# የኢትዮጵያ ሕግ መጽሔት
# JOURNAL OF ETHIOPIAN LAW

ጽ፱ኛ ቅፅ፣ ቁ. ፩
ታህሳስ ፪ሺ፲ ዓ. ም.

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## በዚህ እትም — IN THIS ISSUE



በአዲስ አበባ ዩንቨርሲቲ ህግ ት/ቤት በዓመት ቢያንስ አንድ ጊዜ የሚታተም።
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Since 1964

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የኢትዮጵያ ሕግ መጽሔት ከኢትየጵያ ሕግና ተዛማጅነት ካላቸው ዓለም አቀፍ ሕጎች ጋር ተያይዘው የሚነሱ ሕግ ነክ፣ ፖለቲካዊና ማህበራዊ ጉዳዮችን የሚመለከቱ የምርምር ሥራዎች የሚታተሙባት መጽሔት ነች።

ሕግ ነክ የምርምር ጽሑፎችን፣ የመጽሃፍ ትችቶችን፣ እንዲሁም በፍርዶችና በሕጎች ላይ የተደረጉ ትችቶችን ብትልኩልን በደስታ እንቀበላለን። በተጨማሪም በኢትዮጵያ ሕግ መጽሔት ላይ ቀደም ሲል ታትመው የወጡ የምርምር ጽሑፎችን፣ የመጽሃፍ፣ የፍርድ ወይም የሕግ ትችቶችን የሚመለከቱ አስተያየቶችን ትጋብዛለች። በዚህ መሠረት የሚቀርብ አስተያየት ከ5 ገፅ መብለጥ የለበትም። የተመረጡ አስተያየቶች በፀሃፊው ትብብር አርትኦት ከተደረገባቸው በኋላ በመጽሔቷ ላይ ይታተማሉ።


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**የመጻሕፍት ማዕከል**
**የመ.ሣ.ቁ. 1176**
**አዲስ አበባ ዩኒቨርሲቲ**
**አዲስ አበባ፣ ኢትዮጵያ**

ብላችሁ መጻፍ ትችላላችሁ።

**የቅጅ መብት**

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*በሪሁን ገሣሽኝ*[*]

## አህፅሮተ-ፅሁፍ

በኢትዮጵያ የህግ ማዕቀፍ ውስጥ የዩኒቨርሲቲ መምህራን የቅጥር እና የአስተዳደር ሁኔታን በተለይ ደንግጎ የሚያስቀምጥ እና የሚገዛ የህግ ማዕቀፍ ካለመኖሩ ጋር ተያይዞ በዩኒቨርሲቲ መምህራን የቅጥር እና የአስተዳደር ሂደት ውስጥ አንዳንድ አከራካሪ ነጥቦች ይገኛሉ፡፡ በተለይም መምህራን ሲቪል ሰርቫንት ናቸው ወይስ አይደሉም? መምህራን በቅጥር ደረጃ ቋሚ ናቸው ወይስ ጊዜያዊ? የመምህራንን ጉዳይ የሚገዛው አግባብነት ያለው የህግ ማዕቀፍ የቱ ነው? ጉዳያቸውንስ መዳኘት የሚችለው አካል ማን ነው? የሚሉ የክርክር ሀሳቦች ከጋራ የመወያያ መድረኮች አንስቶ እስከ የፌዴራል ጠቅላይ ፍርድ ቤት ድረስ ትኩረት አግኝተው የቀረቡ ናቸው፡፡ የዚህ ፅሑፍ ዓላማም እነዚህን አራት አከራካሪ ነጥቦች አግባብነት ካላቸው የኢትዮጵያ ህጎች እና ከፌ/ጠ/ፍ/ቤት ሰ/ስ/ችሎት አስገዳጅ የህግ ትርጓሜዎች አንፃር ውይይት እና ትንታኔ በማድረግ በነጥቦቹ ላይ የተሻለ ግንዛቤ እና የህግ አረዳድ እንዲኖር አስተዋፅኦ ማድረግ ነው፡፡ ይህ ፅሑፍ የዩኒቨርሲቲ መምህራን እንደ አግባብነቱ ሲቪል ሰርቫንት ተብለው የሚጠሩና የሲቪል ሰርቫንት አዋጅም ይመለከታቸዋል በማለት ይከራከራል፡፡ በጸሓፊው አመለካከት የዩኒቨርሲቲ መምህራን ቅጥር በየሁለት ዓመት እንዲታደስ መደረጉ ለትምህርት ጥራት ዓላማ እንጂ የመምህራንን ቅጥር ጊዜያዊ ነው የሚያሰኝ አይደለም፡፡ ይልቁንም አግባብነት እና ተፈፃሚነት ካላቸው አዋጆች፣ ደንቦች እና መመሪያዎች አንፃር ሲታይ የመምህራን ቅጥር በባህሪው ቋሚ የሥራ ቅጥር እንጂ የኮንትራት የቅጥር ሁኔታ አይደለም፡፡ በተጨማሪም እንደ ጉዳዩ ባህሪ መምህራንን የሚመለከት የክርክር ጉዳይ በቀጥታ ለመደበኛ ፍ/ቤት የሚቀርብ ወይም ተዋረዱን ጠብቆ ከዩኒቨርሲቲው የበላይ አመራር ውሳኔ ወደ ኢትዮጵያ ሲቪል ሰርቪስ አስተዳደር ፍ/ቤት ብሎም ወደ ፌዴራል ጠቅላይ ፍ/ቤት የሚሄድ ይሆናል፡፡

**ቁልፍ ቃላት፡-** መምህራን፣ ሲቪል ሰርቫንት፣ ጊዜያዊ ሠራተኛ፣ ቋሚ ሠራተኛ፡፡

## መግቢያ

የአሰሪና ሰራተኛ ግንኙነት መነሻው በአሰሪውና ሰራተኛው መካከል የሚደረግ የቅጥር ውል ሲሆን ይህ ግንኙነትም በአሰሪና ሰራተኛ ወይም በመንግስት ሰራተኞች አስተዳደር የህግ ማዕቀፍ የሚገዛ ነው፡፡ የሚገዛበት የህግ ማዕቀፍ ልዩነቱ እንደተጠበቀ ሆኖ በቀጣሪ እና በተቀጣሪ መካከል የሚፈጠረው ግንኙነት በቀጣሪው ወይም በአሰሪው ማንነት ላይ ተመስርቶ በአጠቃላይ በሁለት ይከፈላል፡፡ ይህም የመንግስት እና የግል አሰሪና ሰራተኛ ግንኙነት በመባል ይታወቃል[1]፡፡ በሁለቱም ዓይነት የቅጥር ግንኙነት መስመሮች የተዋዋይ

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[*] ፀሃፊው የመጀመሪያ ዲግሪያቸውን ከመቀሌ ዩኒቨርሲቲ፣ ሁለተኛ ዲግሪያቸውን ደግሞ ከአዲስ አበባ ዩኒቨርሲቲ አግኝተዋል፡፡ ፀሃፊው የቀድሞ የድሬዳዋ ዩኒቨርሲቲ የህግ መምህር የነበሩ ሲሆን፣ በአሁን ሰዓት በፌዴራል እና በደ/ብ/ብ/ህ/ክ/መ በማናቸውም ፍ/ቤቶች ጠበቃና የህግ አማካሪ ናቸው፡፡ እንዲሁም በአዲስ አበባ ዩኒቨርሲቲ በተመላላሽ የህግ መምህርነት ያገለግላሉ፡፡ ይህን ፅሑፍ ለህትመት እንዲበቃ አስፈላጊውን አስተያየት እና ግብዓት ላበረከቱት የፅሑፉ ገምጋሚዎች ፀሐፊው ምስጋናውን ያቀርባል፡፡ ፀሐፊውን በ berishallom71221@gmail.com ማግኘት ይቻላል፡፡

[1] የህግ ማዕቀፍን በተመለከተ የኢትዮጵያ የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96 ተግባራዊ የሚሆነው የግል አሰሪና ሰራተኛ ግንኙነት ወይም የጎንዮሽ ግንኙነት ባላቸው የዜጎች የሥራ ቅጥር ግንኙነት ላይ ብቻ ላይሆን መንግስትም ገቢ በሚሰበስብባቸው የልማት ድርጅቶች ወይም ፕሮጀክቶችም ላይ በግል አቅሙ ወይም private capacity እንደቀረበ

ወገኖች ማለትም የአሰሪውና የሰራተኛው የግንኙነት ባህሪ በግልፅ መታወቅ ይኖርበታል። የሰራተኛው የቅጥር ሁኔታ በግልፅና በማያሻማ ሁኔታ መታወቅ ሠራተኛው ከአሰሪው ጋር ላለው ዘለቄታዊና መልካም ግንኙነት ወሳኝነት አለው።

በኢትዮጵያ ውስጥ የሚገኙ ከፍተኛ የትምህርት ተቋማት[2] እንደማንኛውም የመንግስት መስሪያ ቤት በአዋጅ በተሰጣቸው ስልጣን መሰረት አስፈላጊውን የሰው ኃይል ይቀጥራሉ፣ ያስተዳድራሉ። በዚህ ረገድ ዩኒቨርሲቲዎች ከተቋቋሙበት ዓላማ፣ ራዕይና ተልዕኮ አንፃር ሲታይ የመምህራን ቅጥር ግምባር ቀደሙና ልዩ ትኩረት እና ጥንቃቄ የሚሰጠው ነው[3]። ሆኖም ግን ከመምህራን ቅጥር እና አስተዳደር ጋር በተያያዘ አንዳንድ አከራካሪ ነጥቦች እየተንፀባረቁ ይገኛሉ። በተለይም የመምህራን የቅጥር ግንኙነት በየትኛው የህግ ማዕቀፍ ነው መገዛት ያለበት? መምህራን ሲቪል ሰርቫንት ናቸው ወይስ አይደሉም? መምህራን ቋሚ ናቸው ወይስ ጊዜያዊ ተቀጣሪ ናቸው? መምህራን መብት ከማስከበር ጋር የተያያዙ ጉዳያቸውን በየትኛው የፍርድ ሰጪ አካል ፊት ማቅረብ ይጠበቅባቸዋል? የሚሉት ጥያቄዎች ዋነኞቹ አከራካሪ ነጥቦች ሆነዋል።

በእነዚህ የክርክር ነጥቦች ላይ ግልፅ ውይይትና የጠራ ግንዛቤ ካልተያዘባቸው አሁን ካለው የተግባር ችግር የገዘፈ ችግር መውለዳቸው የማይቀር እና በመማር ማስተማር ሂደት ላይ የማይናቅ አሉታዊ ተፅዕኖ ሊያደርሱ እንደሚችሉ መገመት አያዳግትም። ስለሆነም ይህ ጽሑፍ በተጠቀሱት የክርክር ነጥቦች ላይ በማተኮር አግባብነት ያላቸውን የህግ ማዕቀፎችና የአስተዳደር እና የፍርድ ቤት ውሳኔዎች በመመርመር በጉዳዩ ላይ የጠራ እና የተሻለ ግንዛቤ ለመፍጠር ይሞክራል።

## 1. በዩኒቨርሲቲ መምህራን የቅጥር እና አስተዳደር ሁኔታ ላይ የሚነሱ ዋና ዋና የክርክር ነጥቦች

ዩኒቨርሲቲዎች በመቋቋሚያ ደንቦቻቸው፣ በከፍተኛ ትምህርት አዋጅ ቁጥር 650/2001 (በአዋጅ ቁ. 861/2006 እንደተሻሻለው) መሠረት እና በሌሎች አግባብነት ባላቸው የኢትዮጵያ ህጎች መሠረት በተሰጣቸው ስልጣን መሠረት የተቋቋሙበትን ዓላማ፣ ራዕይና ተልዕኮ ለማሳካት ይጥራሉ። ዓላማቸው ከግብ እንዲደርስ፣ ራዕያቸው እንዲሳካና ተልዕኳቸው እንዲፈፀም ደግሞ ራሳቸውን ብቃትና ጥራት ባላው የሰው ኃይል ማደራጀት ይጠበቅባቸዋል። የከፍተኛ ትምህርት ተቋማት በአዋጅ ቁ. 650/2001 አንቀፅ 8(4) ውስጥ በግልፅ እንደተቀመጠው በአዋጁና በሌሎች ተፈፃሚነት ባላቸው ህጎች ድንጋጌዎች መሠረት ሠራተኞችን የመቅጠርና የማስተዳደር ኃላፊነት ተጥሎባቸዋል። በዚህ ረገድ ተቋማቱ ከፍተኛ ትኩረት ከሚሰጡትና ዕቅድ ከሚይዙበት አንዱና ዋነኛው ጉዳይ ደግሞ የመምህራኖቻቸው ቅጥር እና አስተዳደር ነው። ከመምህራን ቅጥርና አስተዳደር ጋር በተያያዘ በመልካም ተሞክሮነት የሚነሱ ነጥቦች እንዳሉ ሆነው በተለያየ ጊዜያት እና መድረኮች እየተነሱ ያሉ ጥያቄዎች፣ ክርክሮችና ውዝግቦች እንዳሉ ቀደም ሲል

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ስለሚቆጠር ከሚቀጥራቸው ሰራተኞች ጋር ያለው ግንኙነት በህግ በተለይ ካልተደነገገ በስተቀር የሚዳኘው የግል አሰሪና ሰራተኛን ግንኙነትን በሚገዛው የህግ ማዕቀፍ ይሆናል።

[2] የዚህ ጽሑፍ ትኩረት በከፍተኛ ትምህር ተቋማት አዋጅ ቁጥር 650/2001 (በአዋጅ ቁጥር 861/2006 እንደተሻሻለው) በአንቀፅ 2(9)፣ 2(13)፣ 6፣ እና 11 መሠረት የመንግስት ዩኒቨርሲቲ ሆኖ ህጋዊ ሰውነት ይዞ የተቋቋመ የመንግስት ከፍተኛ ትምህርት ተቋም ላይ ነው።

[3] ይህ አገላለፅ የሌሎች ሠራተኞችን ሚና ዝቅ ለማድረግ ሳይሆን ዩኒቨርሲቲዎች የተቋቋሙት የትምህርት ልህቀት ማዕከል ለመሆን እንደመሆኑ መጠን ዋነኛ ትኩረታቸው ጥራትና ብቃት ያላቸው ምሁራን ወይም መምህራን በሰው ኃይላቸው ውስጥ ያካተቱ መሆኑን ማረጋገጥ ነው።

ተመልክቷል።[4] ከዚህ በመቀጠል አራቱ ዋና የክርክር መነሻ የሆኑት ነጥቦች ለምርምርና ለውይይት ያመች ዘንድ በግርድፉ ቀርበዋል።

## ሀ. የዩኒቨርሲቲ መምህራን ሲቪል ሰርቫንት አይደሉም የሚለው ክርክር

የመጀመሪያው ክርክር መምህራን ከዩኒቨርሲቲያቸው ጋር ባላቸው የቅጥር ግንኙነት ውስጥ ምን ዓይነት ሰራተኞች ናቸው የሚለውን ጥያቄ ማዕከል ያደረገ ሲሆን ለዚህ ጥያቄ በአብዛኛው እየተሰጠ የሚገኘው ምላሽ መምህራን ሲቪል ሰርቫንት አይደሉም የሚል ነው።[5] የዚህ አቋም ዋነኛው ምንጭ ደግሞ የፌዴራል መንግስት ሰራተኞች አስተዳደር አዋጅ ለመንግስት ሠራተኛ የሰጠው ትርጉም ነው። እርግጥ የቀድሞው የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ ቁጥር 515/99 በአዋጅ ቁጥር 1064/2010 የተተካ ቢሆንም የመንግስት ሠራተኛነት ትርጓሜን ጨምሮ በዚህ ጽሑፍ የተነሱትን ነጥቦች በተመለከተ ምንም አይነት ልዩነት የሌለውና የቀድሞውን አዋጅ ሀሳብ በማጠናከር የቀረበ በመሆኑ በዚህ ጽሑፍ አፅንኦት ለመስጠት አስፈላጊ በሆነበት ጊዜ ሁሉ የቀድሞው አዋጅ ቁ. 515/99 የሚጠቀስ ይሆናል።

ወደ ነጥባችን ስንመለስ በአዲሱ የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ ቁጥር 1064/2010 (በቀድሞውም አዋጅ ቁጥር 515/99 ተመሳሳይ ነበር) አንቀጽ 2(1) ስር የመንግስት ሠራተኛ ምን ማለት እንደሆነ ትርጉም ተቀምጧል። በዚህ ድንጋጌ መሰረት ሲቪል ሰርቫንት ማለት "በፌዴራል መንግስት መስሪያ ቤት ውስጥ በቋሚነት ተቀጥሮ የሚሰራ ሰው ማለት ነው" ይላል። ከዚህ በመነሳት የሚቀርበው ክርክር መምህራን በየሁለት ዓመቱ እየታደሰ የሚቀጥል የሥራ ውል ያላቸው ጊዜያዊ ወይም የኮንትራት ሠራተኞች እንጂ ቋሚ ተቀጣሪ ስላልሆኑ በአዋጁ መሠረት ሲቪል ሰርቫንት ሊባሉ አይችሉም የሚል ነው። ይህ ክርክር በተለያዩ ዩኒቨርሲቲዎች ውስጥ የጋራ መድረክ ውይይቶች ላይ መንፀባረቁ እንደተጠበቀ ሆኖ በፍርድ ቤት ደረጃም የተነሳ ክርክር ነው። ለምሳሌ (ከታችበሰፊው የቀረበውን ትንታኔ ይመለከቷል) በ*መምህር ግዛቸው ጥሪት እና በወሎ ዩኒቨርሲቲ* መካከል በነበረው ክርክር የፌዴራል መንግስት ሠራተኞች አስተዳደር ፍ/ቤት መምህሩ በዩኒቨርሲቲው ቦርድ ውሳኔ ቅር በመሰኘት ያቀረበውን ይግባኝ መምህሩ በአዋጁ መሠረት የፌዴራል መንግስት ሠራተኛ ሊባል አይችልም በሚል መነሻ ይግባኙን የማየት ስልጣን የለኝም በማለት ሳይቀበለው መቅረቱ በአብይነት የሚጠቀስ ነው።[6]

## ለ. የፌዴራል ሰራተኞች አስተዳደር አዋጅ በመምህራን ላይ ተፈፃሚ አይሆንም የሚለው ክርክር

ከላይ ከቀረበው ክርክር ጋር ተያያዥነት ያለውና በሁለተኛ ደረጃ የሚነሳው ክርክር ደግሞ የዩኒቨርሲቲ መምህራንን ጉዳይ የሚገዙ ሕጎችን ይመለከታል። ከዚህ አንጻር የፌዴራል መንግስት ሰራተኞች አስተዳደር አዋጅ ወይም የሲቪል ሰርቫንት አዋጅ ቁጥር 1064/2010 በዩኒቨርሲቲ መምህራን ላይ ተግባራዊ አይሆንም የሚለው ክርክርም በዋነኝነት የሚጠቀስ ነው። በዚህ ዕይታ መሠረት ከላይ እንደተገለፀው መምህራን ሲቪል ሰርቫንት ስላልሆኑ

[4] እነኚህ ውዝግቦች በስብሰባ ቦታ ላይ፣ በአስተዳደራዊ ውሳኔዎች፣ በህገ-ባዊ ውይይቶች፣ በፍርድ ቤት መዝገቦች ላይ፣ እና በዕለት ተዕለት የመምህራንና የዩኒቨርሲቲ አስተዳደር ሰራተኞች ግንኙነት ውስጥ በስፋት እየተንፀባረቁ እና እየተስፋፉ የሚገኙ ናቸው።

[5] ይህ ክርክር ፀሐፊው ተቀጥሮ ሲሰራ በነበረባቸው ሶስት ዩኒቨርሲቲዎች (ሚዛን ቴፒ ዩኒቨርሲቲ፣ ድሬዳዋ ዩኒቨርሲቲ እና አዲስ አበባ ዩኒቨርሲቲ) በተለያየ ጊዜያት በአስተዳደር ሰራተኞችና ከመምህራን ጋር በነበረ ውይይት የተንፀባረቀ ነው።

[6] በአመልካች መምህር ግዛቸው ጥሪት እና በተጠሪ የወሎ ዩኒቨርሲቲ፤ የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ ፋ/ቁ. 101271 (<u>የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፤ቅጽ 16</u>) ይመለከቷል።

ሲቪል ሰርቫትነትን የሚመለከተው አዋጅ በመምህራን የቅጥር ግንኙነትና አስተዳደራዊ ጉዳይ ላይ ተፈፃሚነት የለውም። የዚህ ክርክር ደጋፊዎች የአዋጁን አንቀፅ 4 ድንጋጌ አንደ ዋነኛ መከራከሪያ ያቀርባሉ። በዚህ ክርክር መሠረት የመምህራን ጉዳይ የሚዳኘው ተዋውለው በገቡበት የቅጥር ውል መሠረት ነው። የቅጥር ውላቸው ብቸኛው የህግ ማዕቀፍ ሲሆን በውላቸው ውስጥ ክፍተት ወይም ችግር ቢኖር የፍትሓ ብሔር ሕጉን በመጠቀም ሊፈታ ይገባል እንጂ የፌዴራሉ የመንግስት ሰራተኞች አስተዳደር አዋጅ በመምህራን ላይ አግባብነት ያለው የህግ ማዕቀፍ አይደለም የሚል ክርክር ነው። ይህ የክርክር ሀሳብ ተቀባይነት ያገኘ መሆኑን የሚያሳየው ከላይ በተጠቀሰው ጉዳይ ላይ የፌዴራል መንግስት ሠራተኞች አስተዳደር ፍርድ ቤቱ የመምህሩን ጉዳይ ለማየት ሥልጣን የለኝም ካለባቸው ግልፅ ምክንያቶች አንዱ መምህሩ የፌዴራል መንግስት ሰራተኞች አስተዳደር አዋጅ ተፈፃሚ የሚሆንበት ሠራተኛ አይደለም የሚል አቋም በመያዝ ይግባኙን ውድቅ ማድረጉ ነው።[7]

### *ሐ. በመምህራን ጉዳይ ላይ የዳኝነት ሥልጣን ስላለው አካል ያለው ክርክር*

መምህራን በቅጥር ጊዜያቸው በሚያጋጥሟቸው አስተዳደራዊ በደሎች፣ ቅሬታዎች ወይም ጥፋትም አጥፍተው ከሆነ በጥፋተኝነታቸው ላይ በሚሰጥ ውሳኔ ላይ ቅሬታ ለማቅረብ፣ ክስ ለመክፈት ወይም ይግባኝ ለማቅረብ ቢፈልጉ ወደ የትኛው የፍትህ ሰጪ አካል መሄድ አለባቸው የሚለው ጥያቄ ደግሞ ሌላው የክርክር ምንጭ ነው። በዚህ ረገድ ያለው አመለካከት በሁለት ተከፍሎ የሚታይ ነው። አንደኛው መምህራን ጉዳያቸውን በቀጥታ ወደ መደበኛ ፍርድ ቤት ይዘው መሄድ አይችሉም የሚለው ነው። ምክንያቱም መምህራን የፌዴራል መንግስት ተቋም ውስጥ እንደመስራታቸው ተቋሙ በሚገዛበት የአዋጅ ቁ. 1064/2010 እና የደንብ ቁጥር 77/94 ሥርዓት ይገዛሉ። በመሆኑም ቀጥተኛ ክስ ለመደበኛ ፍ/ቤት የሚያቀርቡበት አግባብ የለም የሚል ነው። ይህን የክርክር ሀሳብ የሚያንፀባርቁ ወገኖች በከፍተኛ ትምህርት ተቋማት አዋጅ ቁጥር 650/2001 አንቀፅ 44/1/ነ// እንደገና በሁለት ጎራ ይከፈላሉ። አንደኛው ወገን በዚህ አንቀፅ መሠረት የዩኒቨርሲቲው ቦርድ ውሳኔ የመጨረሻና ይግባኝ የማይባልበት ውሳኔ ነው ሲል፤ ሁለተኛው ጎራ ደግሞ በዩኒቨርሲቲው ቦርድ ውሳኔ ላይ ለፌዴራል መንግስት ሠራተኞች አስተዳደር ፍ/ቤት ወይም ለፌዴራል ፍ/ቤቶች ይግባኝ ማቅረብ ይቻላል፤ ድንጋጌው ይግባኝ የማለት መብት ላይ ክልከላ አላደረገም የሚሉ ናቸው። ሁለተኛው የክርክር መስመር ደግሞ መምህራን ሲቪል ሰርቫንት አይደሉም፤ ስለሆነም በሲቪል ሰርቫንት የአስተዳደራዊ መፍትሔ ሥርዓት ሊገዙ አይገባም፤ በቅጥር ውል መሠረት የሚሰሩ ጊዜያዊ ሰራተኞች እንደመሆናቸው ጉዳያቸውን በቀጥታ ክስ ወደ መደበኛው ፍ/ቤት መውሰድ ይችላሉ የሚል ነው። ለምሳሌ ያህል ይህ ክርክር የወሎ ዩኒቨርሲቲ ከመምህር ግዛቸው ጥሪት ጋር በነበረው ክርክር ላይ አፅንዖት በመስጠት ያነሳው ክርክር ነው።[8] ይህም የዩኒቨርሲቲው ቦርድ የመጨረሻ ውሳኔ ሰጪ በመሆኑ ቅር የተሰኘ ወገን ጉዳዩን ወደ ጠቅላይ ፍርድ ቤት በማቅረብ መከራከር አለበት የሚልከ ክርክር ነበር።[9]

### *መ. መምህራን ጊዜያዊ እንጂ ቋሚ ሠራተኞች አይደሉም የሚለው ክርክር*

በመሠረቱ ይህ ክርክር ደግሞ በቁጥር አንድ ከተገለፀው የክርክር ነጥብ ጋር ተያያዥነት ያለው ሲሆን በዋነኝነት መምህራን ለተወሰነ ጊዜ በሚደረግ የቅጥር ውል የሚቀጠሩ

[7] *ዝኒ ከማሁ።*

[8] *ዝኒ ከማሁ።*

[9] *ዝኒ ከማሁ።*

*ሠራተኞች ስለሆኑ ጊዜያዊ ሠራተኞች ናቸው፡፡ በተጨማሪም የከፍተኛ ትምህርት አዋጁ መምህራን ጊዜያዊ ሆነው መቀጠር እንዳለባቸው ያመለክታል የሚል ነው፡፡ በተለይም የዚህ አዋጅ አንቀጽ 33/1/ መምህራን ጊዜያዊ እንጂ ቋሚ ተቀጣሪዎች እንዳልሆኑ ይገልፃል፤ የቋሚነት የቅጥር ሁኔታም እንደማበረታቻነት መስፈርቱን ለሚያሟሉ መምህራን የሚሰጥ ሽልማት ነው፤ በመሆኑም መምህራን ጊዜያዊ ሰራተኞች እንጂ ቋሚ ሰራተኞች አይደሉም* የሚል ክርክር በሰፊው ይንፀባረቃል፡፡ በአጠቃላይ በዚህ በኩል የሚቀርበው የሕግ ክርክር *የመምህራን የቅጥር ሁኔታ ጊዜያዊነት መደበኛው የመምህራን የአቀጣጠር ሥርዓት ሲሆን የቋሚነት ሁኔታ ግን ለተወሰኑት ብቻ የሚሰጥ እንጂ ሁሉንም የሚመለከት አይደለም፡፡ ይህ የክርክር ሀሳብ በዶክተር ደሳለኝ ተመስገን እና በአዲስ አበባ ሳይንስና ቴክኖሎጂ ዩኒቨርሲቲ* መካከል የነበረውን ክርክር የተመለከተው *የፌዴራል ሠራተኞች* አስተዳደር ፍ/ቤት የካቲት 15 ቀን 2008 ዓ.ም. (በመዝገብ ቁጥር 041/2008) በሰጠው ብይን ላይ በግልፅ ተንፀባርቋል፡፡ በዚህ መዝገብ ላይ የአስተዳደር ፍ/ቤቱ "በአዋጅ 515/1999 *መሠረት በፌዴራል መንግስት መ*/ቤት ውስጥ በቋሚነት ተቀጥረው *የፌዴራል መንግስት ሠራተኞች* ተብለው ከሚጠቀሱት *ሠራተኞች* በስተቀር በጊዜያዊነት ወይም በኮንትራት የተቀጠሩትን *ሠራተኞች* አይመለከትም" በማለት የዩኒቨርሲቲ *መምህራን* ቋሚ ሳይሆኑ ጊዜያዊ *ሠራተኛ* ናቸው የሚል አቋም በመያዝ ውሳኔ አሳልፏል፡፡ ይህንኑ ሀሳብ በመደገፍም የፌ/ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎት ይግባኝ የተባለበትን የአስተዳደር ፍ/ቤቱን ውሳኔ በመዝገብ ቁጥር 125278 በማፅናት ይግባኙን መሰረዙ ምን ያህል *መምህራን* ጊዜያዊ እንጂ ቋሚ *ሠራተኞች* አይደሉም የሚለው አስተሳሰብ በፍ/ቤት ዘንድ ተቀባይነት ያገኘ መሆኑን ያሳያል፡፡

