated.[80] Also, the cumulative readings of articles 5/1/d and 3/1/a of Federal Courts Proclamation No. 1234/2013[81] confirm this statement. Accordingly, for an individual trader, the jurisdiction goes to the Federal High Court of the trader's principal place, whereas for a business organization, the Federal High Court of the place where the organization is registered or where the legal person is situated will have jurisdiction.

The Court at which preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings are opened; shall have jurisdiction for actions that derive directly from these proceedings and are closely linked with them, such as actions regarding the restructuring and reorganization plan; the confirmation of the sale of the business as going-concern; the ongoing contracts; the liability of the supervisors, trustees, controllers and directors of the debtor; the submission, verification and admission of claims; the rights *in rem*; set-off; the sale or transfer of assets; the ranking of claims; the distribution of proceeds; the invalidation of acts; the validation and enforceability of contracts; the discharge of the debtor and the closure of the proceedings.[82]

Regarding international jurisdiction for the opening of proceedings and related judgments Article 602 of the RCC sets a governing rule. Accordingly, the Ethiopian courts have jurisdiction to open main proceedings if the center of the debtor's main interest is situated in Ethiopia.[83] The center of main interest shall be the place where the debtor conducts the administration of its interest regularly and which is ascertainable by third parties.[84] In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary.[85] In the case of a physical person, the center of its main interests shall be presumed to be the principal place of business in the absence of proof to the contrary. [86]The judgment opening preventive restructuring proceedings, reorganization proceedings, and bankruptcy proceedings concerning a debtor having its center of main interest in Ethiopia shall have universal effect.[87] Furthermore, Ethiopian courts have jurisdiction for actions that derive directly from these proceedings and are closely linked with them.[88]

3.4. Persons and Bodies Responsible for the Conduct of the Proceedings

The operation of preventive debt restructuring procedures involves a bankruptcy court, a supervisory judge, and an expert in the field of restructuring.[89] The bankruptcy court is the Federal High Court of the place where the registered office of the company is situated.[90] It is the court that opened reorganization or bankruptcy proceedings that shall supervise all proceedings and shall make orders on matters that are outside the powers of the supervisory judge.[91] Besides, it hears appeals from orders

[80] Id, art-600/1
[81]Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia; Federal Courts Proclamation No. 1234/2021, 27th Year No.26 Addis Ababa 26th April, 2021
[82] RCC, *supra* note no-14, art-600(2)
[83] Id, art-602
[84] Ibid
[85] Id, art-602/1
[86] Ibid
[87] Id, art-602(2)
[88] Id, art-602(5)
[89] Id, arts-604-616 and arts-619-622
[90] Id, art-600(1)
[91] Id, art-604(1)

of the supervisory judge.[92] Regarding the conduct of the court proceedings, the RCC imposes that they be held in camera.[93] The opening of preventive restructuring proceedings, including information exchanged during the proceedings and the restructuring plan, shall remain strictly confidential.[94]Any violation of this provision shall result in civil and/ criminal liability.[95]

A supervisory judge is appointed by the court at the judgment opening of the proceedings.[96] It shall be chosen from among the members of the court but may not be a member of the court that opens the proceedings. The supervisory judge shall have the powers: to admit pre-insolvency claims against the estate; to take or cause to be taken by the appropriate authorities all steps and measures necessary to preserve the assets; to authorize transactions or agreements that are outside the ordinary course of business; to decide on the continuation or termination of ongoing contracts; to authorize the payment of pre-insolvency claims; and to decide on the disputes arising in connection with the constitution of the classes of creditors.[97]In addition to this, it has the power to refer to court any claims that fall within its jurisdiction. He/she also has the power to call the creditors committee as required by law, where he considers it necessary.

The third person responsible for the conduct of the proceeding is an expert in the field of restructuring. He or she is appointed by the court at the suggestion of the debtor.[98] Yet, an aggrieved creditor may file an application to the Court for the replacement of the expert in the field of restructuring at any time during proceedings. Hence, the court may grant such an application at its discretion.[99] Experts in the field of restructuring are expected to be bound by rules of professional conduct and ethical standards appropriate to their respective professions.[100] Furthermore, acting independently, the expert in the field of restructuring shall, among others, carry out those tasks[101]*i.e.,* to determine the creditors participating in the preventive restructuring proceedings; to assist the debtor and the creditors in drafting and negotiating a restructuring plan; to convene and preside over the creditors' meetings; to supervise the activities of the debtor during the negotiations on a restructuring plan and report periodically to the Court on the progress of the negotiations; to present the restructuring plan to the Court for confirmation; and to prepare the sale of the business as going concern, as the case may be. In meeting his duties, the expert in the field of restructuring may: order the debtor or any third party to provide necessary additional financial or accounting information; and appoint independent experts, to audit the financial situation and business plan of the debtor. [102]However, a creditor may file with a court for the replacement of the expert in the field of restructuring at any time during the proceedings.[103] The provision does not indicate grounds for the application of the replacement;

[92] Ibid
[93]Id, art-623
[94]Ibid
[95]Ibid
[96]Id, art-605
[97] Id, art-606
[98] Id, art-619
[99] Id, art-620
[100] Id, art- 611(1)
[101] Id, art-621(1)
[102] Id, art-621(2)
[103]Id, art -620(1)

rather, it gives a court discretionary power to determine the grounds.

3.5. Treatment of the Ongoing Contracts

Ongoing contracts are contracts, including, but not limited to, essential services contracts and immovable property leases where the debtor carries out his business, including premises forming part thereof and occupied by himself or his family, between the debtor and one or more creditors under which, at the moment of the opening of proceedings, at least one party still has to perform an obligation that is specific to the contract.[104] The opening of preventive restructuring, reorganization, and bankruptcy proceedings shall not affect the continuation of ongoing contracts.[105] Hence, notwithstanding any contractual provision to the contrary, creditors may not be allowed to withhold performance or terminate, accelerate, or, in any other way, modify ongoing contracts to the detriment of the debtor solely by reasons of: a request for an opening or the opening of preventive restructuring, reorganization, or bankruptcy proceedings; or a request for a single stay of individual enforcement actions, or the granting of such a stay in the framework of preventive restructuring proceedings.[106] Besides, creditors may not claim the payment of any pre-insolvency claim arising under the contract as a condition precedent for the continuation of the contract. However, creditors may submit an opposition to the decision to continue or terminate ongoing contracts. Any opposition shall be decided by the supervisory judge within seven days of the opposition.[107]

3.6. Rights and Obligations of the Debtor and the Creditors

Following the opening of the preventive debt restructuring procedure, the debtor enjoys different kinds of rights and is also subjected to several obligations. The rights and obligations of the debtor in the course of the proceeding are scattered under several provisions of Book III of the RCC. Starting with its rights, following the opening of the proceeding, a debtor has the right to apply to a court for a single stay of action.[108] A single stay of action means a temporary suspension of the enforcement of a claim by a single creditor against a debtor or a third-party security provider. The stay of action shall cover all types of claims, including secured and preferential claims.[109] The rationale behind such a grant is to support the negotiations for a restructuring plan. However, despite its importance, the law imposed a duration barrier. Hence, the total duration of the single stay of actions shall not last longer than the duration of the preventive restructuring proceedings.[110] Another key right granted to the debtor is remaining in possession of his business.[111] Even more, the debtor shall have the power to take all decisions falling within the ordinary course of business.

Having said this much about a debtor's rights, following the opening of the proceeding, the debtor must provide the bankruptcy court with its latest financial statements, a memorandum outlining the circumstances of its financial difficulties and means to resolve them, as well

[104] Id, art-593(2)
[105] Id, art-593(1)
[106] Id, art-593(3)
[107] Id, art-594(1) and (2)
[108] Id, art- 625(1)
[109] Id, art-625(2)
[110] Id, art- 625(2)
[111] Id, art-625(3)

as cash flow projections.[112] Also, the debtor shall pay all debts arising in the ordinary course of business, except for the claims already subjected to a single stay as per Article 625 of the RCC.[113] Failing this might necessitate the opening of re-organization proceedings. Similarly, the debtor also must pay remuneration to the expert in the field of restructuring.[114]

Coming to the rights and obligations of the creditors, the overarching principle of proceedings set out in Book III of the RCC is to protect the legitimate interests of creditors.[115] To this end, the new insolvency law grants various participation rights to the concerned creditors. The creditors shall have the right to submit their observations and be heard at court hearings throughout the proceedings.[116] Another basic right that helps protect the creditor's legitimate interests is information rights.[117] Accordingly, a creditor, a group of creditors, a class of creditors, or the general creditors' meeting shall have the right to request all relevant information from the expert in the field of restructuring, the supervisor in reorganization, and the trustee in bankruptcy.[118] A creditor, a group of creditors, a class of creditors, or the general creditors' meeting shall make such a request in writing to the expert in the field of restructuring. Then the expert in the field of restructuring shall provide a response within ten days from the receipt of such a request and shall satisfy the request as quickly as possible.[119] However, to satisfy the asking creditors or a class of creditors, the request must be justified and not overly burdensome.[120] If the request happens to be unjustified or overly burdensome, the expert in the field of restructuring may decline the request.[121]

Additionally, the creditors shall have the right to seek to amend the restructuring plan and make counter-proposals.[122] In preventive restructuring proceedings, the restructuring plan shall be approved unanimously by all affected creditors.[123] This means the restructuring plan shall be accepted by all affected creditors participating in the preventive restructuring proceedings.[124] Unless the restructuring plan is unanimously approved and accepted by creditors, it will have no effect.[125] The creditors have the right to apply to the court for the setting aside of the restructuring plan if the debtor fails to carry out the terms of the restructuring plan.[126]If the application to set aside the procedure is accepted, the creditors have the right to retain the benefit of the new financing privilege priority obtained under Article 628 of the

[112] Id, art-617(2)
[113] Id, art-626(1)
[114] Id, art-622
[115] Id, art-597(1)
[116] Id, art-598
[117] Id, art-599.
[118] Ibid
[119] Ibid
[120] Id, art-599(3)
[121] Ibid
[122] Id, art-627(1)
[123] Id, art-597(2)
[124] Id, art-627(2)
[125]As per art-627(3) of the RCC, the restructuring plan may contain; the rescheduling of the claims of the affected creditors or/and the waiver of claims of the affected creditors or/and the settlement of claims through the issuing of financial debt instruments subject to laws regulating the issuance of financial debt instruments or/and the conversion of claims of the affected creditors into equity or/and the reduction and increase of capital of the debtor to be subscribed to by creditors or third party investors (subject to the mandatory provisions of this Code,) or/and the sale of existing or issuance of new shares in favor of creditors or third party investors.
[126] RCC, *supra* note no-14, art-632(1)

RCC.[127] Concerning creditors' obligations, they are obliged to execute the confirmed restructuring plan. Article 629(6) of the RCC provides that, upon confirmation of the plan by the Court, the restructuring plan shall be deemed to constitute an executory title.

3.7. Confirmation of the Restructuring Plan and Its Effects

As stated at the beginning, the entire process of debt restructuring is supervised by a court of law. This supervision right is inclusive of the final judicial confirmation by the concerned court of law. Once the preventive debt restructuring plan is adopted by the negotiating parties, the next step would be the confirmation of the plan by the court on the fulfillment of the minimum conditions set by the law. The execution and implementation of the plan are possible only after confirmation by the court.[128] Nonetheless, the court does not confirm the plan without any further investigations. Before confirmation, the court shall first ensure that the conditions under which the restructuring plan can be confirmed are fulfilled. In confirming the restructuring plan, the Court shall verify that: third parties' interests are adequately protected, concerning the taking of security interests and in the framework of new financing; and that the restructuring plan has a reasonable prospect of preventing the bankruptcy of the debtor and assuring the viability of the business.[129] Furthermore, if the terms of the restructuring plan require the approval of the shareholders, the court shall make sure that the approval is made in compliance with the provisions of the RCC. [130]Eventually, after making sure of the fulfillment of the required conditions, the Court will confirm the restructuring plan.[131] Upon confirmation of the plan by the Court, the plan shall be deemed to constitute an executory title, *i.e.*, it is binding upon all participatory or affected parties. However, creditors that are not involved in the adoption of a plan are not affected parties, as the confirmed plan does not bind them. In principle, the success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation.

3.8. Review Procedures

Here it should be noted that the court's confirmation of the plan is not absolute, and there are platforms of review by the affected parties for some justifying reasons. Once a court confirms the plan, there are three distinct avenues of review: appeal, amendment of the restructuring plan, setting aside the restructuring plan, and conversion to reorganization.[132]Regarding appeal, the affected parties should be able to appeal a decision on the confirmation or rejection of a restructuring plan issued by an administrative authority or judicial authority. However, to ensure the effectiveness of the plan, to reduce uncertainty, and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects that potentially preclude the implementation of a restructuring plan.[133] Besides, the grounds of appeal must be

[127] Id, art- 632(3)
[128]*Id, art*-629(1)
[129]Ibid
[130] Id, art-629(3)
[131] Id, art-629(1)
[132] Id, arts-630-633
[133] Ibid

determined and limited.[134] One of the parties that can be affected by the plan is a debtor, and the debtor may appeal against the judgment of the court rejecting the restructuring plan.[135]The debtor is allowed to appeal against the decision to reject the plan in a confirmation under Article 617(1) of the RCC, which allows the debtor only to initiate the proceeding. To avoid unjustifiable delays, the RCC also prescribes a time limit within which the appeal must be invoked. Accordingly, appeals shall be filed within ten days from the judgment of the court rejecting the restructuring plan.[136]

The second venue for review is the amendment of the restructuring plan. In principle, it should be possible for any amendments to the plan to be proposed or voted on by the parties, on their initiative, or at the request of the judicial authority.[137] Despite the principle that states 'upon confirmation of the plan by the court, the restructuring plan shall be deemed to constitute an executory title[138]; the parties may agree to amend the restructuring plan after its confirmation.[139] Such an amendment shall be valid and binding between the parties without being subject to any confirmation by the court. In other words, once the parties agree to amend the plan and upon the conditions of negotiation, the amendment has an automatic binding effect on the parties without the court's confirmation.

The third venue for review is setting aside the restructuring plan.[140]Where the debtor fails to carry out any terms under the restructuring plan, irrespective of its weight and type, the creditors are allowed to apply to set aside the restructuring plan. This paves the way for a creditor to easily leave the plan. Once the unanimous approvals of the creditors are secured and the confirmation by the court is made, the ground for setting aside the restructuring plan should not be made easy. It is plausible to distinguish a ground that best serves the interests of the creditor from those that do not affect the interests of the creditor severely. The other ground for setting aside the preventive restructuring plan under the RCC is the opening of reorganization or bankruptcy proceedings. The opening of a reorganization or bankruptcy proceedings shall result in the automatic setting aside of the restructuring plan.[141]

The final avenue of review is the conversion of preventive restructuring proceedings to reorganization proceedings or bankruptcy proceedings, which can be requested by a debtor or by the court's motion of a court.[142] Of course, the Court may convert preventive restructuring proceedings to bankruptcy proceedings on its motion where the restructuring plan has been rejected by the Court or the restructuring plan has been set aside.

3.9.The Recognition of Foreign Judgments

In the contemporary world, it is increasingly easy for firms and individuals to have assets in more than one country and to move assets across borders.[143] Hence, it is desirable to have

[134] Ibid
[135] *Id.art*-630(1)
[136] Id., art- 630(2)
[137] UNCITRAL Legislative Guidelines, *supra* note no-8, par. 30
[138] RCC, *supra* note no-14, art-629(6)
[139] Id, art-633(1)
[140] Id, art-632(1) states that 'where the debtor fails to carry out the terms of the restructuring plan, a creditor may apply to the Court to set aside the restructuring plan and to open reorganization or bankruptcy proceedings'
[141] Id, art-*632(2*)
[142] Id, art-689
[143] UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018),

a simple regime for recognition and enforcement of insolvency-related judgments that can assist in the recovery of value for financially troubled businesses, thus increasing the potential for successful reorganizations or liquidations. [144]To this end, our law provides some preconditions for the recognition of foreign court judgments related to bankruptcy. It states that,

> The judgment opening preventive restructuring, reorganization, bankruptcy, and insolvency proceedings, as well as insolvency-related judgments handed down by the jurisdictions of another originating state, shall only be recognized by Ethiopian courts provided that the foreign judgment is not contrary to Ethiopia's public order, including its fundamental principles of procedural fairness; the foreign judgment has not been obtained by fraud; and the foreign judgment has been handed down by a competent court by Ethiopia's conflict of jurisdictions rules.[145]

This provision indicates that judgments of foreign courts will be recognized by our courts only if they do not contravene Ethiopia's public order, including its fundamental principles; if the judgments were not obtained through fraud; and finally, if the judgments are rendered by the court with jurisdiction by the law of their origin. Furthermore, recognition of the foreign judgment must comply with Ethiopia's commitments under international treaties or agreements. Hence, no preventive restructuring proceedings, reorganization proceedings or bankruptcy proceedings have been opened in Ethiopia concerning the same debtor, and the foreign judgment must not be inconsistent with a judgment issued in Ethiopia in a dispute involving the same parties.

4. Conclusions

As stated above, the introduction of preventive debt restructuring procedures is one of the major reforms made by the RCC. The procedure is aimed at ensuring that, with the unanimous consent of affected creditors, viable debtors in financial difficulties can contractually, at a very early stage, efficiently and effectively restructure their debts and continue operating or preparing for the sale of the business as a going concern. The content of the RCC's section governing this procedure reveals that most of its provisions are modeled after the European Insolvency and Restructure Directive Voluntary Restructuring Negotiations and the UNCITRAL Legislative Guidelines. The ECC does not recognize the pre-bankruptcy preventive debt restructuring procedure. The only pre-bankruptcy debt enforcement procedure the law recognizes is a scheme of arrangement. This procedure is aimed at securing the creditor's interest rather than rehabilitating or rescuing financially distressed businesses.

The new Ethiopian bankruptcy law embodied under the RCC elaborates on important aspects of the conduct of preventive debt restructuring procedures, including, *inter alia*, who may initiate the restructuring proceeding, what a debtor must submit to open the proceeding, who is involved in the proceeding, including

available at: https://uncitral.un.org/en/texts/insolvency/modellaw/mlij visited on July 5, 2023

[144] Ibid

[145] RCC, *supra* note no-14, art-603(1)

their rights and obligations, the time within which the proceeding must complete, review mechanisms, etc. The RCC does not empower the creditors to initiate the proceeding, but only the debtor. Regarding the parties involved in the procedure, the law designates a debtor and creditors to negotiate. The bankruptcy court and an expert in the field of restructuring played the facilitation role.

Article 617 of the RCC provides a viability test for access to the preventive restructuring procedure. In addition, in a modern preventive debt restructuring procedure like the European Insolvency and Restructuring Directive, debtors' accounting and bookkeeping records are set as a viable condition to invoke the restructuring procedure. A debtor with good accounting and bookkeeping records is viable to invoke the proceeding. This is useful both for the debtor and the government. Furthermore, obeying the obligation to bookkeeping and accounting serves as an early warning tool that can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. Hence, removing the barriers to the effective preventive restructuring of viable debtors in financial difficulties contributes to minimizing job losses and losses of value for creditors in the supply chain, preserves know-how and skills, and hence benefits the wider economy.

Lastly, regarding setting aside the restructuring plan, the RCC leaves the power to determine the grounds of application to the creditors' discretion. Where the debtor failed to carry out any terms under the restructuring plan, irrespective of its weight and type, the creditors can easily apply for a setting aside of the restructuring plan. This paves the way for a creditor to easily leave the plan while different efforts have been made to confirm by the court. The above analysis also reveals that even though the RCC has recognized the debt restructuring procedure and its potential utilization by interested businesses in financial distress, there are shortcomings that can hinder its practical applications. *Firstly*, the initiation mechanism must be reviewed in a way that allows the creditor(s) to initiate a preventive restructuring procedure. It will increase the trend to use the proceeding to rescue the distressed business and protect the interests of the creditor. *Secondly*, the country needs to review its viability condition and limit access to a restructuring framework for debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations. However, the country needs to make sure that the debtors that have taken adequate measures to remedy the issues that gave rise to the sentence, to provide creditors with the necessary information to enable them to decide during restructuring negotiations, is viable for the procedure. Because it serves as an early warning tool, it can detect circumstances that could give rise to a likelihood of insolvency and signal the need to act without delay. The mechanisms employed by the European Insolvency and Restructuring Directive are worth considering. *Thirdly*, to adequately serve the key objective of the restructuring, the existing laws should be reviewed and incorporate the involvement of the employees' representatives in the preventive restructuring procedure. *Lastly*, as sometimes setting aside a confirmed preventive restructuring plan could be necessary, the country's bankruptcy law must be reviewed to stipulate the justifiable

grounds to set aside a confirmed preventive restructuring plan

DOI: https://doi.org/10.20372/wujl.v1i2.1074
ISSN: 2226-7522 (Print) and 3005-7612 (Online)
Wallaga University Journal of Law
WUJL, March- April. 2024, 1(2), 18-33
Home Page: https://journals.wgu.edu.et

Original Article

Cybercrime Threats and Trends in Ethiopia: Critical Legal Analysis

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Abstract

Computer technology and computer-related issues are a recent phenomenon in world history. This phenomenon is even relatively recent in Ethiopia. Hence, computer-based and computer-generated crimes and the resultant laws and enforcement have never been closely examined particularly in Ethiopia. Accordingly, Ethiopia has recently been tackling computer crimes in proclamations and regulations. It has lately implemented legislative measures in response to the growing availability and adoption of information and communication technologies. On June 7, 2016, Ethiopia's House of People's Representatives legislated the Computer Crime Proclamation. The proclamation addresses several issues, including unauthorized computer access, to combating terrorism and as well as child pornography. To prevent, control, investigate, and prosecute computer crimes and gather electronic evidence, a new set of legal mechanisms and procedures were incorporated into the Proclamation. This paper's primary goal is to investigate the adequacy of legislation and enforcement mechanisms of computer crimes under the Ethiopian legal system in line with regional and international covenants. The analysis's primary focus is on examining the strengths and limitations of the substantive and procedural laws, digital evidence, and evidentiary rules. The paper critically explores the prevailing legal and practical challenges concerning computer crime laws in Ethiopia. Finally, the paper includes important recommendations for improving substantive and procedural aspects of criminal justice about computer crimes in Ethiopia.

Article Information

Article History:
Received: 14-11-2023
Revised: 25-02-2024
Accepted: 11-03-2024

Keywords:
Computer crime, Cybercrime, Internet law, Substantive laws, Procedural laws

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1. Introduction

Alvin Toffler divides global history into three distinct waves: the agricultural, industrial, and information eras.[1] We are currently experiencing the third wave of information technology worldwide.[2] However, technology is neutral and can empower both destructive and constructive individuals. Like any new invention, technology will always have its supporters who see only positive effects and its detractors who see only negative effects. Criminals have always utilized opportunities in new technologies. A large number of people fall victim to cybercrime every day and suffer trillions of dollars in financial and property loss worldwide.[3] Even defining the terms complex and variant technological terms of cybercrimes is not an easy task.[4] Numerous research studies have demonstrated that the term cybercrime encompasses a wide range of newly emerging forms of abuse and criminality made possible by information and communication technologies (ICT). The terms "computer crime," "cybercrime," "high-tech crime," "e-crime," and "electronic crime" are commonly employed synonymously to refer to two primary categories of offenses, i.e. cybercrime, computer, or computer-related crimes. Computer crimes are a relatively new phenomenon in the modern world and are expanding at a rapid pace. However, the working definition for cybercrime or computer crime for this paper is any unlawful conduct focused using electronic actions that targets the security of computer systems and the data processed by them.

Nowadays Information and Communication Technology Systems (ICTS) are embraced in all facets of life. The introduction, growth, and utilization of information and communication technologies have been accompanied by increasing and sophisticated criminal activities. Cybercrimes have increasingly become a major and serious concern for the global community. They are international and transnational crimes that have been induced by the global revolution in ICTS, and the new forms of computer crimes present new challenges to lawmakers, law enforcement agencies, and international institutions. This necessitates the existence of effective legal mechanisms that monitor and prevent the utilization of ICTS for criminal activities in cyberspace.

Cyber-crimes can be more harmful than traditional once, since cyber offenders can deploy multi-pronged attacks and innovate at any time, from anywhere, partly or completely anonymously, against information systems. The magnitude and speed of cybercrime require proactive and cautionary measures as they will affect the security and economic interests of the nation. During the enforcement of computer crime in Ethiopia, it is expected that different strategies will be implemented and directives will be issued following the legislation of computer crime law.[5]

The computer crime law of the Federal Democratic Republic of Ethiopia has been drafted and adopted as one of Ethiopia's

[1] *Asmare, Mollalign. "Computer crimes in Ethiopia: An Appraisal of the legal frame work" International Journal of Science and Humanities Research, Volum 3, Issue 1 Page 93 March 2015.*

[2] *Richard power tangle web tales of digital crimes from the shadow of cyberspace (QUE corporation U.S.A 2000 P.4)*

[3] *Halefom Hailu, The state cybercrime governance in Ethiopia, (May 2015,) p. 7*

[4] *McQuade 2011,2or legal and political measures to address cybercrime by Matheus M. Hoscheidt.*

[5] *The Federal Democratic Republic of Ethiopian Computer Crime Proclamation No. 958/2016 (hereafter, ECC) Art 44*

criminal laws as of June 7, 2016. The main objectives of the computer crime legislation of 2016 are to protect Ethiopia's economic and political stability.[6] The proclamation explains that Ethiopia's existing legal framework is not adequately tuned with the technology changes and is insufficient to prevent, control, investigate, and prosecute the suspects of computer crime.[7] The Ethiopian government is constructing ICT infrastructures and ICT-based services, which will eventually lead to a greater dependence on these infrastructures and services.[8] However, it is a fact that with reliance on computer systems and other digital technologies comes vulnerability to cybercrime and cyber-attack as a result of connection to global cyberspace.[9] Therefore, Ethiopia is open to cybercriminals operating anywhere in cyberspace right away as it connects to a global network. Thus, the threat to Ethiopia is indeed real, not imaginary.[10]

Enforcing a computer crime law that is, accessible, predictable, and efficient while adhering to the rule of law is essential to promoting good governance, democratization, and economic growth, as well as maintaining public safety and peace.