ከዚህ ቀጥሎ በሚቀርበው የጽሁፉ ክፍል ከላይ በግርድፉ የተመለከትናቸውን የክርክር ሀሳቦች እንደ ቅደም ተከተላቸው አግባብነት ካላቸው የኢትዮጵያ የህግ ማዕቀፎችና የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር ሰሚ ችሎት ውሳኔዎች አንፃር ሰፋ አድርገን እንመለከታቸዋለን፡፡

## 2. በዩኒቨርሲቲ *መምህራን* የቅጥር እና አስተዳደር ሁኔታ ላይ የሚነሱ ክርክሮች ህጋዊነት ግምገማ

### *ሀ. የዩኒቨርሲቲ መምህራን ሲቪል ሰርቫንት አይደሉም የሚለው ክርክር እና ህጋዊነቱ*

በመጀመሪያ ደረጃ የዚህን ክርክር ይዘት ለመመርመር ሲቪል ሰርቫንት የሚለው ቃልን መመልከት ተገቢነት አለው፡፡ ለመነሻ ያህልም መደበኛ የሆነውን የመዝገበ ቃል ፍቺ ብንመለከት "civil servant" *ማለት* "a person who works in the civil service"[10] *ማለት* ነው፡፡ ይህም ሲተረጎም ሲቪል ሰርቫንት ማለት "በመንግስት መስሪያ ቤት የሚሰራ ሰው" ማለት ነው፡፡ ባጭሩ "civil servant" የሚለው የእንግሊዘኛው ቃል በአማርኛው አቻ ትርጉሙ "የመንግስት ሰራተኛ" ማለት ነው[11]፡፡ በተጨማሪም በጉዳዩ ላይ የተፃፉ የተለያዩ ጽሑፎችም እንደሚያመለክቱት የ"civil servant" ቀጥተኛ ትርጉሙ የመንግስት ሰራተኛ

[10] **በዚህ** *ረገድ* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed., 2005) **እና** THE NEW OXFORD AMERICAN DICTIONARY (2011) *መመልከት ይቻላል*፡፡

[11] *ዝኒ ከማሁ*፡፡

ማለት ነው።[12] ይህ ትርጉም ግን የሠራተኛውን የቋሚነት ወይም የጊዜያዊነት የቅጥር ሁኔታን ግምት ውስጥ አያስገባም።

ስለሆነም በዚህ አግባብ የተነሳውን ክርክር ብናየው መምህራን ጊዜያዊ ሰራተኛ ስለሆኑ ብቻ ሲቪል ሰርቫንት አይደሉም ወይም የመንግስት ሰራተኛ ሊባሉ አይገባም የሚለው ሀሳብ ሊነቀፍ የሚችል ነው። በተጨማሪም የፌዴራል መንግስት ሰራተኞች አስተዳደር አዋጅ ቁጥር 1064/2010 አንቀፅ 2/1/ ራሱ "civil servant" የሚለውን የእንግሊዘኛ ቃል በአማርኛው ትርጉም ገፁ ላይ "የመንግስት ሰራተኛ" ይለዋል። ታዲያ በአዋጁ ለዚህ ቃል የተሰጠው ትርጉም ከላይ ለቃሉ ከተጠቀሰው ትርጉም ጋር ተመሳሳይነት ያለው ነው።

በእርግጥ የቀድሞው አዋጅ ቁጥር 515/99 አንቀፅ 2/1/ በእንግሊዘኛውም ሆነ በአማርኛ ቅጂው ላይ ወጥ በሆነ መልኩ የፌዴራል መንግስት ሠራተኛ ማለት በቋሚነት ተቀጥሮ የሚሰራ ሠራተኛ ስለመሆኑ ደንግጎ የነበረ ቢሆንም ይህን አዋጅ በመሻር በወጣው አዲሱ የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ የፌዴራል መንግስት ሠራተኛ ትርጓሜ ላይ በእንግሊዘኛውና በአማርኛ ቅጂው ላይ ግልፅ የሆነ ልዩነት ይታያል። ይህም የአዋጁ አንቀፅ 2/1/ የንግሊዘኛ ቅጂ "civil servant" means a person employed by federal government institution…" በማለት በቋሚነትም ሆነ በጊዜያዊነት የተቀጠረ ሠራተኛ የፌዴራል መንግስት ሠራተኛ ሊባል እንደሚችል ያመላከተ ቢሆንም በህግ አግባብ ገዢ የሆነው የአማርኛው ቅጂ ደግሞ "የመንግስት ሰራተኛ ማለት በፌዴራል መንግስት መስሪያ ቤት ውስጥ በቋሚነት ተቀጥሮ የሚሰራ ሰው ነው" ብሎ በማለቱ በመሠረታዊ አስተሳሰብ ደረጃ ከቀድሞው አዋጅ መንፈስ ያልተለየ እና አንድ አይነት የሆነ የትርጓሜ ዕሳቤን የያዘ ነው። ይህ የአማርኛው ቅጂ ገዢ ከመሆኑ አንፃር ሲታይ የመንግስት ሠራተኝነትን ከቋሚ ሠራተኝነት ጋር በማዛመድ ትርጓሜ መስጠቱ ህጉ የራሱ ዓላማ ያለው በመሆኑና ህግ አውጪውም የዚህን ህግ ዓላማ ለማሳካት ሲል ሆን ብሎ ዓላማ ተኮር ትርጓሜ (purposive or operational definition) ስለሰጠ ነው ሊባል ይችላል። እንደዚህ ከሆነ ደግሞ "የመንግስት ሰራተኛ" ለሚለው ቃል የተሰጠው ትርጉም ቀጣይነት ባለው መልኩ በአዋጁና አዋጁን መሠረት አድርገው በሚወጡ ደንቦችና መመሪያዎችም ላይ ሊንፀባረቅ ይገባዋል ማለት ነው። ይህ ማለት የአንቀፅ 2/1/ የመንግስት ሰራተኝነት ትርጓሜ ቀጥተኛ መልዕክት ቋሚ ያልሆኑ ወይም ጊዜያዊ የሆኑ ማናቸውም ሰራተኞች ለዚህ አዋጅ ዓላማ ሲባል የመንግስት ሰራተኛ ሊባሉ አይገባም ማለት ነው።

የአዋጁን አንቀፅ 2/2/ ስናይ ደግሞ ስለ ጊዜያዊ ሰራተኞች ያወራል። በዚህ ንዑስ አንቀፅ መሠረት ጊዜያዊ ሰራተኛ ማለት በመንግስት መስሪያ ቤት ውስጥ የዘላቂነት ባህሪ በሌለው ስራ ወይም ሁኔታዎች ሲያስገድዱ በቋሚ የሥራ መደብ ላይ በጊዜያዊነት ተቀጥሮ የሚሰራ ሰራተኛ ነው ይላል። አንቀፁ ጊዜያዊ ሰራተኛ እንጂ ጊዜያዊ የመንግስት ሰራተኛ አለማለቱ ሲታይ በእርግጥ ህግ አውጪው የቃላት አመራረጥ ላይ ተጠንቅቋል ለማለት ያስደፍራል። ሆኖም ግን የ2000 ዓ.ም. የጊዜያዊ ሰራተኞች የቅጥር መመሪያ[13] ስንመለከት ደግሞ በግልፅ የፌዴራል መንግስት ጊዜያዊ ሰራተኞች የሚል ስያሜ ይሰጣል። በአጭሩ መመሪያው ጊዜያዊ ተቀጣሪዎችን የመንግስት ሰራተኞች/ሲቪል ሰርቫንት/ እንደሆኑ ነው የሚረዳው። አሁንም ይህ መመሪያ አዋጁ ፍቃድ ሳይሰጠው እንዲህ ብሎ መግለፅ አግባብ

[12] Christoph Demmke, "Are civil servants different because they are civil servants?" Luxembourg, June (2005), Ministère de la Fonction publique et de la Réforme administrative በሚለው መጽሐፋቸው ላይ ስለሲቪል ሰርቫንት ሠራተኞች በሰፊው ውይይት አድርገዋል።

[13] የመመሪያው አንቀጽ ቁጥር አንድ ፤ይህ መመሪያ የፌዴራል መንግስት መ/ቤቶች የጊዜያዊ ሠራተኞች ቅጥር አፈፃፀም መመሪያ ተብሎ ሊጠቀስ ይችላል፤ ይላል።

አይደለም፤ ሲቪል ሰርቫንት ማለት ቋሚ ሰራተኛ ማለት ብቻ ነው ተብሎ ክርክሩ ቢጠነክር እንኳን ይህ አረዳድ በሁለት መልኩ ወለፈንዲ (logical absurdity) ያመጣል፡፡

የመጀመሪያው ከላይ በመግቢያው ላይ እንደተጠቀሰው የአንድ ሰራተኛ የቅጥር ማንነት የሚመነጨው በቀጣሪው ማንነት ላይ ተመስርቶ ነው፡፡ ይህም የግል መ/ቤት ወይም ድርጅት ተቀጣሪ ከሆነ የግል ሰራተኛ ይባላል፡፡ ከዚህም ጋር ተያይዞ ለምሳሌ የጤና መድህንና የጡረታ መብት ሥርዓትም ይዘጋጅለታል፡፡ በተመሳሳይ መልኩም አንድ ሰራተኛ የመንግስት መ/ቤት ወይም ድርጅት ሰራተኛ ሲሆን የመንግስት ሰራተኛ መባሉ አይቀሬ ነው፡፡ ባጭሩ አንድ ሰራተኛ የተቀጠረበት አግባብ በቋሚም ይሁን ጊዜያዊ በመንግስት መ/ቤት የተቀጠረ እስከሆነ ድረስ የመንግስት ሰራተኛ መባሉ አይቀሬ ነው፡፡ ይህ ግንዛቤ ደግሞ ለመምህራን የማይሰራበት ምንም ምክንያት የለም፡፡ በተጨማሪም የፌዴራል መንግስት ሰራተኞች አስተዳደር አዲሱ አዋጅ ቁጥር 1064/2010 እና የመንግስት ሰራተኞች የጡረታ አዋጅ ቁጥር 714/2003 (እና ማሻሻያው 907/2007) የዓላማ ልዩነት ቢኖራቸውም የምክንያትና የውጤት ግንኙነት አላቸው ተብሎ ይገመታል፡፡ ማለትም አንድ ሰራተኛ የመንግስት ሰራተኛ ከሆነ ብቻ ነው የመንግስት ሰራተኞች የጡረታ ሥርዓት ተጠቃሚ ሊሆን የሚችለው፡፡ በዚህ አግባብ ስናየው ግን የአዋጅ ቁጥር 1064/2010 እና የተሸሻለው የጡረታ አዋጅ ላይ ለመንግስት ሰራተኝነት የተሰጠው ትርጓሜ አንድ ዓይነት ዓይደለም[14]፡፡ በማሻሻያ አዋጁ ቁጥር 907/2007 አንቀፅ 2/1/ ላይ "የመንግስት ሰራተኛ ማለት በመንግስት መ/ቤት፣ በመንግስት የልማት ድርጅት ወይም በመንግስት በሚካሄድ ፕሮጀክት ወይም ፕሮግራም በቋሚነት ወይም ለተወሰነ ጊዜ ወይም ለተወሰነ ሥራ በመቀጠር በየወሩ ደመወዝ እየተከፈለው የሚሰራ ሰው..." ይላል፡፡ ታዲያ በመንግስት ሰራተኞች አስተዳደር አዋጅ (ገዢ በሆነው በአማርኛው ቅጂ ንባብ) መሰረት ሲቪል ሰርቫንት ወይም የመንግስት ሰራተኛ አይደለህም የተባለ እና በሌላ ልዩ ህግ ያልታቀፈ ሠራተኛ (መምህራንን ጨምሮ) እንዴት በመንግስት ሰራተኞች የጡረታ አዋጅ ላይ የመንግስት ሰራተኛ ነህ ተብሎ የጡረታ ሥርዓት ተጠቃሚ ሊሆን ይችላል? በእርግጥ እዚህ ላይ ሊነሳ የሚችል ጥያቄ ቢኖር አዋጆች ለራሳቸው ዓላማ የሚመጥን ትርጓሜ ሊኖራቸው እንደሚችል ሲታይ እንዴት የአዋጅ ቁጥር 1064/2010 አንቀፅ 2 እና የፌዴራል ሠራተኞች የጡረታ አዋጅ አንቀፅ 2 ተጣጥመው መተርጎም ይጠበቅባቸዋል የሚል ይሆናል፡፡ በመሠረቱ እያንዳንዱ አዋጅ ለዓላማው በሚመጥን መልኩ መተርጎም አለበት፡፡ ይህ ትክክለኛ የሆነ የህግ አተረጓጎም መርህ እና አካሄድ ነው፡፡ ሆኖም ግን ከላይ እንደተገለፀው አንዳንድ አዋጆች የምክንያትና የውጤት ግንኙነት ያላቸው ሆነው ሲገኙ ቀደም ሲል የተገለፀው መርህ እንደተጠበቀ ሆኖ የአዋጆቹን የተሳለጠ መንፈስና ግንኙነትን መሠረት ያደረገ የትርጉም አሰጣጥ ሂደትን መከተል አስፈላጊ ይሆናል፡፡ በጉዳያችን ላይ የተገለፁት ሁለቱ አዋጆች ደግሞ የምክንያትና የውጤት ወይም የቀዳሚነትና የተከታይነት ግንኙነት ያላቸው ናቸው፡፡ ይህም ከአዋጅ ቁጥር 1064/2010 ዓላማ አንፃር ሲታይ አዋጁ የፌዴራል መንግስት ሠራተኛ (በቋሚነትም ይሁን በጊዜያዊነት) ተብሎ ሊወሰድ የሚገባው ማን እንደሆነ የመደንገግ ስልጣን አለው፡፡ በዚህ አካሄድ የመንግስት ሠራተኛ የተባለ አንድ ሰው ደግሞ ከሚያገኛቸው ጥቅሞች አንዱ የጡረታ አበል ነው፡፡ ስለሆነም በአዋጅ ቁጥር 1064/2010 የፌዴራል መንግስት ሠራተኛ አይደለህም የተባለ ሰው በአዋጅ ቁጥር 714/99 የሚሸፈንበት አግባብ የለም፡፡ ስለሆነም አዋጅ ቁጥር 714/99 በአዋጅ ቁጥር 907/2007

[14] የመንግስት ሠራተኞች የጡረታ አዋጅ ቁጥር 714/2003 አንቀፅ 2 ከአዋጅ ቁጥር 1064/2010 አንቀፅ 2 (የአማርኛው ቅጂ) ጋር አንድ አይነት የሆነ ትርጓሜ ለመንግስት ሠራተኝነት የነበረው ቢሆንም አዋጁ ከወጣ በኋላ ክፍተኛ ትችትና ውግዘት ያስከተለ በመሆኑ በተለይም መምህራንን በብዛኩ መሠረት ከጡረታ ሥርዓቱ ውጭ የሚያደርግ በመሆኑ የማሻሻያ አዋጁ ቁጥር 907/2007 ይህን ስህተት ባረመ መልኩ ለመንግስት ሠራተኝነት ሰፊ ትርጓሜ በመስጠት ማሻሻያ አድርጓል፡፡

ተሻሽሎ ሰፊ የሆነ የመንግስት ሠራተኝነት ትርጉም እንዲይዝ እስከተደረገ ድረስ አዋጅ ቁጥር 1064/2010ም ተሻሽሎ በዚሁ መልክ ሊቀርብ ይገባል። ስለሆነም ይህ ፀሐፊ የመንግስት ሠራተኛነት ከላይ በቀረበው ትንታኔ መልኩ መሆን እንዳለበትና በተለይም በአዲሱ የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ ቁጥር 1064/2010 አንቀፅ 2/1/ የእንግሊዘኛው ንባብ መሠረት የዩኒቨርሲቲ መምህራንም እንደ ማንኛውም የመንግስት ሠራተኛ ሊወሰዱ እንደሚገባ አቋም አለው። ይህንን የአረዳድ አቋም በሚያጠናክር መልኩ የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት ከላይ በተገለፀው በ*መምህር ግዛቸው ጥሪት እና በወሰ ዩኒቨርሲቲ* መካከል በነበረው ክርክር ላይ በሰበር መዝገብ ቁጥር 101271 በሰተጠው ዉሳኔ "...የዩኒቨርሲቲው የአካዳሚክ ሰራተኞች እንደማንኛውም መንግስት ሰራተኛ..." በማለት መግለፁ መምህራን ወይም የአካዳሚክ ሰራተኞች የመንግስት ሰራተኛ ተብለው ሊወሰዱ እንደሚገባ ያስረዳል።[15]

በአጠቃላይ መምህራን ሲቪል ሰርቫንት አይደሉም የሚለው ክርክር "ሲቪል ሰርቫንት" ከሚለው ቃል ቀጥተኛ ትርጉም አንፃር፣ የመምህራን ቀጣሪ የመንግስት መስሪያ ቤት (የከፍተኛ ትምህርት ተቋም የመንግስት መስሪያ ቤት ስለመሆኑ ከዚህ ቀጥሎ በሚቀርበው ውይይት እንመለከታለን) ከመሆኑ አንፃር፣ የአዋጁን ሁለንተናዊ መንፈስና የ2000 ዓ.ም. የፌዴራል መንግስት ጊዜያዊ ሰራተኞች የቅጥር መመሪያን፣ እንዲሁም የፌዴራል መንግስት የጡረታ አዋጅ (በማሻሻያ አዋጅ ቁጥር 907/2007) ስር "የመንግስት ሰራተኛ" ለሚለው ቃል የተሰጠውን ትርጉም እና ይህ አዋጅና የፌዴራል መንግስት ሰራተኞች አስተዳደር አዋጅ ያላቸውን የምክንያትና የውጤት ግንኙነት ስናጤን፣ የአዋጁ የእንግሊዘኛ ትርጉም ትክክለኛውን የፌዴራል መንግስት ሠራተኛን ትርጓሜ መያዙን ስንመለከት እና ባጠቃላይ ከሕግ አተረጓጎም አንጻር ሲታይ መምህራን ሲቪል ሰርቫንት አይደሉም የሚለው ክርክር አግባብነት የለውም።[16] መምህራን የመንግስት ሠራተኛ ወይም ሲቪል ሰርቫንት ሊባሉ ይገባል የሚለው ድምዳሜ ራሱን የቻለ ጥያቄ እንደሚወልድ ጥርጥር የለውም። የጥያቄዎቹ ሁሉ መሠረት የሚሆነው ደግሞ የሲቪል ሰርቫንት አዋጁ በመምህራን ላይ ተፈፃሚ ይሆናል ማለት ነው ወይ የሚለው ነው። ቀጣዩ የጽሁፉ ክፍል ይህንን ጥያቄ ለመመለስ ይሞክራል።

### *ለ. የፌዴራል ሰራተኞች አስተዳደር አዋጅ በመምህራን ላይ ተፈፃሚ አይሆንም ስለሚለው ክርክር*

ይህ ክርክር ከመጀመሪያው የክርክር መስመር ጋር የሚገናኝ ነው። ምክንያቱም የዚህ ክርክር ዋነኛ መነሻ ከላይ እንዳስቀመጥኩት መምህራን ሲቪል ሰርቫንት አይደሉም፤ በመሆኑም የሲቪል ሰርቫንት መተዳደሪያ የሆነው አዋጅ መምህራን ላይ አግባብነት ያለው የህግ ማዕቀፍ አይደለም፤ መምህራንንም አይመለከትም የሚል ክርክር ነው። የዚህን ክርክር ህጋዊነት ለማየት ተገቢነት ያለውን የአዋጁን አንቀፅ፣ የከፍተኛ ትምህርት ተቋማት አዋጅ ቁጥር 650/2001 እና በጉዳዩ ላይ የፌዴራል ጠ/ፍ/ቤት ሰ/ሰ/ችሎት መዝገቦችን ማየት ተገቢ ይሆናል።

የአዋጅ ቁጥር 1064/2010 አንቀፅ 4 እንዲህ ይነበባል፤ "ይህ አዋጅ "የመንግስት መስሪያ ቤት" እና "የመንግስት ሠራተኛ" ተብሎ በተሰጠው ትርጉም በሚሸፈኑ የመንግስት መስሪያ

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[15] የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ ፋ/ቁ. 101271 (<u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፤ ቅጽ 16)።

[16] ስለመምህራን የመንግስት ሰራተኞች መሆን እየቀረብ ያለው ክርክር መምህራን የመንግስት ሠራተኛ ተብለው በተጠቀሰው አዋጅ ውስጥ ሊወሰዱ ይገባል ከማለት ሌላ የአዋጁ ድንጋጌዎች በአዋጁ ከሚሸፈኑ ሠራተኞች ጋር በእኩል ሚዛንና ዕይታ በመምህራን ላይ ተፈፃሚ ሊሆንባቸው ይገባል የሚል አለመሆኑን አንባቢያን እንዲረዱት ያስፈልጋል።

ቤቶችና የመንግስት ሠራተኞች ላይ ተፈፃሚ ይሆናል" ይላል። በዚህ አንቀፅ መሠረት አዋጁን ተግባራዊ ለማድረግ ሁለት መሰረታዊ መስፈርቶች ተሟልተው ሊገኙ ያስፈልጋል። እነዚህም፡- 1ኛ/ የመንግስት መ/ቤት እና 2ኛ/ የመንግስት ሠራተኛ ናቸው። ይህ ማለት እነኚህ ሁለት የህግ መስፈርቶች (legal elements) በተናጥል ሳይሆን በጥምረት በተገኙበት ማንኛውም ጉዳይ ላይ አዋጁ ተፈፃሚነት ይኖረዋል ማለት ነው።

የቀረበውን ክርክር በዚህ አግባብ ስናየው የመምህራን ቀጣሪ የሆነው ዩኒቨርሲቲ የመንግስት መ/ቤት መባል ስለመቻሉ ጥርጣሬ የማያስነሳና ለክርክርም የሚቀርብ አይደለም። ምክንያቱም በአዋጅ ቁጥር 1064/2010 አንፅ 2/3/ መሠረት "የመንግስት መስሪያ ቤት" ማለት <u>ራሱን ችሎ በአዋጅ ወይም በደንብ የተቋቋመና ሙሉ በሙሉ ወይም በከፊል ከመንግስት በሚመደብለት በጀት የሚተዳደር</u> ሆኖ የመንግስት መ/ቤቶች ዝርዝር ውስጥ የተካተተ የፌዴራል መንግስት መ/ቤት ነው ይላል (*ሠረዝ የተጨመረ*)። በዚህ ትርጓሜ ዓይን ዩኒቨርሲቲዎች የፌዴራል[17] የመንግስት መ/ቤት መባል እንደሚችሉ ለዚህ ጉዳይ አግባብ ከሆነው ከከፍተኛ ትምህርት ተቋማት አዋጅ ቁጥር 650/2001 አንቀፅ 2/9/፣ 2/13፣ 5፣ 6፣ 9/1/፣ 11፣ 35/4/፣ እና አንቀፅ 62 በቀላሉ መረዳት ይቻላል። ባጭሩ እነዚህ አንቀጾች ዩኒቨርሲቲዎች ከመንግስት በጀት የሚመድብላቸው እና በደንብ[18] የሚቋቋሙ ተቋማት ስለመሆናቸው በስፋት ስለሚያስረዱ አዋጅ ቁጥር 1064/2010ን ተግባራዊ ለማድረግ ከሚያስፈልጉት ሁለት መስፈርቶች የመጀመሪያው ተሟልቷል ማለት ነው። በተጨማሪም በመንግስት መ/ቤቶች ዝርዝር ውስጥ የተካተተ የሚለው አገላለፅ የኢትጵያ መንግስት በየዘርፉና በየአይነቱ ያዋቀራቸውና ያቋቋማቸው መ/ቤቶች አሉት። እነዚህን መ/ቤቶች ደግሞ በበላይነትና በዋናናት የሚመሩ፣ የሚያስተባብሩና የሚቆጣጠሩ የሚኒስቴር መ/ቤቶችና ኤጀንሲዎችን አቋቁሟል። በዚህም መሠረት ለምሳሌ በትምህርት ሚኒስቴር ስር የተቋቋሙና ዕውቅና የተሰጣቸው የመንግስት ዩኒቨርሲቲዎች ዝርዝርን በቀላሉ ከትምህር ሚኒስቴር ድረ-ገፅ ላይ ማግኘት ይቻላል።

ሁለተኛው የህግ መስፈርት ደግሞ "መንግስት ሠራተኛ" የሚለው ነው። በዚህ ረገድ በቀደመዉ ንዑስ-ርዕስ በቀረበው ክርክር ላይ መምህራን እንዴት የመንግስት ሠራተኛ ተብለው ሊወሰዱ እንደሚገባ ተመልክቷል። በመሆኑም መምህራን የመንግስት ሠራተኛ እስከሆኑ ድረስና የተቀጠሩበት ዩኒቨርሲቲ የመንግስት መ/ቤት ተብሎ እስከተወሰደ ድረስ ለመምህሩና ቀጣሪ ለሆነው ዩኒቨርሲቲ አዋጅ ቁጥር 1064/2010 አግባብነት ያለው ህግ ነው። ዩኒቨርሲቲዎች ከተቋቋሙለት ዓላማ እና ከመምህራን ልዩ የተልዕኮ ባህሪ አንፃር በመምህራን የቅጥር ግንኙነት ጉዳዮች ላይ የአዋጅ ቁጥር 1064/2010 ድንጋጌዎች ሙሉ በሙሉ ተግባራዊ ይሆናሉ አይሆኑም የሚለው ተገቢና ምላሽ የሚያስፈልገው ጥያቄ ሲሆን ይህን ጥያቄ ለጊዜው አቆይተነው ከላይ በተመለከተው መሠረት አዋጁ ለተግባራዊነቱ ካስቀመጣቸው የህግ መስፈርቶች አንፃር ሲታይ አዋጅ ቁጥር 1064/2010 በመምህራን የቅጥር ግንኙነት ላይ በደፈናው አግባብነት የለውም የሚለው ክርክር ትክክለኛ ያልሆነ ክርክር ነው።

በተጨማሪም አዋጅ ቁጥር 1064/2010 በመምህራን ጉዳይ ላይ አግባብነት ያለው ህግ ስለመሆኑ የተለያዩ የፌ/ጠ/ፍ//ቤት ስ/ስ/ችሎት ዉሳኔዎች ያመለክታሉ። ከላይ ያነሳነው በአመልካች /በመምህር/ ግዛቸው ጥሪት እና በተጠሪ/ቀጣሪ ዩኒቨርሲቲ/ ወሎ ዩንቨርስቲ

[17] ዩኒቨርሲቲዎች በግልም ሆነ በክልል መንግስታት ሊቋቋሙ እንደሚችሉ አዋጅ ቁጥር 650/2009 የሚያመለክት ቢሆንም ይህ ጽሁፍ በቀጥታ የሚመለከተው የፌዴራል መንግስት ዩኒቨርሲቲዎችን ነው።

[18] በኢትዮጵያ የህግ ማዕቀፍና ተቋማትን የማቋቋም ሥርዓት መሠረት የመንግስት ዩኒቨርሲቲዎች በአዋጅ ሳይሆን በደንብ የሚቋቋሙ ናቸው። በዚህ ረገድ የሁሉንም ዩኒቨርሲቲዎች ደንቦች ለማግኘት https://chilot.me/directory-of-government-organs/university-college/ መጎብኘት ይቻላል።

መካከል የነበረውን ክርክር እንደ ምሳሌ መጥቀስ ይቻላል።[19] የክርክሩ መነሻ ባጭሩ አመልካች በዲሲፕሊን ጥፋት ምክንያት በዩኒቨርሲቲው ቦርድ ውሳኔ መሠረት ከስራ እንዲባረር የተወሰነ ሲሆን መምህሩ ግን ይግባኙን ለፌዴራል የመንግስት ሠራተኞች አስተዳዳር ፍርድ ቤት ቢያቀርብም የቦርዱ ውሳኔ የመጨረሻና ይግባኝ የማያስብል ነው፤ ይህ የአስተዳደር ፍርድ ቤት ጉዳዩን በይግባኝ የማየት የህግ መሠረት የለውም ብሎ ይግባኙን ውድቅ በማድረጉ እና የፌ/ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎትም መምህሩ ያቀረበውን ይግባኝ በፍ/ብ/ሥ/ሥ/ህ/ቁ 337 መሠረት በመሰረዙ ምክንያት የቀረበ ነው።

የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎትም በጉዳዩ ላይ ሰፋ ያለ የህግ ትንታኔ ካደረገ በኋላ ውሳኔ አሳልፏል። እንግዲህ በዚህ መዝገብ ላይ ዋነኛው የክርክር ጭብጥ የአንድ ዩኒቨርሲቲ ቦርድ በአዋጅ ቁጥር 650/2001 አንቀፅ 44/1/ነ// መሠረት የመጨረሻ ውሳኔ በአንድ ጉዳይ ላይ ከሰጠ በኋላ ይህ ውሳኔ ይግባኝ የማያስብል የመጨረሻ ውሳኔ ነው ወይስ ይግባኝ ይባልበታል፤ ይግባኝ ከተባለስ ይግባኝ ባይ ወደየትኛው የፍትህ ሰጭ አካል በመሄድ ይግባኙን ማቅረብ ይጠበቅበታል የሚል የህግ ጥያቄ ነው። ይህ ጥያቄ ከዚህ ቀጥሎ በሚቀርበው የጽሁፉ ክፍል ስር የሚመረመር ሆኖ በዚህ ርዕስ ስር ግን የምናነሳው በዚህ መዝገብ ውስጥ አዋጅ ቁጥር 1064/2010 በመምህራን ጉዳይ ላይ አግባብነት ያለው ህግ መሆኑን ሊያስረዱ የሚችሉ የውሳኔውን ክፍሎች ነው። ለመጥቀስም ያህል ፍርድ ቤቱ የዩኒቨርሲቲው ቦርድ በቀድሞው የመንግስት ሰራተኞች አዋጅ ቁጥር 515/99 መሠረት የተቋመ፡ የበላይ ኃላፊ ተደርጎ እንደሚወሰድ ሲገልፅ "...ከዚህ አንጻር ሲታይ ቦርዱ ከፌደራል የመንግስት ሰራተኞች አዋጅ ቁጥር 515/199 አንቀጽ 2 ንዑስ 3 በሚሰጠው ትርጓሜ የዩኒቨርሲቲው የመጨረሻ አስተዳደራዊ ውሳኔ ሰጭ አካል መሆኑን ለመገንዘብ ይቻላል...." (በአዲሱ አዋጅ በአንቀፅ 2/5/ ላይ በተመሳሳይ መልኩ ተቀምጧል።) በማለት ነው። ማለትም ቦርዱ በዚህ አዋጅ መሠረት የበላይ ኃላፊ ተብሎ ካልተበየነ በስተቀር በተቋሙ የአስተዳደራዊ መፍትሄ ማማላይ ባልተቀመጠ ነበር። ቀጥሎም ፍ/ቤቱ አዋጅ ቁጥር 1064/2010ን በአካዳሚክ ሰራተኞች ወይም መምህራን ጉዳይ አግባብነት ያለው መሆኑን ሲያመለክት "....የአዋጁን አንቀጽ 44 ንዑስ አንቀጽ 1/ነ/ ድንጋጌ መሰረታዊ ባህሪና ዓላማ እንደዚሁም ድንጋጌው በአካዳሚክ ሰራተኞች የይግባኝ መብት ላይ የሚኖረው ሕጋዊ ውጤት ለመገንዘብ የመንግስት ከፍተኛ ትምህርት ዓላማዎች፣ የከፍተኛ ትምህርት ተቋማት ሊያከብሯቸውና ሊመሩባቸው የሚገቡ ቋሚና መሰረታዊ እሴቶች፣ በአዋጁ የተረጋገጠውን የመንግስት ከፍተኛ ትምህርት ተቋማት አካዳሚክ ነጻነት ይዘትና የአካዳሚክ ሰራተኞች ስላላቸው መብትና ግዴታ እንዲሁም የመንግስት ከፍተኛ ትምህርት ተቋማት አደረጃጀትና የዩኒቨርሲቲው ቦርድና ሰኔት በአዋጁ የተሰጣቸውን ጥቅልና ዝርዝር ስልጣን፣ ኃላፊነትና ግዴታ አግባብነት ካላቸው የፌደራል የመንግስት ሰራተኞች አዋጅ ቁጥር 515/99 ድንጋጌዎች ጋር በጣምራ መታየትና መተርጎም ይኖርበታል፡..."[20] (ሠረዝ የተጨመረ) በማለት የአዋጁን አግባብነት በግልፅ አስቀምጧል። አክሎም "...ሕግ አውጭው ይህንን ድንጋጌ የመንግስት ከፍተኛ ትምህርት ተቋማት የአካዳሚክ ነጻነት በሚያውጀው የአዋጁ ክፍልና ድንጋጌ ሥር ያካተተው ለከፍተኛ ትምህርት ተቋማቱ በአዋጅ ቁጥር 650/2001 የተረጋገጠላቸው አካዳሚክ ነጻነት በውስጡ ተነጻጻሪ ግዴታንም የያዘ በተለይም ተቋማቱ አዋጁንና አዋጁን ለማስፈጸም የወጣውን የፌደራል የዩንቨርሲቲዎች ደንብ ቁጥር 210/2003 እና በአዋጅ ቁጥር 515/199 እንደ አግባብነቱ ሌሎች አግባብነትና ተፈፃሚነት ያላቸውን የፌደራል ሕጉች መሠረት በማድረግ የሰው ኃይላቸውን የማስተዳደር ኃላፊነት

[19] የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ ፋ/ቁ. 80350 (የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፤ ቅጽ 14) ላይ ተመልክቷል።

[20] ዝኒ ክማሁ፤ ስድስተኛ ሀረግ ላይ ይገኛል።

ያለባቸው መሆኑን የሚያካትት እና ይህ ለተቋማቱ የተሰጠው የአካዳሚክ ነጻነት ይህን የተቋማቱን መሰረታዊ ግዴታ የማያስቀር ወይም የማይቀንስ መሆኑን በግልጽ ለማስቀመጥ እንደሆነ ለመገንዘብ ይቻላል..."።[21] (ሠረዝ የተጨመረ)። በዚህ ገፀ ንባብ ላይ ዩኒቨርሲቲዎች የሰው ኃይላቸውን (መምህራንን ጨምሮ) አግባብነት ያላቸውን ህግ ተፈፃሚ በማድረግ እንዲያስተዳድሩ ኃላፊነት የተጣለባቸው ሲሆን ከነዚህ ህጎች ውስጥም አንዱ የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ መሆኑን ፍርድ ቤቱ አመልክቷል። በመጨረሻም ፍ/ቤቱ መዝገቡን ለፌዴራል መንግስት ሠራተኞች አስተዳደር ፍ/ቤት እንደገና እንዲታይ ሲመልስ "የፌደራል የመንግስት ሠራተኞች አስተዳደር ፍርድ ቤት፣ የአዋጅ ቁጥር 650/2001፣ የፌደራል የዩኒቨርሲቲዎች ደንብ ቁጥር 210/2003፣ በአዋጅ ቁጥር 650/2001 አንቀጽ 49 ንዑስ አንቀጽ 3 መሠረት የዩኒቨርሲቲው ሴኔት ያወጣውን የአካዳሚክ ሰራተኞች መተዳደሪያ ደንብ እና የአዋጅ ቁጥር 515/99 እንደ አግባብነቱ መሠረት በማድረግ በግራ ቀኙ መካከል ያለውን ክርክር ሰምቶ ውሳኔ እንዲሰጥበት ጉዳዩን በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 341 (1) መሠረት መልስን ልከንለታል።" (ሠረዝ የተጨመረ) በማለት ነው።

በተጨማሪም በሌሎች የሰበር መዝገቦች ለምሳሌ በመስከረም 22 ቀን 2005 ዓ.ም. በሰበር መዝገብ ቁጥር 78945 ላይ በደብረብርሃን ዩኒቨርሲቲና በመምህር ባዬ ዋናያ መካከል በነበረው ክርክር እና በመጋቢት 26 ቀን 2006 ዓ.ም. በአዲስ አበባ ዩኒቨርሲቲ ማርች ፕሮጀክት እና በእነ ቤተልሔም ሽፈራው (ሶስት ሰዎች) መካከል በነበረው ክርክር ላይ የፌዴራል መንግስት ሠራተኞች አስተዳደር አዋጅ እንደ ነገሩ ሁኔታ አግባብነትና ተፈፃሚነት ያለው የህግ ማዕቀፍ መሆኑን ችሎቱ የህግ ትርጉም ሰጥቷል።[22]

እዚህ ላይ ግንዛቤ ሊወሰድበት የሚገባ ነገር ቢኖር አዋጅ ቁጥር 1064/2010 በመምህራን ጉዳይ ላይ አግባብነት አለው ሲባል እንዲሁ በደፈናው ሁሉም የአዋጁ ድንጋጌዎች ተፈፃሚ ይሆናሉ ማለት ሳይሆን እንደ ነገሩ ሁኔታ/አይነት የሚወሰን ነው። ከላይ እንደተመለከትነውም እንደ አግባብነቱ የሚለው የፌ/ጠ/ፍ/ቤቱ አገላለፅ ይህን ለማመልከት ሲሆን የጉዳዩን ዓይነተኛ ባህሪ (የፍሬና የህግ ክርክር መነሻና አቅጣጫ) (depending on the nature of the cases) እና የአዋጁን መሰረታዊ ዓላማ መሰረት በማድረግ አግባብነት ያላቸውን የአዋጁን ድንጋጌዎችና መርሆዎች ተግባራዊ ማድረግ ይገባል። በተጨማሪም የግንኙነታቸው መነሻ የሚሆነው በፍ/ብ/ህ/ቁ 1731 የፀና የቅጥር ውላቸውም ቀዳሚነት ያለው የህግ ማዕቀፍ እንደሆነም ሊዘነጋ አይገባም።

### ሐ. በመምህራን ጉዳይ ላይ የዳኝነት ሥልጣን ስላለው አካል ያለው ክርክር

በመምህራን ቅጥርና አስተዳደር ሂደት ውስጥ ከሚነሱ ውዝግቦች ውስጥ በሶስተኛ ደረጃ የምናየው ደግሞ በመምህራን ጉዳይ ላይ የዳኝነት ሥልጣን ስላለው አካል ነው። በዚሁ መሠረት መምህራን ምን ዓይነት ጉዳይ ወደ የትኛው የፍትህ ሰጪ አካል በማቅረብ ፍትህ ማግኘት ይችላሉ የሚለውን ጥያቄ ቀጥሎ እንመለከታለን።

አዋጅ ቁጥር 1064/2010 እንደ አግባብነቱ በመምህራን ጉዳይ ላይ ተፈፃሚነት ያለው የህግ ማዕቀፍ ስለመሆኑ ከላይ ተመልክተናል። በዚህ አዋጅ ላይ በፌዴራል መንግስት መ/ቤት ውስጥ ተቀጥረው ስለሚሰሩ ሰራተኞች የፍትህ አስተዳደር እና የፍትህ ሰጪ አካል በግልፅ

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[21] ዝኒ ክማሁ።

[22] እንደ ቅደም ተከተላቸው የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ፋ/ቁ. 78945 (የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ቅጽ 15) እና የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ፋ/ቁ. 93358 (የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ቅጽ 16) ላይ ይመልከቱ።

የተደነገገ ጉዳይ ነው። በዚህ መሠረት በአንድ ዩኒቨርሲቲ ውስጥ ለሚፈጠር ማናቸውም ክርክር እና ለሚፈጥሩ አስተዳደራዊ ጉዳዮች እንደቅደም ተከተላቸው የዲሲፕሊን ኮሚቴ (አዋጅ 1064/2010 አንቀፅ 71/1/)፣ የቅሬታ ሰሚ ኮሚቴ (አዋጅ ቁጥር 1064/2010 አንቀፅ 76 እና 77 እና ደንብ ቁጥር 77/94)፣ የዩኒቨርሲቲው ፕሬዚዳንት (አዋጅ ቁጥር 1064/2010 አንቀፅ 2/5፤ አዋጅ ቁጥር 650/2001 አንቀፅ 53 እና የፌዴራል ዩኒቨርሲቲዎች ደንብ ቁጥር 77/2003)፣ የዩኒቨርሲቲው ቦርድ (አዋጅ ቁጥር 1064/2010 አንቀፅ 2/5፤ አዋጅ ቁጥር 650/2001 አንቀፅ 44/1/ነ// እና የፌዴራል ዩኒቨርሲቲዎች ደንብ ቁጥር 210/2003) አስተዳደራዊ መፍትሔ ሰጪ አካል ተደርገው ተቀምጠዋል። እነዚህ ውስጣዊ አስተዳደራዊ ጉዳዮች ላይ ሥልጣን ስላላቸው አካላት በአብዛኛው ክርክርም ሆነ ብዥታ አይታይም። ከላይ እንደተመለከትነው የክርክሮቹ ምንጭ የዩኒቨርሲቲው ፕሬዚዳንት የሚሰጠው ውሳኔ ይግባኝ የማይባልበት የመጨረሻ ውሳኔ ነው ወይስ አይደለም? ይግባኝ ቢባልስ የትኛው አካል ነው ስልጣን ያለው? መምህራን ቀጥታ ክስ ለመደበኛ ፍርድ ቤት ማቅረብ ይችላሉ ወይስ አይችሉም? ካቀረቡስ በምን ዓይነት ጉዳይና በምን አግባብ ነው የሚሉት ጥያቄዎች ናቸው።

አስቀድሞ መመለስ የሚገባው ጥያቄ የዩኒቨርሲቲ ቦርድ በአዋጅ ቁጥር 650/2001 አንቀፅ 44/1/ነ// መሠረት የሚሰጠው የመጨረሻ አስተዳደራዊ ውሳኔ ይግባኝ የማይባልበት ውሳኔ ነው ወይ የሚለው ነው። በዚህ ረገድ የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ ችሎት በመምህር ግዛቸው ጥሪት እና ወሎ ዩኒቨርሲቲ መካከል በነበረው ክርክር ላይ ግልፅ የሆነ መልዕክት አስተላልፏል።[23] ከላይ ጠቆም ለማድረግ እንደተሞከረው ተጠቃሹ የሰበር ክርክር የቀረበው መምህሩ ያለአግባብ ከሥራ ተባርሬአለሁ በማለት በዩኒቨርሲቲው የቦርድ ውሳኔ ላይ ቅር በመሰኘት ይግባኙን ለፌዴራል መንግስት ሰራተኞች አስተዳደር ፍ/ቤት ቢያቀርብም ፍ/ቤቱ የቦርዱ ውሳኔ የመጨረሻና ይግባኝ ሊቀርብበት የማይችል ነው በማለቱና ይህንንም ውሳኔ የፌ/ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎት ጉዳዩ አያስቀርብም በማለት በፍ/ሥ/ሥ/ህ/ቁ 337 መሠረት አቤቱታውን በመሰረዙ ምክንያት የቀረበ የሰበር አቤቱታ ነበር።[24] በመዝገቡም ላይ የሰበር ችሎቱ "የአዋጁን አንቀጽ 44 ንዑስ አንቀጽ 1/ነ// ድንጋጌ መሰረታዊ ባህሪና ዓላማ እንደዚሁም፣ ድንጋጌው በአካዳሚክ ሰራተኞች የይግባኝ መብት ላይ የሚኖረው ሕጋዊ ውጤት ለመገንዘብ የመንግስት ከፍተኛ ትምህርት ዓላማዎች፣ የከፍተኛ ትምህርት ተቋማት ሊያከብራቸውና ሊመሩባቸው የሚገቡ ቋሚና መሰረታዊ እሴቶች፣ በአዋጁ የተረጋገጠውን የመንግስት ከፍተኛ ትምህርት ተቋማት አካዳሚክ ነጻነት ይዘትና የአካዳሚክ ሰራተኞች ስላላቸው መብትና ግዴታ እንዲሁም የመንግስት ከፍተኛ ትምህርት ተቋማት አደረጃጀትና የዩኒቨርሲቲው ቦርድና ሴኔት በአዋጁ የተሰጣቸውን ስልጣን፣ ኃላፊነትና ግዴታ አግባብነት ካላቸው የፌደራል መንግስት ሰራተኞች አዋጅ ቁጥር 515/1999

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[23] የፌዴራል ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት የሰ/መ/ፋ/ቁ. 101271 (<u>የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች</u>፣ ቅጽ 16)።

[24] በዚህ የሰበር መዝገብ ላይ አመልካች የፌዴራል መንግስት ሠራተኞች አስተዳደር ፍርድ ቤትና የፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት <u>የዩኒቨርሲቲው ቦርድ የሰጠው ውሳኔ የመጨረሻና ይግባኝ ሊቀርብበት የማይችል</u> (ሠረገ የተጨመረ) ነው በማለት የሰጡት የሕግ ትርጉምና ውሳኔ የፌዴራል ከፍተኛ ትምህርት ማቋቋሚያ አዋጅንና አዋጁን ለማስፈጸም የወጣውን ደንብ ድንጋጌዎች ያገናዘበ አይደለም ብሎ የተከራከረ ሲሆን ተጠሪ በበኩሉ የፌዴራል የመንግስት ሠራተኞች አስተዳደር ፍርድ ቤትና የፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የዩኒቨርሲቲው ቦርድ የሰጠው ውሳኔ የመጨረሻና ይግባኝ ሊቀርብበት የማይችል ነው በማለት የሰጡት የሕግ ትርጉምና ውሳኔ መንግስት ለከፍተኛ ትምህርት ተቋማት የአካዳሚክ ነጻነት ለማረጋገጥ በአዋጅ የሰጣቸውን ሥልጣን ያገናዘበና መሰረታዊ የህግ ስህተት ያልተፈጸመበት ነው። የዩኒቨርሲቲው ቦርድ የሰጠው ውሳኔ የመጨረሻና ይግባኝ የማይቀርብበት በመሆኑ፣ አመልካች የዩኒቨርሲቲው ቦርድ የሰጠው ውሳኔ የመጨረሻና ይግባኝ የማይቀርብበት በመሆኑ አመልካች የዩኒቨርስቲው ቦርድ ውሳኔ ከሰጠበት ቀን ጀምሮ በዘጠና ቀናት ውስጥ የሰበር አቤቱታውን ለፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ማቅረብ ሲገባው ጉዳዩን በይግባኝ ለማየት ሥልጣን ለሌላቸው አካላት ማቅረቡ የህግ መሰረት የለውም ተብሎ ውድቅ መደረጉ ተገቢ ነው የሚል ይዘት ያለው ክርክር አቅርቧል።

ድንጋጌዎች ጋር በጣምራ መታየትና መተርጎም ይኖርበታል፡" ሲል ትንታኔ ሰጥቷል። በመቀጠልም "የፌደራል የመንግስት ሠራተኞች አስተዳደር ፍርድ ቤት ይህ ሰበር ችሎት በመዝገብ ቁጥር 78945 በአካዳሚክ ሰራተኛ ላይ የተሰጠ የዲሲፕሊን ቅጣት ውሳኔ በዩኒቨርሲቲው ኘሬዝዳንት ከጸደቀ በኋላ በአዋጅ ቁጥር 650/2001 አንቀጽ 44 ንዑስ አንቀጽ 1(ነ) መሠረት ለቦርድ ቀርቦ የመጨረሻ አስተዳደራዊ ውሳኔ ሳይሠጥበት በይግባኝም ሆነ በሰበር ቀርቦ ሊታይ እንደማይገባው በመግለጽ የሰጠውን የሕግ ትርጉም በተዛባ ሁኔታ በመረዳት የሰበር ችሎት ቦርዱ የሰጠው ውሳኔ የመጨረሻና ይግባኝ እንደማይባልበት ለአዋጅ ቁጥር 650/2001 አንቀጽ 44 ንዑስ አንቀጽ 1(ነ) ትርጉም እንደሰጠ አድርጎ በውሳኔው ማስፈሩ የተሳሳተና ሊታረም የሚገባው ሆኖ አግኝተነዋል" ካለ በኋላ "የፌደራል የመንግስት ሠራተኞች አስተዳደር ፍርድ ቤት፣ የአዋጅ ቁጥር 650/2001፣ የፌደራል የዩኒቨርሲቲዎች ደንብ ቁጥር 210/2003፣ በአዋጅ ቁጥር 650/2001 አንቀጽ 49 ንዑስ አንቀጽ 3 መሠረት የዩኒቨርሲቲው ሴኔት ያወጣውን የአካዳሚክ ሰራተኞች መተዳደሪያ ደንብ እና የአዋጅ ቁጥር 1064/2010 እንደ አግባብነቱ መሠረት በማድረግ በግራ ቀኙ መካከል ያለውን ክርክር ሰምቶ ውሳኔ እንዲሰጥበት ጉዳዩን በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 341(1) መሠረት መልስን ልከንለታል።" ሲል ውሳኔ አስተላልፏል። ባጭሩ መምህራን ጉዳያቸውን በዩኒቨርሲቲያቸው ቦርድ ፊት ማቅረባቸውና ውሳኔ ማግኘታቸው እንደ አንድ የአስተዳደራዊ መፍትሔ ሰጭ አካል ሆኖ በዩኒቨርሲቲ ቦርድ ውሳኔ ቅር የተሰኘ ሰው ይግባኙን ለፌዴራል መንግስት ሰራተኞች አስተዳደር ፍ/ቤት ማቅረብ ይችላል።

ከዚህ ጋር ተያይዞ መታየት የሚገባው ጥያቄ ሁሉም የመምህራን ጉዳዮች በዚህ ሥርዓት ይገዛሉ ወይስ ቀጥታ ክስ ለመደበኛ ፍ/ቤት የሚያቀርቡበት ዕድል አለ ወይ የሚለው ነው። የፌዴራል መንግስት ሠራተኞች አስተዳደር ፍርድ ቤት በአዋጅ ቁጥር 1064/2010 አንቀፅ 2(5)፣ 79-82 እና በአዋጅ ቁጥር 650/2001 አንቀፅ 31(1)(ሠ) እና (ተ) ብሎም በደንብ ቁጥር 77/94 መሠረት ሥልጣንና ኃላፊነት የተሰጠው የአስተዳደር ፍ/ቤት ነው። የአስተዳደር ፍርድ ቤቱ በአንቀፅ 81 መሠረት የሚያያቸው ጉዳዮች ከህግ ውጪ ከሥራ መታገድ ወይም የአገልግሎት መቋረጥ፣ ከባድ የዲሲፕሊን ቅጣት ውሳኔ፣ ከህግ ውጭ የደመወዝ ወይም ሌሎች ክፍያዎች መቋረጥ፣ በሥራ ምክንያት የደረሰ ጉዳትን የሚመለከቱ የመብት ጥያቄዎች፣ ቅሬታ አጣሪ ኮሚቴ ውሳኔ በሚሰጥባቸው ጉዳዮች እና በሥራ መልቀቂያና አገልግሎት ማስረጃ ላይ የሚነሱ ጉዳዮች ናቸው። በመሆኑም ከእነዚህ ከተዘረዘሩት ጉዳዮች ውጭ ያሉ ጉዳዮች ለአስተዳደር ፍ/ቤቱ በይግባኝ አይቀርቡም ማለት ነው። ለምሳሌ የቅሬታ አጣሪው ኮሚቴ በአዋጅ ቁጥር 1064/2010 አንቀፅ 69/1/ሀ-ሐ// መሠረት በሚወስናቸው የዲሲፕሊን ጥፋቶች ላይ፣ መምህራን ለሁለተኛ ወይም ለሶስተኛ ዲግሪ ትምህርት ሲሄዱ በሚገቡት ውል፣ በዋስትና ውል፣ በተለያዩ ፕሮጀክቶች ላይ ክፍያ እየተከፈላቸው ለመሳተፍ የሚያደርጉት ውል እና በመሳሰሉት ጉዳዮች ላይ መምህራን ከቀጣሪ ዩኒቨርሲቲያቸው ጋር ክርክር ውስጥ ቢገቡ በአዋጁ አንቀፅ 44/1/ነ// መሠረት ጉዳያቸውን እስከ ዩኒቨርሲቲው ቦርድ ድረስ የመውሰድ ግዴታቸው እንደተጠበቀ ሆኖ በቦርዱ ውሳኔ ቅር ቢሰኙ ጉዳያቸውን ወደ አስተዳደር ፍ/ቤት ሳይሆን ወደ መደበኛው የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት መውሰድ ይችላሉ። ከዚህ ጋር ተያይዞ የፌ/ጠ/ፍ/ቤት የሰ/ሰ/ችሎት በአቶ ሲሳይ ይማነ እና በአዲስ አበባ ዩኒቨርሲቲ መካከል በነበረው ክርክር ላይ ውሳኔ አሳልፏል። የክርክሩ መነሻ በአመልካችና በተጠሪ መካከል በነበረው የትምህርት ማሻሻያ እና ከዚሁ ጋር ተያይዞ የተደረገ የጥቅማ ጥቅም ስምምነት ውል ሲሆን መምህሩ ጉዳዩን ወደ ፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ቢያቀርብም ፍ/ቤቱ ጉዳዩን የማየት ሥልጣን የለኝም ብሎ በመወሰኑና የፌ/ከ/ፍ/ቤትም ይግባኙን በመሰረዙ ምክንያት የስር

ፍ/ቤቶች ውሳኔና ትዕዛዝ መሠረታዊ የህግ ሥህተት ያለበት ስለሆነ በሰበር ሊታረም ይገባል በማለት ያቀረበው የሰበር አቤቱታ ነው።[25] ፍ/ቤቱም የተጠቃሹን አዋጅ አንቀፅ 69/1/፣ 79፣ 81 ከህገ መንግስቱ አንቀፅ 79 ጋር አዛምዶ በመመርመርና በመተንተን "...ከዚህ አንጻር ሲታይ የበታች ፍርድ ቤቶች በተጠሪና በአመልካች መካከል የሚደረገውን ክርክር መሰረታዊ ይዘትና ባህሪ ሳይመረምሩ፣ ተጠሪ የመንግስት ተቋምና በመንግስት በጀት የሚተዳደር መሆኑን በመመልከት ጉዳዩን የማየት ስልጣን የለንም በማለት የሰጡት ውሳኔ ከላይ የገለጽናቸውን የህግ ድንጋጌዎች ያላገናዘበና መሰረታዊ የህግ ስህተት ያለበት ነው በማለት ወስነናል ..." (ሠረዝ የተጨመረ) በማለት ደምድሞ ጉዳዩን በፍ/ሥ/ሥ/ህ/ቁ 341 መሠረት ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት መልሶታል። እንግዲህ ከዚህ መዝገብ እንደምንረዳው ሁሉም መምህራንን የሚመለከቱ ጉዳዮች ለአስተዳደር ፍ/ቤት የግድ ይቅረቡ የሚባል ሳይሆን በአዋጁ በማይሸፈኑ ጉዳዮች ላይ መምህራን ቀጥታ ክስ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ማቅረብ እንደሚችሉ ነው። ሆኖም ግን ጉዳያቸው በአዋጁ በሚሸፈኑት ላይ ለአስተዳደር ፍ/ቤት ካቀረቡ በኋላ በአስተዳደር ፍ/ቤቱ ቅር ቢሰኙ በአንቀፅ 80፣ 81 እና 82 መሠረት ይግባኛቸውን ለፌ/ጠ/ፍ/ቤት ቀጥሎም የሰበር አቤቱታ ማቅረብ ቢፈልጉም ለዚሁ ፍ/ቤት የሰበር ሰሚ ችሎት በህገ-መንግስቱ አንቀፅ 79 መሠረት ማቅረብ ይችላሉ።

ለማጠቃለል ያህል መምህራን ባለጉዳይ የሚሆኑባቸው ክርክሮች በአስተዳደራዊ የፍትሕ አደባባዮች ብቻ ይወሰናሉ ወይስ ወደ መደበኛው ፍርድ ቤት መሄድ ይችላሉ የሚለው ክርክር የሚወሰነው የክርክሩ መነሻ የሆነውን ጉዳይ ይዘት መሠረት በማድረግ ነው።

### መ. መምህራን ጊዜያዊ እንጂ ቋሚ ሰራተኞች አይደሉም የሚለው ክርክርና ሀጋዊነቱ

በመጨረሻ የምናየው የክርክር ነጥብ ደግሞ መምህራን ጊዜያዊ ሠራተኛ ናቸው የሚለውን ነው። ይህ ክርክር የመምህራንን የቅጥር ውል እና አዋጅ ቁጥር 650/2001 አንቀፅ 33/1/ን መሠረት ያደረገ ሲሆን በሁሉም ዩኒቨርሲቲዎች አተገባበርና በፍርድ ቤቶችም ሆነ በተማረው ማህበረሰብ ዘንድም ሊነቀፍ የማይችል አረዳድ ተደርጎ ይወሰዳል። በዚህ ክፍል ለማየት የሚሞከረው ይህ አረዳድና ክርክር በህግ ፊት ምን ያህል ተቀባይነት አለው የሚለውን ነው።

ወደ ዝርዝሩ ከማለፌ በፊት ለክርክሩ መነሻ ያደረኩት አገላለፅ ላይ ጥያቄ ሊኖር እንደሚችል እገምታለው። ይህም ክርክሩ መገለፅ ያለበት መምህራን ቋሚ ሳይሆኑ የኮንትራት ሠራተኞች ናቸው በሚል ነው ወይስ መምህራን ቋሚ አይደሉም ጊዜያዊ ሠራተኞች ናቸው በሚለው ነው መገለፅ ያለበት የሚለው ነው። ይህም ማለት የመመህራን የቅጥር ሁኔታ መገለፅ ያለበት "የኮንትራት ሠራተኛ" በመባል ነው ወይስ "ጊዜያዊ" በመባል ነው የሚል ነው። ይህን በተመለከተ ማስቀመጥ የሚቻለው ነገር "የኮንትራት ሠራተኛ" የሚለው አገላለፅ የልማዳዊ አገላለፅ እንጂ ራሱን ችሎ የቆመ የአሰሪና ሰራተኛ የህግ አገላለፅ አይደለም። ይህም የአሰሪና ሰራተኛ የቅጥር ግንኙነት በውል ወይም በኮንትራት የሚፈጠር ሆኖ በሁለት ተክፍሎ የሚገለፅ ነው። ይህም ቋሚ ወይም ጊዜያዊ የሚባል ነው። ጊዜያዊ ሲባል በሥራ መጠን አልያም በጊዜ የተወሰነ ሲሆን በተለምዶው በጥቅሉ የኮንትራት ሠራተኛ በመባል ይታወቃል። ነገር ግን በጊዜም ይሁን በሥራ መጠን ተወስኖ በተደረገ የቅጥር ውል ወይም ኮንትራት የተቀጠረ ሠራተኛ ጊዜያዊ ተብሎ በህግ