The purpose of this paper is, therefore, to critically examine the main substantive and procedural aspects of the computer crime laws of Ethiopia and its practice starting from its legislation in terms of its legal content and procedure. The focus of the analysis is on examining the strengths and limitations of the substantive and procedural laws, digital evidence, and evidentiary rules. It further explores the computer crime law of Ethiopia and its implementation given the legal standards of the existing national, regional, and international computer crime laws.

2. The Context of Computer Crime in Ethiopia

The internet was first made available in Ethiopia in 1997, but access was restricted.[11] As KinfeYilma said Ethiopia is currently amongst the countries with the lowest level of Internet penetration and use. As a result, some argue that internet-related crimes are not imminent threats to Ethiopia.[12] However, Kinfe asserts that since the adoption of the computer crimes laws, several cybercrimes have been committed against Ethiopian cyberspace.[13] There are hundreds of cybercrimes in this country every year that go undetected by the government.[14] He acknowledges that there aren't many documented court cases, though.[15]

On the other hand, some believe that the Ethiopian government is wary of the detrimental effects of the internet on its authority.[16] The government allegedly fears that the use of the new technology or the internet unsettles the existing power structure. As a result, the neglect of providing reliable and affordable internet connections in the major towns, including the capital, is attributed

[6] *Ibid . Pre-Amble Paragraph one.*
[7] *Article 19, Ethiopian computer crime proclamation July 2016 legal analysis page 5 paragraph one*
[8] *Ibid*
[9] *Ibid*
10Halefom Hailu, cyber law and policy researcher at INSA, The state of cybercrime governance in Ethiopia
[11] *Kinfe Micheal Yilma, Ethiopia's new cybercrime legislation: Some reflections, computer law & security review 33 (2017) 250–255, P 252*
[12] *Ibid*
[13] *Halefom Hailu Abraha and KinfeMichealYilma."The Internet and Regulatory Responses in Ethiopia." Mizan Law Review, (September 2015), Vol. 9, No.1. p. 112*
[14] *Ibid*
[15] *Ibid*
[16] *Ibid*

to such fear. There is only one Internet Service Provider, Ethio Telecom, which is owned and operated by the Ethiopian state.[17]

The Ethiopian government has faced pressure to liberalize the telecommunications sector, particularly from the West. A few members of civil society also criticize the situation on the ground, claiming that the public monopoly and lack of competition are to blame for the underperformance of the Ethiopian telecommunications industry.

However, the Ethiopian government has a long history of maintaining its firm position that it will not liberalize the telecom industry anytime soon until recent time. This is primarily because the telecom industry provides the majority of the funding for large-scale projects like the construction of telecommunications infrastructure in rural areas with high costs, such as the railway. Currently, though, there is some indication that the government is willing to allow the partly privatization process to begin in the telecommunications industry. This partly privatization process manifested in agreement with the new telecom provider, Safaricom Ethiopia.

Government institutions are dealing with the regulation of cyberspace in Ethiopia. While they have different objectives, ranging from cyber security, online video, and web advertising, all of them have the legal authority to regulate online content. Given that there is some doubt about these overlapping competencies, how does content regulation operate? The current regulatory framework in Ethiopia is sector-specific due to the fact that broadcasting and telecommunications are governed by different agencies and have disparate legal frameworks. We can now days use the internet to share music, watch television, and make phone calls from handheld devices like smartphones, blurring the lines between the once distinct sectors of broadcasting, ICT, and telecom.

This digital convergence poses challenges to existing governance functions as it makes regulatory overlapping inevitable. Additionally, it casts doubt on regulations about new services made possible by digital technologies like the Internet. Thus, research suggests that another difficulty faced by Ethiopian regulators is the overlap in power and the inactivity of regulatory responsibilities. Even though the issue of internet freedom and national security is not only an Ethiopian problem she faces a great problem. At the moment, it is the subject of a heated international discussion. Finding the ideal balance between internet freedom and other justifiable interests like national security and law enforcement is the largest challenge facing all governments today. As a young democracy, these challenges are more pressing in Ethiopia. On the one hand, the government has legitimate national security and law enforcement interests that cannot be ignored. However, the government must uphold the rights that are stipulated in the constitution, such as the freedom of the internet. This is a demanding position that calls for a strong legal and regulatory framework that guarantees a sufficient degree of protection while also advancing Ethiopia's interests in public security and law enforcement.[18]

International human rights organizations denounce the Ethiopian government for

[17] *Ibid*

[18] *The issue of internet freedom and national security is not only an Ethiopian problem (see Halefome Hailu and Till Waescher)k8*

establishing a political environment that puts peace and development ahead of enabling a diversity of voices to compete in the marketplace of ideas. Additionally, it is charged with suppressing oppositional viewpoints, including those of civil society organizations, which bemoan the fact that serious transgressions and human rights breaches have been ignored in the sake of nonviolent progress that could be advantageous to the nation.[19]

The fact that protecting national, military, foreign policy and international relations is a good thing, believes that such a measure should not violate individuals' freedoms and rights. However, points out that considering the small number of internet users and the limited chances of cyber-attacks, the introduced measures are disproportionate. The penalty and punishment regime in the computer crime law of the revised criminal code of 2004 and the computer crime law of 2016 does not take the country's specific situation into account. On the one hand, cybercrime by its nature requires preparation, intent, and knowledge. On the other hand, the literacy rate and internet access in Ethiopia is extremely low. In this context, the penalty does not give meaning. It includes overly excessive punishments including ill-defined aggravated cases of cyber criminality[20]

1.1. The Adequacy of Ethiopian Law in line with the Budapest Convention.

The criminality involving computers is on the rise in the 21st century due to the proliferation of computers, and their integration into every part of human activities as well as the internet being the environment dominating any communication.[21] The criminal justice system, in general, and criminal law, in particular, faces legal challenges as a result.[22] These problems are distinct from ordinary crimes in that cybercrimes are technology-related crimes that cannot be properly handled by regular criminal justice institutions. As a result, it is expected that the criminal justice system will be adequate,[23] to impose punishment on criminals and guard against damage to persons, data systems, computers, computer systems, computer networks, and other critical infrastructure. While doing this, it is expected that criminal law will be strong and adequate in the criminalization of acts, in defending individual rights, facilitating international cooperation to aid in the collection of electronic evidence, and enabling the investigation and prosecution of a crime through the use of fundamental rules of evidence and criminal procedure.

The Budapest Convention on Cybercrime, which serves as a guideline for developing comprehensive national legislation against

[19] *Ibid*

[20] *Is cyberattack is an imminent threat to Ethiopia? Knife M/ Yilma p 36*

[21] *A conversation on the Future of Cyber Security on Oct 11, 2017, at UN University of Tokyo Center for Policy Research Director (Sabastian Von Einsiedel) with Melissa Hathaway, who served as a senior cyber security adviser to both Presidents George W. Bush and Barack Obama and leading a major Cyberspace Policy Review for the latter.*

[22] *Ibid*

[23] *Black's Law Dictionary defines "adequate" as sufficient, commensurate, and equally efficient, equal to what is required, suitable to the case or occasion, satisfactory…etc. The American Heritage College Dictionary defines "adequate" as sufficient to meet a need. The operational definition that the researcher intended to use for the term adequacy is the Criminological Concepts of Adequacy (sufficient to prevent, control, investigate and prosecute the suspects of Cybercrime or computer crimes and facilitate the collection of electronic evidence) in Ethiopian criminal justice system as indicated at the preamble ,4th paragraph of The Federal Democratic Republic of Ethiopian Computer Crime Proclamation No. 958/2016.*

cybercrime and a framework for international cooperation between State Parties to this treaty (see Chapter III) will be used as a standard for the comparative study. The Convention includes requirements for substantive laws (minimum standards for what is criminalized) procedural mechanisms (investigative and prosecution methods) and international legal assistance (such as cross-border access to digital evidence or extradition). This legal framework provides cybercrime legislation expected to serve at least three purposes.[24] These are first the criminalization of conduct ranging from illegal access to systems interference, computer-related fraud child pornography, and other content-related offences. Second, are procedural law tools to investigate cybercrime and secure electronic evidence concerning any crime, and the third is efficient international cooperation.

These three legalpurposes will be used to eval uate how well Ethiopia's computer crime law's function.[25] These could be offenses against and using computers. The categories include substantive criminal law, like offenses against confidentiality, integrity, and availability of computer data and systems as computer-related crimes such as fraud and forgery are among the ranges of offenses criminalized under the first function.[26] The criminalization also includes content-related offenses.[27] Oftentimes, online content is connected to basic principles rule of law. This includes issues of constitutional rights of an individual, in particular, the right to privacy,[28] and freedom of expression.[29]

The second purpose of the cybercrime legislation is procedural laws which provide criminal justice authorities procedural powers to secure electronic evidence not only concerning cybercrime but also in any other crime.[30] Determining the crime committed and by whom is the purpose of criminal justice, in general, and criminal procedure legislation, in particular.[31] Criminal justice is focused on ensuring the criminal Process as well as the capture and punishment of perpetrators (Investigation and prosecution). The criminal procedure serves two purposes in this regard. This could serve as one way to implement substantive criminal law and another way to distribute power among those involved in criminal justice (Police, prosecutor, judge, victim, and defense lawyer).[32] The exact value anticipated in a fair criminal justice, [33]is related to outcomes such as dependable conviction of

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[24] *The Budapest Convention on Cybercrime: benefits and impact in practice, Cybercrime Convention Committee(T-CY), Strasbourg, on 13 July 2020, " https://rm.coe.int/t-cy-2020-16-bc-benefits-rep-provisional/16809ef6ac" Last visited on September 28/2022*

[25] *Look at the preamble of the Proclamation no 958/2016(The fourth paragraph……. it has become necessary to incorporate new legal mechanisms and procedures in order to prevent, control, investigate and prosecute computer crimes and facilitate the collection of electronic evidences is standard of adequacy to combat cybercrime in Ethiopian context).*

[26] *Council of European on Cybercrime Convention, (European Treaty Series - No. 185, 2001) (hereafter, BC) Art (2-11) and ECC. Art (3-6).*

[27] *BC. Art 9 and ECC. Art (12-14).*

[28] *Universal Declaration of Human Rights (hereafter, UDHR) Article 12. and International Covenant on Civil and Political Rights 1966 (hereafter, ICCPR) .Article 17.*

[29] *UDHR. Article 19. and ICCPR . Article 19.*

[30] *BC. Art (14-15) and ECC. Art (29-38)*

[31] *Wondwossen Demissie, Ethiopian Criminal Procedure A text book (School of Law, Addis Ababa University,(2012).*

[32] *Ibid*

[33] *The term "fair criminal justice process" is to indicate criminal procedure conducted fairly, justly, and with procedural regularity by an impartial judge and in which the defendant is afforded his or her rights under the Federal Constitution or state constitution or other law. Among the factors used to determine fairness is the effectiveness of the assistance of counsel, the opportunity*

the guilty and exoneration of the innocent. This function is a collection of specific procedural rules that specify in great detail the authority that law enforcement organs may exercise when looking into a crime committed against or using computers set up under the first function. As a safeguard for the rule of law, these procedural powers must be subject to restrictions and protections for individual rights.[34]

Herbert L. Packer, a legal professor, developed two models for criminal justice regarding procedural powers, which criminal justice authorities play.[35] These models are referred to as Crime Control and Due Process. The criminal justice system in Packer, especially when attempting to hold offenders accountable for their wrongdoings, may be rather complex. The public expects the system to be competent, swift, and effective while upholding each person's rights and administering justice fairly. Once these objectives have been balanced, justice will be served if crime is reduced, offenders are punished promptly, and individual constitutional rights are respected.[36] The Crime Control Model contends that to overcome the conflict, the law's enforcement objective of criminal proceedings should take precedence over the fairness goal. The Due Process Model, on the other hand, prioritizes the fairness of the trial over the goal of upholding the law. Although neither model is realistic, they do represent the two extremes of the range of potential approaches to delivering justice.[37] These models do not directly represent any particular criminal justice system including Ethiopian, but they do highlight aspects of those systems that correspond to certain objectives and ideals as conceptual framework. Both approaches set general guidelines to combat crime and penalize those who perpetrate it.

According to the due process paradigm, every person should have access to a reasonable and equitable criminal justice system that respects their constitutional rights. According to this concept, a citizen has rights and cannot be denied their rights like the right to life, liberty, or property without following the correct legal procedures and safety protections. The crime control model, in contrast, was said to highlight the importance of effectively suppressing criminal activity in the interest of maintaining public order. It entails quick, unofficial, and routine processes that are handled by criminal justice professionals. This model emphasizes having an effective system, with the primary goal being to suppress and control crime to maintain public order and safety in society. According to this theory, protecting individual freedom comes second to reducing crime. This model represents a more traditional viewpoint of government's role. The crime control model would support swift and severe punishment for offenders to safeguard society and ensure that people are free from the threat of crime.

According to this model, the legal system can resemble an assembly line where prosecutors charge suspects, law enforcement officers apprehend them, the courts declare guilt, and then convicted individuals are given suitable and severe punishments through the criminal

to present evidence and witnesses, the opportunity to rebut the opposition's evidence and cross-examine the opposition's witnesses, the presence of an impartial judge, and the judge's freedom from bias.

[34] *BC. Art 15.*

[35] *Herbert L.Packer "Two Models of the Criminal Process,"113 University of Pennsylvania Law Review 1(1964) (hereafter Packer, "Two Models")*

[36] *Ibid.*

[37] *Cited at note 36*

justice system.[38] According to the principles of the crime control model, for instance, the failure of law enforcement to firmly regulate criminal activity is seen as causing the collapse of public order, which eventually results in the absence of a crucial element of human freedom. The Crime Control Model mandates that the effectiveness,[39] with which the criminal process functions to screen suspects, decide guilt, and gain suitable dispositions for those convicted of a crime be given significant focus to achieve this reasonable goal. The Crime Control Model's high purpose calls on the criminal procedure to screen suspects effectively, assess guilt, and secure adequate punishments for those found guilty.

People are notoriously bad observers of disturbing events, and the more emotionally charged the context; the more likely it is that recollection will be inaccurate. Confessions and admissions by people in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect says. Due Process Values reject this evidence in favor of a view of informal, non-adjudicative fact-finding that emphasizes the possibility of error. All of these factors lead to the rejection of informal fact-finding procedures as being conclusive of factual guilt and the persistence of formal, adjudicative, adversarial fact-finding procedures, where the factual case against the accused is heard in public by an impartial tribunal and is evaluated only after the accused has had a full opportunity to refute the case against him. This Model places a strong emphasis on preventing and getting rid of errors as much as possible. Therefore, it is not necessary to make widespread, illegal practices legal. Instead, it is to reiterate their illegality while also taking action to diminish their occurrence. This paradigm of due process places legitimacy at the center. Although the models prioritize opposing criminal justice ideologies, it is still conceivable to discuss how this conceptual framework might be used to evaluate the adequacy and legitimacy of a particular criminal justice system.

The third function of cybercrime legislation is almost the extension of the second function to the international arena, providing a mechanism for international cooperation in matters not only related to cybercrime but also police-to-police and judicial cooperation to any crime involving electronic evidence.[40] Global connectivity[41] and the ICT revolution have resulted in globalization in computer networks, and the technology is universal and increasingly easy to use, ensuring its availability to both criminals and victims. Criminals use this as an opportunity and utilize it for their guilty purposes. As a result, gathering electronic evidence becomes a global issue that necessitates collaboration between nations. Harmonized national substantive cybercrime laws that punish cybercriminals and national procedural laws that establish the norms of evidence and criminal procedure are essential for international cooperation. By harmonizing bilateral, regional, and multilateral cybercrime instruments as needed, international cooperation can also be made

[38] *Packer, Two Models .P.10.*

[39] *The term "effectiveness" means here the system's capacity to catch, try, convict, and dispose of at least high proportion of criminal offenders whose offenses become known.*

[40] *BC. Art (23 -24). and ECC.Art 42.*

[41] *The term "global connectivity" refers the ability of the internet to provide the possibility of seamless communication throughout the whole planet. This has a wide range of advantages. Individually, it makes possible for those who relocate or travel to stay in touch with friends and relatives all around the world.*

easier. Legal compliance with regional and multinational cybercrime instruments also requires their ratification or accession.

Concerning the Budapest Convention on Cybercrime, signatories must take action on a national level to combat cybercrime, including modifications and additions to substantive legislation and criminal procedure law (to establish the procedures for criminal investigations and prosecutions). The Convention further provides signatories with guidance on mutual assistance and acts as a mutual legal assistance treaty (i.e., an agreement between countries to cooperate on investigations and prosecutions of certain or all offenses proscribed by both parties under national law). Regarding international co-operation under the Council of European Convention puts, the Parties shall cooperate with each other through the application of relevant international instruments on international cooperation in criminal matters.[42] The agreement is based on uniform or mutual legislation and domestic laws, to the widest extent possible for investigations or proceedings concerning criminal offenses related to computer systems and data or for the collection of evidence in the electronic form of a criminal offense.

The adoption of appropriate legislation against cybercrime for criminals or activities intended to affect the integrity of critical infrastructures at the national level is important.

This requires coordinated action related to prevention and response by the government through legal instruments (Legal-regulatory response).

Establishing legal sanctions for cybercriminals and preventing harm to people, data systems, services, and infrastructure is expected to be robust. Such law is also expected to be helpful in protecting individual rights, enabling investigation and prosecution of a crime committed online, and facilitating cooperation between/among/ cybercrime matters of different jurisdictions.

However, several technical reasons make fighting cybercrime difficult. One is attribution on cybercrime investigation. The investigation is difficult because any computer that is connected to the internet can communicate with any other multiple computers on the internet. This is what makes the globalization of computer networks. Cybercrime inevitably often has an extraterritorial aspect to it that can give rise to complex jurisdictional issues that involve persons present and acts being carried out in many different countries. In addition, the investigation of computer crimes and the gathering of appropriate evidence for criminal prosecution can be an extremely difficult and complex issue, due primarily to the intangible and often transient nature of data, especially in a networked environment. The technology renders the process of investigation and recording of evidence extremely vulnerable to defense claims of errors, technical malfunction, prejudicial interference, or fabrication. Such claims may even lead to a ruling from the court against the admissibility of such evidence.

Having these difficulties in hand legal measures play a key role in the prevention and combating of cybercrime especially for the legal challenges. These are required in all areas, including criminalization, procedural powers, jurisdiction, international cooperation, and internet service provider responsibility and liability. While doing this the use of criminalization and criminal law calls for

[42] *BC. Art.23.*

respect of the constitutional rights of an individual as freedom of expression,[43] privacy,[44] and other constitutional rights that should be respected. Concerning these international instruments like International Covenant on Civil and Political Rights put it every one shall have the right to freedom of expression,[45] and similarly, the FDRE Constitution incorporates the right to freedom of expression as everyone has the right without any interference.[46] Regarding the right to privacy, the FDRE Constitution stipulates that everyone has the right to privacy, and this right shall include the right not to be subjected to searches of his home, person, or property, or the seizure of any property under his/her possession.[47]Similarly, UDHR has boldly given attention to the right of privacy as no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, or attacks upon his honor and reputation. And everyone has the right to the protection of the law against such interference or attacks.

Thus, currently the administration of criminal justice including both terrestrial and virtual equally needs adequate and legitimate policy and legal frameworks. For digital societies,[48] cybercrime is frightening and can stand for an almost endless list of different criminal justice concerns that may arise from technical to legal challenges and solutions ranging from technical to legal which call upon policy and legal response by legislation.[49]

Attention has been paid by the Ethiopian government to creating the required legal and legislative framework to combat the widespread use of cybercrime. To preserve the confidentiality, availability, integrity, and authenticity of the information, Ethiopia has adopted the Information Security Policy of 2011, its legislative purpose is to prevent, deter, respond to, and prosecute acts of crime against information and information infrastructure. The Computer Crime Proclamation No. 958/2016 is the law's official translation of the policy. The law has made several behaviors illegal as a means of preventing and combating cybercrime. The Ethiopian Computer Crime Proclamation No. 958/2016 is a relatively recent addition to the body of law that makes a variety of acts illegal as cybercrime. Several unique evidence and procedural rules have also been introduced, which will help with the investigation and prosecution of cybercrimes. The Proclamation is rife with a host of issues, like illegal access to a computer,[50] illegal interception, interference with a computer system, causing damage to computer data,[51]

[43]*Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995(hereafter FDRE constitution), Art. 29*

[44] *Ibid .Art 26*

[45] *ICCPR). Art.19 (2)*

[46]*Cited at note 44, Art 29(2)*

[47] *Ibid, Art 26/2*

[48] *The notions of" digital society" reflects the results of the modern society in adopting and integrating information and communication technologies at home, work, education and recreation, and as the result digital innovations are reshaping our society, economy and industries with a scale and speed like never before.*

[49]*Common challenges in combating cybercrime As identified by Eurojust and Europol June 2019 (Since the Court's rulings, the lack of unified retention of electronic communication data across the EU has proven a key challenge to investigating cross-border cybercrime. The operational experiences of both agencies have shown that technically collection of electronic communication data is the key to successful investigation and prosecution of serious crimes, including cybercrime……. Comprehensive analyses performed by Eurojust and Europol Data Protection Function after the 2014 CJEU ruling, have underlined the value of electronic communication data for criminal investigations and prosecutions and have shown that the majority of law enforcement and judicial authorities support a legislative framework at EU level.)*

[50] *ECC., Art 3*

[51] *Ibid., Art 4-6*

crime against computer systems and Computer data, and also as computer-related crimes like Computer-related Forgery, computer-related fraud, electronic theft and combating child pornography.[52]

2. Infringement to Human Rights and Fundamental Freedoms

There are advantages and disadvantages to the law. In terms of content substantively, the 2016 proclamation is thorough and up to date. A number of recently developed cybercrimes are now included in the existing laws by the Computer Crime Law. In particular, it covers the admissibility of electronic evidence, the production and preservation of electronic data, and the search and seizure of computer data. It also introduces comprehensive procedural and evidentiary rules that are essential in the investigation and prosecution of computer crimes. On the other hand, the 2016 computer crime law violates citizens' fundamental constitutional rights and freedoms, including their right to privacy, their freedom of speech, and the due process of law. This runs counter to the administration's claim that Ethiopia is a democratic nation.[53]

It may be contended that the most troublesome part of the 2016 computer crime law is concerning the warrantless digital forensic investigation that it authorizes INSA to conduct. Where there are reasonable grounds to believe that computer crimes are likely to be committed, INSA investigators can conduct without any judicial oversight virtual forensic investigation into computers suspected to be sources of attack or to be subjected to attacks. When compared with other developing countries, what makes our laws unique is that it shows our attitude to court warrants. However, this law restricts the role of the court. The court has no involvement whatsoever in the most crucial investigation processes. The INSA people can conduct the forensic investigation virtually without presenting at your office and physically touching your computer but without court authorization is unprecedented elsewhere including the Budapest Convention. It should also be noted in this connection that physical examination requires a court warrant. Moreover, about this, INSA investigators are also allowed to carry out, again, warrantless sudden searches against suspected computers for preventive purposes.

Additionally, the law imposed a one-year minimum data retention requirement on communication service providers for data passing through their networks. This requirement is an obvious legislative overreach that makes it possible for rights to data privacy to be violated. The issue is that the law's mandated data retention period is very long, and it could be difficult to maintain the data of many clients for an extended period of time. A concerning clause in the law concerns communication service providers and is related to the recently added "duty to report" provision. When service providers learn of cybercrimes being committed or the distribution of illicit content, such as child pornography, via their computer systems, they are obligated to notify the INSA and the police. The issue with such a requirement is that it might force service providers to proactively monitor communication on their networks in order to avoid the severe consequences that the law foresees for their refusal to assist law enforcement. Even worse, because of this technically demanding legal requirement, service providers would have to use algorithmic bots to automatically identify

[52] *Ibid., Art 9-12*

[53] *Cited at note 12*

illegal activity, which could violate users' right to free speech online as well as their right to privacy. It's similar to keeping an eye on your compound to make sure no crimes are being committed there. Additionally, the cybercrime law contains provisions that contradict fundamental procedural justice tenets like due process of law. The law, for instance, allows courts to rule ex parte on a request by investigators for a production order against a person thought to have computer data needed for investigation.[54] They are giving a production order even without the presence of the person concerned, who could have legitimate reasons to protest an otherwise unreasonable request erodes due process rights. Another important principle of procedural justice abrogated by the law relates to the burden of proof in cybercrime proceedings.[55] The law states that where the Prosecutor has proved 'basic facts', the court may on its motion shift the burden of proof to the accused.[56] This proviso violates a long-established principle of criminal justice which levies on the government the burden to prove guilt beyond any reasonable shadow of doubt and the constitutional principle which requires the accuser to prove the guilt of the accused. Among the issues offered in this paper, understanding what is meant by Computer Crime, in the international context must be followed Ethiopian issues. Ethiopia has been enacting various pieces of legislation to regulate some aspects of the digital environment. The Cybercrime Proclamation of 2016 is a new law that makes a number of cybercrimes illegal. Additionally, it has brought in a number of cutting-edge procedural and evidentiary guidelines that will support the investigation and prosecution of cybercrimes. However, it attracts censures from substantive and procedural corners mainly owing to some of its human rights, privacy rights, and due process rights. The cybercrime legislation incorporates provisions that present a potential threat to the right to privacy and principles of procedural justice. The right to privacy is guaranteed under FDRE Constitution Article 26,[57] and international treaties,[58] like the International Covenant on Civil and Political Rights to which Ethiopia is a state party. The legislation contained concerning clauses that could infringe upon these rights protected by the constitution. One such provision allowed INSA to carry out digital forensic investigations on computers believed to be involved in cyber-attacks, without the need for a court-issued warrant, if there was sufficient evidence to suggest that computer crimes were imminent.[59] Additionally, it empowered INSA investigators to conduct warrantless sudden searches against suspected computers for preventive purposes. Following a flurry of criticism against these rules, the law has mandated a prior judicial warrant before such far-reaching measures are taken by INSA.[60] INSA, however, still wields the power to conduct warrantless virtual not physical digital forensic investigations under its reestablishment proclamation of 2013.[61] Recent subordinate legislation that furthers the 2013 reestablishment proclamation has intriguingly included the requirement of a judicial warrant to conduct a forensic

[54] *ECC Art 31/2*
[55] *ECC Art 37/2*
[56] *Ibid*
[57] *FDRE Constitution Art 26*
[58] *ICCPR Art 17*
[59] *ECC Art 32/2*
[60] *Ibid*
[61] *Information Network Security Agency Re-establishment Proclamation, Federal Negarit Gazeta, Proclamation No. 808/2013, Art 6(8).*

investigation by INSA.[62] The pertinent sections of the Regulation state that the Agency is required to conduct a digital forensic investigation in collaboration with pertinent investigative entities as per Article 6(8) of the INSA Reestablishment Proclamation and under the authority of a court. The discrepancy between these two laws is quite perplexing and not easily understood, considering that regulations are considered secondary legislation within Ethiopia's legal framework. This implies that the proclamation takes precedence in cases of contradiction, yet the intention to address any shortcomings of the proclamation through subordinate legislation raises questions as to why.

It is crucial to emphasize the necessity of judicial oversight for the proclamation. The lack of any oversight mechanism by the courts is what makes the power of sudden searches and virtual forensic investigations so concerning for privacy rights. The power granted for sudden searches under the law could be significantly more invasive, especially when compared to other Ethiopian laws that outline similar search processes.

Another worrying provision of the law relates to the newly inserted duty to report obligations on communication service providers, and government organs.[63] INSA is additionally mandated to establish, through a Directive, the specific format and process for conducting the reporting. Service providers have an obligation to promptly notify INSA and the Police upon discovering instances of cybercrimes or the dissemination of illicit material, such as child pornography, on their computer systems. The apprehension surrounding this requirement is that it may compel service providers to proactively monitor communications on their networks, as failure to cooperate could result in penalties. Nevertheless, the consequences for service providers failing to fulfill their reporting duty remain uncertain. The additional cause for alarm is that the law allows for a single judicial warrant to be used to investigate multiple computer systems. This provision raises the possibility of accessing data stored in computer systems that are linked to the system covered by the warrant. While this provision is based on the Council of Europe and African Union Cybercrime Conventions, it raises valid concerns. Specifically, the broad nature of the warrant undermines the rights of individuals whose computer systems may be accessed without their knowledge. Allowing extension of virtual or physical search warrants initially granted to a specific computer system to another system appears.

The legislation on cybercrime also encompasses regulations that undermine fundamental principles of procedural justice, such as the right to due process. For example, the law permits courts to make unilateral decisions on a request by investigators for a production order against an individual believed to possess computer data relevant to an investigation. Issuing a production order without the presence of the affected person, who may have valid concerns, undermines the rights to due process. Moreover, the disclosure of personal computer data during the enforcement of such an order also raises concerns regarding data privacy rights. Additionally, the law appears to disregard another crucial principle of procedural justice,

[62] *Council of Ministers Regulation to Provide for Execution of Information Network Security Agency Reestablishment Proclamation, Federal Negarit Gazeta, Regulation No. 320/2014, Art 10(1).*

[63] ECC Art 27/1

which pertains to the burden of proof in cybercrime proceedings. The law states that where the Prosecutor has proved basic facts, the court may, on its motion, shift the burden of proof to the accused.[64] This provision contradicts a well-established principle of criminal justice that places the responsibility of proving guilt beyond a reasonable doubt on the government. Furthermore, it undermines the presumption of innocence for the accused, as the mere decision to shift the burden suggests that the prosecutor has already established a strong case. Considering the limited experience in cybercrime investigation and prosecution in Ethiopia, there is also a concern that prosecutors may rely on this provision even when there is insufficient evidence against the suspects. In cases involving complex technicalities, a prosecutor may request the court to alter the burden of proof by presenting somewhat inconclusive evidence, such as the presence of a person's face in illicit content or involvement in criminal activities unrelated to the suspect. This situation is more probable when innocent individuals' computers are compromised and manipulated by hackers to carry out cybercrimes like DoS attacks. As a result, regular individuals who are suspected of committing cybercrimes will face significant challenges in disproving the presumption of evidence once the burden has been shifted.

3. Conclusions

Term definitions are frequently found in particular legislative acts. But term definitions aren't always well-defined by legislators. Occasionally, they do not define at all, leaving law enforcement to make educated guesses until the courts rule. The extremely wide definition of Ethiopian computer crime is one of the main criticisms levelled at it. There is no precise definition of computer crime or distinction between cybercrime and computer crime in Ethiopia. Thus, it ought to be as explicit as other laws, and there ought to be a distinction made between cybercrime, computer crime, and computer-related crimes. To say there is cybercrime three things should exist. These are Computer, network, and internet, whereas in the Ethiopian context there are no differences in terminologies.

In 2011, the government developed a policy and in 2016, passed legislation on cybercrime. By enacting Computer Crime Proclamation No. 958/2016, she has taken legal action to combat cybercrime. The law's purpose is to provide appropriate protection and security measures for the use of information communication technology, which is susceptible to a variety of computer crimes and other security threats that could jeopardize individual rights and impede the nation's overall development. [65] By this law, the country has criminalized different offenses against and using computers citing that the existing laws were not adequately tuned with the technological changes and are not sufficient to prevent, control, investigate and prosecute the suspects of computer crimes.[66] As a result, it has become necessary to incorporate new legal mechanisms and procedures to prevent, control, investigate, and prosecute computer crimes and facilitate the collection of electronic evidence adequately.[67]

On the other hand, the development of new international legal instruments is an opportunity to strengthen mechanisms for international cooperation and obtaining extraterritorial evidence in practice and

64 ECC Art 37/2
65 ECC Pre-amble, par 2.
66 ECC , Pre-amble, par 3
67 ECC., Pre-amble, par 4

capacity building for law enforcement and criminal justice institutions.[68] This maintains the inadequacy caused by a lack of jurisdiction in cybercrime offenses. In this regard, the criminalization of the acts, harmonization,[69] of domestic laws with international and regional laws, accession to existing international or regional cybercrime instruments, and application of the existing law determine whether the law is adequate,[70] to govern the issue.[71]

According to government statements,[72] official INSA reports, and other research, computer crime offenses in Ethiopia have increased since the passage of the Computer Crime Law. On one hand, the critique is not only inadequacy of the law to govern the offense but also the legitimacy about criminal justice authorities, in procedural powers to secure electronic evidence. As to the Packer's Dues process criminal justice model (as formal fact-finding process), having a just and fair criminal justice system for all and a system that does not infringe upon the constitutional rights of an individual is what means by due process. This model is the type of justice system that is based on the principle that a citizen has rights and cannot be deprived of their rights like right to privacy,[73] and freedom of expression,[74] without appropriate safeguards. This model reviews whether the law contains safeguards against arbitrariness is the focus. The philosophical background of the Due Process model is the preservation of the constitutional rights of individuals and the protection of human rights. Under Ethiopian computer crime law, procedural powers to secure electronic evidence are with no safeguards.[75] To protect individual rights still Ethiopia relies on general procedural law provisions for search, and seizure to collect evidence. In general, with regard to computer crime, Criminalization should be specific, and the law must meet the requirements of clarity and adequacy. Concerning procedural powers, investigative measures must be prescribed by law and pursue a legitimate aim without affecting privacy rights. There must be also a guarantee against abuse, and these procedural powers should be limited to safeguards during the collection of electronic evidence. Regarding human rights, privacy rights, and due process rights the cybercrime legislation incorporates provisions that present a potential threat to the right to privacy and principles of procedural justice. The right to privacy is guaranteed under Article 26 of the Ethiopian Constitution and international treaties such as Art 17 of the International Covenant on Civil and Political Rights to which Ethiopia is a state party. So, there is an incompatibility between the Computer Crime Law of 958/2016 and the constitution, the international Covenant on Civil and Political Rights to which Ethiopia is

[68] *BC. Art 23.*

[69] *The context of "harmonization" is both in terms of substantive and Procedural provisions (harmonization of substantive provisions of cybercrime law helps facilitate international cooperation (prevents cybercrime safe havens,) and harmonization of procedural provisions of cybercrime laws facilitates, among other things, global evidence collection and sharing through international cooperation.*

[70] *Cited at note 20*

[71] *It also contains a series of powers and procedures such as the search of computer networks and lawful interception. Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering.*

[72] *https://youtu.be/pepOapF_0ds?t=2734, ጠ/ሚኒስትር ዐቢይ አህመድ ከሠ/ተምቤት አባላት ለቀረቡላቸው …… June 14, 2022 | ዓባይ ቲቪ ዜና*

[73] *UDHR. Article 19. and ICCPR . Article 19.*

[74] *. BC. Art (14-15) and ECC. Art (29-38)*

[75] *BC. Art 15*

a state party. Proclamation No.958/2016 should be harmonized with the FDRE Constitution, international covenants on civil and Political Rights, and other regional covenants like the Budapest Convention.

WUJL, March-April.2024,1(2), 33-51)
DOI: https://doi.org/10.20372/wujl.v1i2.1072

ISSN: 2226-7522 (Print) and 3005-7612 (Online)
Wallaga University Journal of Law
WUJL, March- April. 2024, 1(2), 33-51
Home Page: https://journals.wgu.edu.et

Original Article

Bearer Share Under Ethiopian Share Company Laws: Abolishing or the other option?

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Abstract

A company can issue shares in the form of registered or bearer. Bearer share is without indicating the identity of the owner and that information is not registered in the registry of a company issuing it. Once it is issued, it is unknown who owns the security. Such shares have benefits and risks. The risks are significantly higher than the benefits that a given economy can get. By using the anonymity created by bearer shares, there are possible illicit activities that may be committed by the owners and by the Companies themselves. The 1960 Ethiopian commercial code recognizes the issuance of bearer shares for share companies. However, it seems it is prohibited by subsequent legislation for financial share companies in the country such as banking, Insurance, and microfinancing under the new commercial code of Ethiopia. This bearer shares may open the door for some unlawful activities such as money laundering and tax evasion and it has some benefits at the same time. This paper dealt with the concept of bearer shares under the share company law of Ethiopia. It specifically focused on justifying why deny or allow the issuance of bearer shares by raising the benefits of having it and the dangers of allowing it and argued for the third option of keeping them with custodians instead of banning it. In doing so, the writer assessed provisions of the 1960s the 2021 Ethiopian Commercial Code, and laws governing Ethiopian financial institutions by employing the doctrinal research approach and qualitative data analysis. *The study* analyzed *the experience of other countries* towards bearer shares and their reason *for taking it as an experience for Ethiopia.*

Article Information

Article History:
Received: 5-01-2023
Revised: 26-02-2024
Accepted: 10-03-2024

Keywords:
Bearer Share, Company laws, Ethiopia

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1. Introduction

Shares of shareholders are the sources of capital of a company. The resources that a company collects and invests are from the pockets of its shareholders. The company should appropriately utilize the accumulated wealth from shareholders to support the growth of the company and the economy as well. There should be a robust legal framework that will govern the conduct of the business environment and the actors involved. The nature of the company business is complex and confusing due to the flexible nature of the world's business activities and ideas. There should be a legal framework that can sufficiently govern the company's behavior at each step taken by the company.

One of the areas of regulation is on the forms and classes of shares company may issue. Some countries require a company to keep a registry of its shareholders and those shares issued in their name. Others allow the issuance of certificates representing shares that are not registered to any specific holder or owner.[1]

The 1960 Commercial Code of Ethiopia[2] provides the above similar scenario. The code authorizes share companies to issue both registered and bearer share. Issuing a bearer share may give some flexibility to the owner and avail from inevitable delays and costs. At the same time, there are dangerous consequences attached to the bearer shares that is not limited to a territory of one country. To avoid or to reduce the risks, states are resorting to banning the issuance of bearer shares from their company laws and others are resorting to the other options of managing it without banning it. The commercial code authorized share companies to restrict the issuance of bearer share under their articles of association and memorandum of association. If the companies need to issue a bearer share, they have the full right to do so. In another way, the code indicates the prohibition of issuing bearer share by law. Following this, some laws prohibit the issuance of bearer shares in share companies of specific economic sectors while no legal ban is there for other share companies. In another way, the 2021 Ethiopian commercial code has come up with provisions that prohibit the future issuance of bearer shares and gives some years for the existing bearer shares to be converted to registered shares.[3]

Is intended under this article to analyze the benefits and dangers of recognizing bearer share in general and opt for Ethiopia whether to uphold or abolish or apply other mechanisms of managing them by evaluating the benefits to be acquired and the risks and a close look at the trending international experiences.

This study has employed doctrinal legal research. The qualitative method of data analysis was used to critically examine the issues of bearer shares. Regarding the sources of data, both primary and secondary data were employed. Primary data were gathered from both domestic and foreign laws and the secondary data are books, journals, reports of different international organizations, and websites. Also, the experience of some selected

[1] Gainan Avilov et al., General Principles of Company Law for Transition Economies (English Version), SSRN JOURNAL, 24 (1998), *http://www.ssrn.com/abstract=126539* (last visited Nov 26, 2023).

[2]Commercial Code of the Empire of Ethiopia, Proclamation No. 166 of 1960, Negarit Gazeta Gazette Extraordinary, (Known as The Ethiopian Commercial Code hereafter), Article 325 sub-article 1. It provides that, Shares are either registered in the name of the shareholder or to bearer, as required by the Shareholder.

[3]The Commercial Code of the Federal Democratic Republic of Ethiopia, Proclamation no.1243/2021, Article 267

jurisdictions on how they handle the case of bearer share was seen. The experiences of countries such as the USA, Switzerland, the British Virgin Islands, and Panama were examined. The reason this country are selected was that they have taken various measures on the issuance of bearer shares and it can be a lesson for Ethiopia.

2. The Concept of Share

Share is a technique through which a company may raise capital from the public. There are different approaches to defining the term share. These are judicial, juristic, and statutory[4]. The judicial approach defines share as the interest of a shareholder in the company measured by the sum of money for liability and claim but also consisting of a series of mutual covenants entered into by all shareholders[5] . The definition added that A share is not the sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract including the right to a sum of money of a more or less amount.[6]

The juristic approach will showcase the definition of shares by different scholars and opinions on the meaning of 'shares' are many and varied. The Black's Law Dictionary is of the view that 'share' is "one of the substantial numbers of equal parts into which the capital stock of a corporation or Joint Stock Company is divided and represents the equity in the corporation or Joint Stock company[7]. In another way, Mozley and Whitley's Law Dictionary conceives 'share' as "a share or proportion of the capital of a company, entitling the holder to a share in the profits of the company[8]." For others, in companies or corporations, the whole of the capital stock is usually divided into equal proportions called shares[9].

The statutory approach tells the meaning of shares as codified in the statute books. The company laws of different states address the definition of the term share by using different languages, while others leave without defining it. The Ethiopian commercial code[10] is not to precisely define the term share. The code simply discusses the nature of sharing in different forms of business organization. The Indian Company Law Act defines it as a share in the share capital of a company and includes stock[11]. The Nigerian Company Law defines share as the interests in a company's share capital of a member who is entitled to share in the wealth or income of such company and except where a distinction between stock and shares is expressed or implied, includes stock[12]. Anyways, a share is an instrument through which a person may become a shareholder in a given company and create a particular legal relationship between the shareholder and the company. This share is something determined in terms of money.

A share has some visible natures. It does not confer on its owner a right to the physical

[4]Onyekachi Wisdom Duru, *my 'Share' in the Company: What is it?* SSRN JOURNAL, 5 (2011), http://www.ssrn.com/abstract=2140364 (last visited Nov 26, 2020).

[5]Duru, *supra* note 3.

[6] *Id.*

[7] HENRY CAMPBELL BLACK & JOSEPH R. NOLAN, BLACK'S LAW DICTIONARY: DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (6th ed ed. 1990).

[8] E. Ivanmy, *Mozley and Whiteley's Law Dictionary*, Tenth Edition (London: Buterworths, 1988) at 437.

[9] The law.com law dictionary & black's law dictionary 2nd ed.

[10] Avilov et al., *supra* note 1.

[11] Indian Companies Act of 2013, Sub-section 84, Act NO. 18 of 2013, 29th August, 2013.

[12]Duru, *supra* note 3 at 8–9.

possession of anything[13]. The shares or other interests of a member in a company are personal property and are not like real estate[14]. As a general principle, shares are freely transferable and sold or purchased in the share market[15]. The transferability of company shares is an added advantage to both share company and the investor. The share company's share capital becomes a permanent and stable feature of the company because the shareholders cannot withdraw anything from it. The shareholder gets marketable security. The other component of share is its indivisibility. It means several persons cannot be the owner of a single share. When such a scenario happens, those persons have to appoint a representative to exercise their rights as shareholders.

The issuance of the share is inevitable for the formation of a given company. It is a stepping stone since it is a means to raise capital and make the public a member of the company. Issuance creates a binding contract between the parties. Till such issuing is completed, shares as such do not exist. It is only by the process in this sense that share comes into existence. A company issues a share certificate, a document, stating that the person named therein is the registered holder of a specified number of shares of some classes and that they are fully paid up or paid up to a stated amount. A share certificate has to be issued whether the shares are partly paid up or fully paid up. The share certificate enables the shareholder to deal more quickly in the market.

3. Classes and Forms of Shares Under Ethiopian Share Company Laws

There is no definition of the term share under the Ethiopian Commercial Code. By setting aside the question of meaning, the code describes the nature of share and its classes and forms. Article 304(1) of the 1960 Commercial Code and Article 245 of the 2020 Commercial Code define a share company as a company whose capital is fixed in advance and divided into shares and whose liabilities are met only by the assets of the company[16]. From the definition, one can infer that the company capital is divided into a so-called share without having a clear explanation of the term under the code.

Book II, Title VI, and Chapter 3 of the Ethiopian Commercial Code provide issues related to share and the rights and duties of shareholders.

Both Commercial codes recognize classes of shares. Setting up several types of shares with different rights is a matter left to the memorandum of association of a company or determination by the general meeting[17]. The code does not stick to a mono class of shares; instead, it gives the green light for the issuance of different types of shares. The code recognizes three classes of shares. These are Ordinary shares, Preference shares, and Dividend shares[18]. Preference shares and ordinary shares are the primary forms of shares

[13] JANET DINE & MARIOS KOUTSIAS, COMPANY LAW 67 (8. Ed Ed. 2014).

[14] DINE AND KOUTSIAS, *supra* note 12.

[15]For Instance, from Article 333(1) of the Ethiopian Commercial Code, one can simply understand that unless otherwise prohibited under articles of association, the share of a share company is freely transferable.

[16] The 1960 Commercial Code of Ethiopia, Article 304(1) and the 2021 Commercial Code of Ethiopia, Article 245

[17]The 1960 Commercial Code of Ethiopia, Article 335(1) and the 2021 Commercial Code of Ethiopia, Article 278(1)

[18]The 1960 Commercial Code of Ethiopia, Article 335,336,337, the 2021 Commercial Code of Ethiopia, Article 278, 279, 280.

issued by companies[19]. Both classes of shares bestow legal rights such as income rights (right to payment of dividends), voting rights, and capital rights (right to the return of capital in case of a reduction of capital or on a winding-up) upon their holders[20]. In the case of dividend share, a company may repay, from profits or reserve funds, without reducing the capital, to shareholders the par value of their shares[21].

A company can issue all the above classes of shares in two forms. Article 334(1) stipulates that shares are registered shares or bearer shares as required by the shareholder, not by the company[22]. A shareholder is at freedom to choose among registered and bearer and has a right to convert it from one form to another[23]. But liberty has certain restrictions. If the form of shares is fixed by the memorandum of association or articles of association or when it is prohibited by the law, the liberty of the shareholders will be restricted[24].

When a shareholder of a bearer share wants to transfer its share to a third party, mere delivery of it is sufficient without further requirements. Article 340(1) provides that the assignment of a bearer share is by delivery and no other conditions related to registration[25]. Book IV of the Ethiopian commercial code which governs negotiable instruments is directly related to the concept of shares since share is a negotiable instrument. Article 721 of the commercial code used similar language provided under article 340(1). An instrument of bearer shall be transferred by the delivery of the instrument, and the holder establishes his right to the entitlement as expressed in the instrument by the sole fact of presentment of the said instrument[26]. The presumption is that the holder of the share is the real shareholder and will be allowed to take part in profit-sharing(dividend), redemption and participation in the general meeting[27]. But the presumption is subjected to rebuttal. Unless the contrary is proved, there is no ground to challenge the holder of the instrument, whether he/she is the real shareholder of the company[28]. As its name indicates, for registered shares transfer is only successful if and only if the assignment enters the registry. Ownership of a registered share is only proved upon the entry into the registry of the company[29]. Unlike bearer shares, ownership of the registered share is not automatic; taking some action is necessary to claim ownership over the registered share. Similarly, the law that governs negotiable instruments provides the requirement of entry into the registry when the specified name issues the instrument. Article 723 stipulates that:[30]

Instruments in a specified name may be transferred by the entry or the name of the transferee in the instrument and in the register held by the person issuing the said instrument. They may also be transferred by delivery of a new instrument in the name of the new holder. Such delivery shall be entered in the register.

[19]Assefa Aregay Sefara, Preferred Shares under Ethiopian Company Law. The Ignored Vehicles of Corporate Finance? 19, 64, Available on *https://heinonline.org*.

[20] Sefara, *supra* note 31.

[21] Commercial Code of Ethiopia, Article 337(1)

[22] Commercial Code of Ethiopia, Article 325(1)

[23] The 1960 Commercial Code of Ethiopia, Article 325(2), 325(3)

[24] The 1960 Commercial Code of Ethiopia, Article 325(2), 325(3)

[25]The 1960 Commercial Code of Ethiopia, Article 340(1)

[26]The 1960 Commercial Code of Ethiopia, Article 721(1), 721(2)

[27] The 1960 Commercial Code of Ethiopia, Article 340(2)

[28] The 1960 Commercial Code of Ethiopia, Article 340(2)

[29] Commercial Code of Ethiopia, Article 341

[30]Commercial Code of Ethiopia, Article 723

Accordingly, both the transferee and the transferor are expected to be registered to transfer ownership of a registered share. There is stringent formality followed by the law regarding the assignment of registered shares whereas the mere handing over of the instrument transfers ownership in the case of bearer share.

Article 343 of the code provides temporary warrants as a bearer and registered. These warrants are instruments that confer upon the holder of the instrument the right to buy a particular stock at a predetermined price within a specified time frame[31]. Nevertheless, to gain this right, the buyer of such warrants usually needs to make an upfront payment to the warrant's issuer. On exercise of such warrants, new shares are issued by the issuer company[32]. According to the Ethiopian share company law, temporary bearer warrants shall only be issued in respect of fully paid bearer shares.[33] When the bearer share is not fully paid, it will not have any effect[34]. The issued temporary registered warrants are issued in respect of bearer shares, they may only be transferred under the provisions relating to the assignment of debts[35]. A temporary warrant in respect of registered shares shall be registered and its transfer follows the same as that of the registered share[36].

In another way, the new commercial code of Ethiopia is reflecting some new positions regarding the type of shares that are allowed to be issued by share companies. Many of the provisions governing the classes of shares are the same as in the 1960 commercial code. However, it indicates that there should not be a new bearer share that will be issued by the Share Companies and the previous bearer share should be converted into the registered shares within three years[37]. This indicates that there are no more bearer share issues by share companies in the country. In another way, the code has given recognition to an incorporeal form of shares, which is a share created electronically by a financial institution licensed by the National Bank of Ethiopia, which is a reference to shares traded in stock markets.[38] Article 284 the new code says that A bearer instrument share shall be transferred by mere delivery of the document evidencing such share. No other requirement is needed. It adds that unless proved to the contrary, the holder of a bearer instrument share shall be regarded as an owner of such share for payment of dividends, redemption, and right to vote in a general meeting or benefiting from other rights arising out of the share.

From the above discussion, it is visible that the 1960 Ethiopian commercial code recognizes both registered and bearer shares to be issued by share companies. Similarly, the 2021 commercial code of Ethiopia adopted both forms of shares and uses similar rules that were used by the 1960s.[39]But this new code has tried to abolish the issuance of bearer shares while introducing a new type of share which is known as incorporeal share.

[31] Definition taken from The Economic Times, Available online on https://economictimes.indiatimes.com/ accessed at 23 August, 2023,

[32] Ibid

[33] Commercial Code of Ethiopia, Article 343(1)

[34] Commercial Code of Ethiopia, Article 343(1)

[35] Commercial Code of Ethiopia, Article 343(2)

[36] Commercial Code of Ethiopia, Article 343(3)

[37]The 2021 Commercial Code of Ethiopia, Article 267(1), (2), (3), (4)

[38] The 2021 Commercial Code of Ethiopia, Article 273

[39]The 2021 Commercial Code of The Federal Democratic Republic of Ethiopia, Article 267-280.

4. Bearer shares benefits and flop sides

The usage of bearer shares has different justifications. When a given legal system and companies permit the issuance of bearer shares, there are expected advantages from such an arrangement. The significant benefits of bearer shares will be discussed as follows.

Since business needs simplicity and speed, bearer share is the best device. The instrument is utilized for the provision of a fast, easy, cost-effective, and non-bureaucratic means of transferring ownership[40]. It is known for its quick and easy nature to transfer since only handing over the share certificate is sufficient enough to transfer ownership from a transferee to a transferor. Such types of shares avoid costs and bureaucracies such as the cost of producing newly registered share certificates, payments for using a notary and stamp duty, also transferring assets for the inheritance which can be imposed on registered shares[41].

Privacy is another critical advantage of bearer share. It facilitates privacy in such instances where corporate secrecy can help to restrict sensitive information from being accessed by inappropriate competitors and potentially hostile buyers and is also used to provide asset protection in securities deals where there is a demand for security by shareholders[42]. The level of anonymity of bearer shares is also responsible for securing privacy during certain corporate business transactions for areas involving company trademark secrets or intellectual property[43]. Shareholders may need not to disclose their shareholding in a given company and the number of shares the shareholder has for some other reason. In business, such type of secrecy may be taken as an essential instrument for success and support to win competitors in a given business environment. Not only for competition; also, but there may also be individuals who do not want their identity to be disclosed to the community because of their reputation or the nature of their profession. For instance, Priests and judges may need the anonymity of their identity, though legally not prohibited, morally or spiritually they do not need.

A bearer share is also used to provide asset protection in securities deals where there is a demand for security by financiers[44]. When there is a need to hide property and self from gangs and others, it is an excellent therapy to give protection for such individuals.

Though there are significant bearer share benefits, share the issuance of such types of shares has some dark sides.