[25] በዚህ ክርክር የአዲስ አበባ ዩኒቨርሲቲ ተቋቋመበት አዋጅ ቁጥር 1064/2010 እና በደንብ ቁጥር 77/94 የሚተዳደር ስለሆነ ፍ/ቤቱ በጉዳዩ ላይ ሥልጣን የለውም በማለት ተቃውሞውን አሰምቷል።

አግባብ ይጠቀሳል እንጂ የኮንትራት ሠራተኛ የሚባል ሌላ ሶስተኛ አይነት የአሰሪና ሰራተኛ ግንኙነት ምድብ እንደሌለ ልብ ሊባል ይገባል፡፡

ወደ ክርክሩ ነጥብ ስንመለስ እንደሚታወቀው አንድ ሰራተኛ ቋሚ ወይም ጊዜያዊ ነው ማለት የሚቻለው ጉዳዩን ከሚገዛው የአሰሪና ሰራተኛ የህግ ማዕቀፍ መርሆችና ድንጋጌዎች አንፃር ስለመሆኑ አይካድም፡፡ በግልም ሆነ በመንግስት የአሰሪና ሰራተኛ ግንኙነት ውስጥ በእኩልነት ተፈፃሚነት ያላቸው መርሆች አሉ፡፡ ከእነዚህ መሰረታዊ የጋራ መርሆች አንዱና ዋነኛው ደግሞ በአሰሪና ሰራተኛ ግንኙነት ውስጥ የሰራተኛው የቋሚነት ቅጥር መደበኛ የቅጥር ስርዓት ስለመሆኑ እና ጊዜያዊነት የቅጥር ሥርዓት ህግ በተለይ ዕይታ የሚታይ ስለመሆኑ የሚያስቀምጠው መርህ ነው፡፡ ማለትም በግልም ሆነ በመንግስት መ/ቤት ወይም ድርጅት ውስጥ አንድ ተቀጥሮ እየሰራ ያለ ሰራተኛ ቋሚ ቅጥር እንደሆነ የህግ ግምት ይወሰዳል፤ ቋሚ አይደለም ጊዜያዊ ነው የሚል ወገን ይህን የማስረዳትና ህጉ በግልፅ ባስቀመጣቸው የጊዜያዊ ሠራተኛ የመቅጠሪያ መስፈርቶች መሰረት ሠራተኛውን ስለመቅጠሩ በማስረዳት የቋሚነት የህግ ግምቱን ማስተባበል ይጠበቅበታል፡፡ እዚህ ላይ የሚነሳ ነጥብ ቢኖር ይህ መርህ በመንግስት አሰሪና ሰራተኛ ግንኙነት ውስጥ ህጋዊ መሠረት ያለው ነው ወይ ተብሎ ሊጠየቅ ይችላል፡፡ ሆኖም ግን አዋጅ ቁጥር 1064/2010 አንቀፅ 2(2)፣ 21፣ 22፣ እና የፌዴራል ጊዜያዊ ሠራተኞች የቅጥር አፈፃፀም መመሪያ (ህዳር 2000) አንቀጽ 2.3 ገፀ ንባባትና ትርጉም የሚያስረዱት ነገር ከላይ የተጠቀሰው መርህ በመንግስት አሰሪና ሰራተኛ ግንኙነት ውስጥም እንደተጠበቀ ነው፡፡ በድንጋጌዎቹ መሠረት የፌዴራል መንግስት መ/ቤት በግልፅ እና ተለይተው በተቀመጡ መስፈርቶች ብቻ ነው ጊዜያዊ ሠራተኛን መቅጠር የሚቻለው፡፡ እንዲህ ከሆነ ደግሞ የህጉ መንፈስ የሚያስረዳው መደበኛው የቅጥር አይነት የቋሚነት ቅጥር ሲሆን በልዩ ሁኔታ ብቻ ደግሞ የጊዜያዊነት ቅጥር ሥርዓት አለ ማለት ነው፡፡ ይህ በማስረጃ ሥነ-ሥርዓት (የአቀባበል፣ የአግባብነትና የተገቢነት ሳይንስ) ደግሞ ራሱን የቻለ የማስረዳት ሸክም ውጤት ይኖረዋል፡፡ ይህም ሁል ጊዜም ቢሆን በመርህ ደረጃ የተቀመጡ ፍሬ ነገሮችን ወይም ህግ ግምት የሚወስድባቸውን ፍሬ ነገሮች ማስረዳት አይጠበቅም፡፡ ማስረዳት የሚጠበቀው ወይም የሚቻለውም ከመርሁ ተለይቶ የተፈፀመን ፍሬ ነገር ወይም ተቃራኒ ፍሬ ነገሮችን ብቻ ነው፡፡ ለዚህም ነው በአዋጅ 377/96 አንቀፅ 9 እና 10 የሚታወቀው መርህ በመንግስት አሰሪና ሰራተኛ ግንኙነት ውስጥም እንደአግባብነቱ ተፈፃሚነት አለው የሚባለው፡፡ በተጨማሪም አንድ ሰራተኛ በመንግስት መ/ቤት ውስጥ ቋሚ ሠራተኛ ስለመሆኑ አስረዳ ቢባል ከፍትሃዊነት አንፃርም ሲታይ ኢፍትሃዊ የሆነ የማስረጃ አቀባበል ሥርዓት ነው የሚሆነው፡፡ ምክንያቱም የቋሚነት ፍሬ ነገር ሊገመት የሚችል እንጂ በቀላሉ ማስረዳት የማይችሉት ፍሬ ነገር ስለሆነ፡፡

በመሆኑም መምህራን ጊዜያዊ ሠራተኛ ናቸው የሚለው ክርክር ከዚህ መሠረታዊ የአሰሪና ሠራተኛ መርህና ድንጋጌ አንፃር መታየትና መመርመር ያለበት ጉዳይ ነው፡፡ በሌላ አነጋገር ክርክሩን በይበልጥ ለመመርመር ሲባል መመለስ ያለባቸው ጥያቄዎች አሉ፡፡ እነኚህም በተያዘው ጉዳይ አግባብነት ያለው የህግ ማዕቀፍ የትኛው ነው? በዚህ የህግ ማዕቀፍ ውስጥስ አንድን ሰራተኛ ጊዜያዊ አድርጎ ለመቅጠር የሚቻለው እንዴት ነው? የመምህራን የቅጥር ግንኙነትስ ከእነዚህ መስፈርቶች አንፃር ሲታይ በህጉ አግባብ ነው ወይስ አይደለም? አንድን የአሰሪና ሰራተኛ ግንኙነት በጊዜ በመገደብ ጊዜያዊ የቅጥር ግንኙነት ማድረግ ይቻላል ወይ? የሚሉት መሰረታዊና ሊመለሱ የሚገቡ ጥያቄዎች ናቸው፡፡

ስለሆነም አዋጅ ቁጥር 1064/2010 በፌዴራል መንግስት አሰሪና ሠራተኛ ግንኙነት ውስጥ መሰረታዊው የኢትዮጵያ የህግ ማዕቀፍ ነው፡፡ የቋሚ ሰራተኞች የቅጥር አፈፃፀም መመሪያ (2000 ዓ.ም.) ስለ ፌዴራል መንግስት ቋሚ ሰራተኝነት በግልፅ የሚደነግግ ሲሆን

የፌዴራል መንግስት ጊዜያዊ ሰራተኞች የቅጥር አፈፃፀም መመሪያ (2000 ዓ.ም.) ደግሞ ስለ ፌዴራል መንግስት ጊዜያዊ ሰራተኞች ይደነግጋል፡፡

በአዋጅ ቁጥር 1064/2010 መሠረታዊ መርህ መሠረት በተለይም በአንቀፅ 2(1) እና 21 መሠረት በፌዴራል መንግስት መ/ቤት የሚቀጠሩት ሠራተኞች ቋሚ ሰራተኞች ብቻ ናቸው፡፡ በተጨማሪም ለአዋጁ ዓላማ ሲባል በዚሁ አንቀፅ ላይ ቋሚ ሰራተኛ ተደርገው የማይወሰዱ የመንግስት ሠራተኞች ዓይነት በሙሉ ተዘርዝሯል፡፡[26] በአጭሩ በእነዚህ ድንጋጌዎች መሠረት አንድ ሰራተኛ በመንግስት መ/ቤት ውስጥ ቋሚ ተደርጎ ነው ሊቀጠር የሚችለው፡፡

ወደ ጊዜያዊ ሰራተኞች የቅጥር ሁኔታ ስንመጣ ደግሞ አዋጁም ሆነ አዋጁን ለማስፈፀም የወጣው መመሪያ የሚያስቀምጡት የህግ መስፈርቶች አሉ፡፡ በመሠረቱ በአዋጁ አንቀፅ 2(2) እና 21 መሠረት የፌዴራል መንግስት መ/ቤቶች ጊዜያዊ ሠራተኞችን እንዲቀጥሩ አይፈቀድላቸውም፡፡ ሆኖም ግን 1ኛ/ የተቀጠረው ሠራተኛ የዘላቂነት ባህሪ በሌለው የሥራ መደብ ላይ የተቀጠረ እንደሆነ፤ ወይም 2ኛ/ ሁኔታዎች ሲያስገድዱ ጊዜያዊ ሠራተኞችን መቅጠር ይችላሉ፡፡[27] በቋሚ ሠራተኞች የቅጥር ማስፈፀሚያ መመሪያ አንቀፅ 4 ላይ ዘርዘር ባለመልኩ እንደተቀመጠው በፌዴራል መንግስት መ/ቤት ውስጥ ጊዜያዊ ሠራተኛ ሊቀጠር የሚችለው፡-

1ኛ/ የሠራተኛው አገልግሎት የሚፈለግበት ዕቅድ ወይም ሥራ ለተወሰነ ጊዜ ሆኖ ሲገኝ፣ ወይም ሁኔታዎች ሲያስገድዱ በቋሚ የሥራ መደብ ላይ ለጊዜው ሠራተኛ መመደብ ሲያስፈልግ፣

2ኛ/ በተለያዩ ምክንያቶች አጣዳፊና በአጭር ጊዜ የሚጠናቀቁ ሥራዎች ሲያጋጥሙ፣

3ኛ/ በፕሮጀክት መልክ የሚሠሩ ሥራዎች ሲፈጠሩ፣
ሥራዎችን ለማከናወን ሲባል የሚፈፀም ቅጥር ነው፡፡

እንግዲህ ከመጀመሪያው መስፈርት ስንጀምር አንድ የዩኒቨርሲቲ መምህር ጊዜያዊ ተደርጎ የሚቀጠረው ሥራው የዘላቂነት ባህሪ ስለሌለው ነው? በመሠረቱ የዘላቂነት ባህሪ የሌለው የሥራ መደብ ማለት ከሥራው መደበኛነት እና ከመ/ቤቱ መሠረታዊ ዓላማና ዓይነተኛ ሥራ ጋር ተዛምዶ የሚመዘን ነው፡፡[28] በመመሪያው ላይም እንደተመለከተው የዘላቂነት ባህሪ የሌለው ሥራ ማለት የሠራተኛው ሥራ፣ አገልግሎት ወይም ሞያ የተፈለገበት ዕቅድ ለተወሰነ ጊዜ ሆኖ ሲገኝ ማለት ነው፡፡[29] በዚህ አግባብ የመምህራን ሥራ ከቀጣሪያቸው ማለትም ከዩኒቨርሲቲው ዓይነተኛ ዓላማና ሥራ አንፃር ሲታይ የዘላቂነት ባህሪ የሌለው ነው ሊባል አይችልም፡፡ ምክንያቱም የመምህራን ሥራ በመደበኛነት የሚከናወን በመሆኑ መምህራን ለአጭር ዕቅድ ወይም ሥራ የሚቀጠሩ ሠራተኞችም አይደሉም፡፡

[26] በዚህ ንዑስ አንቀጽ ዝርዝር ውስጥ መምህራንን የሚገልፅ ወይም የመምህርነት ሞያን የሚያመላክት የህግ ቃል አለመኖሩንም መገንዘብ ያስፈልጋል፡፡

[27] የአዋጅ ቁጥር 1064/2010 አንቀፅ 2(2)ን፣ 21ን በ2000 ከወጣው መመሪያ ተራ ቁጥር 2.3 ድንጋጌ ጋር አዛምደን ስንመለከተው የምንረዳው ጉዳይ ነው፡፡

[28] የዩኒቨርሲቲዎችን ዓላማ ከአዋጅ ቁጥር 650/2001 አንቀጽ 4 አንፃር እና ከጠ/ፍ/ቤት ሰ/ሰ/ችሎት ፋ/ቁ. 80350 (የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ቅጽ 14) አስገዳጅ ትርጓሜ አንፃር በማየት ይህንን መገንዘብ ይቻላል፡፡

[29] የመመሪያውን አንቀፅ 4(1) ይመለከታል፡፡

በሁለተኛ ደረጃ የተቀመጠውን መስፈርት ስንመለከት ደግሞ አንድን ሰራተኛ ጊዜያዊ አድርጎ ለመቅጠር "አስገዳጅ ሁኔታ" መፈጠር አለበት፡፡ በአዋጁና በመመሪያው ግልፅ እንደተደረገው ይህ አስገዳጅ ሁኔታ[30] የሚፈጠርበት ምክንያት የተለያየ ቢሆንም ከቋሚ የስራ መደብ ጋር የተገናኘ ነው፡፡ ለምሳሌ በሥራ መደቡ ላይ ተፈላጊ የሰው ኃይል ባለመገኘቱ፤ ቋሚ ሠራተኛው በሞት ወይም በጉዳት ከሥራው ቢለይ ወይም በድንገት ከሥራ መደቡ ቢለቅ ይህ ቋሚ የሥራ መደብ ክፍት ሆኖ ሲገኝና በቦታው ላይ ጊዜያዊ ሰራተኛ ለጊዜው ካልተቀጠረ መ/ቤቱ ላይ ችግር የሚፈጥር መሆኑ ሲገመት ነው፡፡ የመምህራን ቅጥር ደግሞ እንደሚታወቀው በእንደዚህ አስቸጋሪ ሁኔታ ውስጥ ተገብቶ የሚደረግ ሳይሆን ዓመታዊ ዕቅድ ተይዞለት በመደበኛነትና በተከታታይነት በሰው ኃይል አስተዳደር ሂደት ውስጥ አስፈላጊው ሥርዓት ተፈፅሞ የሚከናወን ነው፡፡ በጥቅሉ ይህ የመደበኛ የቅጥር ሥርዓት ደግሞ በህጉ አግባብ መሰረት መ/ቤቱ አስቸጋሪ ሁኔታ ውስጥ ገብቶ ቋሚ ሠራተኛን ለጊዜው ለመተካት የሚያደርገው ነው ለማለት አያስደፍርም፡፡

በሶስተኛ ደረጃ በአጣዳፊና አጭር ጊዜ የሚጠናቀቁ ሥራዎችን ለማከናወን ሲባል የሚደረገው የጊዜያዊ ሠራተኛ ቅጥር ነው፡፡ ይህ ሁኔታ በተለያዩ ዩኒቨርሲቲዎች እንደምናየው ለምሳሌ የተለያዩ ሰው ሰራሽና ተፈጥሯዊ ችግሮች ሲያጋጥሙ ችግሮቹን ለማለፍ ሲባል ወይም ደግሞ በሌሎች አንገብጋቢ እና ጊዜ በማይሰጡ ሁኔታዎች ውስጥ ሲገኙ ችግሮቹን ወይም ሥራዎቹን በሰው ኃይል ብዛት በፍጥነት ለማጠናቀቅና ለማከናወን ሲባል የሚደረግ የቅጥር ሁኔታ ነው፡፡ ከላይ ለመግለፅ እንደተሞከረው አሁንም የመምህራን የቅጥር ሁኔታ እንዲህ ባለ መልኩ የሚደረግ የቅጥር ሂደት ዓይደለም፡፡

በአራተኛና በመጨረሻ ደረጃ የተቀመጠው መስፈርት ደግሞ ለፕሮጀክት ሥራ ተብሎ ጊዜያዊ ሠራተኛ የሚቀጠርበት ሁኔታ ነው፡፡ በዚህ ረገድ ዩኒቨርሲቲዎች የልህቀት ማዕከላት እንደመሆናቸው በተለያዩ ችግር ፈቺ ምርምሮች ላይ ይሳተፋሉ፡፡ የእነዚህ የምርምር ውጤቶችም ለምሳሌ በግብርና፣ በእንስሳት፣ በጤና እና በመሳሰሉት ዘርፍ ላይ የምርምር ውጤቶችን ለማስረፅና የማህበረሰቡንም ተዛማጅ ችግሮች ለመፍታት ሲባል የአጭር ጊዜ የትግበራ ዕቅዶችን ወይም ፕሮጀክቶቹን ለማስፈፀም ሲባል የሰው ኃይል ሊያስፈልጋቸው ይችላል፡፡ በእንደዚህ ዓይነት ፕሮጀክቶች ላይ የሚቀጠሩ ሰራተኞች ለተወሰነ ጊዜ ወይም ሥራ ሲሆን የፕሮጀክቱ የቆይታ ጊዜ ሲጠናቀቅ ወይም በሌላ በማናቸውም መንገድ ሲቋረጥ የሥራ ውላቸውም አብሮ ይቋረጣል፡፡ ይህ የመምህርነትን የስራ ሆኔታ የማይመለከት መሆኑ ግልጽ ነው፡፡

በአጠቃላይ መምህራን ጊዜያዊ ሠራተኛ ናቸው የሚለው ክርክር ከመደበኛው የፌዴራል መንግስት ጊዜያዊ ሠራተኞች የቅጥር መስፈርት አንፃር ሲታይ ክርክሩ አግባብ ከላይ የቀረበው ክርክር የሚያሳምን ይመስለኛል፡፡ ከዚሁ ጋር ተያይዞ መምህራን እንደልማድ የኮንትራት ሠራተኞች ሊባሉ ይገባል የሚል አቋምን ይህ ፀሐፊ አይደግፍም፡፡ ይልቁንም ኮንትራት ከሚባለው የቃሉ ቀጥተኛ ፍቺ አንፃርና ከላይ በመግቢያ ላይ ካስቀመጥኩት መግለጫ አንፃር የአሰሪና ሠራተኛ ግንኙነት (የመመህራንን ጨምሮ) ክፍፍሉ ሁለት ዓይነት ብቻ እንደሆነና ይህም ቋሚና ጊዜያዊ የሚባሉ ስለመሆናቸው ከላይ ለማመልከት ተሞክሯል፡፡

ከዚህ ቀጥሎ ሊታለፉ የማይችሉ ሁለት መሠረታዊ የክርክር መነሻ ነጥቦች አሉ፡፡ እነርሱም የመምህራን የቅጥር ውልና የአዋጅ ቁጥር 650/2001 አንቀፅ 33(1) ጉዳይ ነው፡፡ ከመምህራን የቅጥር ውል ጋር ተያይዞ የሚነሳው ክርክር የመምህራን ውል ለተወሰነ ጊዜ

[30] ይህ ሁኔታ በመመሪያው አንቀፅ 15 ላይ የተገለፀውን የውጭ አገር ዜጎችን የመቅጠር ፍቃድ ድንጋጌ ሥርዓት አያጠቃልልም፡፡

ተብሎ (በአብዛኛው በሁለት ዓመት የተገደበ) በውሉ ውስጥ ተጠቅሶ ስለሚደረግ ቋሚ ተቀጣሪዎች አይደሉም የሚለው ነጥብ ነው። እዚህ ላይ መመለስ ያለበት ጥያቄ አሰሪና ሰራተኛ የሥራ ቅጥር ግንኙነታቸውን በጊዜ ስለገደቡት ብቻ ጊዜያዊ የስራ ቅጥር ግንኙነት ማድረግ ይችላሉ ወይ የሚለው ነው። እንደሚታወቀው በአሰሪና ሰራተኛው መካከል ከፍተኛ የሆነ የመደራደር ኃይል ልዩነት (bargaining power difference) አለ። ለዚህም ነው የአሰሪና ሰራተኛ ግንኙነትን የሚገዛው የህግ ማዕቀፍ በመርህ ደረጃ ቋሚነትን በልዩነት እና በግልፅ ተለይተው በተቀመጡ መስፈርቶች መሠረት ደግሞ ጊዜያዊ ግንኙነት በአሰሪና ሰራተኛ መካከል ሊኖር እንደሚችል የሚደነግገው። ከዚህ መርህና የህግ መንፈስ አንፃር አሰሪው ወገን ያለውን የመደራደር አቅም በመጠቀም ተቀጣሪ ሠራተኛው ላይ የኢኮኖሚ እና የሞራል ተፅዕኖ በማድረስ ባሻው መንገድ ግንኙነቱን በጊዜ በመቁረጥ ግንኙነቱን ጊዜያዊ በማድረግ በሰራተኛው ላይ ጉዳት ሊያደርስ ይችላል። በዚህ ረገድ የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት ለያዘነው ጉዳይ ተጠቃሽ ሊሆን የሚችል አስገዳጅ ትርጓሜ ሰጥቷል። በውሳኔውም ላይ ችሎቱ "...የሥራው ባህሪ ቀጣይነት ያለው መሆኑ እየታወቀ በአሰሪና ሰራተኛ መካከል ጊዜን በመቁረጥ የሚደረግ የቅጥር ውል ስምምነት ህጋዊ ጥበቃ የማይደረግለት ስለመሆኑ ይህ ሰበር ሰሚ ችሎት በአዋጅ ቁጥር 454/97 አንቀፅ 2(1) መሠረት በየትኛውም እርከን የሚገኝ ፍርድ ቤትን የሚያስገድድ የሕግ ትርጉም በሰ/መ/ቁጥር 11924፣ 25526 እና በሌሎች በርካታ መዛግብት የሰጠበት ጉዳይ ነው። ...(ሠረዝ ዮተጨመረ)"[31] በማለት ገልጧል።

እርግጥ እዚህ ላይ ሊነሳ የሚችል ነጥብ ቢኖር ይህ ፍልስፍናና የሰበር ውሳኔ አዋጅ ቁጥር 377/96 ላይ የተመሰረተ እንደመሆኑ እንዴት በመንግስት አሰሪና ሰራተኛ ግንኙነት ውስጥ ሊሰራ ይችላል የሚል ይሆናል። ነገር ግን በትኩረት ልንመለከተው የሚገባው ነገር ይህ ፍልስፍና በመሠረቱ የእኩልነት፣ የህጋዊነትና የፍትሃዊነት መርሆችን ያዘለ ነው። ምክንያቱም ከላይ እንደተገለፀው በፌዴራል መንግስት መ/ቤት ውስጥ በመደበኛነት የቋሚ ቅጥር በልዩነትና በተለይ ተዘርዝረው በተቀመጡ መስፈርቶች ደግሞ ጊዜያዊ ሠራተኞች መቀጠር እንዳለባቸው ተመልክተናል። ስለሆነም አንድ የመንግስት መ/ቤት ለሌሎች አቻ መ/ቤቶችና የግል ድርጅቶች አርአያነት ያለው ተቋማዊ ባህሪ (organizational behavior) ሊኖረው ከሚገባ በቀር ይህን ድንጋጌ ጥሶ እንዳሻው ቅጥር ቢፈፅም የህጋዊነት መርህን ከመጣሱም ባሻገር በዜጎች መካከል ልዩነት በመፍጠር የእኩልነት መብታቸውንም የሚጋፋ ተግባር ይሆናል። ይህ ደግሞ ራሱን የቻለ የዜጎችን ኢኮኖሚያዊ ፍትሃዊነትን የሚያዛባ ይሆናል። ለዚህም ነው ከላይ የተገለፀው መርህ እንደ አግባብነቱ በፌዴራል መንግስት አሰሪና ሰራተኛ ግንኙነት ውስጥም ሊንፀባረቅና ሊጠበቅ የሚገባ ሀገራዊ መርህ ነው የሚል አቋም የተያዘው። በተጨማሪም የመምህራን የሥራ ቅጥር ውላቸው በየሁለት ዓመቱ የሚታደስ በመሆኑ ብቻ መምህራን ጊዜያዊ ወይም የኮንትራት ሠራተኞች ናቸው ሊያስብል እንደማይችል የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት በታህሳስ 28 ቀን 2009 ዓ.ም በመዝገብ ቁጥር 132714 ላይ በአመልካች ዶክተር ደሳለኝ ተመስገን እና በተጠሪ በአዲስ አበባ ሳይንስና ቴክኖሎጂ ዩኒቨርሲቲ መካከል በነበረው ክርክር ላይ በግልፅ አስገዳጅ የህግ ትርጉም ሰጥቷል። ስለሆነም የመምህራን የስራ ቅጥር ውል በጊዜ የተወሰነ ወይም ጊዜ የተቆረጠለት መሆኑ ብቻ የስራ ውላቸውን ለተወሰነ ጊዜ የተደረገ እነርሱን ደግሞ ጊዜያዊ ሰራተኛ

[31] የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት ፋ/ቁ. 80350 (የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ 14). በተጨማሪም የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት ፋ/ቁ. 11924 (የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ 3) እና የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት ፋ/ቁ. 25526 (የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ10) ላይም በተመሳሳይ መልኩ የተገለፀው ነገር የሥራ ውሉ ጊዜ ተቆርጦ የተወሰነለት መሆኑ ብቻ የሥራ ውሉን ለተወሰነ ጊዜ የተደረገ የስራ ውል ወይም ጊዜያዊ የሥራ ግንኙነት አያደርገውም።

ሊያደርግ አይችልም፡፡ ቀደም ሲል እንደተገለፀው መምህራን እንደማንኛውም ዜጎች ካላይ በተቀመጠው መሠረታዊ መርህና የህግ ፍልስፍና ተጠቃሚ መሆን አለባቸው፡፡