The secrecy nature of bearer shares listed as a benefit can be taken as a significant danger it in another direction. Such type of privacy brought about by bearer shares makes locating shareholders impracticable, leading to difficulty communicating liquidation rights and dividends[45]. The residence of a shareholder is unknown whether he or she is available at the place at which the company makes communication can reach him or not. Or the medium of communication used by the company may not be accessible by the bearer shares holder. Accordingly, a lack of

[40] Andre Vanterpool, the fall of bearer shares and how to use them today: A Company Law comparison between the UK and some offshore jurisdictions, Institute of Advanced Legal Studies, School of Advanced Study University of London 7.

[41] OECD Report Behind the Corporate Veil using corporate entities for illicit purposes. Page 30.

[42] The Control of BVI-Issued Bearer Shares | British Virgin Islands Financial Services Commission,, https://www.bvifsc.vg/publications/control-bvi-issued-bearer-shares (last visited Dec 4, 2023).

[43] Andre Vanterpool, *supra* note 51 at 8.

[44] *Id.* at 8.

[45] Andre Vanterpool, *supra* note 51.

communication can be created between the company and the bearer shareholder, and this may result in affecting the rights and interests of the shareholder mainly.

Management difficulty is another risky side of issuing a bearer share. It is something related to the absence of communication which is discussed above. Essential information like the name and contact address in general of a bearer share is not known, it is challenging for the company to know who is holding the certificate of share and who should be contacted if required for administrative purposes. It also affects the corporate command by management due to difficulty in maintaining management control through the proxy system as an essential way of communicating between a corporation and the presently unknown is through publication[46].

Across the globe, especially today, bearer shares are closely connected with tax evasion. Evasion of taxes may happen as the anonymous nature of bearer shares contributes to the difficulty in collecting and assessing income, transferring shares, inheritance taxes, and also capital gains[47]. Tax evasion is one of the major reasons for the popularity of bearer shares nowadays and it is becoming a strong justification to abolish bearer shares in different countries and lobby others to do the same (this is the case, especially in countries with the same economic community). Let us see an example of tax evasion below.

A U.S. company called "A" established a company called "S" in Panama. "A" holds 95%of shares in "S" however, the shares have been issued as bearer shares. S commercially operates in the U.S. but the money is paid into its account in Panama. Panama has a territorial taxation system, which establishes that the income produced outside the territory of the Republic of Panama will not be taxed. Consequently, the earnings of A through the operation of S are almost free of taxation[48].

Moreover, because their cloudy structure can effectively obscure ownership, thereby providing maximum anonymity, it reduces the amount of information accessible to law enforcement and regulatory bodies in the event of an investigation[49]. As a consequence, bearer shares are vulnerable to misuse by the ethically challenged[50]. There is a growing body of evidence that the high level of anonymity provided by bearer shares makes them particularly susceptible to use for evil purposes such as money laundering, fraud, and terrorism[51]. It gives maximum anonymity and makes such corporate vehicles more susceptible to misuse for illicit purposes[52]. For example, companies issuing bearer shares are usually exempt from having to maintain a share register concerning those shares. This reduces the amount of information that the authorities may access in the event of an investigation[53]. Nowadays, because of such features, corporate vehicles are increasingly attractive to criminals to disguise their identity and distance themselves from their illicit assets.

Money laundering is the processing of assets generated by criminal activity to obscure the link between the funds and their illegal origins.

[46] *Id.*
[47] *Id.*
[48] José Maria Lezcano Navarro, *The Panamanian Bearer Shares; Is it Necesary to Eliminate Them?* Page 10.
[49] Navarro, *supra* note 59.
[50] *Id.*
[51] *Id.*
[52] Andre Vanterpool, *supra* note 51.
[53] Financial Action Task Force (FATF), *GUIDANCE ON TRANSPARENCY AND BENEFICIAL OWNERSHIP*, Page 42 (2014), Available on www.fatf-gafi.org.

At the same time, terrorism financing involves raising funds to support terrorist activities[54]. While these two phenomena differ in many ways, they often exploit the same vulnerabilities in financial systems that allow for an inappropriate level of anonymity and capacity in carrying out transactions[55]. The harm that money laundering and or terrorist financing may cause includes the effect of the underlying criminal and terrorist activity on financial systems and institutions, as well as the economy and society more generally[56]. It may consist of short- or long-term consequences in nature and also relate to populations, specific communities, the business environment, or national or international interests, as well as the reputation and attractiveness of a country's financial sector [57].

Corporate vehicles may also be misused in bribery or corruption transactions. According to the financial action task force, shell companies and nominees are frequently misused by bribe donors and recipients to facilitate their illicit transactions[58]. For example, French oil company *Elf Aquitaine* was alleged to have funneled bribes to Gabon President El Hadj Omar Bongo through his Swiss bank accounts opened in the names of offshore shell corporations[59]. In another way, money earned through corruption can enter into the market because of the secret nature of bearer shares. Corrupted officials can enjoy the secrecy found in bearer shares and invest the money that they have earned through corruption. It may have the power to motivate corrupted officials to further similar unlawful acts and make them benefit from malicious activity.

The existence of bearer shares may also make a corporate vehicle to hide and shield assets from creditors and other claimants, such as spouses and heirs[60]. The obscurity provided by bearer shares can be exploited to conceal the existence or ownership of assets to keep them out of the reach of creditors and other claimants and pose a problem in some bankruptcy cases[61].

Another danger that is attached to the bearer's share is that it might be stolen or lost. Since the shareholder's name is not indicated on the share and its transferability is upon possessing the certificate, it is very exposed to being stolen or lost.

So, it is evident that bearer shares have benefits, but there are dangerous fallouts attached to it.

5. Bearer shares in Ethiopia: Resort to Abolish?

Share Company is one of the types of business organizations recognized under the Ethiopian Commercial Code. Nowadays, a considerable number of Share Companies are being formed. These companies are permitted by law to engage in different commercial activities, including but not limited to essential activities such as Banking and Insurance activities. The share companies in Ethiopia are allowed to issue both bearer and registered shares when

[54] IMF and the Fight Against Money Laundering and the Financing of Terrorism, *https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism* (last visited Dec 7, 2020). Page 1

[55] *Id.*

[56] Financial Action Task Force (FATF), *National Money Laundering and Terrorist Financing Risk Assessment*, Page 7 (2013).

[57] Financial Action Task Force (FATF), *supra* note 67.

[58] Financial Action Task Force (FATF), *supra* note 64 at 37.

[59] Financial Action Task Force (FATF), *supra* note 64.

[60] *Id.* at 35.

[61] Financial Action Task Force (FATF), *supra* note 64.

offering shares to the public unless otherwise there may be restrictions.[62] The issuance of bearer shares can be restricted in two scenarios. The first is that a memorandum of association or articles of association of a company may ban the issuance of bearer shares and opt only for the registered one. The second situation is when issuing a bearer share is prohibited by law. This law may be the law that applies to a specific business area. There are laws of financial institutions that are indirectly or impliedly banning bearer shares without precisely stating the term bearer shares. One of the rules under which bearer shares are prohibited is the banking business proclamation of Ethiopia.

Article 10 (2) of the proclamation stipulates that every bank shall keep a register of shares and shall show the names and voting rights of shareholders, and it should be open to the public without charge.[63] From this provision, it may be argued that providing the name of a shareholder refers to registered shares. Sub article 3 of the same article added that when the share is transferred to an influential shareholder,[64] such transfer shall be approved by the National Bank before such transfer is recorded in the register of shares.[65] This sub-article is also touching upon the existence of registration. The most important provision related to bearer shares is sub-article 4 of article 10 of the proclamation. According to this sub-article, any type of transfer of shares should be recorded and if not recorded such type of transfer is null and void.[66] Transfer by delivery is the character of bearer shares and such type of shares and transfer shall be null and void under the banking proclamation of Ethiopia.

Likewise share companies engaging in insurance businesses are prohibited from issuing a bearer share. Precisely the same language used under the above banking business proclamation is used for the insurance business. Article 11(3) of the Insurance business proclamation of Ethiopia provides that, a transfer of shares not registered is null and void[67]. The proclamation added any transfer of shares, which is recorded in the register, shall be binding on both the transferor and transferee and provide conclusive evidence of the transaction and transfer of title and the registry should be disclosed to the public for inspection[68]. These provisions have indirectly banned the issuance of bearer shares by insurance companies since registering every transfer and revealing it to the public is mandatory.

Again, the Micro-financing business proclamation of Ethiopia stipulated the requirement of registration of shares and

[62] The 1960 Commercial Code of Ethiopia, Article 325(1)

[63] Banking Business Proclamation of The Federal Democratic Republic of Ethiopia, Proclamation No. 592/2008, A Proclamation to Provide for Banking business, Published on Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 14th Year No. 57 Addis Ababa 25th August, 2008 (Referred as Banking Business Proclamation hereafter), Article 10(2), Article 10(5)

[64] For the banking business proclamation of Ethiopia, Influential shareholder means, a person who holds directly or indirectly two percent or more of the total subscribed capital of a bank (See article 2 Sub article 11of the Proclamation)

[65] Banking Business Proclamation, Article 10(3)

[66] Banking Business Proclamation, Article 10(4)

[67] Insurance Business Proclamation of The Federal Democratic Republic of Ethiopia, Proclamation No. 746/2012, A Proclamation to Provide for Insurance Business, Published on Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 18th Year No. 57 Addis Ababa 22nd August, 2012 (Referred as Insurance Business Proclamation hereafter), Article 11(3)

[68] Insurance Business Proclamation, Cumulative reading of Article 11(1) and 11(5)

shareholders. According to this proclamation, every micro-financing institution shall maintain a register that shall show the list of shareholders with voting rights, and any transfer of shares, which is recorded in the register, shall have legal effect.[69] That means the non-registered transfer of shares does not have a legal meaning.

The above laws indicate that the non-financial share companies of Ethiopia are impliedly not allowed to issue bearer shares. However, the word bearer is not directly stated in the provisions since the requirement for the transfer of shares is stringent. The reason why the legislature is incredibly restricting the issuance of bearer shares in banking, Insurance, and Microfinancing institutions is that the sectors are essential for the country's financial and economic stability.

The question that can be raised at this juncture is that what about non-financial share companies shares? Does the law prohibit them from issuing a bearer share or is it left to these company's memos and articles of association?

Unlike financial share companies, non-financial share companies do not have a specific proclamation that governs the issuance of shares. Instead, they have to adhere to the provisions of the commercial code. Accordingly, the 1960 commercial code indicates that determining the forms of shares is left to the company's memorandum and article of association. However, the new commercial code has banned the issuance of bearer shares.

When share companies issue bearer shares, certain benefits can be acquired. One of the benefits is its quick transferability nature. Since business is a matter of time and speed, bearer shares can play a pivotal role in making a business environment smooth and comfortable. Ownership of such type of share can simply be acquired through transfer of the bearer shares certificate without further processing of change of name and registration. So, bearer share will assist the Ethiopian business environment by creating a conducive and attractive market. The existence of bearer shares is another advantage in terms of avoiding registration costs and unnecessary bureaucracies. The cost of registration is not there; the transferor and transferee of shares cannot worry about how much to incur for the change of name and other requirements. Not only cost but bureaucracy is a very challenging matter in different organizations. There is no easy-going in Ethiopia regarding business-related issues or others. Company-related issues such as getting a business license and renewal of it are fraught with a lot of bureaucracy, lack of efficiency, and time-consuming processes in Ethiopia today.[70] The same complex bureaucratic issues may happen for the change and registry of the name of shareholders. Accordingly, bearer shares enable the shareholder to avoid such difficulty and help them manage their time and resources.

Issuance of bearer shares may have some advantages in the capital market. They increase liquidity since they can be easily transferred, without complicated procedures for filling out documents and registering formality interfering with the quick action of the securities market. They can also attract foreign investment by

[69] Micro-financing business Proclamation of The Federal Democratic Republic of Ethiopia, Proclamation No.626 /2009, A Micro-financing Business Proclamation, Published on Federal Negarit Gazeta of The Federal Democratic Republic of Ethiopia, 15th Year No.33 ADDIS ABABA 12th May, 2009, Article 10 (2)

[70] Company Registration in Ethiopia, Research Team Amha Bekele and Zemedeneh Negatu, D.C.PSD Hub Publication No.6, August 2005, Page 98

refusing to register them to simplify many technical and administrative procedures that follow the trail of their owners and open them to a whole new layer of potential clients.

Even though bearer shares can supply benefits to the improvement of markets by avoiding some challenges, there are several disadvantages that the Ethiopian government may face by maintaining the issuance of bearer shares by companies.

The first problem with the bearer share is tax evasion. The tax collection system of Ethiopia is poor and disorganized. There is no powerful institution equipped with modern technologies, experts, and legal framework that can enable one to collect taxes properly. This loophole creates a golden opportunity and leads the country to lose a massive amount of money which ought to be collected from the taxation of businesses. Recently, the Ethiopian Ministry of Revenue officially charged 65 people out of the 105 placed under custody suspected of tax fraud and evasion activities.[71] The ministry has taken measures on a total of 135 companies concerning tax fraud and evasion amounting to 14 billion birr.[72] It was disclosed that a thorough investigation and assessment into the tax payment history of these companies, dating back five years, has revealed some interesting findings and also revealed that the suspected organizations had been engaged in specific businesses such as manufacturing, import and export, distribution, wholesaling, and construction.[73] From the investigation, one can conclude that evasion is a virus that is hindering a country's revenue. Such a situation will add fuel to the existing problem since the nature of bearer shares is convenient to evade tax.

Globally, banning bearer shares helps to recover billions of evaded taxes. Many countries are abolishing the application of bearer shares to enhance the transparency of a company's system for tax purposes. For instance, about 90% of Global Forum members on transparency and exchange of information for tax purposes do not permit the issuance of bearer shares or have in place arrangements for identifying the owners.[74] As a result, over 40 jurisdictions have either abolished bearer shares or introduced adequate custodial or non-custodial arrangements for identifying their owners since 2009.[75] The abolishment is to reduce the tax evasion scenario that can be created because of the issuance of bearer shares. From this, we can understand that there is a strong link between tax evasion and bearer share globally. In the case of Ethiopia, since the number of share companies is increasing and the country in moving towards joining the World Trade Organization, allowing the issuance of bearer shares may lead the country to lose revenues. There is no empirical evidence that shows the amount of tax evaded because of the existence of bearer share in Ethiopia. But this does not mean that there is no tax evaded. The experience of other countries even with advanced technologies and

[71] The reporter Magazine, Reported by Yonas Abiye, March 2019, Available on https://www.thereporterethiopia.com/article/ministry-charges-65-business-organizations-tax-fraud-evasion Accessed on August 2023.

[72] Ibid

[73] Ibid

[74]Report of Global Forum members on transparency and exchange of information for tax purposes, Transparency and Exchange of Information for Tax Purposes, Multilateral Co-operation Changing the World, 10th ANNIVERSARY REPORT, OECD, Available on https://www.oecd.org/tax/10th-anniversary-global-forum-on-tax-transparency.htm accessed at August 2023.

[75] Ibid

expertise in tax collection area shows that there is tax evasion by bearer shares owners. Maintaining the provision that allows bearer shares issuance may negatively affect the country's revenue.

Managing bearer shares is a difficult task for share companies in Ethiopia. There is no advanced technology that will facilitate communication and other supportive means through which companies in the country can communicate to their unknown shareholders who are holding bearer shares in case needed. The whereabouts of the shareholders, their identity, and the number of shares they have may not be known. Such unclarity can pose a difficulty for the administration of the companies since it is easily transferable. Traditionally, in Ethiopia call to the company's shareholders can be carried out by using newspapers which will only cover a few major cities, and through broadcast media. These means of communication are not fully effective since bearer shareholders might not get access to information through the above means of communication because of barriers attributable to the country's underdeveloped means of communication or to the bearer shareholder itself. But for registered shares, there is no secrecy of shareholders as to their name, exact address, and other necessary information needed. The problem of management can be more difficult when the securities market is established in Ethiopia. Though there is no securities market in Ethiopia today, it is inevitable to set it in the future. One thing is that the issuance of bearer shares may help the securities market, but since a single share can be transferable to different individuals at different times, managing and communicating with these shareholders will be cumbersome. As a result, for countries like Ethiopia, issuing a registered share is more manageable than bearer shares since the required infrastructures are not developed.

There is a possibility that bearer shares may pose a problem of money laundering and terrorist funding to Ethiopia. According to the OECD, money laundering can, and does, occur practically in all jurisdictions.[76] Money launderers, however, prefer using jurisdictions that enable them to avoid detection through strict secrecy laws, lax regulatory and supervisory regimes, and the availability of corporate vehicles with impenetrable anonymity features in particular companies attract money launderers to these jurisdictions.[77] Terrorist funding might be employed by using the secret nature of bearer shares. According to the IMF, these illicit activities can discourage foreign investment and distort international capital flows.[78] They may also result in welfare losses, draining resources from more productive economic activities, and even have destabilizing effects on other countries. [79]In an increasingly interconnected world, the harm done by these activities is global. Money launderers and terrorist financiers exploit the complexity inherent in the global financial system as well as differences between national laws; jurisdictions with weak or ineffective controls are especially attractive for moving funds undetected.[80] Belgium had taken measures aimed at preventing the use of legal persons and arrangements for money laundering and terrorist funding purposes.[81] Among these, it is

[76] OECD Report, supra note 58, Page 34
[77] Ibid
[78] The IMF Fact sheet, supra note 71,
[79] Ibid
[80] The IMF Fact sheet, supra note 71
[81] FATF (2015), "Legal persons and arrangements" in Anti-money laundering and counterterrorist financing measures- Belgium,Fourth Round Mutual Evaluation

essential to note in particular the elimination of bearer shares, which became fully effective on 1 January 2014. To reduce these illicit acts, the Belgium government abolished bearer shares.[82]
Money laundering and terrorist financing are among the growing criminal activities in the Horn of Africa in general and in Ethiopia, specifically. Statistical reports from the former Ministry of Justice (today's Office of Attorney General) revealed that between 2009-2010 and 2011-2012, 126 cases of terrorism financing had been investigated and mostly prosecuted. There were also about 141 cases of money laundering in the same year.[83] This shows that this criminal act of Money laundering and terrorist funding is something that requires due attention. Letting bearer shares to be issued in the future may attract illicit acts in the country since the company's business is increasing from time to time and there is a possibility of an increase of foreign companies that will enter into the country in one way or another.
Bribe donors and recipients may misuse companies to facilitate their illicit transactions. To hide their illegal activities, companies may enter into corruption arrangements with concerned government officials. This will lead to the continuation of unlawful acts (e.g. tax evasion) by the company and bribery to the officials. Furthermore, the presence of bearer shares may create an opportunity for money earned through corruption to enter into business. This is the case when government officials engage in corruption activities and become shareholders by investing the money made by bribery. A bearer share is the best device for such officials to hide their identity from the public or their relationship with the company is unknown to the public. This is because there is a strong relationship concerning illegal activity and the absence of transparency in the control and ownership of companies. The World Bank-UN Office for Drugs and Crime Stolen Asset Recovery Initiative conveyed that a large number of the cases of corruption investigated include using corporate vehicles to obscure the actual funding source and beneficial ownership.[84] From these cases, the overall takings of corruption amounted to some 56.4 billion dollars.[85]
The recent best example of this matter of corruption is the Panama Paper Scandal. The paper provided that abuse of anonymous shell companies is among the reasons why many countries are facing challenges today.[86] The investigation started with 11.5 million documents that were leaked from Panamanian law firm Mossack Fonseca.[87] Copies of contracts, bank transactions, and emails showed how the firm had sold and serviced anonymous offshore companies around the world.[88] The results were shocking, implicating 12 national leaders, celebrities, and other public figures in a dark web of global financial secrecy, prompting public outrage and formal

Report, FATF. www.fatfgafi.org/topics/mutualevaluations/documents/mer-belgium-2015, Page 131
[82] Ibid
[83] Tu'emay Aregawi Desta, "The Anti-Money Laundering and Countering Terrorist Financing Regime in Ethiopia," Center on Global Counterterrorism Cooperation, February 2013, Page 5
[84] 'Barriers to Asset Recovery', 2011: http://star.worldbank.org/star/publication/barriers-asset-recovery accessed August 2023
[85] Ibid
[86] Panama papers four years on: anonymous companies and global wealth, 09 April 2020, Available on https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-'global-wealth# accessed on August 2023
[87] Ibid
[88] Ibid

inquiries.[89]Different government officials were sentenced to imprisonment after the leakage for corruption or bribery.[90]By 2019, the Panama Papers data on real owners of companies had helped governments recover over US$1.2 billion in assets through seizures, fines, and audits.[91]These things have happened under the shadow of the secret identity of shareholders which is arranged by bearer shares nature. This shows that recognizing bearer shares in a given company has the power to create a golden opportunity for corrupted officials to negotiate with companies by using their governmental authority and help them to benefit from their evil actions by hiding their identity.

In Ethiopia, the extent of corruption is very high, starting from lower officials to high-level officials. It ranges from petty to grand and acts as an impediment to its development and further aggravating poverty. Lack of accountability and transparency, low levels of democratic culture and tradition, lack of clear regulations, low level of institutional control, absence of punishment, and others are some of the factors that contribute to corruption thriving in the country.[92] According to the Transparency International Report 2019, Ethiopia ranks 96 out of 180 countries in the Corruption Perceptions Index by scoring 37 points.[93] This shows that there is a high level of corruption in the country. No research and concrete evidence show the corruption act related to bearer shares so far in Ethiopia since due attention has not been given to the matter. However, the level of corruption in the country and the suitable nature of bearer shares possibly allow the corrupted officials to become shareholders by investing the money acquired through corruption and getting a profit. Not only this but also such type of company's share can help these individuals to hide their identity from the public and criminal investigation. With the increasing number of share companies and foreign companies entering the country, the possibility of committing act corruption by using a bearer share as a shield is feared to increase. So, the existence of bearer shares may contribute to the commission of corruption. The experience of other countries shows the same.

The risk of loss or theft is a severe disadvantage of bearer shares. Since it is easily transferable and the name of a shareholder is not indicated on it, once lost or stolen it is challenging to recover. This may pose a dilemma as to whether the holder of the instrument is the real and the face shareholder. Recovering the stolen or lost bearer share may be difficult in developed countries themselves let alone underdeveloped countries like Ethiopia in which the system of police investigation is underdeveloped or in which investigation is conducted traditionally.

When we see the experience of countries of the world, most of them are reforming their company laws since its drawbacks are creating

[89] Ibid

[90] For example, In 2018, for example, the former Prime Minister of Pakistan Nawaz Sharif was sentenced to 10 years in prison and fined US$10.6 million on corruption charges following the revelations that his children were linked to offshore companies that owned luxury apartments in London. That same year, high-level public officials and executives were arrested in Ecuador after leaked documents exposed their links to the Petro Ecuador bribery scheme. (Received from: https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-‘global-wealth#)

[91] Ibid

[92] Kaunain Rahman with contribution from: Abdulatif Idris, Overview of corruption and anti-corruption in Ethiopia, U4 Anti-Corruption Helpdesk, October 2018, Page 4

[93] Transparency International Report, 2019, Available on www.transparency.org/cpi Accessed on August 2020, Page 3

many problems for the bearer share and the benefits of bearer share. So, different concerned organizations are recommending states obliterate bearer shares or pave the way on how to regulate them. In the USA, the registered share is only recognized. Because of its difficulties, corporation laws in the United States generally provide for only registered equity shares.[94] In Switzerland, as of 1 January 2020, Swiss companies that so far can issue bearer shares under their articles of association will no longer be able to do so.[95] Any company able to issue bearer shares should display to amend their articles of association during the transition period leading up to 1 July 2022.[96] If not done by this deadline, any other modifications to the articles of association will be banned by the commercial register.[97] At the time of the amendment, the issued bearer shares will also be changed into registered shares.[98]

The other Alternative: Custodian

In most jurisdictions, bearer-share statutes have generally been undergoing a process of reform such as immobilization and employment of custodians. The immobilization of bearer shares is another alternative to abolishing it. This practice of immobilization is believed to reduce the misuse of bearer shares to a certain extent and is also practiced by countries such as the British Virgin Islands, Cayman Islands, and Panama.[99] Immobilization is restricted to avoid its mobility nature share through the custodian. The holders of bearer shares in existing companies are required to employ a custodian.[100] The custodian can be a registered agent, bank, or trust company.[101] The objective of introducing this requirement is to establish a record where the details of the person who deposited the bearer shares are kept.[102] This avoids the anonymity of identity, and the custodian should register the name of the shareholder. It is believed that by immobilizing shares, tax evasion and other illicit activities can be eliminated.

The use of custodians for bearer shares offers benefits

In the first place, recording who owns what assets makes things clearer. Custodians keep records of who truly owns the bearer shares and track all trades and the public does not know who holds the share; it is only known if needed to the buyer when they change hands. A report from the International Organization of Securities Commissions says custodians play an important role. Providing accurate data on who owns securities improves transparency for financial markets.[103]

Secondly, custodians can assist with avoiding risks linked to unlawful acts. The verification procedures employed by custodians may help prevent illegal activities, for instance, money laundering and tax evasion related to bearer shares. Financial action task forces stresses

[94] Gerald M. Amero, Corporations Bearer Shares in the United States Civil Law Contrast Connecticut and Montana Statutes Authorizing Issuance, 48 Cornell L. Rev. (1962) Available at: http://scholarship.law.cornell.edu/clr/vol48/iss1/5, Page 174

[95] Lukas Glanzmann and Philip Spoerlé, Baker McKenzie's Corporate Finance Practice Group in Zurich, De facto abolition of bearer shares and new criminal sanctions for board members and shareholders of Swiss companies, International Briefing, Butterworths Journal of International Banking and Financial Law, November 2019, Page 709

[96] Ibid

[97] Ibid

[98] Ibid

[99] Andre Vanterpool, supra note 57

[100] Ibid

[101] Ibid

[102] Ibid

[103] International Organization of Securities Commissions (IOSCO), "Custodian and Third-Party Broker Relationships, 2012

robust customer due diligence is vital, facilitated by custodians, mitigating money laundering risks within the financial sector.[104]

Additionally, custodians are important for following rules and government oversight. They help people follow regulations and give information to officials who monitor things. A report by the Institute of International Finance says custodians play a key role in assisting companies with regulation compliance and reporting requirements.[105]

Lastly, custodians build confidence and trust in investors. They guards investors' assets with security measures. Moreover, custodians assist in lowering the dangers tied to owning securities. As a result, they add to the trust in the system. The World Bank Group highlights this by pointing out that custodians offer safe custody services that nurture trust. Their task is to limit dangers for investors who hold securities.

Some jurisdictions have rules to control the transaction of bearer shares. Often, they need a third party called custodians to be a part of it. Custodians work between the person who holds the bearer shares and the firm that gives them, keeping the share papers for the holder. Their main job is to make sure that bearer share trades are honest and legal. This means they must check who the holder is, do checks to stop crime and keep precise records of who owns the shares.[106]

The British Virgin Island Companies Act 2004, in its Part III, Division 5 immobilized bearer shares.[107] The legislation addresses all the aspects regarding the immobilization of bearer shares; *inter alia*, those who can be considered a custodian, duties and obligations of the custodian, and beneficial owner of the bearer shares. The amended Company Law of Cayman Island in 2001 restricted the circulation of bearer shares through establishing custodians.[108] Panama also Immobilized its bearer shares after intense debate and providing different proposals.[109]

OECD and other international institutions have put pressure on countries to avoid the issuing of bearer shares. As a result, it looks like the end of the bearer share. Financial Action Task Force (FATF) provided recommendation 24, which requires countries to take measures to prevent the misuse of bearer shares and bearer share warrants.[110] The Interpretive note to the recommendation provides that the misuse of bearer shares should be avoided by applying one or more mechanisms. There are mechanisms such as prohibiting them and/or converting them into registered shares or share warrants and/or immobilizing them by requiring them to be held with a regulated financial institution or professional intermediary and/or requiring shareholders with a controlling interest to notify the company, and the company to record their identity.[111]

Thus, using a custodian system for bearer shares can help keep the good parts of bearer shares and deal with the risks. Instead of getting rid of bearer shares completely, regulators can think about making strict custodian rules to

[104] The Financial Action Task Force (FATF) Customer Due Diligence for Banks", 2001

[105] Institute of International Finance (IIF) "Securities Custody: Market Developments and Financial Stability Considerations", 2017

[106] Swiss Federal Act on Intermediated Securities (FISA) - https://www.admin.ch/opc/en/classified-compilation/20123565/index.html (Accessed on June 2023)

[107] British Virgin Island Companies Act 2004, in its Part III, Division 5, articles 68 and 70

[108] Andre Vanterpool, supra note 57

[109] Ibid

[110] Financial Action Taskforce Supra note 70, Page 10

[111] Ibid, Page 17

make sure that transactions with bearer shares are honest and safe. The custodian of bearer shares can be a good way to deal with worries about transparency, accountability, and security in bearer share transactions. By using a custodian system, regulators can be proactive in dealing with the risks of bearer shares while preserving the privacy and anonymity afforded by bearer shares. This careful way of doing things can help keep the financial system healthy by balancing new ideas with accountability, which can help investors and the economy as a whole. When such a measure is employed, it is possible to avoid the dark side of bearer share and enjoy the positive side of such type of share.

Generally, it can be understood that globally there is a reform towards bearer share from every jurisdiction since it is opening a door for illicit activities and other drawbacks and its effect is cross-boundary. In Ethiopia, the 1960 commercial code recognizes the issuance of bearer shares by share companies. Subsequently issued proclamations of financial institutions require registration transfer of shares to have a legal effect without making a clear indication about bearer share. The newly issued 2021 commercial code provides the abolishment of the issuance of bearer shares though bearer transfer of instruments and incorporeal shares are recognized. Unlike other jurisdictions, Ethiopian law does not recognize the concept of immobilizing or keeping the custodian bearer shares. However, Capital Market Proclamation no.1248/2021 has introduced the issue of custodians to keep customers' securities.[112] So, this indicates that it is logical to add the keeping of bearer shares by the custodians by giving recognition to bearer shares. The recognition of such bearer shares is also important for the recently established capital market in Ethiopia since it can easily be transacted without a complex process of transfer. To increase the number of foreign companies in Ethiopia through foreign direct investment and to promote individuals who do not want to disclose their identity because of their lawful and acceptable personal reasons to buy a share.

6. Conclusion

From the above discussion, it can be concluded that the issuance of bearer shares has both advantages and disadvantages. Privacy and the absence of registration costs and bureaucracy are among the benefits of bearer shares. The advantage of privacy is the problem of inciting the owner to engage in some illicit criminal activities such as money laundering and terrorist funding, corruption, tax evasion, and other similar activities by taking advantage of the lack of transparency. The possibility of being stolen and loss and difficulty of administration are among the drawbacks of bearer shares.

Controlling such shares is becoming difficult because of its complex nature and convenience it for some criminal activities. Some jurisdictions are abolishing bearer shares from their company laws while others are innovating ideas to control them by compromising obscurity to some extent. Also, an international organization such as OECD, World Bank, and IMF are recommending and putting countries under pressure to make a reform towards bearer share management. Countries like the USA allow only the issuance of bearer shares from

[112]Capital Market Proclamation, Proclamation No. 1248/2021, Published on the Federal Negarit Gazette of The Federal Democratic Republic of Ethiopia, 27th Year No.33 ADDIS ABABA, 23rd July, 2021, Article 2(16).

the very beginning while most European countries previously gave recognition for bearer shares started to see other options or banning it. Some dematerialize, while others immobilize the bearer shares by amending their company laws to cope with the existing situation of tackling the danger born.

In Ethiopia, the 1960 Commercial Code recognizes the issuance of bearer shares though there are some indications under the proclamations of financial institutions. Even these proclamations do not directly avoid the issuance of bearer shares by share companies. Instead, they provide that all shares and its transfer should be registered. That means, that when the share is registered at the beginning and its transfer is registered as well, there is no unregistered share. Impliedly, bearer share is eliminated from banking, Insurance, and Microfinance Institutions share companies. For non-financial share companies, the new commercial code of Ethiopia has eliminated bearer shares and has given some period for the existing bearer shares to be converted to registered shares.

The writer believes the introduction of the third option which is keeping with the custodian is the best option instead of simply keeping it or abolishing it. Issuance of bearer shares has some benefits for the development of company business and the securities market of a country. At the same time, there are some shortcomings of such a type of share. So, to balance the two dimensions, allowing the issuance of bearer shares and keeling them with custodians is the smart way of enjoying the benefits and closing doors for the dark sides.

DOI: https://doi.org/10.20372/wujl.v1i2.1075
ISSN: 2226-7522 (Print) and 3005-7612 (Online)
Wallaga University Journal of Law
WUJL, March- April. 2024, 1(2), 51-71
Home Page: https://journals.wgu.edu.et

Original Article

Constitutionality of Treating Addis Ababa as a Regional State and Its Effect on Jurisdictions of Oromia Regional State Courts

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Abstract

Since 1995, constitutionally Ethiopia has been experiencing a federal form of government. The FDRE Constitution has recognized nine regional states within federations and leaves room for the formation of new regional states (internal secession). The FDRE constitution also identified the criteria and rules to be followed to form new regional states. However, there are circumstances in which the House of People's Representatives treats Addis Ababa as an independent regional state contravening the rules and criteria incorporated within the FDRE constitution. This writing tries to assess the constitutionality of treating Addis Ababa as a regional state and its effect on the jurisdiction of Oromia regional state courts. Treating Addis Ababa as a regional state has adverse effects since it reduces the jurisdiction of regional courts in general and that of the Oromia regional state in particular. To accomplish this task, the writer utilized qualitative methodology in which both the laws of the House of People's Representatives and the decisions of federal Supreme Court cassations have been analyzed to forward possible remedies. Since treating Addis Ababa as a regional state is unconstitutional, the writer recommended quashing the laws of the House of People's Representatives and decisions of federal Supreme Court cassation that treat Addis Ababa as a regional state before the House of Federation.

Article Information

Article History:
Received: 10-12-2023
Revised: 18-02-2024
Accepted: 05-03-2024

Keywords:
FDRE *Constitution, Addis Ababa, Federal Supreme Court Cassation, Oromia Regional State Courts*

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1. Introduction

Federalism is a system of government in which, there is a division of powers between tiers of government: the federal at the center and other sub-national states that are, also independent each of other in their respective jurisdiction and autonomous from one another. Such distributions of powers are prescribed within a constitution, as one of them would not take the other's jurisdiction discretionary. These distributions of powers are not only attributable to the federal and sub-national governments but also to the executive, legislative, and judiciary. Different countries throughout the world are now becoming federal states for different purposes: to protect against the central state authority by securing immunity and non-domination for minority groups; to accommodate minority nations who aspire to self-determination and preservations of their culture, language, or religion; to increase opportunity for citizens participation in public decision making and resource allocations, etc. Ethiopia is not an exception to this fact and starting from 1995 Ethiopia has been exercising a full-fledged form of federalism.

The federation of Ethiopia was formed from the federal government as the center and nine regional states horizontally based on settlement patterns, languages, identity, and consent. That means; the Federal Democratic Republic of Ethiopia comprises the Federal government and the state members.[1] State members are members included under article 47/1 of the Federal Democratic Republic of Ethiopia (hereinafter abbreviated as FDRE) constitution. However, it does not close the door for the creation of a new state in the future for the Nations, Nationalities, and peoples of Ethiopia. The FDRE constitution also sets criteria and procedures for the formation of new regional states within Ethiopian federations. Since the nature of the Constitution is general, it requires subsidiary laws that are specific to enforce matters included within the Constitution in a general manner. Those subsidiary laws are expected to be in light of the principles and values FDRE constitution to enforce the latter. If they contravene the FDRE constitution, they are null and void.[2]

This writing; therefore, dwells on assessing the constitutionality of treating Addis Ababa as a regional state by the House of People's Representatives[3] and the decisions of federal supreme court cassation and its effect on the jurisdiction of Oromia regional state courts. To this end, this writing has different sections that talk about the general framework of how states are formed under the FDRE constitution, a specific description of the Oromia regional state, the status of Addis Ababa under the FDRE constitution, and the structure of the Ethiopian court system, the laws of the house of people's representatives that treat Addis Ababa as regional state, practical decisions of federal Supreme Court cassation and concluding remarks.

1. Methodology

The methodological approach of this article was Qualitative research methodology supported by secondary sources. That means the qualitative approach enables the researcher to be flexible enough for data collection and

[1]The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta , Year, 1 No. 1 August, 1995.

[2]Ibid, Article 9(1).

[3]For instance proclamation no 251/2000, 943/2016 and 1234/2021

analysis. This methodology aimed to achieve an in-depth understanding of the *constitutionality of treating Addis Ababa as a regional state and its effect on jurisdictions of Oromia regional state courts.*

2. State Formations Under the FDRE Constitution

When we examine the formation of the Ethiopian Federation, it is from the federal government at the center and nine regional states at regional levels. There are arguments about how the Ethiopian federations are formed; some say by way of holding together[4] and others say by way of coming together.[5] In this piece of writing, the writer is not interested in ways of forming a federation instead to indicate a sub-national state on one hand and the federal government at the center is building bricks to the Ethiopian federation. After having the above concepts for the formation of the Ethiopian Federation, it is better to discuss how regional states are formed within the FDRE constitution. The Federal Democratic Republic of Ethiopia shall comprise states and those states are delimited based on settlement patterns, language, identity, and consent of the people concerned.[6] Those factors that demarcate regional states are both objective and subjective. It is authoritative to discuss how the drafter of the FDRE Constitution formed a regional state. There were two arguments; the first argument was forming regional states based on geography and the second argument was forming regional states based on language and identity.[7] The first argument supports mostly people who were supporters of a unitary system of government and promoters of one language, one culture, etc. The second argument supporters were mostly the representatives of EPRDF (Ethiopian People's Revolutionary Democratic Front), based on geography to form a regional state was only for administration by dividing land not for the protection of nations, nationalities, and peoples which is directly the same with previous historical injustice.[8] They strongly affirmed that the geographical basis for state formation is undistinguishable from the non-answering of self-governance/self-determination for which nations, nationalities, and peoples have been fighting for more than a century. The criteria for state formation incorporated within Article 47 of the Constitution to form a state were primarily meant for the exercise of rights enshrined within Article 39 of the FDRE Constitution. It is debatable if the regional states formed within the FDRE Constitution were purely based on language and identities. Owing to those facts, the FDRE constitution has established nine regional states under article 47/1, and currently, three regions including the Sidama *regional state* internally have seceded from Southern Nations, Nationalities, and Peoples regional states.

However, the FDRE constitution did not close a room for the creation of a new regional state within Ethiopian federations. This implies that

[4]TsegayeRegassa, *Ethnic federalism and the right to self-determination as a constitutional legal solution to problems of multi ethnic societies-the case of Ethiopia*, (LLM thesis) University of Amsterdam, (2001) unpublished.

[5]Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Revised edition, Forum of Federations, an international Network on Federalism, (2007) Wolf Legal Publishers, And Nijmegen: the Netherlands

[6] Supra note 1, Article 46 1/and 2

[7] አስራት አብርሃም፣የሕገ መንግሥቱ ፈረሰኞች፣ 2009 ዓ.ም፤ አዲስ አበባ ገጽ78-79

[8] Ibid.

nations; nationalities and peoples within nine regional states have a right to form their regional state at any time.[9] Those empowered groups to form new states are a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identity, a common psychological makeup, and who inhabit an identifiable, predominantly contiguous territory.[10] For instance, recently the Sidama nationalities of Southern nations, nationalities, and peoples regions have formed their regional state. What is expected from those nations, nationalities, and peoples to form a new state is to follow procedures and conditions listed under Article 47/3 of the FDRE Constitution. Matters included under Article 39 are also either directly or indirectly applicable to the formation of a state since it is one of the components of the right of self-determination. Based on those facts, it is not possible for people or residents of Addis Ababa to form new regional states or to claim independent regional states. Because; residents of Addis Ababa do not fulfill the criteria included under articles 47/2/ and 39/5 of the FDRE Constitution. For the formation of new regional states in Ethiopian federations in the future, the criteria included under articles 47/2 and 39/5 of the FDRE Constitutions are cumulative requirements. That means; those two provisions of the FDRE Constitution support each other to be pragmatic on the ground within the essence of the FDRE Constitution.

3. Oromia Regional State

Oromia is the homeland of the Oromo people. Its name is derived from its people or for the people belonging to the lowland eastern Cushitic linguistic family.[11] Trace back to history, the Oromo nation has its own social, political, and economic system. The Gada system is an institution that is a highly developed self-sufficient system used to influence every aspect of Oromo life. It is further said to be the law of the society; a system by which Oromo administer, and defend their country and through which all their objectives are fulfilled.[12] The transitional charter of the Ethiopian government guaranteed the right to establish local administrative purposes based on nationalities. According to Article 13 of the Ethiopian transitional charter, there shall be a law establishing local and regional councils for local administrative purposes defined based on nationality.[13]Later on, by Proclamation No_ 7/1992, fourteen regional self-governments were established.[14] This proclamation established Oromia as one of the members of fourteen established regional self-governments. Self-government as defined by this proclamation; is related to a nation or regional entity vested with legislative, executive, and judicial power[15] and regional transitional self-government means transitional self-government which is jointly established by

[9] Supra note 1, Article 47/2

[10]Ibid. Article 39/5 which gives definition for Nations, Nationalities and Peoples

[11]Betru Dibaba, *Special interest of Oromia on Addis Ababa*, LLB thesis Mekelle University, (2011) unpublished. P.9

[12]Geda Melba, *Oromiya: an introduction*, Khartoum, (1998)p.10-11

[13]The Transitional Government of Ethiopia, Article 13

[14]The transitional Ethiopian government, proclamation for the establishment of national/ regional self-governments, Proclamation No7/1992, *Negarit Gazeta*, Addis Ababa, Article 3

[15]Ibid. Article 2/3

and with the agreement of two or more adjacent nations, nationalities, and peoples and which is considered as a national self-government.[16]

However, constitutionally Oromia regional state was established as one of the building bricks of the federal government of Ethiopia under article 47/1/ of the FDRE constitution. The FDRE constitution guarantees the regional state council the power to adopt, draft, and amend the state constitution and also empowers them to enact and execute the state constitution and other laws.[17] Based on this legal ground similar to other regions of Ethiopia, Oromia regional state has enacted the regional constitution which is a supreme law of the region. According to the Oromia regional state constitution; Oromia regional state is the *uninterrupted* territory inhabited by the people of the Oromo nation and other peoples who chose to live in the region, the border of which is; to the south of the region of the southern nations, nationalities and peoples and Kenya, to the north Afar and Amhara region, to the east the Somali region, and the west the Benishangul Gumuz, the Gambella region and Sudan.[18] From this provision, it is straightforward to infer that Addis Ababa or Finfinne, Dire Dawa, and Harari regions are an integral part of the Oromia regional state. The phrase uninterrupted and the federal constitution do not harmonies with each other. Because, the phrase uninterrupted territory means a land mass, the territory of which is connected from one point to the next without being interrupted by another land mass or territory. In light of the Harari regional state, the Oromia regional state constitution is unconstitutional and the FDRE constitution has a paramount value. That is why the FDRE constitution under Article 9 indicates the supremacy of the FDRE constitution to any laws including the regional state constitution.

That means the FDRE Constitution has recognized the Harari regional state as a region that interrupts the geographical location of the Oromia regional state. Pertaining to Addis Ababa and Dire Dawa, the phrase uninterrupted territory does not raise the constitutionality issues. In this section, the writer does not intend to analyze the constitutionality of boundaries but rather to reveal the geographical location of the Oromia regional state as per the regional constitution. Based on the provisions of the FDRE constitution such as Article 5, article 8, and Article 39, the Oromia regional state has determined Afaan Oromoo as their working language.[19]

4. Status of Addis Ababa/Finfinnee Under The FDRE Constitution

Addis Ababa is the capital city of the Federal Democratic Republic of the Ethiopian government[20] as well as the headquarters of the African Union. Proclamation number 7/1992 which was enacted for the establishment of national/regional self-government specifically declared the status of Addis Ababa as a regional state. [21]Under the FDRE constitution, nine constituting regions were established.[22] Constitutionally speaking, the Addis Ababa

[16] Ibid. Article 5

[17]Supra Note 1, Article 50/5

[18]The Revised Oromia Regional State Constitution, Proclamation No.46/2001, *Megeleta Oromia*, 2001, Finfinnee, Article 2/1

[19]Ibid. Article 5

[20]Supra Note 1, Article 49/1

[21] Supra note 14, Article 3/1

[22]Supra note 1, Article 47/1. Currently Sidama Regional state and two new regions in southern nations, nationalities, and peoples are formed. Once the formation of regional state is recognized by house of

city administration is entrusted with a full measure of self-government. Though English version of the provision is different from the Amharic version in which the former gives the full measure of self-government for residents while the latter empowers self-government for city administration which is the legal person/legal entity. However, granting full measures of self-government for city administration or residents is not the same as having the status of the region within the FDRE constitution. Even though the FDRE constitution has not set the status of Addis Ababa expressly, different reasons possibly lead us to deduce that Addis Ababa is below the status of a regional state within Ethiopian federations.

At the outset the preamble of the FDRE constitution which is both a political and legal document starts with, We, nations, nationalities, and peoples…. Those Nations, Nationalities and peoples are empowered groups in which they can manifest their rights decisively by being a member of the House of Federation. However, those nations, nationalities, and peoples living in Addis Ababa city administration are not constitutionally guaranteed to be represented in the House of Federation. Even they are below the minimum threshold for the definition of nations, nationalities, and peoples in light of article 39/5 of the FDRE constitution. The writer is not saying that the House of Federations is the representative of the state within the context of Ethiopian federations. Rather, to compare the status of Addis Ababa with regional states utilizing as one element.

Constitutionally speaking, the House of Federations is the representatives of nations, nationalities, and peoples of Ethiopia not the representatives of regional states. However, de facto is different; because if we see the selections of the House of Federation members in light of article 61/3 of the FDRE constitution, members of the House of Federations are elected by state councils themselves or hold direct elections. From this, practically the members of the House of Federations are more or less state councils that are elected to represent the state rather than the Nations, Nationalities, and peoples of Ethiopia what the FDRE constitution aspired to achieve. Secondly, Addis Ababa does not have a constitution enacted by its council like that of regional states. Having an Addis Ababa city administration charter does not amount to having a constitution though it serves as such. Because, it is a law, which is enacted by the House of People's Representatives, organs not empowered to enact a constitution. Even though a dozen nations, nationalities, and peoples of Ethiopia have been residents of Addis Ababa, they are not entitled to rights listed under Article 39 of the FDRE constitution as a whole. Had they been entitled to such rights, article 49 of the FDRE constitution clearly states the rights of self-determination, secession rights, and equitable representation within the federal government without selecting only rights of the full measure of self-government which is provided under article 39/3 and the representation in the House of People's Representatives by ignoring the representation in the House of federation.

federation, which is empowered to decide on the issues of self-determination, it automatically takes the place of nine regional states included within FDRE constitution.

Besides this, if we see the terms self-government and self-determinations separately; self-determination is the principle by which people freely determine their political status and freely pursue their economic, social, and cultural development. [23] It helps to define who should have power and why, who should have a voice in decision-making, and how an account should be rendered. [24] It could be either external or internal self-determination. Internal self-determination refers to those rights listed under article 39/2/ of the FDRE constitution which in turn encompasses the self-government as part and parcel of it. While external self-determination mostly involves an entity more in the international arena thereby determining its international status. [25]In any way, external self-determination deals with the status of a people vis-a-vis another people, state, or empire. Moreover, external self-determination embraces the rights of people to be free of external interference. [26] Self-government is defined as the rights the rights of each member of the community to choose in full freedom, the authorities that will implement the genuine will of the people. [27]As such self-governance is narrower in scope than that of self-determination. Those aforementioned reasons confirm the argument that the status of Addis Ababa is below the regional state within the FDRE constitution.

5. Relationship of Addis Ababa and Oromia Regional State Under the FDRE Constitution

From the foregoing discussion, it is easy to see that Addis Ababa is part and parcel of the Oromia regional state of geographical location saving the administration issues as an exception. Constitutionally, because Addis Ababa is located within the center of the Oromia region, it gives some guarantees for the latter. According to article 49/5 of the FDRE constitution reads as follows;

The special interest of Oromia in Addis Ababa, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administration matters arising from the location of Addis Ababa within the state of Oromia shall be respected. [28]

By reading this provision, it is difficult to define what is the special interest that the Oromia region has in Addis Ababa (Finfinne)? However, it is possible to guess it by phrases included under the provision such as social services, utilization of natural resources, and joint administrative matters. The provisions of social services that the Oromia regional state assumes on Addis Ababa were related to sectors of peacekeeping, water services, the interactions in the health, education, and infrastructures such as road, electricity, and transportation sectors are by far limited to informal exchange of information when the need arises[29]. The issue of utilization of natural resources may include timber, minerals, oil, water, wildlife, and other environmental gifts[30]. The FDRE constitution states that Addis Ababa is the capital city of the Federal government.

[23] M. Pomerance, *self-determination in law and practice,* the doctrine in United Nations 12/1982

[24]WondesenWakene,*self-governing Addis Ababa, the federal government and Oromia; bottom lines and limits in self-government,* LLM thesis Addis Ababa university unpublished.

[25] Ibid.

[26] Ibid

[27] Ibid.

[28] Supra note 1 Article 49/5

[29]Betru Dibaba, supra note 8

[30] Ibid.

This does not mean that the Oromia regional state cannot make its capital city in Addis Ababa / Finfinne as far as no word or phrase states that Addis Ababa shall be the capital city of the Federal government solely. The Addis Ababa City Administration Charter which was previously amended by Proclamation No-87/1997, article 33/2 states that Oromia has been given the right to make its capital city in Addis Ababa[31]. This could be taken as the manifestation of exercising joint administration that was specified under the FDRE constitution. The revised charter of Addis Ababa city administration proclamation number 361/2003 under article 62/1/ states that the relation of the Addis Ababa city government and the Oromia regional state rests on fruitful cooperation and the special interest of Oromia region shall be respected as provided under Article 49/5 of FDRE constitution. The details shall be set out by the agreement to be made between the city government and the Oromia region or by law to be issued by the House of People's Representatives[32]. Even though this proclamation adds the methods of determining the special interest of Oromia in Addis Ababa, the federal constitution gives recognition to the latter one, laws enacted by the House of People's Representatives (by the sentence particulars can be determined by gives a hint of it). Proclamation number 94/ 2005 Article 6 of the Oromia regional constitution states that Finfinne is the capital city of the Oromia regional state. Article 49/5 of the FDRE constitution is a neglected provision that may not have an impact for now because a single party has controlled the federal government, the Addis Ababa municipality, and the Oromia region relatively for the past three decades.

However, the situation could become problematic if this changes. That means, that when there is the practical move from a single political party system to a multi-system of political parties there would be progress from simple to more complex and challenging. What would happen if the Region/City falls under the opponent political party against the ruling party at the center or vice versa? Even the Oromo nations are demanding the enactment of the Special Interest of the Oromia regional state on Addis Ababa city administration.

When we relate those issues to the federal cities throughout other federations, we can find three models of cities.[33] The first model is the *Federal District*. In this model, the city is under the exclusive control of the federal government. This reduces the conflict of interest concerning to jurisdiction and rights between the federal government and regional state. In light of this model, the federal city cannot exercise the rights of self-determination. Concerning to jurisdictional if there is a controversy between the Oromia regional state and Addis Ababa, which had been a follower of the federal district model, it automatically falls within the jurisdiction of federal courts in light of the federal court establishment proclamation. It gives the central government sufficient control over the planning and development of its capital. Furthermore, it avoids having the laws of any one-member state dominating the capital of the whole federation, interfering with the organs of the central government, or imposing its legal and cultural dominance on the federal

[31] Proclamation No-87/1997 article 33/2.

[32] Proclamation number 361/2003 article 5

[33] Ronald Watts, *Comparing Federal Systems*,3rd ed. (2008) Queen's University Press, London p. 79

capital.[34]For instance, Washington, DC(USA), Canberra, the Australian Capital Territory (Australia), the Federal District of Mexico City (Mexico), the Federal District of Caracas (Venezuela), etc.

Addis Ababa does not fall within the category of this model city because; it has some sort of self-determination rights under article 49/2 of the FDRE constitution though self-determination rights are ambiguous as for the residents or the city itself. The second model is a *full-fledged city-state*. This model city has the double duty of a federal capital and constituent member of a federation simultaneously. They are constitutionally guaranteed to exercise both rights of a capital and state together; it is less influenced by federal governments. The city has full autonomy and can exercise full rights of self-determination rights. Vienna (Austria), Moscow (Russia), Berlin (Germany since reunification in 1990), and Brussels (Belgium) are examples of full-fledged city-state models. Had Addis Ababa city been categorized under this model of the federal city, it would have been under the jurisdiction of federal courts when a matter arises between the Oromia regional state and residents of Addis Ababa city.