በህጉ አግባብ የጊዜያዊ ሠራተኛነት መቅጠሪያ መስፈርትን ሳያሟሉ የዘላቂነት፣ ተከታታይነት እና መደበኛነት ባህሪ ባለው የሥራ መስክ ላይ መምህራንን በመቅጠር ጊዜያዊ ናቸው የሚለው ክርክር የህግ መሠረት የሌለው ነው፡፡ በዚህ ረገድ ቀደም ሲል የጠቀስነው በዶክተር ደሳለኝ ተመስገን እና በአዲስ አበባ ሳይንስና ቴክኖሎጂ ዩኒቨርሲቲ መካከል የተደረገውን ክርክር መመልከት ይገባል፡፡[32] የክርክሩ መነሻ ዶክተር ደሳለኝ (አመልካች) ለፌዴራል መንግስት ሠራተኞች አስተዳደር ፍ/ቤት ያቀረቡት አቤቱታ ሲሆን ፍሬ ነገሩም ዩኒቨርሲቲው (ተጠሪ) ያለአግባብ የሥራ ውሴን በማቋረጥ ከሥራ ያሰናበተኝ ስለሆነ የስንብት ደብዳቤው ተሽሮ ወደ ሥራዬ ልመለስ ይገባል የሚል ሲሆን ዩኒቨርሲቲው በበኩሉ ካቀረባቸው ክርክሮች አንዱና ዋነኛው አመልካች የመ/ቤቱ ቋሚ ሠራተኛ ሳይሆኑ በየሁለት ዓመቱ የሚታደስ የሥራ ውል ያላቸው ጊዜያዊ ወይም የኮንትራት ሠራተኛ በመሆናቸው ጉዳያቸው በአስተዳደር ፍ/ቤቱ ሊታይ አይችልም የሚል ነው፡፡ የአስተዳደር ፍ/ቤቱም የተጠሪን ክርክር በመቀበል ፍ/ቤቱ ሊያይ የሚችለው በፌዴራል መንግስት መ/ቤት ውስጥ በቋሚነት ተቀጥረው ለሚሰሩ ሠራተኞች በመሆኑና አመልካች ደግሞ የኮንትራት ሠራተኛ በመሆናቸው የቀረበውን አቤቱታ የማየት ሥልጣን የለኝም በማለት የአመልካችን አቤቱታ ውድቅ በማድረግ መዝገቡን ዘግቶ አሰናብቷል፡፡ አመልካች ጉዳያቸውን ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ቢያቀርቡም ፍ/ቤቱ የአስተዳደር ፍ/ቤቱን ውሳኔ በማፅናት ይግባኙን በመሰረዙ አመልካች ለፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት የሰበር አቤቱታቸውን አቅርቧል፡፡ የሰበር አቤቱታውም ባጭሩ ምንም እንኳን የቅጥር ውል ርዕሱ የኮንትራት ሠራተኛ ቢልም አመልካች በተጠሪ መ/ቤት ከጥቅምት 12 ቀን 2005 ዓ.ም ጀምሮ በባዮሎጂካል ኬሚካል ሳይንስ ቴክኖሎጂ ት/ቤት ውስጥ በረዳት ፕሮፌሰርነት ማዕረግ የተቀጠሩ መሆኑን፣ በዚህም መሠረት የተጠሪ መ/ቤት ቋሚ ሠራተኛ በመሆን እያገለገሉ የነበሩ መሆኑን በመግለፅ ያለአግባብ የኮንትራት ሠራተኛ ነህ ተብሎ በሥር ፍ/ቤቶች የተወሰደው ትርጉም አግባብነት የሌለው በመሆኑ የተጠሪ መ/ቤት ቋሚ ሰራተኛ በመሆኔ ተጠሪ ያለአግባብ ከሥራ ያሰናበተኝ መሆኑ ተረጋግጦ ወደ ሥራ እንድመለስ እንዲወሰንልኝ የሚል ይዘት ያለው ነው፡፡ ተጠሪም ለሥር ፍ/ቤቶች ያቀረበውን ክርክር በማጠናከር የስር ፍ/ቤቶች ውሳኔ የህግ ስህተት የሌለበት በመሆኑ ሊፀና ይገባል በማለት ተከራክሯል፡፡ ሰበር ችሎቱም በአመልካች እና ተጠሪ መካከል የተደረገውን ውል፣ አዋጅ ቁጥር 515/1999፣ የጊዜያዊና ቋሚ ሠራተኞች የቅጥር ሥርዓትን እና መስፈርትን የሚደነግጉ የቅጥር መመሪያዎችን፣ የተጠሪ ዩኒቨርሲቲን ሴኔት ህግጋት፣ አዋጅ ቁጥር 650/2001ን (በአዋጅ ቁጥር 861/2006 እንደተሻሻለው) እና የፌዴራል ዩኒቨርሲቲዎች ደንብ ቁጥር 210/2003 እና ተከራካሪዎች ያቀረቡትን ክርክር ከመረመረ በኋላ "....በአመልካች እና በተጠሪ መካከል የተደረገው የቅጥር ውል ጊዜያዊ ነው ሊባል የሚችልበት አግባብ የሌለ መሆኑን ከአዋጅ ቁጥር 650/2001 በአዋጅ ቁጥር 861/2006 እንደተሻሻለው ከአንቀፅ 30 እና 33 ጣምራ ንባብ በከፍተኛ ትምህርት ተቋማት እና መምህራን መካከል የሚደረጉ ውሎች በየሁለት ዓመቱ እንዲታደሱ ከሚደረግበት መሠረታዊ ዓላማ፣ በአዋጅ ቁጥር 515/99 አግባብ በህዳር 9 ቀን 2000 ዓ.ም. ወጥቶ የነበረው ጊዜያዊ የቅጥር ውል አፈፃፀም መመሪያ በኢ.ፌ.ድ.ሪ. ሪፐብሊክ ጠ/ሚኒስትር ጽ/ቤት በቁጥር መ80-839/1 በተላለፈው መመሪያ መነሻነት በከፊል ቀሪ ከመሆኑና በህግ ጥበቃ ሊሰጣቸው የሚገባቸው ውሎች በህጉ አግባብ የተቋቋሙ ናቸው ከሚለው የፍ/ብ/ህ/ቁ 1731 ድንጋጌ መሠረታዊ ይዘት የተገነዘብን በመሆኑ በጉዳዩ ላይ የተሰጠው ውሳኔ

[32] የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በታህሳስ 28 ቀን 2009 ዓ.ም. በመዝገብ ቁጥር 132714፡፡

መሠረታዊ የህግ ስህተት የተፈፀመበት ሆኖ ስላገኘነው....”[33] በማለት የስር ፍ/ቤቶችን ውሳኔ ሙሉ በሙሉ ሽሮታል። ችሎቱ በትንታኔው ትኩረት የሰጠው አንድ ሰራተኛ በመንግስት መ/ቤት ውስጥ በጊዜያዊ ሰራተኝነት ሊቀጠርበት የሚችልበት ውስን መስፈርቶች መኖራቸውንና አመልካች በተጠሪ መ/ቤት ውስጥ የተቀጠረው በጊዜያዊ ሰራተኛነት ነው ሊያስብል የሚችል አግባብ የሌለ መሆኑን በግልፅ ተችቷል።

በመጨረሻ ሊነሳ የሚገባው ነገር የአዋጅ ቁጥር 650/2001 አንቀፅ 33(1) በመምህራን የቅጥር ግንኙነት ላይ ስለሚኖረው ሚና ነው። አንቀፅ 33(1) እንዲህ ይላል፦ “እንደ ልዩ ጥቅምና ለሙያ ልቀት ማበረታቻ እንዲሆን አንድ አካዳሚክ ሠራተኛ ቋሚ ቅጥር ሊደረግ ይችላል። የአካዳሚክ ሠራተኛ ቋሚ ቅጥር የሚሆነው በሰጠው አገልግሎትና ባበረከተው የማስተማር እና/ወይም የምርምር ምሁራዊ አስተዋፅዖ ወይም ባስመዘገበው የተቋም መሪነት ብቃት ላይ ተመስርቶ ይሆናል።” (*ሰረዝ የተጨመረ*)። መምህራን ጊዜያዊ ናቸው የሚለው የብዝዎች ክርክር መሠረት ያደረገው ይህን ድንጋጌ ነው። ነገር ግን ጥያቄው እውነት ይህ ድንጋጌ የመምህራንን የቅጥር ሁኔታ በቀላሉ ጊዜያዊ ናቸው ለማለት ያስደፍራል ወይ የሚለው ነው።

እንግዲህ የአንቀፁን “...ሊደረግ ይችላል። ...” የሚለውን ሀረግ በጥንቃቄ ስንመረምረው ድንጋጌው ለትርጉም የተጋለጠና በሁለት መልኩ ሊታይ እንደሚችል የሚያመላክት ነው። የመጀመሪያው የትርጓሜ ይዘት የተጠቃሹን ሀረግ የወደፊት አገላለፅ (future expression) መንፈስ የያዘ ሲሆን ይህም “ማንኛውም መምህር ሲቀጠር ቋሚ ተደርጎ አይቀጠርም፤ ነገር ግን በአዋጁ የተመለከቱትን መስፈርቶች አሟልቶ ሲገኝ ቅጥሩ ቋሚ ቅጥር ሊደረግለት ይችላል” የሚል ነው። በአዋጁ ውስጥ በጥቅሉ የተመለከቱት የቋሚነት መስፈርቶች በቅርቡ በፀደቀው የመንግስት ከፍተኛ ተቋማት ሀርሞናይዝድ አካዳሚክ ፖሊሲ (Harmonized Academic Policy of Ethiopian Public Higher Education Institutions) ውስጥ በአንቀፅ 21 ላይ እንዲህ ተብሎ በዝርዝር ሰፍሯል።[34]

> Article 21: Criteria for Awarding Tenure
>
> Tenure may be awarded to a full-time University Academic Staff member who:
>
> 1. holds the rank of Associate Professor or above and serve the university for a total of ten years or assistant professor with 10 years' service after holding such status ; and
> 2. demonstrates a desire to continue to serve the University as a staff member for an indefinite period;
>    AND
> 3. has demonstrated throughout their professional career:
>    3.1. scholarly ability through teaching, research, publications or other contributions to the advancement of the respective academic field; and
>    3.2. Service of merit to the University, through contributions to University committees or its constituents or in connection with other tasks which may have been assigned.

[33] *ዝኒ ክማሁ።*

[34] The Harmonized Academic Policy of Ethiopian Public Higher Education Institutions, Article 21.

**የመስፈርቶቹን ምንነትበዝርዝር መመልከት የዚህ ፅሁፍ ዓላማ አይደለም፡፡ ነገር ግን በአጭሩ ማመልከት የምፈልገው ቴንየር** (tenure) **ያለው መምህር ያለ ጥርጥር ቅጥሩ ቋሚ የሚደረግለት ሲሆን ቴንየር የልላቸው መምህራን ቋሚነት ግን በሁኔታዎች የተገደበ** (conditional tenure) **ነው ማለት ነው፡፡ ይህ የቅጥር ሁኔታ ለመከራ ጊዜ ከሚቀጠር ሰራተኛ ሁኔታ ጋር የሚመሳሰል እንጂ ጊዜያዊ ተደርጎ ከሚቀጠር ሰራተኛ ጋር የሚመሳሰል አይደለም፡፡ ምክንያቱም ለመከራ ጊዜ ተብሎ የሚቀጠር ሰራተኛ በተቀመጠለት መመዘኛ ተመዝኖ መመዘኛዎቹን አሟልቶ እስከተገኘ ድረስ ወደ ቋሚ ሰራተኝነት የመቀየር መብት እና ዕድል ሲኖረው ጊዜያዊ ተደርጎ የተቀጠረ ሰራተኛ ግን ይህ ዕድል የለውም፡፡**[35] **በዚህ ረገድ የዩኒቨርሲቲ መምህራን ለመከራ ጊዜ ተቀጥረው የቴኒየር መስፈርትን ሲያሟሉ ወደ ቋሚነት የሚቀየሩበት የቅጥር ሂደት በተለያዩ ሀገራት በሚገኙ ዩኒቨርሲቲዎች ውስጥ በስፋትና በልምድ የሚታይ ነው፡፡**[36] **በዚህ መንፈስ መሠረት መምህራን ጊዜያዊ ቅጥር ናቸው ማለት አይቻልም፡፡ ይልቁንም በከፍተኛ ትምህርት አዋጁ ላይ የተቀመጠው የ10 ዓመት ርዝማኔ ራሱን የቻለ ክርክር እና ሙግት የሚያመጣ ሆኖ የውል መምህራን ጊዜያዊ ሠራተኛ ከመባል ይልቅ ለመከራ ጊዜ የተቀጠሩ ሰራተኞች ናቸው ቢባል ለዘብተኛና የቀረበ ወይም የተሻለ የህግ ትርጉም ሊሆን እንደሚችል እገምታለሁ፡፡**[37]

**ሁለተኛው "…ሊደረግ ይችላል፡፡ …" የሚለው ሀረግ መንፈስ ደግሞ አንድ መምህር ሲቀጠር ቋሚ ቅጥር ተደርጎ ሊቀጠር ይችላል የሚል ትርጉምም ይሰጣል፡፡ ማለትም ቋሚነቱ ከተቀጠረ በኋላ ሳይሆን ከጅምሩ ቅጥሩ በቋሚ ሠራተኝነት ሊሆን ይችላል ማለት ነው፡፡ ይህ ሊሆን የሚችልበት አጋጣሚ ለምሳሌ አንድ መምህር ከላይ የተጠቀሰውን የቋሚነት መስፈርት ሊያሟላ የሚችልበት ደረጃ ላይ ከደረሰ በኋላ በተለያየ ምክንያት የነበረበትን ተቋም ለቆ ወደ ሌላ ተቋም ሄዶ የሚቀጠርበት አጋጣሚ ይኖራል፡፡ በዚህ አይነት አጋጣሚ የሚመጡ መምህራን በህጉ አግባብ መሠረት በሰነድ አስደግፈው የሚያቀርቡት የስራ ልምድ ማስረጃቸው በሚቀጠሩበት ዩኒቨርሲቲ የቅጥር ማህደራቸው ውስጥ ይያያዝላቸዋል፡፡ እዚህ ላይ ግን የአካዳሚክ ፖሊሲውን የቴኒየር ድንጋጌ በአንድ ተቋም ውስጥ ብቻ ለሚሰጥ አገልግሎትና የሥራ ልምድ የሚውል ድንጋጌ አድርጎ የመገንዘብ አዝማሚያ አለ፡፡ ሆኖም ግን ከከፍተኛ ትምህርት ተቋም አዋጅ ቁጥር 650/2001 እና ቴኒየርን ወይም ቋሚነትን መስጠት ከተፈለገበት ሀገራዊና ዓለማቀፋዊ አጀንዳና ዓላማ አንፃር ሲታይ በአንድ ዩኒቨርሲቲ ውስጥ ባለው የአገልግሎት ቆይታና የሥራ ሚዛን ለቴኒየር የደረሰ መምህር በሌላ ዩኒቨርሲቲ ሄዶ ሲቀጠር ቴኒየር የሚነፈግበት አግባብ አይኖርም፡፡ ስለሆነም በዚህ በሁለተኛውም አረዳድ የአዋጅ ቁጥር 650/2001 አንቀፅ** 33(1) **መንፈስ ውስጥ መምህራን ጊዜያዊ ቅጥር ናቸው ሊያስብል የሚችል ጠንካራ መሠረት የለም፡፡ የፌ/ጠ/ፍ/ቤት ሰ/ሰ/ችሎት በዶክተር ደስአለኝ እና በአዲስ አበባ ሳይንስና ቴክኖሎጂ ዩኒቨርሲቲ መካከል በነበረው ክርክር ላይ በግልፅ ካመለከታቸው የህግ ትርጉሞች**

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[35] የፌዴራል መንግስት መ/ቤት የቋሚ ቅጥር አፈፃፀም መመሪያ 2000ን (ህዳር 2000 ዓ.ም.) እና የፌዴራል መንግስት መ/ቤት የጊዜያዊ ሠራተኞች የቅጥር አፈፃፀም መመሪያ 2000 (ህዳር 2000 ዓ.ም.) መመልከት ተገቢ ነው፡፡ አንድ በጊዜያዊነት የተቀጠረ ሰራተኛ የሥራ ዘመኑ ወይም የተወሰነው ጊዜ ሲያበቃ ወይም ሥራው ሲያልቅ ወይም ፕሮጀክቱ ሲፈፀም የስራ ውሉም በዚያው የሚያበቃ ስለመሆኑ ከላይ ከተሰጠው ማብራሪያ መረዳት ይቻላል፡፡

[36] Jehle Christian and Schiewer Jochen Hans, *Tenure and Tenure Track at Leru Universities: Models for Attractive Research Careers in Europe,* 17 ADVICE PAPER 6-18 (September 2014). የLeru Universities አባላት ከሆኑት ውስጥ የአምስተርዳም፣ የካምብሪጅ፣ የኢደንበርግ፣ የጀኔቭ፣ የሄልሲንኪ፣ የሉንድ እና የዙሪክ ዩኒቨርሲቲዎች ይገኙበታል፡፡

[37] አዋጅ ቁጥር 1064/2010 አንቀፅ 20፣ 21 እና 22ን መመልከት ተገቢ ነው፡፡ እርግጥ ከከፍተኛ ትምህርት ተቋማት ዓላማ እና ከመምህራን ሥራ ባህሪ አንፃር ሲታይ የመምህራን ቅጥር በመስፈርቱ መሠረት (በተለይም ለ10 ዓመት ያህል አገልግሎት መስጠት የሚለውን ስናይ) ከመደበኛው የፌዴራል መንግስት የመ/ቤ ሰራተኞች የሽግግር ዘመን (6 ወር ቢበዛ 9 ወር፣ መመሪያ 2000 አንቀፅ 5.10(2) መሠረት) የተለየ ግምትና የጊዜ መጠን (በህርሞናይዝድ ፖሊሲው ላይ የተጠቀሰው የ10 ዓመት የጊዜ ርዝማኔ ራሱን የቻለ ክርክር ቢኖረውም) ቢሰጠው ተገቢነቱ የሚያከራክር አይሆንም፡፡

አንዱ የአዋጅ ቁጥር 650/2001 አንቀፅ 33(1) ሲሆን በውሳኔውም ላይ "....የአዋጅ ቁጥር 650/2001 አንቀፅ 33/1/ አግባብ ቋሚ ቅጥር የሚፈፀምበት አግባብ በዩኒቨርሲቲው እና አመልካችን ከመሰሉ መምህራን ጋር የሚፈፀመው ቅጥር ጊዜያዊ ቅጥር ነው ብሎ ለመደምደም የሚያስችል ሆኖ አልተገኘም"[38] በማለት በአዋጅ ቁጥር 650/2001 አንቀፅ 33(1) መሠረት የዩኒቨርሲቲ መምህራን ቋሚ ሳይሆኑ ጊዜያዊ ሠራተኞች ናቸው የሚለው ክርክር የህጉን መንፈስና ይዘት ያልያዘ ክርክር መሆኑን በግልፅ አሳይቷል።

## ማጠቃለያ

በዚህ ጽሑፍ ለመዳሰስ የተሞከረው በዩኒቨርሲቲ መምህራን ቅጥርና አስተዳደር ዙሪያ እየተነሱ የሚገኙ አንዳንድ አከራካሪ ነጥቦችን ነው። በዚህም መሠረትየአንድ ሠራተኛ የቅጥር ማንነት የሚወሰነው በቀጣሪው ማንነት ነው። በተጨማሪም አንድ ሠራተኛ የመንግስት ሠራተኛ ነው ለማለት የግድ ከቋሚነት ወይም ከጊዜያዊነት የቅጥር ሁኔታ ጋር መገናኘት የለበትም። በዚህ ረገድ በአዋጅ ቁጥር 1064/2010 አንቀፅ 2(1) የእንግሊዘኛው ቅጂ ትክክለኛ የመንግስት ሰራተኝነት ትርጉም የያዘ በመሆኑ የአማርኛውም ቅጂ በዚህ መልኩ ሊሻሻል ይገባል። ነገር ግን መምህራን የመንግስት ሠራተኛ ተብለው መወሰድ ይገባቸዋል ማለት የሲቪል ሰርቫንት ህጉ በሁሉም የመምህራን ጉዳይ ላይ ተፈጻሚ ይሆናል ማለት እንዳልሆነ እና ነገር ግን እንደ ነገሩ ሁኔታ እና እንደ አግባብነቱ ተፈፃሚ ሊደረግባቸው የሚችል የህግ ማዕቀፍ ስለመሆኑ በጽሁፉ ውስጥ ለማብራራት ተሞክሯል።

ሌላው መምህራን በየትኛው ፍትህ ሠጪ አካል ፊት ቀርበው ዳኝነት ያገኛሉ የሚለው ጉዳይ የሚወሰነው በዋናነት በቀረበው ጉዳይ ባህሪና መልክ ነው ላይ መሆኑ በዚህ ጽሁፍ ተዳሷል። በአዋጅ ቁጥር 1064/2010፣ ደንብ ቁጥር 77/94 እና በከፍተኛ ትምህርት አዋጅ ቁጥር 650/2001 (በአዋጅ 861/2006 እንደ ተሻሻለው) ውስጥ በተጠቀሱት ድንጋጌዎች መሠረት መምህራን የሚያጋጥሟቸውን ጉዳይ ለመፍታትና ዳኝነት ለማግኘት መጣር አለባቸው። በዚህ ረገድ ሊሰመርበት የሚገባው ነገር በአዋጅ ቁጥር 1064/2010 አንቀፅ 75 መሠረት የማይሸፈኑ ጉዳዮች ከሆኑ መምህራንም ሆነ ቀጣሪ ዩኒቨርሲቲው የቀጥታ ክስ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት የማቅረብ መብታቸው የተጠበቀ ነው።

መምህራን ጊዜያዊ ሠራተኞች ናቸው የሚለው አመለካከት በህግ እይታ ተቀባይነት የሌለው መሆኑ አንዱ አጽንኦት የተሰጠው የጽሁፉ ክርክር ነበር። በዚህ ረገድ የአዋጅ ቁጥር 650/2001 አንቀፅ 33(1) ሚና የጎላ ሲሆን የአንቀፁ መንፈስ በጥንቃቄ ሲመረመር መምህራን ምንጊዜም ሲቀጠሩ ጊዜያዊ ሆነው መቀጠር አለባቸው ወይም መምህራን ምንጊዜም ቢሆን ጊዜያዊ ናቸው ሊያስብል የሚችል ጠንካራ መሠረት የለውም። የመምህራን የሥራ ቅጥር ውል ጊዜ ተተምኖለት የተዘጋጀ በመሆኑ ብቻ ለተወሰነ ጊዜ የተደረገ የሥራ ውል ነው፤ መምህራንም ጊዜያዊ ናቸው የሚያስብል የህግ መሠረትም አይደለም። በመንግስት ዩኒቨርሲቲዎች አካዳሚክ ፖሊሲ ላይ ቴኒየር ለማግኘት የተቀመጠው የ10 ዓመት የአገልግሎት ጣሪያ ርዝማኔ ራሱን የቻለ ሌላ የክርክር ጭብጥ መሆኑ ባይካድም በአሁን ሰዓት እየተካሄደ ያለው የመምህራን የቅጥር ሥርዓትና የህግ አፈፃፀም ለመከራ ጊዜ የሚደረግ የሠራተኛ ቅጥር ነው ቢባል እንጂ ጊዜያዊ ናቸው ለማለት ምንም ህገዊ መሠረት አይታይም።

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[38] የፌ/ጠ/ፍ/ቤት/ሰ/ሰ/ችሎት በታህሳስ 28 ቀን 2009 ዓ.ም. በመዝገብ ቁጥር 132714።

# University Teachers' Employment and Administration in Ethiopia: Legal analysis of some contentious issues

*Berihun Gezahegn*[*]

## *Abstract*

*In Ethiopia, the employment and administration of public university teachers remains to be source of legal and practical issues of contention. Particularly, issues in relation to the applicability of the civil servants' proclamation to matters of university teachers' including whether they are to be called as "civil servants"; whether they are permanent or temporary employees, and also with regard to the proper adjudicatory body in matters involving the teachers are issues that need resolution. The purpose of this article is to critically discuss and analyze the above identified issues against the available relevant legal frameworks and the Federal Supreme Court Cassation Division's decisions so as to create better understanding on the issues. The article has argued that in the proper meaning of the term, 'university teachers' are civil servants and the relevant parts of the civil servants' proclamation applies to matters relating to university teachers. In addition, despite the contractual nature of their employment (mostly renewable for every 2 years), university teachers are permanent employees. Finally, in regards to litigation or dispute involving university teachers, administratively, they could take their cases to Federal Civil Service Administrative Tribunal and then to the Federal Supreme Court after exhausting their institution-level remedies. Other civil actions can be to ordinary courts.*

**Key-terms**: University teachers, civil servant, temporary employee, permanent employee

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# How to Rescue Human Rights from Proactive Counterterrorism in Ethiopia

*Wondwossen Demissie Kassa (PhD)*[*]

## *Abstract*

*Though, in theory, there is no trade-off between counterterrorism and the protection of human rights, in practice their interaction has been problematic. Broadly, the problematic nature of counterterrorism from human rights perspective is attributable to two factors. The first is lack of universally accepted definition of terrorism. The second is the proactive approach of counterterrorism — an approach that departs from the traditional reactive approach of the criminal law and allows intervention against a conduct before it matures into a terrorist act. This paper is concerned with Articles 4 and 7 of the Ethiopian Anti-terrorism Proclamation No 652/2009, which, respectively, criminalize preparatory conduct to commit a terrorist act and membership in a terrorist organization, and introduce a proactive approach to counterterrorism in Ethiopia. The application of these provisions involves prediction of future behaviours based on limited information, which makes them susceptible to misuse. This potential for abuse calls for maximum care in their implementation. This article explores how these provisions should be construed to mitigate human rights casualty. Drawing on the law and practice of counterterrorism in jurisdictions from which the Ethiopian antiterrorism proclamation has been adapted, this article suggests a precautious reading of these provisions. This path, which calls for the court to play its role in safeguarding human rights from proactive counterterrorism in Ethiopia, is not only desirable, but prudent and sufficiently mindful of the constitutional role of the judiciary.*

**Key terms:** Ethiopia, proactive counter terrorism, Human Rights

## Introduction

Ethiopia passed the Anti-terrorism Proclamation 652/2009 (ATP) in 2009. Both the law and its (mis)application have been the subject of consistent criticism from governmental and non-governmental organizations.[1] Research suggests the

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[1] African Commission on Human and Peoples' Rights, '218: Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia' (51st ordinary Session, 18 April to 2 May 2012, Banjul, The Gambia) <http://www.achpr.org/sessions/51st/resolutions/218/>; United Nations Human Rights, Climate of intimidation against rights defenders and journalists in Ethiopia (2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E >; Human Rights Council Working Group on Arbitrary Detention (2012), Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty Fifth Session, 14-23 Nov, No. 62/2012 (The Federal Democratic Republic of Ethiopia), Retrieved from: <http://www.freedomnow.org/wp-content/uploads/2013/04/Eskinder-Nega-WGAD-Opinion.pdf>; Human Rights Watch, 'An Analysis of Ethiopia's Draft Anti-Terrorism Law' (30 June

problematic nature of the law from human rights point of view. Hiruy offers an overview of the broadness and vagueness of the definition of a terrorist act under the ATP and has warned that it can potentially be used to discipline dissent.[2] Similarly, Sekyere and Asare examine the relationship between some of the provisions of the ATP and human rights instruments and conclude that 'there is a real potential for the state to crack down on political dissent in governance and curtail the growth of democracy in Ethiopia.'[3] In an earlier work, I have expressed concern on the aptness of criminalising precursor and inchoate conduct and criminal participation under the ATP in the light of criminal law theories.[4] Mesenbet[5] and Husen[6] have pointed to the proclamation's potential to silence dissenting views. Those who denounce the ongoing prosecutions against journalists and opposition political party members under the ATP cite these prosecutions as evidence of the misuse of the law.[7]

2009) <https://www.hrw.org/news/2009/06/30/analysis-ethiopias-draft-anti-terrorism-law> accessed 20 July 2017; Amnesty International, 'Ethiopia: Dismantling dissent intensified crackdown on free speech in Ethiopia' (30 April 2012) <https://www.amnestyusa.org/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia/> accessed 15 June 2017; Committee to Protect Journalists, 'Anti-terrorism legislation further restricts Ethiopian press' (23 July 2009) <https://cpj.org/2009/07/anti-terrorism-legislation-further-restricts-ethio.php> accessed 05 April 2016; Lewis Gordon, Sean Sullivan and Sonal Mittal, 'Ethiopia's Anti-Terrorism Law: A tool to Stifle Dissent' (2015), Retrieved from: <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf> accessed 10 December 2016.

[2] Hiruy Wubie, *Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective*, 25 JOURNAL OF ETHIOPIAN LAW 24 (2011).

[3] Peter Sekyere and Bossman Asare, *An Examination of Ethiopia's Anti –Terrorism Proclamation on Fundamental Human Rights*, 12 EUROPEAN SCIENTIFIC JOURNAL 351, 351(2016).

[4] Wondwossen Demissie Kassa, *Criminalization and Punishment of Inchoate Conduct and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law*, 24 JOURNAL OF ETHIOPIAN LAW 147 (2010).

[5] Mesenbet A. Tadeg, *Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges* 5 U. BALT. J. MEDIA L. & ETHICS 69 (2016).

[6] Husen Tura, *The Impact of Ethiopia's Anti-Terrorism Law on Freedom of Expression*, (25 July 2017), Proceeding of 5th International Conference of PhD Students and Young Researchers, 393 Vilnius University Faculty of Law (International Network of Doctoral Studies in Law) https://ssrn.com/abstract=2660268 or http://dx.doi.org/10.2139/ssrn.2660268 accessed 10 September 2017.

[7] United Nations Human Rights, Climate of intimidation against rights defenders and journalists in Ethiopia (2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E>; Patrick Griffith, "Ethiopia's Anti-Terrorism Proclamation and the right to freedom of expression" (*freedom now* 30 August 2013) <http://www.freedom-now.org/news/ethiopias-anti-terrorism-proclamation-andthe-right-to-freedom-of-expression/>; Human Rights Council Working Group on Arbitrary Detention (2012), Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty Fifth Session, 14-23 Nov, No. 62/2012 (The Federal Democratic Republic of Ethiopia), Retrieved from: <http://www.freedomnow.org/wp-content/uploads/2013/04/Eskinder-Nega-WGAD-Opinion.pdf>; Human Rights Watch (2011), 'Ethiopia: Journalists Convicted Under Unfair Law, Deeply Flawed anti-terrorism Act should be revoked', retrieved from: <http://www.hrw.org/news/2011/12/21/ethiopia-journalists-convicted-underunfair-law>; Amnesty International (2012), Ethiopia: Conviction of government opponents a 'dark day' for freedom of expression, retrieved from: <http://www.amnesty.org/en/news/ethiopia-conviction-government-opponentsdark-day-freedom-expression-2012-06-27>

This article focuses on Articles 4 and 7 of the ATP which, respectively, criminalizes preparatory acts (refer to both planning and preparation) and membership in a terrorist organization. These provisions which introduce a proactive counterterrorism, otherwise known as precautionary approach to counterterrorism,[8] are susceptible to misuse and thus call for a maximum restraint in their application. The article proposes how these provisions should be construed so that their application on a wrong target can be minimized. It promises to be a valuable contribution to an understanding of the nature of precautionary counterterrorism and offering a perspective on how to mitigate its impact on human rights. The ATP has drawn on anti-terrorism laws of foreign jurisdictions,[9] such as Australia, United Kingdom and the United States. In order to gain original understanding of the law, the article draws heavily on the laws and literature relating to counterterrorism in these jurisdictions.