The final model is a *city in the state*, the capital city falls under the competence of a member state of a federation. The capital city is treated similarly to other cities located in the region. This model highly restricts the direct influence of the federal government and does not raise conflict of jurisdiction with the region in which the city is situated. Bern (Bern, Switzerland), Ottawa (Ontario, Canada), Kuala Lumpur (Selangor, Malaysia), etc are examples of city in the state models. By reading of the Oromia regional state constitution, goes to the extent of deducing that Addis Ababa is a city located within the Oromia regional state. If so, it does not raise a conflict of jurisdiction between the Oromia regional state and Addis Ababa concerning jurisdictional wise. The writer opts for the final model of a federal city-state within Ethiopian federations.

6. *Some Proclamations* that Treat Addis Ababa as a Regional State Under the Federal Democratic Republic of Ethiopian Government

Both federal and regional states within the Ethiopian federation have their respective legislature, executive and judicial powers.[35] The legislative organs of each government are empowered to enact laws on their respective matters. They are expected to carry on their functions in light of promoting principles and values of good governance. The FDRE constitution also includes the principles of good governance under article 12 which indicates the activities of government officials must be transparent and they are expected to be accountable for any failure in their official duties. For this reason, they are obliged to enact laws in light of the principles and values of the FDRE constitution. The House of Peoples Representatives is the main organs of the federal government empowered to enact laws which the federal governments are assigned to carry on. For instance matters included under articles 51 and 55 of the FDRE constitution are belong to the federal government and the House of People's Representatives is authorized to enact laws on such matters. In the guise of legislating laws on matters assigned to federal governments, the House of Peoples

[34] Ibid.

[35] The FDRE constitution, Article 50/2

Representatives is not at liberty to enact laws which against the FDRE constitution.

Even though the House of People's Representatives has enacted several proclamations that treats Addis Ababa as a regional state, this writing tries to encircle Proclamation No- 251/2001, No-943/2016[36], and Proclamation No-1234/2021.[37] The writer is limited to those proclamations since they are directly *proportional* to the jurisdiction of courts and the Justice Office of regional states. Treating Addis Ababa as a regional state hurts the jurisdiction of regions that are constitutionally established in general and that of the Oromia regional state in particular. This is a result of the geographical location of Addis Ababa within the umbilical of the Oromia regional state. For instance "State" shall mean the states formed by Article 47/1 of the Constitution of the Federal Democratic Republic of Ethiopia and, includes the Addis Ababa City Administration and Dire Dawa Administrative Council.[38] Currently, the proclamation No-251/2001 is amended by Proclamation No-1261/2021. The latter Proclamation, defined region/member states are member states of the Federal Democratic Republic of Ethiopia which are established by Article 47 of the FDRE Constitution.[39] "Region" means any regional state referred to in Article 47 (1) of the Constitution and includes Addis Ababa and Dire Dawa city administrations.[40] Those two proclamations declare Addis Ababa and Dire Dawa as independent regions. This setting is against the rules and procedures of making a new regional state incorporated within the FDRE constitution. Besides, Under the provision that deals with the jurisdiction of federal court, the federal courts have jurisdiction over cases that arise between persons permanently residing in different regions; regions and Addis Ababa; regions and Dire Dawa, Addis Ababa, or Dire Dawa.[41] From this proclamation, it is possible to deduce two issues which need to be answered. The first issues relate to the Amharic version and English version of the law. The English version needs the existence of two regions or more regions and Addis Ababa or Dire Dawa to empower federal courts. Because, it says between *regions and Addis Ababa,* which is plural *form.* On the other side, the Amharic version says *'ክልልና አዲስ አበባ'* literally state and Addis Ababa *not* 'ክልሎችና አዲስአበበ' literally states and Addis Ababa. Taking the English version as binding does not as goes with treating Addis Ababa as equivalent to a regional state while taking the Amharic version is the reverse. It is not defensible to conclude the intention of legislation has both retrospective and prospective effects on the jurisdiction of courts. Retrospectively, the legislature was intended to give effect and support for the judgments of federal Supreme Court cassation that was decided on the cases between Addis Ababa and Oromia regional state as the power of federal courts. Those decisions which the legislatures intended to recognize retroactively were discussed under the section which talks about

[36]The Establishment of Federal Attorney general proclamation No_943/2016

[37] Federal courts Establishment proclamation 1234/2021, *Negarit Gazzet*, No- 1, 26 April, 2021

[38]Supra note 36, Article 2/1

[39] A Proclamation to define the Powers and Functions of House of Federation, Proclamation No. 1261/2021, Federal Negarit Gazeta , Year, 27 No. 43 August, 2021, Article 2/15

[40] Supra note 37, Article 2/5

[41] Supra note 38, Article 5/1/h

the practice of federal Supreme Court cassation treating Addis Ababa as a regional state. Prospectively, the legislatures intended to lubricate the relation of regional courts and federal courts on the cases arising between residents of Addis Ababa and another region specifically the Oromia regional state through having a legal framework.

Even though the writer selected those proclamations that extend the scope of the region to Addis Ababa and Dire Dawa, it is possible to find several proclamations enacted by the House of People's Representatives that treat them as regional states. Since the Ethiopian Federation is a covenant of nations, nationalities, and peoples of Ethiopia, both levels of government are expected to safeguard their pledges. When the Houses of People's Representatives proclaim a law that treats Addis Ababa as an independent state within some proclamations contrary to the FDRE constitution, the federal government particularly the House of Peoples Representatives is reducing the pledges of empowered groups of the FDRE constitution. This practice also leads to the practices of centralization of the Ethiopian federation which in turn encourages suspicions among nations, nationalities, and peoples of Ethiopia. So, treating Addis Ababa as a regional state by the House of People's Representatives is unconstitutional since it did not full-bodied the criteria and procedures of state formation under the FDRE constitution.

It is significant to relate the cause of treating Addis Ababa as a regional state by the House of People's Representatives to the concepts of federation and second chambers. Because, the primary role of most of the federal second chambers in the federations reviewed in this study has been legislative, reviewing federal legislation to bring to bear upon it regional and minority interests and concerns.[42] That means other federations, like the USA and Germany have regional representation in federal policy-making or legislature. Even though the House of Federation is not the representative of the regional state, it does not have a legislative function. However, in other federations, the chamber of the second chamber has equal power with lower houses to enact laws and policy. For instance, the Senate in the case of the American Federation represents regional states at the federal law-making stage and they can exercise either suspension or veto power.[43] By utilizing this mechanism, those federations safeguard the interests of regions or Landers.[44] However, this mechanism is lacking in the Ethiopian Federation. Because, in Ethiopia, the House of Federations are not the representatives of the regional state. Even though the Ethiopian legislature is bicameralism, strictly speaking, the House of Federation does not have law-making power. The Ethiopian House of Federation is unique

[42] Ronald watts, supra note 33 p. 153

[43] Suspension power and veto powers are the mechanism by which regional state representatives/second chambers protects the interest of regional state at federal law/policy making level. For instance, Bundesrat (second chambers of Germany federation) has absolute veto power on federal legislations affecting any states administrative functions. This also works in USA federations. The effect of absolute veto is when the law is enacted affecting the interest of certain regional state, it does not have binding effect up on regions contested that law by way of veto power. In case of Malaysia and Spain federations, the second chambers exercise suspension power to protect the interest of regional state and they suspend the draft law not to proclaim or enact for some time limit.

[44]Landers are the name of regional state within Germany federation.

among federal second chambers in having been assigned a role as the ultimate guardian of the constitution. It has the exclusive right and ultimate authority to interpret the Constitution, and this indeed is its main function. In doing so, they protect the interest of nations, nationalities, and peoples of Ethiopia not the interest of regional states. Had the House of Federation been empowered to enact law/policy at the federal level equally with the House of Peoples Representatives; the house of Federation is not the representative of regional states but rather the representative of nations, nationalities, and peoples of Ethiopia.

Representatives of the regional state are quite different from the representatives of nations, nationalities, and peoples of Ethiopia, particularly in divided societies to protect the interest of the regional state. This reflects Ethiopia's adoption *Tri Cameralism (three houses*[45]*)* to protect the interest of the regional state in federal law-making or policy-making. Besides, political reasons can also be taken as a cause for treating Addis Ababa as an independent regional state by the House of Peoples Representatives. That means; the Federal governments of Ethiopia for the past three decades were politically dominant over the regional states and the regional states were also not autonomous to resist the practice of the federal government when the latter contravened the values and principles of the constitution practically.

Treatment of Addis Ababa as the regional state hurts the symmetrical federation of Ethiopia included under article 47/4 of the FDRE constitution.[46] This provision reflects all regional states in the Ethiopian Federation have equal power/jurisdiction and rights. Regional states' power extends from the capital city of their region to the kebele/ administrative lower level. When the laws of the House of People's Representatives treat Addis Ababa as a regional state, it reduces the jurisdiction of Oromia regional state in general and that of Oromia regional state courts in particular. That means; the FDRE constitution aspired to increase the powers and rights of the Oromia regional state included under article 47/4 of the FDRE constitution by utilizing article 49/5 of the FDRE Constitution. That means; the Oromia regional state has equal power and rights with the other regional states of Ethiopia in light of article 47/ 4 of the constitution and even exceeds them in light of article 49/5 of the FDRE Constitution. However, the practices of the House of People's Representatives are deviating from concepts of powers and rights intended by the FDRE constitution.

7. Structure of Courts Under the FDRE Constitution

The FDRE constitution provides for the structure of courts and provides some hints

[45]In addition to House of Federation and House of Peoples Representatives, it is better to have a house that safeguard the interest of regional state may be *Council of States* or *Senate* or other name for the third house. Because House of Federations are the representatives of nations, nationalities and peoples of Ethiopia and its law making power within Ethiopian federation is very minimal. This house works to protect the interest of those nations, nationalities and peoples rather than regional state through constitutional adjudication and fiscal matters. The House of Peoples Representatives is the law making organ and they are the representatives of the people. Therefore, it is better to have another third house to the context of Ethiopian federation for the protection of the interest of regional state. This must be supported with empowering it equal law making power with that of house of people's representatives.

[46]It states that regional states of Federal Democratic Republic of Ethiopia shall have equal rights and powers.

about the organization of courts. Though some federal systems establish monolithic court structures, it is commonly acceptable to have dual court structures within federations. The aim of the federation to have a parallel side of the court is to bring justice closer to the people. Local problems should be solved by local institutions. The FDRE constitution clearly states that the federal government and the states shall have legislative, executive, and judicial power.[47] The FDRE Constitution states that Supreme federal judicial authority is vested in the federal Supreme Court and reserves for the HoPR to decide by a two-third-majority vote to establish inferior federal courts, as it deems necessary, nationwide or in some parts of the country.[48] However, the House of People Representatives did not establish federal courts within regional states until 2003. The decisions of the framers of the FDRE constitution to empower HoPR for the establishment of lower federal courts could be for the sake of flexibility and the opportunity to draw some experiments from another federal judicial system. This means, had those lower federal courts established by the FDRE constitution likewise that of the Federal Supreme Court, it would be less flexible to establish and demolish it, and closes the door for getting experiences from another federal judicial system. Besides, granting the power to establish lower federal courts to the House of People's Representatives also advantageous in deciding just how much jurisdiction those courts ought to have power.

Proclamation No-322/2003 was issued to provide for the establishment of federal high courts in the state of Afar, Benishangul Gumuz, Gambella, Somali and Southern Nations, Nationalities, and Peoples.[49]As far as the organization of the inferior federal courts in the states is concerned, the constitution declares that the jurisdictions of the Federal High Court and the First Instance Courts are delegated to state courts.[50] However, the jurisdiction of the federal Supreme Court cannot be delegated to state courts. By setting this delegation, the state Supreme Court exercises, in addition to its state jurisdiction, the jurisdiction of the federal High Court, and the state high courts exercise, in addition to their state jurisdiction, the jurisdiction of the federal First Instance Court. To guarantee the right of appeal of the parties to the case, decisions rendered by a state high court exercising the jurisdiction of the federal First Instance Court are appealable to the state Supreme Court.[51] Decisions rendered by a state supreme court on federal matters are appealable to the federal Supreme Court.[52] To have a clear and full-fledged dual court structure, there should be federal courts in each state to entertain federal jurisdictions even though the delegation is stated under Article 78/2 of the FDRE constitution.

8. The Practice of Ethiopian Federal Supreme Court Cassation Bench Treating Addis Ababa as a Regional State

Both under the federal and state courts of Ethiopia, in addition to the regular Supreme Court, there is a special structure, the cassation court. A court of cassation is a high instance court that exists in some judicial systems.

[47]Supra Note 1, article 50/2
[48] Ibid, article 78/2
[49]The Establishment of the Federal High Court in Some Regions, Proclamation No.322/2003, *Negarit Gazeta*, 9th year, No.42, 8th April, 2003
[50] Cumulative reading of article 78/2 and 80 of FDRE constitution
[51] Supra note 1, Article 80/5
[52] Ibid.

Courts of cassation do not re-examine the facts of a case, they are only competent for verifying the correct interpretation of the law. For this, they are appellate courts of the highest instance. Thus, they are different from systems that have only a Supreme Court, which can rule on both the facts and the law of a case. The power of cassation in the Ethiopian federation has a constitutional status both at the federal and regional states. The Federal Constitution recognized the existence of such a system at both tiers of government.[53] Cassation court currently comes into reality where there is a basic error of law from the final decision of regular and appellate jurisdiction of courts. The FDRE constitution under article 80/3/a gives the federal Supreme Court, the power of cassation over any final court decision. The English version of the constitution is limited to any final court decision while the *Ahmaric* version of the FDRE goes beyond the English version. That means the Amharic version of the FDRE constitution under article 80/3/a, states that any final decision (*manachohunyemecereshawusane*) without identifying the institutions that rendered the final decision. But concerning to the state court's cassation, it is limited to any final decision on state matters.

Even though the FDRE constitution gives the cooperative relationship between organs of federal and regional government in general and that of courts in particular, there are some subsidiary laws and practices that make the relation of federal courts superior to regional courts.[54] In light of the power of cassation over cassation[55], even if the federal constitution established parallel jurisdiction of courts in both tiers of the government, the cassation division of the federal Supreme Court reviews any final decision of courts. This is when it manifests a prima facie case for basic error of law.[56] The cassation division of the federal Supreme Court is located at the apex of the present court system in Ethiopia. The Cassation Division court shall exercise the cassation authority in a way that the legislative branch of government intended the law to be applied. This is because, unlike courts of the common law legal system, the Cassation Division of Civil law countries have no authority to pile an original precedent. Each interpretation shall go hand in hand with the spirit of separation of power. It shall not refute the doctrine of separation of power which is equally recognized under the FDRE Constitution.

The FDRE constitution declares that the federal Supreme Court has the highest and final authority over federal matters. The Federal Supreme Court includes a cassation division, which has the power to review and overturn decisions issued by lower levels of federal courts and state supreme courts containing fundamental errors of law. As can be seen from the experience of other Federal countries like the USA, the federal Supreme Court is intended for guaranteeing uniformity reasons regarding some cases and that function of guaranteeing

[53] Ibid, Article 80/3/ a/&b

[54] See for instance, Article 6/2 of proclamation no-25/96. This provision gives supremacy clause for federal laws at the time when it contravenes with regional laws. However, supremacy of law is not included within the constitution of FDRE. Article 35 /1/ a/ of the proclamation also states that federal Courts of any level may order that decisions and orders given by them be enforced by Regional Courts. This makes any level of federal courts as a boss to regional courts.

[55]The term cassation over cassation signifies the possibilities of review of decision rendered in state supreme court through its cassation bench (on a purely state matter) by the federal counter part on the same basis.

[56] Supra Note 1, Article 80/3/a/

uniformity is often limited to federal laws.[57] This important qualification is missing in the Ethiopian situation and the Federal Supreme Court extends its scope beyond what was intended by the Supreme Court of another federal country.

The establishment of the Federal Supreme Court Cassation Division is to guard the legislature's purpose and intent. However, the Division sometimes deviates from what the law says and the lawmaker intends even to the extent of twisting a clear provision of the law. Traditionally, the function of cassation courts was to examine a case assumed to incorporate a fundamental error of law, quash it if it finds the same, and remand it to a court of rendition. In Ethiopia, the role of the judiciary is to interpret laws.[58] Law-making power is exclusively given to the legislative branch of government which other organs or branches of government cannot exercise except through delegation power. For this reason, as one facet of law-making, the judicial branch cannot amend and/or repeal laws. Moreover, if the law is clear, the Cassation Division shall apply it as it is. As the words of the law are presumed to express the intention of the legislator, there is no need for interpretation, unless the interpretation of the law may lead to an absurd conclusion. In short, unless there is strong evidence that shows the intention of the legislator was different, it is not proper to give a different meaning to a clear provision of the law.

Consequently, when the decision of the Cassation Division is repugnant to the legislative intent and is made mistakenly or deliberately, it always costs justice. However, the Ethiopian Federal Supreme Court Cassation division is deviating from its normal business and enacting laws, which is the role of the legislature. The federal system counteracts the concentration of power. This means the horizontal division of power, where state authority is divided into executive, legislative, and judicial powers, and which vertical division of powers between central and constituent states in terms of legislative, executive, and judiciary supplement. However, in the case of the Ethiopian Federation, practically the federal courts especially the Federal Supreme Court cassation division are striving to centralize the Ethiopian Federation through snatching the jurisdiction of state courts. Such practice of the Federal Supreme Court Cassation is unconstitutional.

For instance, under the case of *Mengistu Lema and ChalchisaOromiya vs. GutaTullu*[59], the case was initiated within the Oromia region, Oromia Special zone Surrounding Finfinnee, Sabata Hawas Woreda (District) court. The detail of the case is the injunction of construction between the plaintiffs, who were residents of the Oromia region, and the defendants, who are residents of Addis Ababa in light of article 1149 of the Ethiopian civil code. At the Woreda level, the defendants submitted their statement of defense to the court raising preliminary objections. The

[57] Sileshi Zeyohannes, *Constitutional Law II*, *Teaching Material*, Justice and Legal System Research Institute, (2009), Addis Ababa at 206

[58] Supra Note 1, Article 79/1

[59] Federal supreme court cassation decision file number 98973 (decided on 10/4/2007 E.C), Mengistu Lemma was the resident of Addis Ababa, Kirkos sub city Adminitration, Chalchisa Oromia was the resident of Addis Ababa,Nifas Silk Lafto sub city administration and GutuTullu was the resident of Oromia Regional state Sebeta Haws Woreda.

preliminary objection was raised by the defendants at the Woreda court stating the court has no material jurisdiction to entertain the case at hand since the parties to the suits are permanent residents of different regions. The defendants of the case at hand are residents of Addis Ababa and the plaintiff was a resident of an Oromia regional state. Due to this fact, the defendants asked the court to dismiss the case as a result of lack of material jurisdiction since parties to the suits were residents of different regional states (one resident of Oromia regional state and the other party was a resident of Addis Ababa). Legally speaking, if the suit arises between permanent residents of different regional states within the Ethiopian federation, it is the jurisdiction federal court.[60] Woreda courts do not have jurisdiction to entertain matter that falls within the jurisdiction of federal courts by the mechanism of delegation. The Woreda court of Sabata Hawas overruled the preliminary objection raised by the defendants and pronounced judgment to release the illegally seized land for the plaintiff. However, the defendants were dissatisfied with the decision of Woreda courts and appealed to the Zonal high court of the Oromia special zone surrounding Finfinne. This Zonal appellate court confirmed the decisions of the Woreda court and for this reason, defendants were appealed to the Oromia regional state Supreme Court Cassation. The Oromia regional state Supreme Court cassation bench also confirmed the decision of lower courts stating that there is no fundamental error of law committed by lower courts. Finally, those defendants were appealed to the Federal Supreme Court cassation bench. The federal Supreme Court Cassation bench admitted the appeal of the defendants of the Woreda court and summoned the opponent parties. The federal cassation court framed an issue which says, are lower courts entertained the case at hand having material jurisdiction or not? By analyzing different laws and flows of arguments, the federal cassation court concluded lower courts are entertaining the raised case without having material jurisdiction. The Federal Supreme Court cassation bench reversed the lower court's decision and came up with a new decision that treats Addis Ababa as an independent regional state. This may result from the political dominance of the federal government over the regional state. On the other side, Oromia regional state legislation No- 216/2018 empowers the Oromia regional state Supreme Court to establish and organize necessary court levels in Finfinne to entertain matters included within article 24/3/a-d of the same proclamation. This indicates the existence of exercising power and rights enshrined within the FDRE constitution by the Oromia regional state on one side and contravening the principles and values incorporated within the FDRE constitution by HoPR and the Federal Supreme Court on the counterpart.

The federal Supreme Court cassation has reversed the decisions of Oromia regional state courts starting from the Woreda court to the state Supreme Court cassation bench based on article 5(2) of Proclamation No-25/1996.[61] This provision empowers the federal courts to have jurisdiction over parties that are residing

[60]Federal Courts Establishment, Proclamation No. 25/1996 , 2nd year, No.13, *Negarit Gazeta*, 15th February, 1996, Article 5/2

[61]Federal courts have civil jurisdiction over suits between persons permanently residing indifferent Regions

permanently within different regions. If a certain case arises between two or more permanent residents of different regions, it automatically falls within the jurisdiction of federal courts. In this situation, regional courts can only entertain such matters through delegations. Currently, Proclamation 1234/2021 which amended Proclamation No-25/1996 did not directly categorize Addis Ababa as a regional state but, indirectly tried to put the status of Addis Ababa as a regional state. This is mainly inferred from the phrase which dealt with the jurisdiction of the federal government when the raised case is between permanent residents of Addis Ababa and regions. That's why the writer argues the retrospective effect of the latter legislation which tries to recognize the decisions of federal Supreme Court Cassation preceding the enactment of Proclamation No-1234/2021.

One may easily grasp that the intention of legislation departing not to define the meaning and scope of the region under the definition of words or concepts was an indicator for limiting regional states that are listed under Article 47 of the FDRE constitution. As per the case cited above, the two defendants were residents of Addis Ababa with different sub-city administrations Kirkos and Nifas Silk Lafto Sub-city administration and the plaintiff was a resident of Oromia regional state. The Federal Supreme Court Cassation division has criticized the decisions of all levels of Oromia regional courts stating they have committed a fundamental error of law.

For this reason, the federal Supreme Court Cassation concluded that Oromia regional state courts do not have original jurisdiction rather they have delegation power as incorporated within the FDRE constitution (translation is by writer). The decree part of the judgment clearly states that: 'የሰበታ ሀዋስ ወረዳ ፍ/ቤት እና በየደረጃ ያሉ ፍ/በቶች የግራቀኙ መደበኛ መኖሪያ ቤት በሁለት ክልሎች ሆኖ ሳለ እና ጉዳዩ በዉክልና የሚመለከቱት የፌደራል መሆኑ እየታወቀ የክልል ስረነገር ስልጣን ስር በማድረግ መወሰናቸዉ በአግባቡ አይደለም ብለናል' the reason of court decision is as far as the case was between residents of different regions, the Federal court has the first instance jurisdiction. Is Addis Ababa City is regional a state? The FDRE constitution under articles 47(1) and (2) recognizes nine regional states under the Ethiopian federation and provides a right to form additional new states for nations, nationalities, and peoples within the above nine states (internal secession). By any means, Addis Ababa would not be a state if we read cumulatively article 39(5) and article 47(1), (2) of the FDRE constitution. The reasons that the writer discussed above under state formation also support the idea that Addis Ababa cannot be treated as a regional state constitutionally.

In addition to the above real case which treated Addis Ababa as a regional state by federal Supreme Court Cassation, *Yasin Ibrahim and Getu Ishetu Vs Hailu Taye*[62] the Ethiopian Federal Supreme Cassation bench decided Addis Ababa as an independent regional state. The Oromia regional state courts starting from the high court to the Oromia regional state Supreme Court cassation didn't treat Addis Ababa as an independent regional state for two reasons. Firstly, they are based on article 47 of the FDRE constitution which lists nine regional states and opens a room for forming new

[62] Federal supreme court cassation decision(2012 E.C), file number 144613 (decided on 30/9/2010 E.C) volume 23, p.358

regional states excluding Addis Ababa. Secondly, the property which is subject to the case and agreement for the transaction was made in the Oromia regional state. The Federal Supreme Court Cassation treated Addis Ababa as an independent regional state by reversing the decision of the Oromia regional state Supreme Court Cassation bench based on two reasons. First, they are based on Article 47 with Article 50/4 of the FDRE constitution and Article 49/2 of the same constitution. That means; regional states were empowered to establish their self-administration as per article 50/4 of the FDRE Constitution. They thought it was the same with concepts incorporated within article 49/2 of the constitution that treats Addis Ababa as a self-governing power. However, having self-governance by itself does not lead the entity as a regional state in light of the FDRE constitution. Besides, self-governance/administration within the spirit of article 50/4 of the FDRE Constitution is expected to be organized and formed by regional states. On the other hand, self-governance concerning Addis Ababa in light of article 49/2 was merely the stretching arms of the federal government. Finally, the federal Supreme Court cassation relies on Addis Ababa having a charter to treat it as an independent regional state. The writer supports that the decisions rendered by Oromia regional courts were constitutional and sound not to treat Addis Ababa as an independent regional state. Such a decision of federal Supreme Court cassation contravenes the values and principles of the FDRE constitution, which does not treat Addis Ababa as a regional state. If we took such a decision as justifiable by law, it snatches the jurisdiction of Oromia regional state courts in general and that of Woreda courts in particular when a case arises between residents of Addis Ababa and Oromia regional state. This is because of geographical location of Addis Ababa is within the Oromia region and most of the residents of Addis Ababa have been owning property within the Oromia regional state especially surrounding Finfinne. This in turn reduces the jurisdiction of Oromia regional state court compared to other regional states court's jurisdiction if a case arises between residents of Oromia and Addis Ababa.

Since the decisions of federal Supreme Court cassation have a binding effect on federal lower courts and regional state courts, it limits the scope of argument of parties to the suits. That means parties are expected only to argue on whether the parties are residents of Addis Ababa or not, instead of arguing Addis Ababa is not a regional state. Besides, it can affect the smooth relationship between the federal and Oromia state courts, especially in the case of transferring judgment for execution and delegated powers. It creates a reluctance to execute decisions of the federal courts when the federal Supreme Court cassation takes the jurisdiction from the Oromia regional state instead of correcting fundamental errors of law. It may also negatively affect the rights of parties who are the residents of Oromia regions especially when original jurisdictions have been taken from regional state courts; it reduces the extent of appeal rights of parties. It is also possible to relate this problem to language rights. If delegation power is taken from a regional state, parties to the case who are residents of Oromia regional states are expected to argue and to claim their rights by using the Amharic language.

Even though Proclamation No-454/2005 amended by Proclamation No- 1234/2021 oblige the lower federal and state courts to be bound by the federal Supreme Court cassation,

it is observable from some judges as they are refusing to be bound by the decision of the federal Supreme Court cassation that was not published under the volumes of cassations such as above raised decisions[63].

The FDRE constitution also aspires to become a sort of solution for past mistakes and to put the nation on the path of chosen policy. The past mistakes could be the centralization of power. While distributing or dividing powers, the federal and states have a constitutional agreement to share the power and not to centralize it. Thus, it is understandable to infer that the federal Supreme Court cassation is breaching the pact of nations, nationalities, and peoples of Ethiopia. The Federal Supreme Court cassation was not empowered to divide powers between federal and regional state courts through correcting fundamental errors of laws.

The practice of Federal Supreme Court Cassation affects the smooth relationship working between federal and regional courts in general and that of Oromia regional courts in particular. That means, Federations require IGR (Intergovernmental Relationships) to solve the issues of ambiguity on the division of power between or among levels of government. Within Proclamation No-25/1996 and Article 51/4 of proclamation 1234/2021, it is the Federal Supreme Court that solves issues about conflict of jurisdiction between federal and regional courts. In this circumstance, it is a difficult event to claim jurisdiction before a regular court of the federal Supreme Court while the special court of it violates the law. That means; the federal Supreme Court is entertaining matters by which it is the party itself that opens the argument of its neutrality.

9. Concluding Remarks

The writer has indicated the criteria and procedural rules for forming new a regional state in light of the FDRE constitution. It is nations, nationalities, and peoples who are empowered to form regions with the FDRE Constitution. Contrary to those criteria and procedural rules forming a regional state or treating certain administrative units as regional states is unconstitutional. All legislative, executive, and judicial organs of both Federal and regional governments must respect and enforce the FDRE constitution. However, the House People's Representatives were in some laws as the writer indicated above proclamations go to the extent of categorizing Addis Ababa as an independent state.

Particularly under the provision which defines the word or phrase of the region. This categorization is unconstitutional because it adversely affects the jurisdiction or powers of regions in general and that of the Oromia regional state in particular as a result of the geographical location of Finfinne. The Federal Court's establishment proclamation simply says civil matters that arise between permanent residents of different regions fall within the jurisdiction of federal courts. If someone reads the federal court's establishment laws thoroughly, it is easy to glance at as it did not treat Addis Ababa as an independent regional state. So, it is a clear indication of the works of federal Supreme Courts as it is enacting a law that is unconstitutional in the guise of correcting the fundamental error of law. This mostly snatches the jurisdictions of Oromia

[63]The case of Mengistu Lema and ChalchisaOromiya vs. GutaTullu file number 98973, cassation decision not published under the volumes of Federal Supreme Court, It is available with parties to the Suit.

regional state courts in general and that of Woreda courts in particular. Before the enactment of Proclamation No-1234/2021, the Federal Supreme Court cassation treated Addis Ababa as an independent regional state by fact and its binding interpretation. However, the new Federal Courts Proclamation No-1234/2021, Article 5/1/h retrospectively legalized the practice of the Federal Supreme Court Cassation treating Addis Ababa as an independent regional state.

Since treating Addis Ababa as a regional state is unconstitutional, the writer recommends quashing the laws of the House of People's Representatives, specifically Article 5/1/h of Proclamation No-1234/2021 and decisions of federal Supreme Court cassation that treat Addis Ababa as a regional state before the House of Federation. Alternatively, to have regional representation at the federal law-making/policy-making level that has equal law-making power with the House of Peoples Representatives to safeguard the interest of regions including Oromia regional states.

WUJL, March-April.2024,1(2), 71-88)
DOI: https://doi.org/10.20372/wujl.v1i2.1077
ISSN: 2226-7522 (Print) and 3005-7612 (Online)
Wallaga University Journal of Law
WUJL, March- April. 2024, 1(2), 71-88
Home Page: https://journals.wgu.edu.et

Original Article

Examining the Criminalization of Forced Displacement in International Law: Extracting Insights for Ethiopia

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Abstract

Forced displacement is a violation of fundamental human rights that often occurs during conflicts, natural disasters, and other crises worldwide. The criminalization of forced displacement under international law is a crucial aspect of ensuring accountability and justice for the victims. This study delves into the legal frameworks that govern the criminalization of forced displacement at the international level, examining key principles and precedents. By exploring these legal foundations, this research aims to extract valuable insights that can inform the development and implementation of appropriate measures in Ethiopia to combat forced displacement effectively. This study contributes to the ongoing discourse on protecting internally displaced populations and refugees and seeks to enhance Ethiopia's ability to address forced displacement issues in a manner compatible with international legal standards.

Article Information

Article History:
Received: 08-12-2023
Revised: 28-02-2024
Accepted: 15-03-2024

Keywords:
Forced displacement, Criminalization, Criminal law, Ethiopia

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Acronyms

API Additional Protocol One
APII Additional Protocol Two
CIH Customary International Humanitarian Law
FDRE Federal Democratic Republic of Ethiopia
IACs International Armed Conflicts
ICC International Criminal Court
ICL International Criminal Law
ICTR Statute of the International Criminal Tribunal for Rwanda
ICTY Statute of the International Criminal Tribunal for former Yugoslavia
IDPs Internally Displaced Persons
IHL International Humanitarian Law
GCIV Geneva Convention Four
UNHRC United Nations High Commissioner for Refugee

Introduction

Throughout history, human populations have been forcibly displaced.[1] People are forced to flee due to a persistent dynamic of proximal and root causes that endanger lives and safety.[2] Forced displacement arises when state and non-state actors forcibly uproot individuals and communities from their homes or places of habitual residence due to armed conflict, widespread violence, violations of human rights,[3] persecution,[4] natural or man-made disasters, and/or development projects.[5] According to Naziye Dirikgil, forced displacement comprises both involuntary movement and direct or indirect forms of coercion, which can take place either within a state's borders (forcible transfer) or outside (deportation).[6] Forced displacement in its broadest sense indicates both the movement of Internally Displaced People (IDPs) within a State and refugees[7] and asylum seekers[8] acros s international borders.

[1]Alexander Betts, Gil Loescher and James Milner, UNHCR: The Politics and Practice of Refugee Protection (Routledge, 2nd ed, (2012) 1. See also UNHCR, The State of the World's Refugees 2000: Fifty Years of Humanitarian Action (Oxford University Press, 2000) 1.

[2]Christina Boswell, 'Addressing the Causes of Migratory and Refugee Movements: The Role of the European Union' *(Working Paper No 73*, UNHCR, 25 December 2002) 7. External causes refer to the actions of foreign actors that result in displacement elsewhere. Root causes refer to the structural and deep-rooted socio-economic, legal and political conditions in a state that may exist over a long period. These include inequality, political repression, marginalization and ethnic tensions in a society. Proximate causes on the other hand refer to sudden events that threaten the lives and safety of people. These include, for example, the actual break out of a conflict or genocide, or the occurrence of a natural hazard. See Susanne Schmeid, 'Exploring the Causes of Forced Migration: A Pooled Time-Series Analysis, 1971–1990' (1997) 78(2) *Social Science Quarterly 284*, 287– 289.

[3]Forced Displacement, available at: <https://inee.org/eie-glossary/forced-displacement> accessed on 2 January, 2024

[4]UNHCR Global Trends: Forced displacement in 2015: <https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.htm.> accessed on 3 January, 2024.

[5] Forced Displacement, *supra* note 3

[6] Naziye Dirikgil, 'Protection of Internally Displaced People from Arbitrary Displacement: The Development of the Right not to be Arbitrarily Displaced', Thesis submitted for the degree of Doctor of Philosophy Aberystwyth University, (September 2020), p.125

[7]UN Refugee Convention, (1951), under Article 1 defined as, a refugee is a person who has fled their own country because they are at risk of serious human rights violations there. Because their own government cannot or will not protect them, they are forced to seek international protection. See also Organization of African Unity Convention on Refugees and the Cartagena Declaration that expanded the definition of refugee to include persons fleeing generalized violence (international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order, or massive violations of human rights) in the whole or part of the country of nationality.

[8]An asylum-seeker is someone who is seeking international protection abroad, but hasn't yet been recognized as a refugee.

The UNHCR's Global Trends report provides the most recent official data on refugees, asylum seekers, and IDPs around the world, along with important statistical trends. As per the report, about 108.4 million people were forcibly displaced globally by the end of 2022 due to persecution, conflict, violence, abuses of human rights, and incidents that gravely disrupted public order.[9] Similarly, there were 110 million forcibly displaced individuals globally in mid-2023 due to events that substantially disrupted public order, conflict, violence, persecution, or abuses of human rights. Out of these, 62.5 million are internally displaced, 36.4 million are refugees, 6.1 million are asylum seekers, and 5.3 million are others in need of protection.[10] Furthermore, data collected by the International Organization for Migration using its Displacement Tracking Matrix methodology indicates that over 4.38 million people were displaced in Ethiopia between November 2022 and June 2023, with over half of those displacements being the result of conflict.[11] In addition, due to conflict and violence, around 3.1 million people in Ethiopia were forcefully displaced as of May 2023.[12]

From aforesaid reports, everyone can understand that IDPs, Refugees, and Asylum-seekers are victims of forced displacement and the state must criminalize it. For forced displacement to be classified as a crime under international law, it must be "arbitrary displacement" that is ordered or carried out without justification.[13] It is deemed criminal under both international criminal law (ICL) and international humanitarian law (IHL).[14] Acts of forced transfer or deportation have been outlawed by states in their military and domestic criminal codes, with differing degrees of clarity, since the United States passed the Lieber Code in 1863.[15] As a result, states are required to outlaw certain arbitrary displacement actions that amount to international crimes,[16] such as genocide,[17] war crimes,[18] and crimes against humanity.[19] However, some acts of forced displacement that amount to international crime and/or ordinary crimes are not prohibited in the Federal Democratic Republic of Ethiopia Criminal Code (FDRE Criminal Code)[20] or other laws.

This Article aims to examine the Criminalization of Forced Displacement in International Law: Extracting Insights for

[9]UNHCR, Global Trends: Forced Displacement in 2022, available at: <https://www.unhcr.org/global-trends-report-2022> accessed on 3 January,2024

[10]UNHCR, Refugee Data Finder, available at:<https://www.unhcr.org/refugee-statistics/>accessed on 5 January,2024

[11]New IOM Report, 23 August 2023, available at:<https://ethiopia.iom.int/news/more-438-million-people-displaced-ethiopia-more-half-due-conflict-newiomreport#> accessed on 8 January, 2024

[12]UNHCR, Ethiopia Humanitarian Crises, available at:<https://www.unrefugees.org/emergencies/ethiopia/> accessed on 5 January, 2024

[13]Federico Andreu-Guzmán, Criminal Justice and Forced Displacement: International and National Perspectives, ICTJ/Brookings Research Brief Criminal Justice and Forced Displacement, (June 2013), pp 2-3

[14]RLI Blog on Refugee Law and Forced Migration, Enhancing Refugee Protection Through the Criminalization of 'Mass Forced Displacement', Refugee Law Initiatives, RLI 3rd Annual Conference, School of advanced Study University of London (Aug 2, 2018)

[15]The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General of Canada, 13 August 2001; International Criminal Court Act 27 of 2002, 40

[16] UNHCR, Making Arbitrary Displacement a Crime: Law and Practice, El Salvador, (2019), p. 9

[17] Federico Andreu-Guzmán, *supra* note 14

[18] Ibid

[19] Ibid

[20] The FDRE Criminal Code, (2005)

Ethiopia. Section one explores the prohibition of forced displacement under IHL. Section two dealt with forced displacement in ICL. Under section three the principle of legality and forced displacement has been shortly addressed. The fourth section critically scrutinizes the FDRE Criminal Code and Forced displacement. The conclusion finalizes the article.

1. Prohibition of Forced Displacement under International Humanitarian Law

Notably, IHL is a body of regulations that in times of armed conflict, aim to limit the means and methods of fighting, while also protecting civilians who are not, or are no longer, directly involved in hostilities.[21] IHL comprises key provisions to stop forcible displacement and to protect those who are compelled to escape, especially as they are enshrined in the 1949 Geneva Convention (hereafter GCIV)[22] and their 1977 Additional Protocols (API and APII).[23] Deportations of protected individuals or group transfers are prohibited in International Armed Conflicts (IACs).[24] According to Article 49 of the GCIV, forcible transfer is specifically prohibited during armed conflict:

> 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'[25] Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons evacuated in such circumstances shall be transferred back to their homes as soon as hostilities in the area in question have ended.[26] The Occupying Power shall not deport or transfer parts of its civilian population into the territory it occupies.[27]

Perceptibly, Article 49(1) GCIV proscribes "forcible transfer" within and "deportation" from occupied territory in IACs.[28] According to this provision, parties to an international armed conflict may not deport or forcibly remove the civilian population of an occupied territory unless necessary for the safety of

[21] UNHCR, Handbook for the protection of Internally Displaced People, Global Protection Cluster Working Group, (March 2010), p 28

[22] Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Geneva, (12 August 1949)

[23] Protocol Additional to the Geneva Conventions of 12 august 1949, and Relating to the Protection of victims of International Armed Conflicts (Protocol I), (8 June 1977) (here after API) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (8 June 1977) (here after APII)

[24] Common Article 2 of the Geneva Conventions of 12 August 1949, which is applicable to IACs, provides that: In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

[25] GCIV, *supra* note 23, Article 49 (1)

[26] Id, Article 49 (2)

[27] Id, Article 49 (6)

[28] ICTY, Prosecutor v. Blagojevic´ and Jokic´, Trial Judgement, IT-02-60-T, (17 January 2005), para.595

civilians or urgent military reasons.[29] Another characteristic of forcible transfers or deportations is that, to be considered such, they must be implemented with force, that is, without the consent of the individuals involved, by the use of direct or indirect coercion or pressure.[30] Additionally, it is forbidden to forcibly transfer one person or more, therefore a violation of the Geneva Convention does not always need to involve a mass transfer.[31] Traditionally, "deportation" occurs outside of an internationally recognized state border, whereas "forcible transfer" refers to a displacement or movement within the borders of a state or an occupied territory.[32] There are three stages involved in evaluating a forcible transfer: first, legal transfers are those that are driven by a person's sincere desire to depart. Therefore, people are not driven by such illegality. In the context of "forcible transfer," "forcibly" refers not only to the use of physical force but also to threats of force or coercion resulting from psychological oppression, fear of violence, duress, detention, abuse of power against that person or those people, or from taking advantage of a coercive environment. Second, it's critical to remember that apparent consent to a transfer needs to be carefully evaluated because it might have been 'valueless' due to the circumstances or might have resulted from discrimination and other violations of human rights. Finally, it must be determined case-by-case, taking into account all pertinent factors, whether a transferred individual truly has an option.[33]

Even while it is strictly forbidden, not all population displacements that occur as a result of armed conflict are illegal. "If the security of the population or imperative military reasons so demand," "evacuations" are permitted under Article 49(2) of the GCIV and Article 17(1) of AP II.[34] Thus, even though population displacements through force are generally prohibited, the subcategory of evacuations may be allowed provided it is properly justified based on one of the two accepted grounds and complies with applicable laws.[35] The "security of the population" is the first justifiable reason for evacuation, and it is quite simple. In such circumstances, at least some of the impacted parties will likely agree to the evacuation.[36] More explanation is required regarding the justifiable reason for an evacuation under "imperative military ground." First of all, it should be understood that the political goals that the parties involved have successfully pursued do not always equate to valid "military reasons" for evacuations. Therefore, the language precludes using evacuations to "exercise more effective control over a dissident ethnic group" or to defend them as a form of ethnic cleansing.'[37]

[29] UNHCR, Handbook for the Protection of Internally Displaced Persons, *supra* note 22, p.29

[30] Pictet Commentary IV at 279: Gerhard Werle, Völkerstrafrecht (Mohr Siebeck 2007), 448

[31] Diakonia International Humanitarian Law Centre, Displacement and IHL, Sweden, 2024 available at: <https://www.diakonia.se/ihl/resources/international-humanitarian-law/ihl-displacement/>accessed on 3 Januar,2024

[32] *Prosecutor v. Blagojevic´* and *Jokic´ supra* note 29

[33] Diakonia International Humanitarian Law Centre, *supra* note 32

[34] Etienne Henry, 'The Prohibition of Deportation and Forcible Transfer of Civilian Population in the Fourth Geneva Convention and beyond', Forthcoming in Borhan Uddin Khan and Jahid Hossain Bhuiyan (eds), Revisiting the Geneva Conventions: 1949-2019 (Koninklijke Brill 2019), p.17

[35] Ibid

[36] Id, p.18

[37] Id, p.19

However, as stated in Article 17 of the APII, Non-International Armed Conflict (NIAC)[38] forbids the forced displacement of civilians, saying that such orders may only be given for reasons related to the conflict or when the security of the civilians involved or pressing military needs so dictate.[39] It is forbidden to force civilians from their land for conflict-related causes.[40] This article states that "forced movement of civilians" is covered by APII under Article 17 and includes both ordering a person to be relocated within a territory (Article 17(1) AP II) and compelling a person to leave their territory (Article 17(2) AP II).[41] According to Jan Willms, the focus of this article will solely be on "forced displacement," which is defined as the forcible transfer of civilians within a region during a conflict that is not on an international scale. Forced displacement is synonymous with terms like "ordered displacement" or similar expressions that suggest citizens are not allowed to leave.[42] Consequently, parties to NIAC may not mandate the full or partial dislodgment of the civilian population for conflict-related reasons,[43] unless it is necessary for the security of civilians or urgent military purposes.[44] Upon the cessation of the grounds for their displacement, displaced individuals are entitled to freely and safely return to their homes or places of habitual abode.[45] States are also prohibited from relocating portions of their civilian population into areas they currently control.[46]

Additionally, like GCIV, API, and APII, Customary International Humanitarian Law (CIHL), both in IACs and NIAC, contains numerous pertinent rules that prohibit displacement and safeguard IDPs and refugees as members of the civilian population.[47] Similarly, states are prohibited from deporting or transferring portions of their civilian population into areas they control,[48] and those who have been displaced have the freedom to freely return to their homes or other habitual residences in safety as soon as the circumstances leading to their displacement end.[49]

2. Forced Displacement in the International Criminal Law

Essentially, the post-World War II trials were important in the creation of the ICL,[50] which holds people criminally liable for violating IHL[51] and for widespread or systematic

[38] International of Committee of the Red Cross, (2008) defined NIACs "as protracted armed confrontations occurring between governmental armed forces and the forces of one or more-armed groups, or between such groups arising on the territory of a State. The armed confrontation must reach a minimum level of intensity, and the parties involved in the conflict must show a minimum of organization."

[39] APII, *supra* note 24, Article 17 (1)

[40] Id, Article 17 (2)

[41] Jan Willms, 'Without order, anything goes? The prohibition of forced displacement in non-international armed conflict', *International Review of the Red Cross*, Volume 91 Number 875 (September 2009), p. 550

[42] Ibid

[43] Diakonia International Humanitarian Law Centre, *supra* note 32

[44] UNHCR , Handbook for the Protection of Internally Displaced Persons, *supra* note 22

[45] Ibid

[46] Ibid

[47] CIHL-Rule 129 prohibits act of displacement as: A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

[48] Id, Rule 130

[49] Id, Rule 132

[50] First Report on Crimes against Humanity, Special Ra`pporteur Mr Sean D. Murphy, A/ CN.4/680, (17 February 2015), 27

[51] Ibid

significant human rights violations, such as forced displacement.[52] The first international criminal tribunal to be founded and the first to prosecute acts that amount to the war crime of forceful transfer or deportation was the International Military Tribunal at Nuremberg.[53] Accordingly, the national authorities are principally in charge of outlawing any transgressions of international human rights and humanitarian law within their borders.[54] Deportations and forced transfers were previously viewed as war crimes and crimes against humanity, but this has altered dramatically after the establishment of the International Criminal Tribunal for the Former Yugoslavia (hereafter the ICTY Statute) in 1993. Forced displacement was outlawed by the Statute under Article 2, which defined it as a serious violation of the Geneva Conventions[55] and a war crime. This included the unlawful expulsion or transfer of civilians as well as their unlawful imprisonment.[56] Here, certain elements must be considered for acts of forced displacement to constitute a war crime, such as unlawful deportation (across state border) or transfer (within a territory) or unlawful confinement against civilians and as a severe breach of the Geneva Conventions.

Likewise, Article 5 prohibits the deportation of civilians, whether carried out during an internal or international armed conflict, to be a crime against humanity,[57] even if the offense is the same in both cases.[58] On the other hand, expulsion or other forms of coercion that result in forced displacement are not penalized under Article 5.[59] Besides, the act violates Article 5 of the ICTY statute is punishable as persecution when it is carried out based on discriminating reasons, including political, racial, or religious ones.[60] Furthermore, it stipulates in Article 5 that crimes against humanity may be prosecuted "when committed in armed conflict, under other inhumane acts," which was defined to include forced transfers.[61] These acts must be systematic, organized, targeted against civilians, of a specific size and seriousness, and directed at a civilian population to qualify as crimes against humanity.[62] The ICTY which we shall discuss first recognized and prosecuted forced transfers as a crime against humanity under the section about "other inhumane acts," although it only included deportations in its Statute. Because of this, the ICTY developed relatively extensive jurisprudence of case law about forced transfers.[63]

For instance, the ICTY prosecuted multiple instances involving offenses of forced displacement and distinguished between deportations and forced transfers as separate

[52] Ibid

[53]Jean-Marie Henckaerts, Deportation and Transfer of Civilians in Time of War, *Vanderbilt Journal of Transnational Law,* Vol.26:469 (1993), pp.484-485.

[54]O. K, Lwabukuna, Reflections on the Possibility of a Comprehensive Framework for the Protection of IDPs in Africa's Great Lakes Region, (LLD thesis, University of Pretoria 2012) p.111.

[55]UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/808 (1993; last amendment 2002), Article 2(g)

[56] Ibid

[57] Id, Article 5(d)

[58]ICRC Study, Practice Relating to Rule 129. The Act of Displacement, available at:<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule129> accessed on 4 January,2024

[59] Prosecutor v Karadjic, IT-95-5/18-T, (24 March 2016), para.488

[60] ICTY Statute, *supra* note 56 Article 5 (h)

[61] Id, Article 5 (i); Judgement, *Kupreskic et al,* (IT-95-16), (14 January 2000), para.566

[62]Nikolic, T-94-2-R61, Review of Indictment (20 October 1995), para 26

[63]Victoria Colvin and Phil Orchard, A Forgotten History: Forcible Transfers and Deportations in International Criminal Law, *Criminal Law Forum* 32(1), March 2021, DOI:10.1007/s10609-020-09409-7

crimes.[64] According to the ICTY jurisprudence deportation could include crossing a *de jure* international border, but also in some cases *de facto* borders between the warring sides.[65] Afterward, forcible transfers were noticed as incorporating any movements of civilians that occurred exclusively within a State's territory.[66] Furthermore, there is no doubt that the ICTY established the illegal nature of forced displacement, declaring that the criminal responsibility for the forced uprooting of people from a territory rests with the one who initiates the forceful displacement and not with the place to which the people are sent.[67] To end with, while the ICTY did successfully convict several perpetrators for forcible transfers or deportations, in none of the cases were these the only crimes charged. The bulk of cases, however, were directly connected to genocide, particularly in light of the events at Srebrenica;[68] other cases were connected to detention procedures[69] or a variety of crimes committed during the Kosovo War, such as murder and persecution. Among these were charges of deportation, forcible transfer, murder as both war crimes and crimes against humanity against Vilastimir Őorđević,[70] and Šainović *et al*[71] charged with expulsion, forced displacement, persecutions, and murder as both a crime against humanity and a war crime.[72] In the judgment, Šainović, Pavković, and Lukić were found guilty of murder and persecution, deportation, and murder in violation of the laws of war; on the other hand, Lazarević was found guilty of assisting and abetting deportations and forcible transfers.[73]

Likewise, acts of forcefully transferring children from one group to another are considered acts of genocide under Article 2 of the 1994 Statute of the International Criminal Tribunal for Rwanda (here after ICTR Statute) when they are carried out with the intention of destroying a national, ethnic, racial, or religious group entirely or in part.[74] In addition, deportation on the basis of nationality, ethnicity, religion, or politics is illegal under Article 3 of the ICTR Statute and is considered a crime against humanity.[75] But, like the ICTY Statute, the ICTR Statutes do not distinguish between lawful and unlawful displacement, although the ICTY Statute has accepted that forced displacement must be caused without grounds permitted under international law.[76]

Moreover, the Special Court for Sierra Leone Statute,[77] which is similar to the ICTY and ICTR deportation[78] and persecution on political, racial, ethnic, or religious grounds[79] are crimes against humanity. The crimes listed below must be committed by a person as part of a systematic or widespread attack against

[64]The Appeal Judgement, *Stakić*, (IT-97-24-A), 22 March 2006, para.302) established the need to cross a *de jure* or *de facto* border, while the *Đorđević* trial judgment of 2011 (IT-05-87/1-T) (23 Feb 2011), paras.1604 and 1613.