The article has three sections. The first provides a theoretical background to proactive counterterrorism in light of which the approach under the ATP is to be examined. It discusses the major justifications for the precautionary approach in the context of countering terrorism, the human rights concerns associated with adopting the approach and the safeguards that need to be put in place to minimise the human rights impact of the approach. The second section deals with precursor offences under the ATP. Specifically it analyses the physical and mental elements of these offences and their relationship with a principal terrorist act as provided under the ATP. The third section is concerned with how the ATP treats membership in a terrorist organisation. Though criminalisation of membership in a terrorist organization is arguably an extension of proactive counterterrorism, unlike in the case of preparatory offences, states have different approaches to its criminalisation. This section analyses the legal provisions of the ATP dealing with membership of a terrorist organisation in comparison with the approach in other jurisdictions. Finally, concluding remarks are offered.

## 1. Proactive counterterrorism and its potential intrusion on human rights

### 1.1. Proactive counterterrorism

United Nations Security Council Resolution 1373 (the Resolution) requires states to criminalise execution as well as preparation for and planning of a terrorist act.[10]

[8] For the details on this approach, see Section 1 below.

[9] Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives (2008/2009), 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, p.1 16-117. Yemane Negash, "**ኤርፖርት ላይ አንደሚታነቁ የሚያምኑ ሰወች ቢኖሩም ኢህአዴግ ግን ስለመኖራቸዉ አያዉቅም**" (*ሪፓርተር* 10 December 2014) <http://www.ethiopianreporter.com/index.php/politics/item/8182>; a program on Terrorism in Ethiopia hosted by Ethiopian Television and Radio Agency in 2013, part two, Available at: <http://www.mereja.com/video/watch.php?vid=ecb2493b5>.

[10] SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) Para. 2 (e).

Even where counterterrorism instruments do not require states to criminalise preparatory acts, the states have been encouraged to do so.[11] The United Nations Security Council Counterterrorism Committee and the UN Office on Drugs and Crime have called upon states to criminalize 'extended modes of criminal participation' in their anti-terrorism legislation.[12]

In response to the Security Council's instruction and encouragements from different corners, states have adopted a proactive approach to fight terrorism. A proactive approach calls for 'a strategy to permit intervention against terrorist planning and preparation before they mature into action.'[13] This, in turn, entails 'criminalizing acts that are committed BEFORE any terrorist acts take place.'[14] Under this approach, state anti-terrorism laws push the traditional reach of criminal law. These laws criminalise planning and preparatory acts which transpire earlier than attempt and conspiracy in the continuum of contemplation and commission of a crime.[15] Preparatory offences 'stretch the thread between the substantive crime that the law seeks to pre-empt — terrorism — and the criminalized acts.'[16] These offences are referred to by different names such as precursor crimes,[17] pre-inchoate crimes,[18] or pre-crime.[19] Criminalising acts preparatory to terrorist attacks is a feature of 'a precautionary criminal law'[20] where authorities 'anticipate and forestall that which has not yet occurred and may never

[11] Ben Saul, *Criminality and Terrorism*, *in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 133, 148 (Ana María Salinas de Frías, Katja LH Samuel, and Nigel D. White eds., Oxford University Press 2012); Luis Misguel Hinojosa-Martinez, *A Critical Assessment of United Nations Security Council Resolution 1373*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 626, 626(Ben Saul ed., Edward Elgar 2014).

[12] Saul, *supra* note 11, at 148.

[13] United Nations Office on Drugs and Crime Terrorism Prevention Branch, *Preventing terrorist acts: A criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments*' (2006) 2 <https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf>.

[14] Jean Paul Labrode, 'Countering Terrorism: New International Criminal perspectives', 132nd International Senior Seminar Visiting Experts Papers (2007) 71 RESOURCES MATERIAL SERIES 10-13, 11 (emphasis original).

[15] JUDE MCCULLOCH AND DEAN WILSON, PRE-CRIME: PRE-EMPTION, PRECAUTION AND THE FUTURE (Routledge 2015).

[16] Jude McCulloch, *Human Rights and terror laws,* 128 PRECEDENT 26, 28 (2015).

[17] Stuart Macdonald, *Understanding Anti-terrorism policy: Values, rationales and principles*, 34 SYDNEY LAW REVIEW 317 (2012).

[18] Tamara Tulich, *Prevention and Pre-emption in Australia's domestic Anti-terrorism legislation*, 1INTERNATIONAL JOURNAL FOR CRIME AND JUSTICE 52, 56 (2012); ANDREW LYNCH, GEORGE WILLIAMS, AND NICOLA MCGARRITY, INSIDE AUSTRALIA'S ANTI-TERRORISM LAWS AND TRIALS 32 (NewSouth 2015).

[19] Jude McCulloch and Sharon Pickering, *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'*, 49 BRITISH JOURNAL OF CRIMINOLOGY, 628 (2009). Chesney refers to the prosecution involving such acts as 'anticipatory'. Robert M. Chesney, *The Sleeper Scenario: Terrorism-support Laws and the Demands of Prevention*, 42 HARVARD JOURNAL ON LEGISLATION 1(2005); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenges of Unaffiliated Terrorism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 425 (2007).

[20] Andrew Goldsmith, *Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law*, *in* LAW AND LIBERTY IN THE WAR ON TERROR *(*Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007).

do so.'[21] As noted by Virta, the 'precautionary principle' has been the basis of the counterterrorism policymaking.[22]

### 1.2. Justifications for Proactive counterterrorism

In view of the seriousness of the potential harm that might occur if the traditional criminal law approach were followed, there has been a support for the proactive approach to counterterrorism.[23] For example, Labrode suggests that terrorism being one of the most serious crimes, maximum attention should be given to prevent it.[24] According to Saul, the probability of catastrophic harm is among the factors that justify the peculiarity of regulating of terrorism from other crimes.[25] Williams argues that 'given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack.'[26] Officials from the United States, the frontrunner in the global war on terrorism, vigorously expressed the need for a proactive approach on different occasions. For example, in May 2006, Deputy Attorney General Paul McNulty indicated:

> On every level we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention. We resolved not to wait for an attack or an imminent threat of an attack to investigate or prosecute.[27]

While the prevention rationale dominates the proactive approach,[28] there is another related justification for it. Deterrence, one of the core functions of

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[21] Lucia Zedner, *Pre-crime and post-criminology?* 11 THEORETICAL CRIMINOLOGY 261, 262 (2007).

[22] Sirpa Virta, *Re/building the European Union Governing through Counter terrorism*, *in* SECURITY IN EVERYDAY LIFE 186 (Vida Bajc and Willem de Lint eds., Routledge 2011).

[23] Lynch, Williams, and McGarrity, *supra* note 18; Goldsmith, *supra* note 20; Robert Cornall, *The effectiveness of Criminal Law on Terrorism*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 50 (Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007); McCulloch, *supra* note16.

[24] Labrode, *supra* note 14, at 10.

[25] Saul, *supra* note 11, at 149.

[26] George Williams, *A Decade of Australian Anti-Terror Laws*, 35 MELBOURNE UNIVERSITY LAW REVIEW 1136, 1161(2011).

[27] Paul J. McNulty, Prepared Remarks of Deputy Attorney General Paul J. McNulty at the American Enterprise Institute (24 may 2006) <https://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html>. A month later, Homeland Security Secretary Michael Chertoff echoed:

> prevention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action. Investigating and prosecuting terrorists after they have killed our countrymen would be an unworthy goal. Preventing terrorism is a meaningful and daily triumph.

Alberto Gonzales, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (16 August 2006) <https://www.justice.gov/archive/ag/speeches/2006/ag_speech_060816.html>.

[28] McCulloch and Pickering (19) 632. For more on the rationale from the perspective of different actors in different jurisdictions see: McCulloch and Wilson (15).

punishment, is unworkable as far as jihadist terrorists are concerned. There are terrorists who are ready to die for their cause rendering punishment unable to serve its deterrent purpose.[29] As Ruddock notes, '[t]he underlying motivation of terrorism provides a compelling, nihilistic drive to terrorists that often trumps their value of the perpetrators' own lives.'[30]

Research by Baker, Harel, and Kugler indicates what they call 'virtue of uncertainty.'[31] According to their research, and other things being equal, uncertainty relating to the extent of sanction or the likelihood of detection before the commission of crime increases deterrence.[32] Citing this research, Zedner notes that 'in the case of determined terrorists it is probably fair to assume a high degree of calculative rationality, such that uncertainty could be expected to play a large part in deterrence.'[33] Furthermore, she endorses Baker *et al*'s view that 'if uncertainty in fact increases deterrence, then increasing uncertainty may be a cost-effective way to increase deterrence in situations in which there is reason to believe the existing level of deterrence is not optimal.'[34] Similarly, Saul argues that criminalising preparatory acts would have a strong deterrent effect on potential terrorists, who would otherwise not be deterred by the post-crime punishment, not to take the first step towards commission of a terrorist act.[35]

While accepting that the post-2001 Security Council resolutions focus on prevention of terrorist acts, others contend that the novelty of this approach is exaggerated.[36] For example, Labrode reiterates that public safety institutions have always attempted 'both to prevent crime and to solve offences already committed.'[37] Supporting this view, Saul notes that criminal law has never been exclusively reactive; it has played a preventive role as well.[38] Similarly, Ashworth and Zedner observe that 'even the most retributively focused system of criminal law could hardly fail to have regard to the prevention of the wrongs for which it

[29] Goldsmith, *supra* note 20, at 59; Cornall, *supra* note 23, at 50.

[30] Philip Ruddock, *Law as a Preventative Weapon against Terrorism*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 3, 5 (Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007).

[31] Tom Baker, Alon Harel, and Tamar Kugler, *The virtues of uncertainty in law: an experimental approach*, 89 IOWA LAW REVIEW 443 (2004).

[32] *Id.*

[33] Lucia Zedner, *Neither Safe Nor Sound? The Perils and Possibilities of Risk*, 48 CANADIAN JOURNAL OF CRIMINOLOGY AND CRIMINAL JUSTICE 423, 429 (2006).

[34] *Id.* at 429.

[35] Saul, *supra* note 11, at 149.

[36] Labrode, *supra* note 14, at 10. Similarly, some legal scholars tend to refer to planning for and preparation to commit a terrorist act as inchoate offences on the grounds that they are similar to the traditional inchoate offences as in both cases defendants are convicted without completion of the substantive crime and with no harm caused. Bernadette McSherry, *Terrorism offences in Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, 27 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 354 (2004); Saul, *supra* note 11, at 149.

[37] Labrode, *supra* note 14, at 10.

[38] Saul, *supra* note 11.

has decided to censure people.'[39] While acknowledging the seemingly perplexing nature of criminalising preparation for committing a terrorist act, Saul remarks that this is to be viewed as part of a wider expansion of liability in international criminal law as a whole.[40] Thus, he rejects the novelty of the proactive approach in counterterrorism noting that though the new terrorism offences reach much earlier or farther into acts preparatory to terrorism than in ordinary inchoate offences it is 'more a matter of degree than kind.'[41]

### 1.3. Human rights concerns associated with proactive counterterrorism

Prevention of commission of a terrorist act a laudable goal as it is, the criminal law's proactive approach to achieve this purpose has provoked concerns.[42] These concerns relate to a very difficult question in anticipatory prosecution which Chesney calls 'the early intervention dilemma',[43] the dilemma of 'when to arrest and begin prosecution.'[44] As Williams observes '[a]nti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack.'[45] It is a question of where the line should be drawn between 'innocent' conduct and that, which needs to be prohibited.[46]

As Zedner notes the criminal law's proactive approach opens a space for increasingly early and more intrusive measures,[47] which in turn results in an undesirable consequence of false positives.[48] It is true that on the continuum of

[39] ANDREW ASHWORTH AND LUCIA ZEDNER, PREVENTIVE JUSTICE 95 (Oxford University Press 2014).

[40] Saul, *supra* note 11.

[41] *Id.* at 149. Still others contend that "[t]he concept of prevention, while always in the picture of law enforcement, took on a particular meaning and urgency after September 11th." Gonzales, *supra* note 27, at 18.

[42] Lucia Zedner, *Pre-crime and pre-punishment: a health warning*, 81 CRIMINAL JUSTICE MATTERS 24 (2010); HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 196, 200 (Cambridge University press, 2nd ed., 2015). On the other hand, while acknowledging the potential human rights impact of a proactive approach in illiberal states, Laborde suggests that the approach would not be problematic in liberal jurisdictions. Labrode, *supra* note 14, at 11.

[43] Chesney, 'Beyond conspiracy?', *supra* note 19, at 433.

[44] Gonzales, *supra* note 27.

[45] Williams, *supra* note 26, at 1162.

[46] Lynch, Williams, and McGarrity, *supra* note 18, at 43.

[47] Zedner, 'Neither Safe Nor Sound?', *supra* note 33, at 430.

[48] Early intervention has another problematic side. It affects the prosecution's success rate. There is a possibility that while some of the arrested are truly dangerous, available evidence might not be adequate to result in their conviction (false negatives). Chesney agrees that early termination of gathering intelligence and evidence entails "greater risks of acquittals." Chesney, 'Beyond Conspiracy', *supra* note 19, at 427. On losing a court case being acceptable risk in an anticipatory prosecution, former U.S. Attorney General Alberto Gonzales notes "preventing the loss of life is our paramount objective. Securing a successful prosecution is not worth the cost of one innocent life." Gonzales, *supra* note 27. Furthermore the United States Deputy Attorney General Paul J. McNulty states "a reality of our prevention strategy is that we may find it more difficult in certain cases to marshal the evidence sufficient to convince 12 jurors beyond a reasonable doubt. That is because we must bring charges before a conspiracy achieves its goals – before a terrorist act occurs. To do so, we have to make arrests earlier than we would in other contexts where we often have the luxury of time to gather more evidence. This

anticipation and execution of a criminal thought the earlier the intervention, the lesser the evidence available to the prosecution. As Chesney rightly notes the farther one moves from a foretold completed act to the earlier stages of attempt, preparation, planning, 'the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.'[49] Though false positives cannot be avoided in criminal prosecution, be it proactive or reactive, the demand for prevention, by calling for intelligence and law enforcement agencies and blurring the distinction between evidence and intelligence, opens a space for 'greater tolerance for false positives.'[50]

As McCulloch has noted, under the proactive approach 'behaviours deemed to be preparatory acts are usually innocuous, harmless and lawful except for what is perceived to be the intention to engage in future act of terrorism.'[51] Similarly Galli observes 'the *actus res* of terrorist inchoate offences' are usually made to include 'a wide range of behaviours, sometimes apparently innocuous.'[52] For example, the law's 'going too far in criminalizing action engaged in prior to the commission of any terrorist act'[53] has been a common criticism against the Australian anti-terrorism legislation. Maidment, in connection with the Australian anti-terrorism law, observes that the type of conduct which may be caught by the provisions criminalising preparatory acts is unlimited.[54] Similarly, McSherry, referring to the same legislation, observes that 'any act' would be eligible to be the physical element of planning or preparation.[55]

heightened risk of acquittals is one we acknowledge and accept given our unwavering commitment to prevent terrorist risks from materializing into terrorist acts." McNulty, *supra* note 27. Similarly the Australian Federal Commissioner has noted:

> One of the biggest challenges we face is the acute need to manage risk … we must balance the needs of preventing an incident from occurring against the need to have gathered as much evidence as possible to ensure successful prosecution. As a result we intervene in a terrorist matter earlier than we normally would in other criminal investigations. McCulloch and Pickering, *supra* note 19, at 634-35.

[49] Chesney, 'Beyond Conspiracy?', *supra* note 19, 435.

[50] Kent Roach, *The Eroding Distinction between Intelligence and evidence in terrorism investigations*, *in* COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 48, 49 (Nicola McGarrity, Andrew Lynch and George Williams eds., Routledge 2010).

[51] McCulloch, *supra* note 16, at 28-29.

[52] Francesca Galli, *Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression*, *in* COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW: CROSSING LEGAL BOUNDARIES IN DEFENCE OF THE STATE 106, 121 *(*Aniceto Masferrer and Clive Walker eds., Edward Elgar 2013).

[53] Lynch, Williams, and McGarrity, *supra* note 18, at 42.

[54] Richard Maidment, *Australia's Anti-terrorism Laws –the offences provisions*, A paper delivered to the National Imams Consultative Forum (21 April 2013) 5.n <http://asiainstitute.unimelb.edu.au/__data/assets/pdf_file/0009/760779/Theterrorismoffenceprovisions_-_21_April_2013.pdf>.

[55] McSherry, *supra* note 36, at 366.

David Anderson, the UK's Independent Reviewer of the Terrorism Legislation, observes the following in relation to preparatory offences under the UK Terrorism legislation:

> The potential for abuse is rarely absent … By seeking to extend the reach of the criminal law to people who are more and more on the margins, and to activities taking place earlier and earlier in the story, their shadow begins to loom over all manner of previously innocent interactions. The effects can, at worst, be horrifying for individuals and demoralising to communities.[56]

A drift towards criminalising innocuous conduct with the purpose of preventing future harm, Jakobs notes, is a feature of what he calls 'enemy criminal law.'[57] Thus, while criminalisation of preparatory conduct is described as 'a move from criminalizing conduct to criminalizing intention or thought,'[58] the anticipatory prosecution is described as 'a shift from prosecuting tangible terrorism conspiracies to prosecuting bad thoughts.'[59] Consequently, contrasting the impact on human rights of the broadness of the terrorism definition with the criminal law's proactive approach, McCulloch has attached more significance to the latter.[60]

### 1.4. The Need for caution in the application of proactive counterterrorism

While Zedner recognises that 'prevention makes good sense', she notes the impossibility of an accurate prediction of human behaviour as a major problem that would call for what she states is 'a health warning.'[61] A precautionary approach as a measure 'that act[s] coercively against individuals,' Zedner advises, 'need[s] to be subject to rigorous principled restraint.'[62] Zedner recommends firmness 'on proof beyond reasonable doubt that an individual has the necessary intention … to commit the substantive offence before we punish'[63] as a restraint to minimise the chance of conviction of innocent persons. As noted above, owing to the 'tendency to devise offences around a minimal *actus reus*'[64] almost any conduct can satisfy this element of terrorist preparatory offences. Consequently, it is the requirement that

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[56] David Anderson, 2013, *Shielding the Compass: How to Fight Terrorism without Defeating the Law*, quoted in ANDREW ASHWORTH AND LUCIA ZEDNER, PREVENTIVE JUSTICE 105 (Oxford University Press 2014).

[57] G Jakobs, *Terroristen als personen im Recht?* 117 ZEITSCHRIFT FUR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 839 (2006) as quoted in Galli, *supra* note 52, at 117.

[58] Inayat Bunglawala, *Don't Even Think about It*, THE GUARDIAN (online), 6 December 2007 <http://www.theguardian.com/commentisfree/2007/dec/06/donteventhinkaboutit>. Also see: Duffy, *supra* note 41.

[59] Dahlia Lithwick, *Stop Me Before I Think Again*, THE WASHINGTON POST (online) 16 July 2006, B03, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/14/AR2006071401383_pf.html>.

[60] McCulloch, *supra* note 16, at 28.

[61] Zedner, 'pre-crime and pre-punishment', *supra* note 42.

[62] *Id.* at 25.

[63] *Id.*

[64] Galli, *supra* note 52, at 121.

the defendant does the act with an intention to commit a terrorist act that is seen as a bulwark against the potential overreach of the law that creates preparatory offences.[65] As such, Galli observes that in terrorist preparatory activities more importance is given to '*mens rea* over the *actus reus*.'[66] The wordings of provisions criminalising preparatory offences make the decisiveness of intention in preparatory offences clear. For example, the UK Terrorism Act Section 5(2) criminalises an act where 'an individual with the *intention* of committing acts of terrorism … engages in any conduct in preparation for giving effect to his intention.'[67] Relating to the Australian anti-terrorism legislation, Maidment points to the requirement that there be proof of a link between the alleged conduct and a foretold terrorist act, which is satisfied by proof of intention. [68] There is an intention to commit a terrorist act where the actor meant to 'do an act in preparation for a terrorist act.'[69] This accompanying intention gives an otherwise lawful/harmless activity a terrorist character.

On the importance of the requirement of intention to mitigate a potential intrusiveness of criminalising precursor offences, Rose and Nestorovska observe that an 'increasing remoteness of the supporting act is likely to be directly proportional to the increasing difficulty of proving *mens rea*. If no *mens rea* is established, then it is clear that no offence is proved.'[70] Though proving intention is 'a complex and exacting task for the prosecution',[71] it is this requirement that filters out innocuous activities which would have been otherwise caught under the broad physical element of preparatory offences.

However, McCulloch and Wilson observe that the guarantee that the requirement of proof of intention offers to safeguard the prosecution and conviction of innocent persons has been more apparent than real — the courts interpret the law in such a manner that satisfying the intention requirement is not difficult. Having reviewed court cases in Australia, UK and the US, they conclude that 'perceptions about the defendant's threatening identity have been bundled with evidence of intent.'[72] That is 'suspicious identity … stands in as proxy for intention,' a shortcut to get conviction.[73] In reality, they argue that 'prosecution of non-imminent crimes

[65] McCulloch, *supra* note 16, at 29. However, Saul observes that there are times where the standard of proof for these offences is lowered by requiring recklessness or dispensing with the *mens rea* requirement at all. Saul, *supra* note 11, at 148-149.

[66] Galli, *supra* 52, at 121.

[67] Section 5(2), Terrorism Act quoted in Zoe Scanlon, *Punishing proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom*, 25 CURRENT ISSUES IN CRIMINAL JUSTICE 764, 769 (2014) (emphasis added).

[68] Maidment, *supra* note 54, at 5.

[69] *Id.*

[70] G.L. Rose and D. Nestorovska, *Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms*, 31CRIMINAL LAW JOURNAL 20, 29 (2007).

[71] Maidment, *supra* note 54, at 6.

[72] McCulloch and Wilson, *supra* note 15, at 64.

[73] McCulloch, *supra* note 16, at 29.

makes it difficult for defendants to establish their innocence.'[74] Similarly Lynch, Williams, and McGarrity, citing court judgments in different terrorism prosecutions in Australia, argue that criminalising the very early stages of a terrorist act has exposed individuals to criminal responsibility without forming 'a clear criminal intent.'[75]

## 2. Preparatory offences under the ATP

Coming to the ATP, Article 4 provides '[w]hosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.' This provision creates preparatory offences and prescribes punishment for the offences.[76] It establishes five different terrorism-related offences representing different steps towards the commission of a principal terrorist act: planning, preparation, conspiracy, incitement and attempt.[77] Article 4 criminalises both inchoate[78] and pre-inchoate offences of planning[79] and preparation.[80]

Apparently, by referring to '[w]hosoever plans, prepares, … to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation,' Article 4 does not seem to require an overt act.[81] The phrasing of

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[74] McCulloch and Wilson, *supra* note 15, at 66.

[75] Lynch, Williams, and McGarrity, *supra* note 18, at 33.

[76] As Bentham has noted the laws that criminalise conduct and the laws that prescribe for its punishment are different:

> A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal; and, Let the judge cause whoever is convicted of stealing to be hanged.*

J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed., 1948). On the other hand, Meir Dan-Cohen notes the laws that prescribe for punishment of a conduct necessarily *imply* the laws that criminalize conduct. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,* 97 HARVARD LAW REVIEW 625, 627 (1984). Hart has argued that such approach obscures "the specific character of law as a means of social control." H.L.A. HART, THE CONCEPT OF LAW 39 (Clarendon Press 1961).

[77] This blend of different offences into one criminal provision would be a source of confusion for the defendants charged under this provision and opens a space for arbitrariness by the prosecution and the courts.

[78] Attempt is a crime under Article 27 of the Cr. Code of Ethiopia in general terms to apply to all principal crimes. Articles 36 and 38 of the Cr. Code deal with incitement and conspiracy respectively. While Article 36 (2) criminalises incitement only where the incited person at least attempts the crime, Article 4 of the ATP does not have such condition. Under the Cr. Code conspiracy is criminalised in exceptional cases, which are provided under Articles 257 (b), 274 (b), 300 and 478 of the Cr. Code. By virtue of Article 38(1) of the Cr. Code, in other cases, conspiracy serves as aggravating circumstance during the sentencing stage. On the other hand, Article 4 of the ATP makes it a crime to conspire to commit a terrorist act.

[79] Planning to commit crimes against the constitution or the state and international law are punishable under Articles 257(b) and 274(b) of the Cr. Code, respectively.

[80] As provided under Article 26 of the Cr. Code, in principle, preparation to commit a crime is not punishable.

[81] Wondwossen, *supra* note 4.

this provision is different from parallel provisions in other jurisdictions, where an overt act is explicitly required. For example, Article 101.6 (1) of the Australian Criminal Code criminalizes doing 'any *act* in preparation for, or planning a terrorist act.'[82] The UK's equivalent provision, *Section 5(2) of the Terrorism Act,* criminalises when an individual 'with the intention of committing acts of terrorism or assisting another to commit such acts, engages in any *conduct* in preparation for giving effect to his intention.'[83] Though arguably preparation necessarily involves an overt act,[84] planning being a step before preparation can purely be a mental activity with no overt act.[85] To the extent that Article 4 of the ATP criminalises planning that does not involve an overt act, it does criminalise a mere thought contrary to Article 29 of the Ethiopian Constitution that provides for freedom of thought and opinion. This renders Article 4 of the ATP to be susceptible for what Lithwick describes as the worst case scenario of anticipatory prosecution where individuals are prosecuted for their 'bad thoughts.'[86]

Having expressed prosecuting bad thoughts as undesirable, Lithwick warns that maximum care has to be taken for this not to happen.[87] Thus, to avoid this anomalous consequence one may argue that because '*planning*' is listed along with conspiracy, attempt and incitement (inchoate offences which normally require an overt act), a physical element (conduct) has to be read into it. This approach is supported by Article 23 of the Cr. Code. By virtue of Article 23 (2) of the Code, 'a crime is only completed when all its legal, material and moral ingredients are present.' Though the wording of Article 4 of the ATP does not appear to incorporate what is referred to as a material element, Article 23(2) of the Cr. Code in tandem with the preceding construction suggests that the material element is implicitly part of the crimes that Article 4 establishes.[88] It follows that planning which does not involve an overt act does not fall under Article 4 of the ATP. This would make Article 4 congruent with Article 29 of the FDRE Constitution.

While reading conduct element into Article 4 narrows its scope compared to its reach without the physical act requirement, the lack of restraint on the range of activities that constitute this element lessens the significance of this interpretation in narrowing its scope and protecting innocent people. There is no limit on the

[82] Criminal Code Act (1995).

[83] Terrorism Act 2006 (UK) (emphasis added).

[84] Article 26 of the Cr. Code defines preparatory acts as '*acts* which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for its commission' (emphasis added). Article 36 of the ATP authorizes resort to the Cr. Code where doing so is necessary to fill gaps in or interpret its provisions.

[85] The term 'plan' refers to 'an intention or decision about what one is going to do.' *English Oxford Dictionaries*, https://en.oxforddictionaries.com/definition/plan.

[86] Lithwick, *supra* note 59.

[87] *Id.*

[88] Article 36(2) of the ATP states '[w]ithout prejudice to the provisions of sub article (1) of this Article, the provisions of the Criminal Code and Criminal Procedure Code shall be applicable.'

type of physical act that would fall under Article 4. Any act is eligible to fulfil the physical element requirement of the offence.[89] Any slightest action suffices to satisfy the act requirement. Thus, the concern raised above in relation to the human rights impact of preparatory offences in general is relevant to Article 4 of the ATP.

Furthermore, Article 4 of the ATP does not specify the mental element for the offence thereunder. This silence invites resort to the Cr. Code.[90] Article 57(1) of the Cr. Code provides that a person is guilty and responsible under the law where 'he commits a crime either intentionally or by negligence.' Article 59 (2) provides 'crimes committed by negligence are liable to punishment only if the law so expressly provides.' Thus the cumulative reading of the two provisions indicates that where the law creating the offence does not specify the mental element, intention is presumed to be the required mental element under that law. It follows that no reference to a mental element under Article 4 of the ATP means the acts envisaged thereunder would be criminal and punishable only where the doer does any of the acts intentionally. Because, as noted above, almost any conduct satisfies the material element of Article 4, the real test of whether or not someone's act constitutes preparation for or planning a terrorist act centres on the actor's intention.

In its relevant part on the meaning of intention, Article 58(1) of the Cr. Code provides that a person is deemed to have committed a crime intentionally where he [sic] commits an act 'with full knowledge and intent in order to achieve a given result.' As noted above, Article 4 criminalizes planning, preparation… to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of the ATP. These offences are created to prevent commission of any of the six terrorist acts listed under Article 3.[91] To use Moore's terms these offences are 'wrongs by proxy'[92] but not stand-alone offences. Thus, for the purpose of Article 4 of the ATP, intention refers to one's doing of an act knowing and intending that she/he is doing the act in planning, conspiring, attempting, inciting or preparation for commission of any of the six terrorist acts listed under Article 3 of the ATP. The

[89] Only acts that are specifically criminalised under a separate provision of the ATP would be excluded from the scope of an act under Article 4. For example, Article 7 of the ATP criminalises taking training or becoming 'a member or participating in any capacity for the purpose of … committing a terrorist act ….' Similarly possessing or using 'property knowing or intending it to be used to committing or facilitating a terrorist act' is criminalised under Article 8 of the ATP.