[65]Ibid

[66] Ibid

[67]Appeal Judgement, *Krnojelac* (IT-97-25-A), (17 Sept 2003), para.218

[68] Radovan Karadžić (Judgement, Karadžić, (IT95-5/18-T) (24 Mar 2016) and Ratko Mladić, (Judgement, Mladić, (IT-09-92-T) (22 Nov 2017)

[69] Milorad Kronojelac, (Judgement, Krnojelac (IT-97-25-T) Trial Chamber, 15 March 2002, para 486-498, See also Prlić et al (IT-04-74)

[70] Vilastimir Đorđević, (IT-05-87/1-T)

[71] Šainović et al. (IT-05-87)

[72] Ibid

[73]Šainović et al, (IT-05-87-A), Appeals Chamber, 23 January 2014

[74]UN Security Council, 'Statute of the International Criminal Tribunal for Rwanda', UN Doc S/RES/955 (1994; last amendment 2006), (ICTR Statute), Article 2 (e)

[75] Id, Article 3 (d)

[76] Prosecutor v Krajisnik, IT-00-39-A, AC, Judgment, (17 March 2009), para.723

[77] Special Court for Sierra Leone Statute, (January 2002)

[78] Id, Article 2 (d)

[79] Id, Article 2(h)

any civilian population. The Special Panels for Serious Crimes of the United Nations Transitional Administration in East Timor have also pursued charges of war crimes and crimes against humanity for the violence and widespread forced displacement that followed the 1999 referendum, specifically for "deportation or forcible transfer of population" and "unlawful deportation or transfer or unlawful confinement."[80] However, while the Special Panels for Serious Crimes indicted 106 individuals for deportation or forcible transfer as a crime against humanity[81], the failure of Indonesia to cooperate with the process meant that few alleged perpetrators appeared before the Panels. Only eight individuals were convicted by the Panels of deportation or forcible transfers including three who pled guilty.[82]

Furthermore, on July 17, 1998, the Rome Statute was ratified and on July 1, 2002, the ICC's foundation treaty came into effect.[83] The ICC Statute was established to address the gravest international crimes, such as forced displacement and, more specifically, war crimes, crimes against humanity, and genocide.[84] Forced displacement is defined as genocide under Article 6 of the ICC Statute when it is carried out with the intention of eradicating a national, ethnic, racial, or religious group entirely or in part and involves the forcible transfer of children to another group.[85] Similarly, "deportation or forcible transfer of population" is defined as a crime against humanity under Article 7(1) of the ICC Statute when it is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[86] According to Article 7(2) (d) of the Statute, "deportation" or "forcible transfer" of people is defined as the forcible removal of the individuals in question from the territory in which they are lawfully present by expulsion or other coercive acts, without justification allowed by international law. Also, persecution against any identifiable group or collectivity on the basis of political, racial, national, ethnic, cultural, religious, or gender grounds is also considered a crime against humanity under Article 7(1) of the Statute when it is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[87] "Persecution" is defined in the Statute under Article 7(2) (g) as the deliberate and severe denial of fundamental rights in violation of international law on account of the group or collectivity's identity. Further, according to Article 7(1) (k) of the ICC Statute other inhumane acts of a similar nature that are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," constitute a crime against humanity. These acts

[80]United Nations General Assembly, "Report of the International Commission of Inquiry on East Timor," A/54/726,31 Jan 2000; United Nations Transitional Administration in East Timor, "Regulation No.2000/15," UNTAET/REG/2000/15, 6 June 2000, Section 5 5.1 (d) and Section 6 6.1(a) (vii)

[81]Bassiouni, M. C. 'Crimes against Humanity: Historical Evolution and Contemporary Application', Cambridge University Press, (2011), p.253

[82]The Prosecutor v. Joao Sarmento (18A/2001); Prosecutor v. Benjamin Sarmento and Romeiro Tilman (18/2001). See also Prosecutor v. Anastacio Martins and Domingos Goncalves (11/2001) Goncalves was found guilty of forcible transfers to West Timor.

[83]Rome Statute of International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) UN, Treaty Series, vol. 2187, No. 38544 (here after ICC Statute)

[84] Id, Article 5

[85]Id, Article 6(e), see also Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention), Article II

[86] Id, Article 7(1) (d)

[87] Id, Article 7(1) (h)

must also intentionally cause great suffering or serious harm to one's physical or mental health. Furthermore, the following are defined as "war crimes" under Article 8(2) of the ICC Statute: (a) serious violations of the Geneva Conventions of August 12, 1949, namely any of the following acts against individuals or property covered by the applicable Geneva Convention. The following acts, within the established framework of international law, constitute unlawful deportation, transfer, or confinement;[88] other grave violations of the laws and customs applicable in IAC: the transfer, directly or indirectly, by the Occupying Power of portions of its own civilian population into the territory it occupies; or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,[89] additional grave transgressions of the rules and traditions that apply to armed conflicts not of an international character, within the established framework of international law, specifically, any of the following acts ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.[90]

3. Principle of legality and Forced Displacement

Any contemporary criminal legislation must be based on the fundamental idea of legality.[91] The principle of legality originated from the Latin word, which means "*Nullem Crimen, Nulla Poena Sine Lege*".[92] The Latin phrase for the first time used as a legal discourse by German law Scholar Feuerbach[93] and he classified it into three main categories. First, *Nulla Poena sine Lege,"*which means 'every inflation presupposes a criminal statute'.[94] Second, "the imposition of punishment is contingent upon the existence of the threatened act" (*Nulla poena sina crimine*).[95] Third, the statutory prerequisite (the statute that threatens the deed) is dependent upon the statutory punishment, or *nullem crimen sine poena legali*.[96] Then, both regional and international legal instruments uphold the legality principle. The 1949 Geneva Convention III[97] and GCIV[98] are the first international legal documents that embrace the concept of legality. The Universal Declaration of Human Rights,[99] International Covenant on Civil and Political Rights,[100] Convention on the Rights of the Child,[101] and regional human rights instruments, in particular the African Charter on Human and Peoples Rights,[102] European Convention for the Protection of Human Rights, and Fundamental

[88] Id, Article 8(2) (a) (vii)
[89] Id, Article 8(2) (e) (viii)
[90] Id, Article 8(2) (e) (viii)
[91]Simeneh Assefa, Methods and Manners of Interpretation of Criminal Norms, *Mizan Law Review* (11(1):88, (September 2017).
[92]Hornle, Tatjana, Foundation Texts: P.J.A Von Feuerbach and His Textbook of the Common Penal Law (1801) (March 1, 2013). M. Dubber (ed), Foundation Texts in Modern Criminal Law, Oxford University press (2014), available at SSRN: http://ssrn.com/abstract=2999796, accessed on 7 January, 2024.
[93]Ibid
[94] Ibid
[95] Ibid
[96] Ibid
[97]Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, (12 August 1949)(GCIII),Article 99
[98] GCIV, *supra* note 23, Article 67
[99] Universal Declaration of Human Rights, (1948), Article 11
[100] International Covenant on Civil and Political Rights, (1966), Article 15 (1)
[101] Convention on the Rights of the Child, (1989), Article 40 (2)
[102] African Charter on Human and Peoples Rights, (1981), Article 7 (2)

Freedoms,[103] and American Convention on Human Rights,[104] all guarantee the international version of the principle of legality. The other important international legal instrument that provides the principle of legality is the ICC Statute which is a special ICL.[105]

Furthermore, all modern criminal laws are based on the idea of legality. The FDRE Constitution of Ethiopia also included the principles of legality, such as the prohibition of double jeopardy[106] and the non-retroactivity of criminal law.[107] Likewise, a basic principle of legality was adopted under the FDRE Criminal Code. Accordingly, the FDRE Criminal Code under Article 2 provides that:

> Criminal law specifies the various crimes and the penalties and measures applicable to criminals. (2) The Court may not treat as a crime and punish any act or omission which is not prohibited by law. The Court may not impose penalties or measures other than those prescribed by law. (3) The Court may not create crimes by analogy, (4) the above provisions shall not prevent the Court from interpreting the law. In cases of doubt, the Court shall interpret the law according to its spirit, by the meaning intended by the legislature to achieve the purpose it has in view. (5) Nobody shall be tried or punished again for the same crime for which he has been already convicted, punished, or subjected to other measures or acquitted by a final decision by the law.

According to principles of legality, the above provisions embrace the following sub-principles. The first principle as provided under Article 2(1) is no law no offence and no law no punishment. According to this provision, an act or omission which is not specified as a crime in

[103] European Convention for the Protection of Human Rights and Fundamental Freedoms, (4 November 1950), Article 7.

[104] American Convention on Human Rights, (22 November 1969), Article 9

[105] ICC Statute, *supra* note 84, stated the principle of legality under Article 22(1) and Article 24(1) and (2) as:

> "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court and No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute … In the event of a change in the law applicable to a given case prior to a final judgement, the law more favorable to the person being investigated, prosecuted or convicted shall apply."

[106] FDRE Constitution, (1995), under Article 23 provides that "No person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure."

[107] Id, Article 22 stated as:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed. 2. Notwithstanding the provisions of sub-Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person.

criminal law is not a crime, and penalties or measures not specified at the time of committing a crime cannot be applied as a principle. According to Simenh, based on Article 55(5) of the FDRE Constitution criminal law should be enacted by the Federal lawmaking body of the House of Peoples' Representatives.[108] The third one is no offense by analogy and no penalty by analogy. The fourth ingredient is an interpretation of criminal law. According to Article 2(4) of the FDRE Criminal Code, the court shall interpret the law only in case doubt exists by legislative intent, but in case of difficulties interpreting in favor of the suspect (principle of strict construction).[109] The fifth principle is the prohibition of double jeopardy which is stated under Article 2(5). The sixth principle is the non-retroactivity of criminal law. The FDRE Criminal Code under Article 5 prohibits the retrospective application of criminal law, except in cases advantageous to him/her.

Overall, the aforementioned provisions and justifications of the principle of legality shall be considered in Ethiopian criminal law to criminalize acts of forced displacement. Thus, legality principles guarantee the accused person's right to a trial by existing law and are intended to deter and fight impunity in Ethiopian criminal law.

4. FDRE Criminal Code and Crime of Forced Displacement

The 1957 Empire Ethiopia Penal Code was superseded by the FDRE Criminal Code, which aims to prevent crime by informing people about crimes and the penalties associated with, punishing offenders to make less likely to commit crimes in the future (specific deterrence), making them an example to others (general deterrence), and facilitating their reform and efforts to stop crimes from being committed.[110] In Ethiopia, as addressed in introduction section, currently several IDPs, Refugees, and asylum seekers are overwhelmingly forcibly displaced. Ethiopia is a state party to the Kampala Convention, under Article 6 requires all member states to make acts of arbitrary displacement that constitute international crimes against humanity, war crimes, or genocide illegal.[111] In addition, some arbitrary displacement activities may also be considered ordinary crimes (common crimes) under certain special criminal laws.[112] So, let's try to explore the criminalization of forced displacement in the FDRE Criminal Code that amounts to international core crimes and ordinary crimes.

Fundamental offenses in violation of international law are governed by the FDRE Criminal Code under Part 2, Book 3, Title 2, chapter 1, from Articles 269 to 280. So, under which provisions forced displacement criminalized as core crimes against international law to be examined. Indeed, the FDRE Criminal code under Article 270 nebulously criminalizes some arbitrary displacement actions against civilian populations as war crimes. According to this provision, anyone who organizes, directs, or participates in acts against the civilian

[108] Simeneh Assefa, *supra* note 92, p 105

[109] Dejene Girma Janka, 'A Handbook on the Criminal Code of Ethiopia', revised edition, Addis Ababa (Finfinne), Ethiopia, (2021), p 19

[110] FDRE Criminal Code, *supra* note 21, Article 1 para. 2

[111] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Adopted by the Special Summit of the Union Kampala, Uganda 23rd October 2009**,** entered into force 6th December 2012 (Kampala Convention), Article 6

[112] UNHCR, Making Arbitrary Displacement a Crime, *supra* note 17, p. 16

population during a time of war, armed conflict, or occupation in violation of international humanitarian conventions and public international law "the compulsory movement or dispersion of the population, its systematic deportation, transfer, or detention in concentration camps or forced labor camps"[113] is guilty of war crimes against the civilian population and faces a rigorous 5-to 25-year prison sentence, or, in more serious cases, life in prison or the death penalty. FDRE Criminal Code under Article 270(d) revealed forced displacement as one manifestation of war crime. According to this provision, the code has criminalized some acts of forced displacement within in context of war crimes. However, the issue is what acts constitute forced displacement as a war crime. From a close reading of this provision, we understand that the victims must civilian population, but the criminal code did not define what civilian population constitutes. The words civilian and civilian populations are defined under Geneva Convention III[114] and GCIV as part of protected persons including IDPs and Refugees.[115]

In addition, for forced displacement of civilians to be classified as a war crime, the players involved must be directly or indirectly involved in the population's forced movement or dispersal, systematic expulsion, transfer confinement in concentration camps, or forced labor camps. The FDRE Criminal Code does not, however, specify what behaviors qualify as forced displacement or population dispersal, systematic deportation, transfer, or incarceration in camps for concentration or forced labor. The ICC Statute to which Ethiopia is not a signatory state, for instance, in Article 8(2) (b) (viii) states that "the deportation or transfer by the Occupying Power of all or parts of the population of the occupied territory within or outside this territory" constitutes a war crime in IACs. Article 8(2) (e) (viii) of the same Statute, on the other hand, provides that "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" is a war crime in NIACs. Nevertheless, the FDRE Criminal Code under Article 270(d) does not identify an act that constitutes war crimes in international and internal armed conflict, as such ICC Statute. Thus, it is better to interpret the FDRE Criminal Code the provision that deals with forced displacement with the ICC Statute.

Furthermore, systematic transfers or detentions in concentration camps or forced labor camps conducted against civilian populations are classified as war crimes under Article 270 (d) of the FDRE Criminal Code. A careful reading of this clause reveals that any act that was conducted in a way that was consistently associated with warfare is classified as both a war crime and a crime against humanity. It is

[113] FDRE Criminal Code, *supra* note 21, Article 270 (d)

[114] GCIII *supra* note 98, under Article 50 define Civilian and Civilian Population as:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians

[115]GCIV, *supra* note 23, under Article 4 and 27 protected person as civilian population including refugees and IDPs. Refugees receive, besides the general protection afforded to civilians by IHL, special protection in the GCIV under Article 44 that specifies detaining Powers should not treat as enemy aliens refugees who do not, in fact, enjoy the protection of any government. See also API, *supra* note 24, under Article 73 adds that refugees must be regarded as protected persons in all circumstances and without any adverse distinction.

specified as a clear war crime instead of being offered as such. Interestingly, compelling a protected civilian population is deemed a grave breach of Article 147 of GCIV, to which Ethiopia is a state party. Additionally, compelling a protected person to participate in the armed forces of a hostile power is illegal under Article 8(2) (a) (v) of the ICC Statute, regardless of how the act was carried out. It should be noted that, the ICC Statute's Article 8(2) (b) (xv) states that it is a war crime in IACs for someone to "compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service prior to the commencement of the war."

Article 270(l) of the FDRE Criminal Code also designates as war crimes against the civilian population, acts of displacing individuals who were, prior to the commencement of hostilities, regarded as stateless or refugees under applicable international instruments or national legislation of the State of refuge or State of residence. In this case, it appears that refugees and stateless people are receiving increased attention in an effort to shield them against acts of arbitrary displacement. Apart from the broad protection that the IHL offers to citizens, the IHL also provides special protection for refugees. To illustrate, Article 44 of GCIV guarantees that detained authorities shall not be regarded as refugee hostile aliens without government protection. Similarly, API provides in Article 73 that refugees must always and everywhere be treated equally and as protected individuals. Further, as stated in GCIV Article 45, "a protected person shall not be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[116] This clause shields asylum seekers and refugees from being returned to their home country (*refoulment*) or to a third nation out of fear of persecution due to their religious or political views.

In addition to criminalizing forced displacement as a war crime against the civilian population, the FDRE Criminal Code also criminalizes acts of genocide as fundamental crimes.[117] Genocide is defined as "committed with intent to destroy, in whole or in part, a nation, nationality, the ethnical, racial, national, color, religious, or political group" under Article 269 of the FDRE Criminal Code. This includes anyone who plans, directs, or participates in "compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance" during a time of war or peace.[118]

Here, to say acts of Genocide by forcibly transferring peoples or children, certain elements that constitute the offense shall be considered. Mainly, the perpetrator any time (in war or peace) partakes (directly or indirectly) through organizing, ordering, or engaging in the offense shall be considered. The other element, (physical element) forcibly transferring people or children or their placing under living conditions calculated to result in their death or disappearance. Lastly, the crimes must be carried out with the intention of completely or partially destroying a nation, nationality, ethnic group, race, ethnicity, color, religion, or political organization (mental element). Similarly, forcibly moving a group's children to another group that committed with the intent to destroy, in whole or in part, a

[116] GCIV, *supra* note 23, Article 45 para.4
[117] FDRE Criminal Code, *supra* note 21, Article 269
[118] Id, Article 269 (e)

national, ethnic, racial, or religious group is considered genocide, according to Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), to which Ethiopia is a signatory state.[119] When we look at the constituents that establish the crime under Article 269 (e) of the FDRE Criminal Code and Article 2(e) of the Geneva Convention, they are all less similar, except for the protected persons. Accordingly, under the FDRE Criminal Code people and children are protected from acts of forcible transfer, but in the Genocide Convention, only children are protected. In addition, in both the FDRE Criminal Code and the Geneva Convention the scope of protections is destined to defined groups, but the FDRE Criminal Code expanded to Nation, nationality, color, or political group. Furthermore, it may be a crime against humanity to forcibly displace civilians. However, crimes against humanity in general, and deportation or/and forcible transfer of civilian population as crimes against humanity in particular are not criminalized in the FDRE Criminal Code[120] or any other laws, except in the FDRE Constitution.[121] FDRE Constitution under Article 28 defined crime against humanity as genocide, summary executions, forcible disappearances or torture,[122] and such offenses shall not be barred by the statute of limitation and may not be commuted by amnesty or pardon.[123] Also, according to Peter "genocide is recognized as one of the crimes against humanity" under international law.[124] According to Article 7(1)(d) of the ICC Statute to which Ethiopia is not yet a state party, for instance, "deportation or forcible transfer of population" is considered a crime against humanity when it is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." This does not mean that the "attack" has to be a military attack in the sense that it is defined by IHL, nor does it have to entail any use of force of any kind, including armed hostilities.[125] Thus, based on the principle of legality guaranteed under Article 2 of the FDRE Criminal Code we can understand that, in Ethiopia, acts of deportation and/or forcible transfer committed as part of a widespread or systematic attack directed against any civilian population were purposefully left out of the FDRE Criminal Code or any other specific law that has a criminal nature definition of crime against humanity. Even though Ethiopia is not a signatory to the ICC Statute, there are circumstances under which Ethiopian crimes against humanity may be investigated by the ICC. When the UN Security Council sends a referral to the ICC,[126] Ethiopia may voluntarily begin the investigation.[127]

Moreover, it should be noted that the International Court of Justice has implicitly acknowledged the *jus cogens* rule on crimes against humanity.[128] International criminal tribunal rulings have also established the *jus*

[119]Genocide Convention, *supra* note 86, Article II (e); See also ICC statute, *supra* note 84, Article 6(e).
[120] FDRE Criminal Code, *supra* note 21
[121] FDRE Constitution, *supra* note 107
[122] Id, Article 28 (1)
[123] Ibid
[124] C .M. Peter, Human Rights in Africa; A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of rights, (1990) 60
[125] Rodney Dixon in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (Baden-Baden: Nomos Verlagsgesellschaft, (1999), p. 124.
[126] ICC Statute, *supra* note 84, Article 13 (b)
[127] Id, Article 12 (3)
[128] Dire Tladi, 'Crimes against humanity as a peremptory norm of general international law (*jus cogen*s): There

cogens prohibition against crimes against humanity. These consist of the rulings made by the ICC in Prosecutor v. William Samoei Ruto and Joshua Arap Sang,[129] Prosecutor v. Milan Simi´c, and Prosecutor v. Zoran Kupreški´c et al.[130] It is widely acknowledged that the interdiction of crimes against humanity enjoys the status of *jus cogens* in the aforementioned instances. Accordingly, "deportation or forcible transfer of population," which is defined as a crime against humanity under Article 7(1) (d) of the ICC Statute, must be criminalized in Ethiopia.

Furthermore, the FDRE Criminal Code also failed to criminalize the crime of ethnic cleansing under any of the international crimes or as a separate crime. According to CIHL, a program of "changing the demographic composition of a territory"[131] by "using military means to terrorize civilian populations, often to force their flight in a process that came to be known as "ethnic cleansing".[132] Here, categorizing ethnic cleansing as a crime against humanity or as genocide is difficult. There is no precise definition of ethnic cleansing or specific acts that qualify as such, and it is not recognized by international law as a separate crime. According to the interim report of a United Nations Commission of Experts tasked with investigating breaches of international humanitarian law in the former Yugoslavia, ethnic cleansing is[133] "... rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[134] The Commission outlined the definition of ethnic cleansing as follows in its final report:[135] "... a purposeful policy designed by one ethnic or religious group to remove the civilian population of another ethnic or religious group from certain geographic areas by violent and terror-inducing means."[136] According to the Commission of Experts, these actions "may constitute crimes against humanity and may be integrated into particular war crimes." Additionally, these actions might be covered by the Genocide Convention.[137] Therefore, ethnic cleansing is neither considered a distinct crime nor a part of an international crime under Ethiopian or international criminal law.

Moreover, acts of forced displacement that do not constitute international crimes are also not criminalized as ordinary crimes in the FDRE Criminal Code.[138] To characterize arbitrary displacement as an ordinary crime, certain elements need to be legally defined. For example, the Columbia Criminal Code criminalizes acts of forced displacement (arbitrary displacement) as international crime[139] and ordinary crime simultaneously.

really is no doubt! But so what?', *African Year Book on International Humanitarian Law*, (2020), p.9.

[129] ICC, Prosecutor v William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision of Trial Chamber on the Request of Mr. Ruto for Excusal from Continued Presence at Trial, International Criminal Court, (18 June 2013), para 90

[130] ICTY, Prosecutor v Zoran Kupreški´c et a*l*, IT-95-16-T, (Judgment of 2000), para.520

[131] CIHL-Rule 129, *supra* note 48

[132] Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica, UN Doc. A/54/549, para.19

[133]UN Security Council, S25274, 10 February 1993, paras.55-56 <https://undocs.org/S/25274> accessed on 3 January,2024

[134] Ibid

[135] UN Security Council, S/1994/674, 27 May 1994, para.129 <https://undocs.org/S/1994/674> accessed on 3 January,2024

[136] Ibid

[137] Ibid

[138] FDRE Criminal Code, *supra* note 21

[139]Columbia Criminal Code (Law 599 of 2000), Article 159 define Deportation, expulsion, transfer or forced displacement of the civilian population as: " Anyone who, on the occasion and during the development of an armed conflict and without any military justification,

According to this criminal code, the crime of forced displacement is as ordinary crime defined as: "anyone who arbitrarily causes one or more of its members to change their place of residence through violence or other coercive acts directed against a sector of the population."[140] It shall not be deemed forced displacement, however, if the population is forcibly dislocated by public force by international law for the population's security or in the event of urgent military necessity.[141] Thus, the crime of forced displacement as an ordinary crime is defined as acts not permitted by law, and in exceptional circumstances, the act shall not constitute forced displacement. The writer asserts that, to fight impunity Ethiopian Federal government must criminalize some acts of forced displacement that constitute heinous crimes, as well as forced displacement as independent ordinary crime simultaneously.

5. Conclusion

Every year millions of civilian populations as individuals or in mass forcibly displaced from their legally owned homeland to another place. Forced displacement becomes an increasingly sneaky method of removing civilian populations through persecution, human rights violations, armed conflict, widespread violence, or man-made calamities. Persons who have been forcibly displaced may decide to apply for refugee status after crossing an international boundary, while the forcible movement of civilian populations within in territory of a single state leads to IDPs. In international law, the criminalization of forced displacement is a crucial aspect of ensuring accountability and justice for the victims.

The crime of forced displacement was initially identified in accords as early as the Nuremberg Charter, which came into effect shortly after World War II and was closely related to the crimes of deportation and population transfer. Later, the Nazis' widespread use of forced deportations during World War II served as the impetus for the 1949 Geneva Convention's explicit clause against forcible transfer and deportation. No matter the reason, the GCIV forbade the individual or mass forceful transfers and deportations of protected individuals from the occupied territory; additionally, "unlawful deportation or transfer of a protected person" is considered a grave breach. At first, nevertheless, the crime of forced movement was restricted to IAC alone. Nevertheless, the 1949 Geneva Conventions and their Additional Protocols forbid the forcible displacement of people within IAC and NIAC.

The jurisprudence of international tribunals has led to the treatment of forced displacement as a criminal offense. Although the ICTR legislation did not include the crime of forced displacement, it addressed the crime against humanity of "inhuman acts." In contrast, the ICTY statute includes deportation and the transfer of civilians as crimes against humanity, as well as deportation and deportation as war crimes. Moreover, the ICC Statute was created to address heinous crimes like genocide, war crimes, and crimes against humanity that involve forced displacement. According to the ICC Statute, forcing children to transfer to another group is considered genocide if the act is carried out to eradicate the group in whole or in part a national, ethnic,

deports, expels, transfers or forcibly displaces civilian population from their settlement site."

[140]Article 180, shall incur a prison sentence from 6 to 12 years, a fine of 600 to 1,500 current legal monthly minimum wages, and the prohibition of the exercise of rights and public functions for 6 to 12 years.

[141] Ibid

racial, or religious group. Similarly, when "deportation or forcible transfer of population" is "performed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," it is considered a crime against humanity. Additionally, forcible transfers are forbidden under Article 8 of the Rome Statute as war crimes. These transfers are defined as distinct unlawful deportations or transfers committed in IAC and displacement not justified by the necessity to protect civilians or imperative military reasons in NIAC. These definitions have been made possible by the Rome Statute and the practices of the ICC. However, compared to other crimes, the evolution of international jurisprudence on this specific topic has not been as extensive.

FDRE Criminal Code under the heading crimes against international law criminalizes war crime and Genocide, whereas it seems crime against humanity is deliberately absent. Even though the FDRE Criminal Code does not recognize or criminalize crimes against humanity, there is no chance to prosecute these acts as such. However, since crime against humanity is recognized as *jus cogence*, even if Ethiopia is not a signatory to the ICC Statute the provisions that deal with crime against humanity, particularly with forced displacement Ethiopia must apply. In the FDRE Criminal Code acts that do not constitute international crime are also not criminalized as an ordinary crime. Overall, to fill the lacunas in Ethiopian criminal law, it is better to extract from forced displacement criminalized under international criminal law.

the best option instead of simply keeping it or abolishing it. Issuance of bearer shares has some benefits for the development of company business and the securities market of a country. At the same time, there are some shortcomings of such a type of share. So, to balance the two dimensions, allowing the issuance of bearer shares and keeling them with custodians is the smart way of enjoying the benefits and closing doors for the dark sides.