[90] Anti-Terrorism Proclamation No. 652/ 2009 (Article 36), see *supra* note 88.

[91] Thus, preparation for or planning of committing any act other than those listed under Article 3 (1)-(6) of the ATP would not fall under Article 4 even if it is accompanied by the requisite motive and meant to coerce the government, intimidate the public or section of the public, or destabilise or destroy the fundamental political, constitutional, economic or social institutions of the country.

[92] MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 784 (Clarendon Press 1997) cited in Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/punishment Divide*, 48 SAN DIEGO LAW REVIEW 1273, 1283 (2011).

intention element under Article 4 is established where the prosecution proves one or a combination of the six offences listed under Article 3 as foretold crime/s.

To prove a pre-crime terrorist activity under Article 4, the prosecution needs to establish certain conduct and is required to show that the prospective action to which the conduct in preparation or planning was directed has all of the characteristics of a terrorist act, save completion. That is, the prosecution has to establish that the actor engages in certain conduct with a view 'to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional, economic or social institutions of the country' through the commission of one of the six acts listed under Article 3. Thus, at the time of carrying out a certain deed in preparation for or planning of committing any of the six acts that Article 3 refers to, the actor has the motive and accepted the means of advancing the cause to which Article 3 refers.[93] This makes these elements of Article 3 central to prove a precursor crime under Article 4.[94]

As noted above proving the existence of elements of a terrorist act for a prospective act is a complex and exacting task for the prosecution. However, it is that requirement which gives an alleged conduct its terrorist character and provides a safeguard against prosecution of innocent persons for non-terrorism related conduct.[95] Following Maidment's argument, it is the applicability of elements of Article 3 that qualifies a conduct as preparation for or planning of *the commission of a terrorist act* under Article 4.[96] Had it not been for this requirement, the type of conduct that Article 4 refers to, as noted above, would have been boundless. This relation between Articles 3 and 4 can be illustrated by employing Richard Maidment's approach[97] to distinguish a precursor crime from a principal terrorist act.

Violation of Article 3 would be established where the following are proved.

[93] To have the motive and to decide on the means of advancing the cause are mental processes that do not need an overt physical activity. What needs preparation or planning is the actual causing of the damage or imperilment through committing the acts listed under Article 3. Indeed, the motive to advance any one of the three causes and the conviction to use the violent means to promote one's cause precede even the planning and the preparation. In that sense what makes planning and preparation different from attempt is that the latter is closer to causing the damage or endangerment.

[94] The act would be categorized as planning, preparation, conspiracy, attempt and incitement depending on several factors including its proximity to the principal terrorist act.

[95] Scanlon, *supra* note 67, at 764; Maidment, *supra* note 54; Rose and Nestorovska, *supra* note 70, at 55.

[96] Maidment, *supra* note 54; Rose and Nestorovska, *supra* note 70, at 55.

[97] Maidment, *supra* note 54, at 5.

1) A defendant's conduct,
   And
2) The defendant's motivation being to 'advance a political religious or ideological cause',
   And
3) The defendant's intention of:
   a) Coercing the government,
      Or
   b) Intimidating the public or Section of the public
      Or
   c) Destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country
   And
4) The defendant's conduct has:
   a) caused a person's death or serious bodily injury; or
   b) created serious risk to the safety or health of the public or section of the public; or
   c) caused kidnapping or hostage taking; or
   d) caused serious damage to property; or
   e) caused damage to natural resource, environment, historical or cultural heritages; or
   f) endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
   g) threatened commission of any of the acts stipulated 'a' to 'f' above.

On the other hand, violation of Article 4 would be established where the following are proved.

1) A defendant's conduct,
   And
2) The defendant's motivation being to 'advance a political religious or ideological cause',
   And
3) The defendant's intention of:
   a) Coercing the government,
      Or
   b) Intimidating the public or Section of the public
      Or
   c) Destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country
   AND
4) The defendant's *intention* that *their conduct* would be of a kind that would under normal circumstances:

a) cause a person's death or serious bodily injury; or,
b) create serious risk to the safety or health of the public or section of the public; or
c) cause kidnapping or hostage taking; or
d) cause serious damage to property; or
e) cause damage to natural resource, environment, historical or cultural heritages; or
f) endanger, seize or put under control, causes serious interference or disruption of any public service;

From this breakdown two points can be made on the relation between Article 3 and Article 4. First, the difference between the two provisions lies in the fourth component.[98] While a prosecution is to be based on Article 3 where any of the six acts has *actually materialised*, it would be based on Article 4 where there is merely an *intention to commit* any of these acts. Second, the last three components of Article 4 relate to the phrase '*to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3* of this Proclamation.' These components can only be established by linking the first element of Article 4 (conduct) to Article 3. This interpretation, by reading key elements of a terrorist act incorporated under Article 3 into Article 4, confines the scope of conduct that Article 4 captures to acts which are truly precursor to a principal terrorist act.

## 3. Membership offences under the ATP

Unlike preparation for or planning of a terrorist act, Resolution 1373 does not require states to criminalise membership of a terrorist organisation.[99] This is despite the similarity between justifications for both: prevention of a 'remote risk of grave harm to highly important legal interests.'[100] Criminalisation of membership of a terrorist organisation is an extension of a proactive application of the criminal law for the sake of prevention of commission of a terrorist act. However, many do not support criminalisation of mere membership of a terrorist organisation for different reasons.[101] First, criminalization of membership contradicts the principle of legality/rule of law. For example, Allen has argued:

> [a]lthough the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is a crime?

[98] While conduct under Article 3 refers to that which has *actually caused* any of the damages or risks listed under number four, a conduct under Article 4 is the conduct that the actor engages in with *the intention to cause* one of these damages or risks.

[99] Paragraph 2(a) of the Security Council Resolution 1373 requires states to suppress 'recruitment of members of terrorist groups.' SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

[100] Liat Levanon, *Criminal Prohibitions of Membership in Terrorist Organizations*, 15 NEW CRIMINAL LAW REVIEW 224, 225 (2012).

[101] For an opposing view see: *Id.*

> And Who is the criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.[102]

Allen notes that laws criminalising one's status/membership of an association deny an opportunity to members to adapt their conduct to the law's requirement.[103] Citing Allen, McSherry argues that governments should punish criminal conduct not criminal types.[104] This is 'an important premise' of the rule of law which requires that there should be no punishment without law (*nulla poena sine lege*).[105] Thus, in analysing section 102.3 of the Criminal Code of Australia which criminalises membership of a terrorist organisation, McSherry argues that laws that criminalise mere membership breach the *nulla poena* principle.[106] Under such laws, one is deemed to commit a crime not because they committed a terrorism-related activity but simply because they are a member of a terrorist organisation.[107]

Second, criminalisation of membership is objectionable on freedom of association and due process grounds.[108] As Roach has noted criminalising membership of proscribed organisations is a practice found in non-democratic countries.[109] Legislative history of Section 2339B Title 18 of the United States Code, which criminalises material support to a Designated Foreign Terrorist Organisation, indicates that its preceding versions were rejected on the ground that the drafts capture mere membership in violation of Freedom of Association that the First Amendment to the Constitution recognises.[110]

The United States, without directly criminalising membership of a terrorist organisation, prohibits provision of material support to a Designated Foreign Terrorist Organisation.[111] 'Material support or resources' is defined as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal

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[102] FRANCIS ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW 15 (Oxford University Press 1996).

[103] *Id.* at 15-16.

[104] Bernadette McSherry, *The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?*, 12 PSYCHIATRY, PSYCHOLOGY AND LAW 279 (2005).

[105] *Id.* at 282.

[106] *Id.* at 283.

[107] Edwina MacDonald and George Williams, *Combating Terrorism* 16 GRIFFITH LAW REVIEW 27, 37 (2007).

[108] Rachel E. VanLandingham, *Meaningful Membership: making war a bit more criminal*, 35 CARDOZO LAW REVIEW 79, 82-83 (2013-2014).

[109] Kent Roach, *The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001*, STUDI SENESI, 510-511 (2004) as quoted in MacDonald and Williams, *supra* note 107.

[110] VanLandingham, *supra* note 108, at 81-89; Chesney, 'The Sleeper Scenario', *supra* note 19, at 4-18.

[111] 18 USC § 2339B.

> substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[112]

Owing to the capacious nature of the definition, many liken criminalisation of material support to criminalisation of membership or guilt by association.[113] For example, Cole argues that by criminalising what is otherwise a lawful and peaceful act in the name of material support to a terrorist organisation, the statute criminalises the morally innocent which means treating the actor as 'guilty only by association.'[114] But the US Supreme Court decided that because the statute prohibits not being a member of a terrorist organisation but provision of material support, it does not contradict freedom of association under the First Amendment.[115] The court makes a distinction between membership and material support. Critics do not agree with this distinction on the ground that the conduct, which the statute criminalises, constitutes manifestations of one's membership.[116] However, one thing is clear. Mere membership, without more (passive-nominal membership), is not a crime under this law.[117] In the US:

> Supreme Court jurisprudence has long provided a bulwark against the criminal prohibition based solely upon group membership. Since the 1960s, this protection has taken the form of a scienter requirement, which protects members who lack the specific intent to further a particular group's criminal objectives.[118]

Similarly, in both Canada and New Zealand mere membership of a terrorist organisation is not criminalised. Under the title 'Participation in Activity of Terrorist Group', the Canadian Criminal Code criminalises those who 'knowingly *participate in* or *contribute to*, directly or indirectly, any activity of a terrorist group *for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity*.'[119] Similarly, the *New Zealand's Terrorism Suppression Act 2002* captures those who participate in a terrorist group or organisation 'in order to enhance the ability of the group or organisation to commit or participate in the commission of a

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[112] 18 USC § 2339A (b).

[113] David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, *in* COUNTER TERRORISM: DEMOCRACY'S CHALLENGE 233 (Andrea Bianchi & Alexis Keller eds., Hart Publishing 2008); Levanon, *supra* note 100.

[114] Cole, *supra* note 113, at 241.

[115] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705.

[116] Cole, *supra* note 113; VanLandingham, *supra* note 108.

[117] VanLandingham, *supra* note 108, at 81.

[118] Scales v. United States, 367 U.S. 203, 208 (1961) in *id.,* at 83.

[119] § 83.18(1) R.S.C., ch. C -46 (1985) (emphasis added).

terrorist act.[120] Thus, a person's participation should be with a certain purpose related to terrorism in mind for the statute to capture the person.[121]

On the other hand, the United Kingdom and Australia criminalise membership of a terrorist group. The UK Terrorism Act 2000 prohibits belonging or professing to belong to a proscribed terrorist organisation.[122] By confining its applicability to membership of a proscribed organisation, Sec. 11 of the UK Terrorism Act 2000 is narrower in scope than its parallel in the Australian Criminal Code which captures membership of both proscribed and non-proscribed terrorist organisations.[123] Within the Australian approach there is a risk that a group of people who do not consider themselves as an organisation could be treated as such with a consequence of liability for membership and leadership in the group. There is a chance that they know they have formed an organisation where charges are laid.[124]

The requirement of participation in a terrorist organisation or terrorist act serves the underlying purpose of the membership offence — preventing commission of a terrorist act — while ensuring that punishment is imposed for an act of participation but not for one's mere status as a member of the organisation.[125] Thus, the requirement of participation in a terrorist organisation has been recommended to replace the mere membership offence in Australia.[126]

Within the ATP, participation in a terrorist organisation is regulated under Article 7. It provides that:

> 1/ Whosever [sic] recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organisation or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years.
>
> 2/ Whosever [sic] serves as a leader or decision maker in a terrorist organisation is punishable with rigorous imprisonment from 20 years to life.

Article 7 envisions a range of crimes that one may commit. It criminalises participation in a terrorist organisation or terrorist act ranging from participating *in any capacity* to serving as a leader of that organisation. While Sub Article 2 deals with leadership of a terrorist organisation, Sub Article 1, like Article 4 of the ATP, refers to different types of criminal conduct. It criminalises training, membership,

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120 Terrorism Suppression Act 2002 (NZ), s 13.

121 MacDonald and Williams, *supra* note 107, at 39.

122 Terrorism Act 2000 (UK), s. 11as quoted in MacDonald and Williams, *supra* note 107, at 38.

123 Section 102.3 Criminal Code.

124 MacDonald and Williams, *supra* note 107, at 38.

125 *Id.* at 40.

126 Parliamentary joint committee on Intelligence and Security, Parliament of Australia (2006), 74 as quoted in *id.*

recruiting and participation *in another capacity* for the purpose of a terrorist organisation or carrying out a terrorist act. In relation to membership, at first sight mere membership of a terrorist organisation, a type of membership in a terrorist group that involves doing nothing of value for the group appears to fall under Article 7(1).[127] It follows that in so far as one is a member in a terrorist organisation, it does not seem that the prosecution needs to prove more (involvement in a certain terrorism-related conduct) to charge one under this provision.

However, a close reading of the provision suggests that mere membership is not criminalised. The term *participation,* which refers to 'the action of taking part in something,'[128] has a vital place under Article 7. First, the caption of the Article is 'participation in a terrorist organisation' which means membership is listed under the umbrella of *participation*. Second, the content of Sub Article 1 indicates the weight given to the term *participation* and reinforces the relation between it and membership. The first limb of the Sub Article by providing '[w]hosever [*sic*] recruits another person or takes training or becomes a member or *participates in any capacity* for the purpose of a terrorist organisation or committing a terrorist act …', suggests that it provides an illustrative list of *participation* in a terrorist organisation or in the commission of a terrorist act. This, in turn, indicates that the 'membership' envisioned is not a passive-nominal membership but that which involves some form of *participation*. Moreover, the second limb of the Sub Article which provides that one is punishable with rigorous imprisonment from 5 to 10 years 'on the basis of *his* [sic] *level of participation*,' indicates that the punishment needs to match one's degree of involvement in a terrorist organisation, strengthening the significance of participation.

In jurisdictions where mere membership is prohibited, it is criminalised separately from other acts that require participation.[129] Under the ATP, membership is mentioned along with conduct that requires some form of involvement in an activity relating to a terrorist organisation or terrorist act. It is associated with engaging in recruiting members for a terrorist organisation, taking training or participating in any other capacity in a terrorist organisation or committing a terrorist act, all of which involve some kind of a positive step towards contributing to the terrorist organisation or to the commission of a terrorist act.

Whether or not being a member, in and by itself, satisfies the requirement of *participation* in a terrorist organisation has been discussed in relation to anti-terrorism laws in other jurisdictions. MacDonald and Williams compare and contrast anti-terrorism laws of Australia, Canada, New Zealand, the United

[127] For this type of involvement in an organization see: VanLandingham, *supra* note 108, at 93.

[128] *Oxford Dictionaries*, <http://www.oxforddictionaries.com/definition/english/participation>.

[129] For example Terrorism Act 2000 (UK), S 11; Criminal Code (Australia) Section 102.3.

Kingdom and the United States in relation to the approach to criminalising membership of a terrorist organisation.[130] As noted above, while Australia[131] and the United Kingdom[132] criminalise membership in a terrorist organisation, others do not. New Zealand's Terrorism Suppression Act 2002[133] and the Canadian Criminal Code[134] target those who participate in a terrorist organisation or in its carrying out of a terrorist act. MacDonald and Williams referring to the requirement of *participation* interpret both provisions as not capturing 'merely the status of membership'[135] but one who participates with some purpose related to terrorism in mind.

In view of its emphasis on participation, Article 7(1) of the ATP is akin to parallel anti-terrorism provisions in these jurisdictions. Thus, MacDonald and William's interpretation of these provisions of the anti-terror laws of New Zealand and Canada would be relevant to interpret Article 7(1) of the ATP. Thus, following the same logic, Article 7(1) of the ATP does not allow prosecuting and punishing one for being a member of a terrorist organisation. To be prosecuted, the member has to *participate* in a certain capacity for the purpose of the terrorist organisation or committing a terrorist act.[136]

Another reason to construe Article 7(1) of the ATP to require some form of participation in addition to membership relates to Article 31 of the FDRE Constitution which provides for freedom of Association.[137] In explaining the reason for not criminalising membership of a terrorist organisation in Canada, New Zealand, and the United States, Roach has noted that in these countries freedom of association is protected by bills of rights.[138] Without prejudice to differences in enforcement, by recognising freedom of association at a constitutional level, Ethiopia is comparable to these jurisdictions. Thus the same logic — constitutional recognition of freedom of Association — would make Article 7(1) of the ATP unable to capture mere membership in the face of Article

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[130] MacDonald and Williams, *supra* note 107 at 36-40.

[131] Section 102.3 Criminal Code.

[132] Terrorism Act 2000 (UK) s 11.

[133] Terrorism Suppression Act 2002 (NZ) Section 13.

[134] Criminal Code, RS 1985, c C-46, s 83.18.

[135] MacDonald and Williams, *supra* note 107, at 39.

[136] Similarly, while Germany criminalises membership of a terrorist organisation, to be considered as a member one has to engage in activities towards the terrorist objectives of the organisation after joining it. Merely joining a terrorist organisation does not satisfy the requirement of membership. Levanon, *supra* note 100 at 243-44.

[137] Article 31: Freedom of Association

> Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited." By virtue of Article 13 (2) of the FDRE Constitution, this provision is to be construed in light of Article 20 and 22 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, respectively.

[138] Roach, *supra* note 109.

31 of the Constitution. Thus, the requirement of *participation* narrows the scope of members in a terrorist organisation that would fall under this provision by excluding passive-nominal members.

However, the phrase 'participation in *any capacity'* is so broad that there is a risk that it takes in any participation in the organisation irrespective of its relation with a terrorist act. This would be problematic when the provision is applied to participation in what are known as dual organisations, which engage in both terrorist and non-terrorist activities.[139] As Weinberg and Pedahzur have noted, under some circumstances terrorist organisations create a 'political wing' and become dual organisations. The reverse is not uncommon. [140] Once the organisations are transformed into dual purpose organisations, they engage in both violent and peaceful political activities simultaneously.[141] As Levanon has argued criminalisation of members of such organisations would be justifiable in relation to those who are involved in a terrorist wing. In dual purpose organisations, Levanon asserts, criminal liability should not be imposed as early as joining the organisation as a member. As far as such organisations are concerned, criminalisation of membership is 'justifiable only in later stages of activity'[142] where there is tangible evidence indicating the member's inclination to the terrorist side of the organisation.[143]

In *Scales v. the United States*, the US Supreme Court deals with membership in organisations having both legal and illegal objectives. The court contrasted these organisations with pure criminal conspiracies which have only criminal purposes.[144] According to the Court, criminalising 'all knowing association' with the latter, as opposed to organisations with dual purpose, would not harm legitimate political expression or association. Subsequent court cases confirm this.[145] For example in *Elfbrandt v. Russell*, the Supreme Court held that '[t]o presume conclusively that those who join a "subversive" organisation share its unlawful aims is forbidden by the principle that a State may not compel a citizen to prove that he has not engaged in criminal advocacy.'[146] Furthermore the court held

[139] Levanon, *supra* note 100; VanLandingham, *supra* note 108, at 84.

[140] LEONARD WEINBERG AND AMI PEDAHZUR, POLITICAL PARTIES AND TERRORIST GROUPS 37 (Routledge 2003).

[141] *Id.* at 61.

[142] Levanon, *supra* note 100, at 229.

[143] If mere membership is to be criminalised, Levanon argues, it should be in relation to organisations that have as their entire purpose the commission of a terrorist act. Levanon, *supra* note 100 at 229.

[144] VanLandinghamt, *supra* note 108, at 84.

[145] *Id.* Compare *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705 where the Supreme Court held that provision of otherwise a lawful service, such as legal advice, to a terrorist organisation is prohibited under Section 2339 B.

[146] *Elfbrandt v. Russell* 384 U. S. 17-18 (1966).

'[t]hose who join an organisation without sharing in its unlawful purposes pose no threat to constitutional government.'[147]

Article 7(1) does not make such distinction between participations in terrorist and non-terrorist sides of a dual purpose organisation. Because it does not confine its scope to an organisation's terrorist activity, it seems to capture participation not only in terrorist but also non non-terrorist activities of a dual purpose terrorist organisation.

## Conclusion

There are sound reasons for adopting a proactive approach to counterterrorism. While the criminal law's proactive approach has been in place in contexts other than countering terrorism, it has been a predominant strategy in the context of the latter. Because the approach involves prediction of future behaviours based on limited information, there is a high risk that the approach may result in false positives, which calls for maximum care in its implementation. The requirement that one's intention to commit a principal terrorist act, which can be established through demonstrating a terrorist act as a foretold crime, be proved in anticipatory prosecutions is proposed as a mechanism to mitigate the human rights casualty.

The ATP incorporates a precautionary approach to countering terrorism. Provisions of the ATP relating to preparatory offences and membership offences are by and large vague and, therefore, susceptible to misuse and abuse. This article has suggested a precautious reading of these provisions to minimize such occurrences. A close reading of Article 4, by tying conduct that constitutes a precursor crime to the intention to commit any one of the six terrorist acts listed under Article 3, would guarantee that one would not be caught under Article 4 of the ATP for a seemingly, but only for a truly, precursor crime. Similarly, by conditioning criminal responsibility arising from membership of a terrorist organisation upon actual participation in a terrorist organisation, as contrasted to mere membership, the scope of conduct that Article 7 of the ATP captures could be narrowed down to the truly dangerous persons.[148] This path, which supports a pragmatic role for the court in the counterterrorism space in Ethiopia, is not only possible, but prudent and sufficiently mindful of the constitutional role of the judiciary.

* * *

[147] *Elfbrandt v. Russell* 384 U. S. 17 (1966).

[148] However, while requiring *actual participation* in a terrorist organisation or terrorist act precludes passive members, that the membership offence encompasses *any participation* still makes it broad enough to capture those who do not have the true intention to be involved in terrorist activities or in terrorism-related functions of a dual organisation.

# "Over-criminalisation": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia

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## *Abstract*

*Criminalisation is the most intrusive state action; as such, it requires strong justification. Looking merely at the doctrinal justifications, in the common-law system, harm is the single most important justification for criminalisation. In the continental system, however, there are positive and negative requirements to be complied with. The positive requirement is that the law is intended to protect 'legal good'. Such legal good covers interests that are essential for the social existence of the individual. The negative requirement is ultima ratio. Further, when the criminal law is used, the means-end proportionality is required to be maintained. The criminal law is one body of law. Thus, the General Part of the criminal law is applicable to offences stated both in the Special Part of the Criminal Code and those stated in special penal legislation or penal provisions contained in administrative regulatory legislation. The notion of legal good is incorporated into Art 1 of the Criminal Code in broader context as 'common good'. However, the law maker adopted several pieces of penal legislation and extensive penal provisions contained in administrative regulatory legislation contrary to such 'legislative promise'. In those penal provisions, the law maker criminalises conducts that were already criminalised in the Criminal Code, save they increase the punishment. The legislator criminalises conducts contrary to the principles of criminalisation, including the principles in the General Part of the Criminal Code, such as, the principle of legality and the principle of lenity. The legislator is consistent in choosing increased penal sentence both in absolute and relative standards. It is this excessive use of criminal law and excessive punishment that is presented as over-criminalisation.*

**Key terms:** Criminalisation, over-criminalisation, legal good, common good, *ultima ratio*, criminal law, special legislation.

## Introduction

Criminal law is the most intrusive state interference into the autonomy and liberty of individuals; as such, criminalising any conduct requires a strong justification. In continental criminal law, there are positive and negative justifications for criminalisation. Once a conduct is criminalised, the lawmaker also determines the measure or punishment attached to such conduct. The positive reason for

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criminalisation of conduct is the protection of the "common good". The common good is the physical and moral integrity of the social structure to which the individual is a member. The protection of the common good is only the necessary condition; it is the principle of *ultima ratio* that constitutes the sufficient condition for criminalisation of conduct, i.e., the state may use the criminal law as the last resort action for protection of the common good where other measures, such as administrative measures and civil actions, are ineffective.

Having regard to this theory of criminalisation, the amount of punishment is determined based on two principles - the principle of proportionality as a measure of punishment against guilt and the principle of parsimony for enforcing utility - only such amount of punishment having lasting impression on society in order to show the promise of punishment is genuine but the least painful on the individual undergoing the punishment. These principles are included in the General Part of the Federal Democratic Republic of Ethiopia (FDRE) Criminal Code. In fact, the General Part of the Criminal Code is a legislative promise of limited use of state coercive power limiting the state's resort to the criminal law as well as the application of the criminal law itself.

The individual is subject to criminal punishment if she commits a criminal conduct with a guilty mind and her punishment is limited to the extent of her guilt. The centrality of guilt to the individual criminal responsibility and the individual nature of criminal responsibility are made sufficiently clear in the General Part of the Criminal Code.

Continental criminal law has two categories of criminal law: the primary criminal law, as contained in the criminal/penal code, and the secondary criminal law covering administrative criminal law. Despite the fact that our Criminal Code is purely continental, both in content and structure, we have common law influences in the statutory criminal laws. Therefore, we have three categories of criminal law: the primary criminal law is composed of those crimes covered by the Criminal Code and those contained in the special penal legislation, such as, *Proclamation to Control Vagrancy No 384/2004*, *Anti-Terrorism Proclamation No 652/2009*, and *Corruption Crimes Proclamation No 881/2015*. The second category of criminal law is that contained in Part III of the Criminal Code covering petty offences, which in the continental system are said to be administrative criminal law. The other category of criminal law includes those penal provisions contained in administrative proclamations which cannot fully be categorised under administrative penal law because almost all of them are punishable with imprisonment and fine and often they govern a subject that is already criminalised in the Criminal Code. It is those special penal legislation and this third category that are the subject of this article.

Despite the fact that there are several penal legislation (both contained in special penal and administrative legislation), criminal law is considered to be one body of law. Therefore, the principles in the General Part of the Criminal Code are also applicable to those other legislation. A review of legislation adopted by the House of Peoples' Representatives ("HoPR") indicates that there are penal provisions in all administrative regulatory legislation giving the impression that the state attempts to solve all administrative problem using criminal law. The lawmaker does not seem to have any restriction on its power of criminalisation. Furthermore, penal sanctions are getting tougher every time a legislation is revised again giving the impression that there is no rule governing the amount of punishment the lawmaker may impose for conducts that are legitimately criminalised, which results in over-criminalisation. It is this excessive use of criminal law and severe punishments we call "over-criminalisation."

This article reviews the general principles of criminal law as included in the Constitution and the Criminal Code, a substantial number of penal legislation (both special and administrative), and decisions of the Federal Supreme Court Cassation Bench, and the literature pertinent to the topic at hand. Section 1 presents a brief history of the continental criminal law and how those criminal law doctrines incorporated into the Ethiopian criminal law have evolved in continental criminal law. Section 2 deals with criminalisation, doctrinal and constitutional limitations over the state's power in using the criminal law for the purpose of achieving ends other than the protection of the common good. The doctrine of the common good is a significant limitation requiring both positive and negative justifications for use of criminal law. The doctrine of the common good is incorporated into the constitution relatively fairly, but there is also a 'separation of power' limitation. Other criminal law principles, such as, the principle of legality and the non-retroactivity of the criminal law are also discussed.

Section 3 discusses the application of those principles and doctrines to special criminal legislation and penal provisions contained in administrative laws. Based on those doctrines discussed in section 2, section 4 discusses over-criminalisation. Over-criminalisation is discussed both in terms of excessive use of the criminal law and the use of the criminal law to achieve other purposes than the protection of the common good, as well as the use of excessive punishment. Finally, there is a conclusion.

## 1. A Brief History of Continental Criminal Law

Criminal Law is the most intrusive state coercive action into the private life of the individual. Therefore, it requires a justification for its enactment and application. In fact, criminal law was once linked to the natural law theory that considered crime

as sin and that punishment was imposed for expiation.[1] However, alternative theories of criminal law have evolved since the age of enlightenment.

The advances in the natural sciences in the renaissance period did not have a counterpart development in the social sciences, particularly in law.[2] Because those crimes that were treated as serious were those committed against religion and property, the critics of the then existing criminal justice were extremists – arguing that criminal law was not necessary and that it was not justified under the then existing social conditions. The logical conclusion of this argument was that people were not responsible for their acts because they had been led to crime by the prevailing social injustices and punishment would be justified only after such social injustices were abolished.[3] Even Beccaria's argument, although it appears to be based on the theory of utilitarianism and the social contract theory, was still based on the political economy of the state giving the theory an economic background.[4]

Some described the then existing criminal justice as "appalling."[5] The law was "confused, cruel and inconsistent"[6] the punishments and their application "reached the limits of human inventiveness in its barbarism, ferocity and studied cruelty."[7] In France, which was considered to be "the most civilized and advanced country in Europe", the penal law and its administration was described as barbaric.[8] That appears to be the reason why the greater number of the well-

[1] G. Gardiner, *The Purposes of Criminal Punishment: I. The Nature of Punishment*, 21 THE MODERN L. REV. 117, 117-119 (1958). This has been the case in Ethiopia until the 1930 Penal Code was adopted. Before the adoption of the Penal Code the applicable law was the *Fiteha Negest*. Intimately connected with the Ethiopian Orthodox Church and the King, it commands legitimacy because it is said to have been inspired by the 318 Fathers meeting at Nicaea. In the *Fiteha Negest*, crimes (transgressions) "are against God, not against man." As such, judgments are considered divine because the judge is judging the sin (crime) and in doing so he has the full power of God. FITEHA NEGEST: THE LAW OF THE KINGS xxi, 4 (Abba Paulos Tsadwa trans., Law Faculty, HSIU 1968). Graven holds that, despite the introduction of "new concepts" to the Ethiopian criminal law, the 1957 Penal Code did "not scarify the idea …expiatory punishment." J. Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. ETH. L. 288 (1964).

[2] Unlike what was in the hard sciences, the discussions in the field of social sciences, including law, were not based on measurable and quantifiable concepts. Therefore, Beccaria's principle of 'utility', i.e., 'the greatest happiness to the greatest (larger) number of people', changes the abstract into the concrete. C. BECCARIA, BECCARIA ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xix (R. Bellamy ed., Cambridge University Press 1995) (1764). B.Z. TAMANAHA THE LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 22, 23 (Cambridge University Press 2006).

[3] P. Jenkins, *Varieties of Enlightenment Criminology: Beccaria, Godwin, de Sade*, 24 BRITISH J. OF CRIMINOLOGY 119, 128 (1984).

[4] Beccaria, *supra* note 2, at xvi, xv; Jenkins, *supra* note 3, at 115, 116.

[5] P.M. Warthon, *The Humanitarian Movement in European History*, 48 IL PLITICO 700 (1983).

[6] *Id.*

[7] T. Cizova, *Beccaria in Russia*, 95 THE SLAVONIC AND EAST EUROPEAN REVIEW 384 (1962). Regarding judicial torture, generally, see J.C. Welling, *The Law of Torture: A Study in the Evolution of Law*, 5 AM. ANTHROPOLOGIST (1892). The barbarism of the day is dramatically described by Foucault about the public execution of the person who attempted to kill the king of France in 1757. M. FOUCAULT DISCIPLINE AND PUNISH: THE BIRTH OF PRISONS, 3 – 6 (A. Sheridan transl. Vintage Books 1995) (1975).

[8] Warthon, *supra* note 5, at 701. Montesquieu published his *The Spirit of the Law* in 1748 and Helvetius published his *De L'Espirit* in 1758.

known critics of the criminal law, such as, Voltaire, Montesquieu, Helvetius and Diderot, were from France.[9]

Some opine that the reform in the criminal justice began in 1762 with the execution of Jean Calas[10] who had been represented by Voltaire before the French *Parlement* (sovereign court).[11] However, because several of these theorists were atheists and their theory is based on materialism and determinism resulting in extreme propositions, they faced severe criticism from the ecclesiastics and the aristocrats, and their propositions for criminal justice reform were not heeded.[12]

In 1764 Beccaria published his book *On Crime and Punishment*[13] in which he stated the appalling conditions of the criminal justice which moved him to seek for justification for use of the criminal law and punishment. In search of justification he acknowledged the influence of those French theorists.[14] But the foundation of his theory was Rousseau's social contract theory published in 1762 and Helvetius' principle of utility.[15]

Beccaria argues, in the social contract, individuals yield a portion of their freedom constituting the sovereign in collective self-defence from the "war of all against all."[16] Punishment is, thus, justified by ensuring "the continued existence of society" by protecting men from disrupting their continued social existence.[17] Explaining the utility of punishment, he argues that because law operates in the

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[9] *Id.*, at 703.

[10] C.L. VON BAR, ET. AL, A HISTORY OF CONTINENTAL CRIMINAL LAW 1 (T.S. Bell, et. al. trans, Little, Brown and Company 1916). Jean Calas, a protestant merchant in Toulouse, and his entire family were wrongly convicted, for murder of his son who committed suicide, by the Toulouse *Parlement* and he was "broken on the wheel." Voltaire defended this case and three years later in 1765 the Paris *Parlement* found Calas and family innocent. The surviving members of the family received financial compensation. Cizova, *supra* note 7, at 385 Footnote 5.

[11] S. Dauchy, *Legal Interpretation and the Use of Legal Literature in 18th Century Law Reports of the "Parlement" de Flandre*, *in* INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW 45, 47 (Y. Morigiwa, M. Stolleis, and J.L. Halperin eds., Springer 2010). J.L. Halperin, *Legal Interpretation in France Under the Reign of Louis XVI: A Review of the Gazzette des tribunaux,* , *in* INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW 21, 36 (Y. Morigiwa, M. Stolleis, and J.L. Halperin eds., Springer 2010).

[12] Jenkins, *supra* note 3, at 117.

[13] Voltaire "recruited [this book] in his own campaign against various abuses perpetrated by the French legal system and prepared a *Commentary* on the text, which was regularly published along with the subsequent editions [...] in French and other languages." Beccaria, *supra* note 2, at xxix.

[14] Beccaria makes specific reference to Montesquieu in his Introduction and in Chapter 2 on "The right to punish". His social contract theory discussion is obviously borrowed from Hobbes and the discussion on the principle of utility is from Helvetius. Beccaria, *supra* note 2, at xvi-xviii.

[15] Jenkins, *supra* note 3, at 117.

[16] Beccaria took the social contract theory for its theoretical explanation not in its historical context. Beccaria, *supra* note 2, at xviii. Jenkins, *supra* note 3, at 116, 117. E. Monachesi, *Pioneers in Criminology IX Cesare Beccaria (1738-1794)*, *46* J. OF CRIM. L., CRIMINOLOGY AND POLICE SCIENCE 439, 442 (1955).

[17] Beccaria, *supra* note 2, at 9-11. Monachesi, *supra* note 16, at 445. He carefully crafted his theory bringing apparently contradictory theories of social contract and utility in harmony. Beccaria, *supra* note 2, at xviii, xx, xxi.

negative, individuals react more to avoid pain rather than pursing pleasure, crime and punishment should be closely linked.[18] He also argued for the least but effective punishment, i.e., it is certainty of prosecution that creates the greatest impact or "enduring impression" on society to prevent crime with "less pain on the individual" undergoing punishment,[19] while he argues against corporal and death penalty as not to have formed a part of the social contract.[20]

In order to determine the intensity of punishment Beccaria classified offences into three categories[21], having regard to the relative importance of the good and the "harm" caused to society by such crime.[22] The preventive aspect of punishment is succinctly stated by Hegel who said that the criminal law is never meant to be applied; the criminal, by committing crime, is doing service to the criminal law as he transforms it from abstractness to concreteness.[23] The state imposes punishment neither to torment the criminal nor to undo the crime but to show those would be offenders that the promise of punishment is genuine thereby to maintain the "continued social existence".[24]

As part of his proposal for a criminal law reform, Beccaria presents three propositions which he calls "consequences".[25] First, punishment must be based on law applicable to the public in general (not to specific individuals) adopted by the legislature representing all the members of society; second, the laws are applied equally and the determination of violation is by a third-party magistrate; and third, no severe punishment may be imposed unless in the prevention of crime. He concluded that it is this type of government under which the protection of life, liberty and property of persons is possible.[26]

The secular theories of materialism and determination were severely criticised by the church and the aristocracy; however, the religious reason for obedience to the law also failed among the public because, after suffering several natural and manmade disasters, it was seen that "there was no plan or purpose for humanity, no guiding hand of God or providence."[27] This made Beccaria's justification of the

[18] Beccaria, *supra* note 2, at xvi, xvii. Even though he was praised by Bentham as a father of Sensorial Jurisprudence, Beccaria was also criticised for evaluating man as a pain and pleasure subject.

[19] *Id*., at xxii. Monachesi, *supra* note 16, at 443, 445.

[20] Beccaria, *supra* note 2, at 39-44, 66-72. Monachesi, *supra* note 16, at 446. Jenkins, *supra* note 3, at 119.

[21] "Some crimes directly destroy society or its representatives. Some undermine the personal security of a citizen by attacking his life, goods or honor. Others sill are actions contrary to what each citizen, in view of the public good, is obliged by law to do or not to do." Beccaria, *supra* note 2, at. 24-25.

[22] *Id*., at 19-23. Monachesi, *supra* note 16, at 445.

[23] W.S. Landecker, *Criminology in Germany*, 31 J. OF CRIM. L. AND CRIMINOLOGY 551, 553 (1941).

[24] *Id*., at 554. Beccaria, *supra* note 2, at 31. Monachesi, *supra* note 16, at 455.

[25] Beccaria, *supra* note 2, at 12-13.

[26] Monachesi, *supra* note 16, at 444.

[27] *Id*., at 114, 115.

criminal law on the social contract theory palatable[28] both to the ecclesiastics and the aristocrats.[29]

Beccaria's small book was so influential in continental Europe, except Russia, and Italy until sometime,[30] that some even opined that it "hastened" the approaching French Revolution.[31] He influenced German criminal law significantly in the way it evolved to the level it has attained today. The 1813 Bavarian Penal Code used general prevention theory of punishment and included the principle of legality.[32]

The interests that are protected by the criminal law in earlier German criminal law development were subjective rights of the individual. In 1834 Birnbaum developed the concept of "legal good" by criticising the concept of subjective rights as "narrow" in scope.[33] Although for some time following its development, the concept of legal good was considered redundant with subjective rights and had been abandoned it was later re-discovered in order to expand the scope of the criminal law including the protection of the state's interest.[34] The concept of legal good and the principle of legality are now indispensable criminal law doctrines limiting the power of the state both in criminalising conducts and arbitrariness in the administration of the criminal law.[35]

The European humanist movement that started in the mid-eighteenth century came to Ethiopia after 200 years and is incorporated in the 1957 Penal Code completing the positivisation of criminal law.[36] The 1957 Penal Code states that the complexities of social life requires "effective, yet human and liberal procedures

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[28] Jenkins, *supra* note 3, at 116, 119.

[29] Jenkins, *supra* note 3, at 114-17. Cizova, *supra* note 7, at 387. Beccaria completed the secularisation and positivisation of the law by seeking a human justification for criminalisation and punishment as he made it clear in his note "To the Reader" appended to the fifth edition of his book.

[30] Russia was not able to adopt Beccaria's humanist concept until 1926 because of the 'serf system'. Cizova, *supra* note 7, at 390, 393-96. Warthon, *supra* note 5, at 716, 717. Some gave up their judicial career for not being able to implement Beccaria's idea in Russia, some were imprisoned, some exiled, and some even committed suicide. Cizova, *supra* note 7, at 398, 401 and 403. Italy, on the other hand, had been a papal state and the public did not get awakening of national consciousness. Warthon, *supra* note 5, at 713.

[31] Cizova, *supra* note 7, at 386. Jenkins, *supra* note 3, at 112.

[32] Some (wrongly) attribute the development of the principle of legality to Feuerbach, who drafted the 1813 Bavarian Criminal Code. T. VORMBAUM AND M. BOHLANDER EDS. A MODERN HISTORY OF GERMAN CRIMINAL LAW 42 (Springer 2014).

[33] *Id.*, at 49-50, 56. M.D. Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. OF COMP. L. 679, 687 (2005).

[34] Vormbaum and Bohlander, *supra* note 32, at 55.

[35] *Id.*, at 56, 175.

[36] The 1957 Penal Code in its Preface states that the Code is "inspired by the principles of justice and liberty and by the concern for prevention and suppression of crime, for the welfare and, indeed, for the rehabilitation of the individual accused of crime." Further, Graven states that the 1957 Penal Code is borrowed primarily from continental penal codes. He even makes specific reference to Beccaria and the humanist movement in his commentary on Art 1 of the 1957 Penal Code. His comments reflect that the provision is very much influenced by the ideas of Beccaria in criminalization and punishment. P. GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW (ARTS 1-84 PENAL CODE) 2, 5-8 (Faculty of Law, HSIU 1965).

be adopted so that legislative prescriptions may have the efficacy intended for them as regulators of conduct"[37]

## 2. Criminalisation

Criminal law is one of the most effective social control mechanism discovered yet.[38] Because the state has the monopoly of such coercive power, modern (constitutional) criminal law requires a justification for the use of such power. Criminalisation is understood to mean the normative declaration of a conduct criminal by the lawmaker.[39] Such a decision is made based on choices and justifications the state makes, not based on the inherent qualities of such conduct.[40]

This theory appears to be guided by two conflicting interests. Individual freedom is natural while criminal justice and social co-existence is a social construct. Therefore, when the state is pursuing an interest that is of social construct, it should not limit the natural right unjustifiably. Thus, the state's power to restrict the individual freedom through the use of the criminal law should be kept to the minimum.

However, the complexities of life, the urbanisation and impersonal nature of relationships demand the expansion of the criminal law in order to maintain the social existence.[41] It is natural if one would then ask, in any constitutional state, whether the state is using the criminal law for legitimate purposes and if there is any limitation on such power.

### 2.1. Consequentialist *vs.* Deontological Theories

It is absolutely necessary to make a clear distinction between the consequentialist theory of criminal law, and punishment and the deontological arguments. As stated above, the theory of crime in continental criminal law is generally consequentialist,

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[37] 1957 Penal Code, Preface, para. 2.

[38] Often the criminal law is described as social control mechanism; see generally, D. GARLAND THE CULTURE OF CONTROL: CRIMES AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (University of Chicago 2001). R.F. Meier and W.T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOCIOLOGICAL REV. 292 (1977); N. Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MODERN L. REV. 936, 950 (2009).

[39] There are also those, such as, Lacey, who argue for a broader understanding of criminalization and application of the concept of criminalisation both as a normative declaration as well as a judicial practice. See generally, Lacey, *supra* note 38. In this article, we are focusing on the normative declaration of a conduct criminal. However, sometimes, resort may be had to the broader understanding of the concept where the practical application of the law is found necessary, for instance, in tax cases.

[40] N. PERSAK CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS 12 (Springer 2007).

[41] Lacey, *supra* note 38, at 956. Also, the Penal Code states that the scope of the criminal law is expanding because of the "expanding frontiers of society brought about through the contributions of science, the complexities of modern life." Preface, para 2.

i.e., it justifies punishment on external factors, such as, prevention of crime; and the state imposes punishment neither to torment the criminal nor to undo the harm but to prevent such crime.[42] Thus, punishment is not justified if it is not necessary to achieve this purpose.[43]

The deontological argument is based on the theory of justice that punishment is inherent in the crime itself in retaliation. Kant argues that the harm caused to the individual "must find its equivalent in the harm done to" the offender; it is the harm that justifies punishment irrespective of any future consequences.[44] Also, Hegel argues from the perspective of justice that the state imposes punishment in order to counter the injustice caused by the criminal conduct. Punishment is a negation of the negation of law by the criminal in order to restore justice.[45] It is thus evident that while the consequentialist theory is forward looking the deontological theory is backward looking.

The provisions of Art 1 of the 1957 Penal Code indicate that the Code was consequentialist that both the theories of crime and punishment are guided by the purpose of prevention of such crime. This provision is taken over to be Art 1 of the 2004 Criminal Code.

### 2.2. Positive and Negative Justifications for Criminalisation

Whether it is in a continental criminal code or in a common-law statute, criminalisation has both positive and negative reasons in defining its scope.[46] The positive reasons are the considerations or a set of conditions the state may look into before using the criminal law as a means to achieving the state's end. In the continental criminal law, the state may use the criminal law for the protection of the legal good by preventing crime. The use of the criminal law must be necessitated by the protection against a threat to or violation of such legal good from crime. It is a positive justification for the state to use its coercive power.[47] The negative aspect of criminalisation includes the principle of *ultima ratio* that the criminal law may be used for the protection of the legal good if other means, such as, administrative sanctions and civil actions cannot do as well or even better.[48]

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[42] Beccaria, *supra* note 2, at 30.

[43] *Id*., at 10-11.

[44] Landecker, *supra* note 23, at 522.

[45] *Id*., at 553.

[46] The positive requirement for criminalization is a necessary condition while the negative requirement for criminalization is a sufficient condition. L.A. Zaibert, *Philosophical Analysis and the Criminal Law*, 4 BUFFALO CRIM. L. REV. 108, 109 (2000).

[47] G.P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 689, 690, 698 (2000).

[48] See generally, D. Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. OF LEGAL STUDIES 207 (2004); Persak, *supra* note 40 at 22. Fletcher, *supra* note 47, at 700.

In continental criminal law, these theories of criminalisation are manifested in the positive and the negative aspect of the legal good. There is no well-developed equivalent analytical approach for criminalisation in the common law.[49] However, on the positive reason for criminalisation, a conduct is a criminal conduct if it causes or likely to cause harm (to others), which is sometimes referred to as public wrong.[50] On the negative reason for criminalisation, arguably, the principle *ultima ratio,* is in operation.[51]

Both the positive and negative reasons of criminalisation are included in the 2004 Criminal Code of Ethiopia in an elaborate manner as "common good". They take two forms: the concept of common good, and other constitutional and institutional limitations.

### 2.3. The "Common Good" Doctrine

Art 1 of the Criminal Code provides that the purpose of criminal law is to "ensure order, peace and the security of the State, its peoples and inhabitants;" the law does so not for its own end of "order, peace and security" but for the "common good."[52] It is this concept of "common good" that incorporates both the positive and the negative justifications for criminalisation of conduct.[53] However, this concept is incorporated into the Ethiopian Criminal Code with broader notion as "common good," appears to be close to the idea of Beccaria rather than the

[49] F. Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV. 123, 124 (2011). Dubber, *supra* note 33, at 681. Zaibert, *supra* note 46, at 104, 108, 109. Zaibert's analysis on the justifications to criminalisation is very much aligned to the continental approach.

[50] See Persak, *supra* note 40, in general for an in-depth study of Mill's and Feinberg's harm principle justifying the criminal law. R.A. Duff, *Towards a Theory of Criminal Law* 84 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY *(SUPPLEMENTARY VOLUMES)* 1, 17-21 (2010).

[51] The *ultima ratio* principle can only work with a criminal law based on theory of crime prevention. This is a continental criminal law theory, not a common-law theory. Further, principal theory of punishment in the Anglo-American system is the desert theory; there are those who advocate for expression theory of punishment. In those cases, the criminal law cannot logically be the last state action. See, for example, Husak, *supra* note 48, at 221, 222. Lacey calls this "intermediate scrutiny" analysis "imaginative" facing "serious political and institutional constraints." Lacey, *supra* note 38, at 940, 941.

[52] There is a stark difference between the Amharic and the English version of the reference to the criminal law. The Amharic version makes reference to *criminal law* in general while the English version makes reference to the specific *FRDE Criminal Code*. However, as discussed later, Art 3 makes the criminal law a body of one criminal law governed by the same basic principles rather than several criminal laws. Further, when such difference occurs, we opt for the Amharic version (Arts 5(2) and 106, FDRE Const.) which is a much better form of statement of the purpose of criminal law in this context.

[53] It is this idea that is incorporated into the German word *Rechtsguter* which is literally translated to mean "legally protected interests" or sometimes referred to as "legal good". A. PETRIG AND N. ZURKINDEN, SWISS CRIMINAL LAW 43, 44, 47 (Die Deutsche Bibliothek 2015). As our 1957 Penal Code was originally drafted in French and then translated into English, this concept is referred to as "common good." We are using the phrases "legal good" and "common good" interchangeably.

German concept of "legal good" which is very narrow, for it actually addresses the common good of the society.[54]

*The positive aspect of criminalisation* - it is indicated above by Beccaria that crime is a threat to or a violation of the communal existence of society.[55] There are those legal interests that need the protection of the law. However, not all interests that need the protection of the law need the protection of the criminal law. It is those interests that need the protection of criminal law that are called "common good." In any social and democratic society, such interests, in order to be protected by criminal law, must be "fundamental to the preservation of social life."[56] Those interests that are said to be fundamental to social life fall into two categories: "elementary life good" and "deeply rooted ethical convictions of society".[57]

Those interests that fall under the category of "elementary life good" include "life, liberty, limb, the incorruptibility of public office," etc.[58] As the examples show, those elementary life goods are essential to the physical existence and integrity of the person in the society as well as the preservation of the social structures and public institutions.

Those interests that fall under the category of "deeply rooted ethical convictions of society" cover those social beliefs highly valued by the society and the violation of which makes communal existence difficult or impossible.[59] This aspect of the common good focuses on essential values of the society. However, the criminal law cannot be used for the protection or promotion of a political ideology, since that would turn the state into a tyranny.[60]

In order to have clarity on the positive determination of the interest that need the protection of the criminal law, some opined that it is worth looking at whether the interest has constitutional protection, the gravity of harm caused or likely to be caused to the individual directly or indirectly.[61] The 'harm to the society' is not meant for the protection of the 'society' in the abstract or a mere collective social order, which is a manifestation of an authoritarian criminal law. By the concept of

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[54] Beccaria, *supra* note 2, at 22-27. Monachesi, *supra* note 16, at 445. This principle is a continental criminal law doctrine and is not expressly provided for in other jurisdictions. Graven, *supra* note 36, at 5. The German law concept of "legal good" is transplanted into the Swiss, French, Spanish and several other continental criminal codes as a legal doctrine. This concept also found its way into our Criminal Code, Art 1 and is translated to mean "common good."

[55] Beccaria, *supra* note 2, at xviii, 19-25.

[56] S. Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct*, 11 NEW CRIM. L. REV.: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 409, 413 (2008).

[57] Dubber, *supra* note 33, at 684.

[58] *Id.*

[59] *Id.*

[60] *Id.*, at 691.

[61] Mir Puig, *supra* note 56, at 414-417.

legal good, the law is rather looking at the amount of concrete harm to the individual by violating the collective interest.[62] In this sense the concept of "legal good" is protection of conditions whereby the individual "within the context of overall social structure" would be able to fully develop and realise his potential. That is the reason the state needs to protect the proper functioning of such system of social structure.[63]

*The normative aspect of the common good* - the concept of legal good, in as much it is used to legitimise the state's use of coercive power it also used to limit the state's power of criminalisation by guiding the lawmaker what conducts to criminalise and what not.[64] That is, the lawmaker can use the criminal law legitimately only if it is meant to protect the "common good" and there is no other better way to deal with the matter, such as, administrative sanctions and civil actions.[65] The use of criminal sanctions must be a last resort mechanism; not the first response of the state.[66]

If the criminal law is used for purposes other than the protection of the common good, or that there are other options to achieve that end as effectively, then the use of criminal law is not legitimate.[67] Read in connection with Art 3 of the Ethiopian Criminal Code, the concept of the common good stated under Art 1 of the Criminal Code does not make any distinction between the crimes in the Criminal Code and other legislation. (See section 3, below, for more on this)

### 2.4. Constitutional and Institutional Limitation to Criminalisation

The FDRE Constitution under Art 51 lists the powers allocated to the Federal Government. Under Art 55 the law-making power of the House of Peoples' Representatives (HoPR) are listed. Accordingly, Art 55(1) provides that the HoPR has the power to legislate on matters that are allocated to the Federal Government. Sub-Article 2 provides for specific areas where the House may adopt detailed legislation. Sub-Articles (3) - (5) provide for the House's competence in regards to specific legislation, namely, the labour law, the commercial code and the penal code. Further, the HoPR is given the power to make law on civil matters that are deemed necessary by the House of Federation to establish and sustain one economic community.

From the foregoing provisions, three things follow. First, criminal law is to be contained in a penal code and to be promulgated as a Proclamation. Determination

[62] *Id.*, at 415.

[63] Dubber, *supra* note 33, at 685.

[64] *Id.*, at 685. Mir Puig, *supra* note 56, at 413, 418.

[65] L.E. Chiesa, *The Rise of Spanish and Latin American Criminal Theory*, 11 NEW CRIM. L. REV. 363, 366 (2008). Mir Puig, *supra* note 56, at 417, 418.

[66] In this sense, the concept of legal good or common good helps to combat over-criminalisation. Chiesa, *supra* note 65, at 368.

[67] Dubber, *supra* note 33, at 687, 689, 692.

of the scope of the penal code, regarding what is to be left to the states, is left to the discretion of the HoPR. The Regional States are also granted the power to adopt criminal legislation on matters that are not covered by the federal penal code.

Second, the HoPR in laws it makes on matters falling under the jurisdiction of the Federal Government may criminalize acts or omissions that are considered as serious violations of important interests. In criminalising such conduct, the HoPR may not include a penal provision in such administrative legislation. It rather has to cross-refer to the penal code and the punishment should be stated in the penal code. See for instance, the provisions of Arts 343 and 344 of the Criminal Code.

Third, this duty to legislate a penal code is bestowed on the HoPR as an institutional power; it cannot delegate this duty, which is inherently a legislative duty, to the executive.[68] The purpose of separation of power is limiting the power of the state from abuse. The threat to individual freedom is serious when there is a blend of power in the executive and it defeats the very purpose of separation of power.[69] In fact, it is the criminal law that necessitated the idea of separation of power in the first place.[70] Even though delegation is a common practice in administrative matters and the Council of Ministers is routinely authorised to adopt regulations for the implementation of a given proclamation, criminal law is different and thus, demands a greater and stricter separation of power in law-making and administration.[71]

One may still question whether the concept of common good, a concept developed in political theory outside the constitutional law, can be justified to limit the exercise of constitutional law-making power. Persak, for one, argues that for legal goods to perform their critical functions of restricting legislative power of the state, they need to be beyond or outside the positive law.[72] If this argument is pushed to its logical limit, it also means that the principle of legality and the principle of non-retroactivity of the law do not serve their purpose while within the positive law. However, they are limiting the law-making and arbitrariness in administration of the criminal law. Thus, if those principles do their function while forming part of the positive law, the concept of the common good could do a better job if it is made part of the positive law, particularly the constitution, to be complied with.

Further, as noted earlier whether a particular conduct is a threat to or a violation of an important legal interest is determined by, among others, whether such interest

[68] R.E. Barkow , *Separation of Powers and the Criminal Law*, 58 STANFORD L. REV. 989, 1006 (2006).

[69] *Id.*, at 991.

[70] *Id.*, at 994.

[71] *Id.*, at 1034.

[72] Persak, *supra* note 40, at 12, 109, 110.

has a constitutional protection. The bill of rights is mean to protect life, limb, property, good name, etc. Other parts of the Constitution provide for important values, such as, the integrity of the constitutional state, the incorruptibility of public office (Art 12), the proper collection of duties and taxes, and the integrity of public transport and communications. Criminalisation has to find its positive justification in the Constitution as a founding document.[73] But it also finds its negative justification – in the rule of law.

### 2.5. Theory and Measures of Punishment

The purpose of criminal law is preventing crime. It does so by giving notice first about the nature of the criminal act and the consequent punishment or measure. The purpose of punishment is therefore achieving the ends of the criminal law - prevention of crime.[74] Beccaria argues "characteristically it is the prospect of pain rather than pleasure that moved us to act."[75] He further argues that it is the certainty of prosecution rather than the severity of punishment that creates lasting impression commanding respect for the law; thus, in order to create a close link between crime and pain of punishment there has to be a speedy prosecution.[76] This theory of punishment is not based on determinism; it is rather based on human rationality. It considers human beings as rational beings making reasonable choices and complying with legal requirements, rationally.[77] Therefore, human beings want to avoid pain and pursue pleasure via a reasonable and legitimate means. That is, men can control and guide their passion and they can choose to do legally acceptable/required things.[78]

If punishment is, thus, justified by the threat to or harm to the legal good, then it is justified to the extent of the degree of such threat to or harm to such legal good. Thus, measure of punishment for a particular crime appears to be *proportionality* to the threat to or harm caused to legal good.[79] Still bound within the principle of utility, the state should choose punishment that creates lasting impression on society and least painful on the person condemned for punishment - the principle of *parsimony*.

[73] The fact that it makes reference to the nations, nationalities and people appear to be difficult to comprehend how those categories can come together and decide on what grounds to hold the individual criminally accountable. The bill of rights is meant to protect the individual, at least, procedurally even though it is not as effective to protect him in matters of criminalisation.

[74] Beccaria, *supra* note 2, at 31. That is the only reason Beccaria links crime with the pain of punishment.

[75] *Id.*, at xvii. Elsewhere Beccaria argued that generally laws operate negatively to prevent harm than positively in promoting pleasure. *Id.*, at xxix.

[76] *Id.*, at xvii.

[77] *Id.*

[78] *Id.*, at xvi. Unlike Hume who believes men are slave to their passion, Beccaria believes men can control and guide their passion to do things rationally.

[79] See, *supra* note 21.

This is reflected in both the 1957 Penal Code[80] as well as the 2004 Criminal Code. The Preamble of the Criminal Code states that even when the death penalty is upheld in the Special Part of the Criminal Code, it is with a view to prevention of crime even though it does not give the convict a chance to reform.[81] In so doing, the criminal law imposes penalty in a progressive manner. The three principal punishments are fine, imprisonment and death. Legislators have to use those penalties progressively and somehow 'wisely'.[82] Including judicial discretion, the law generally puts the upper and lower limits of the penalties giving the impression that it does so in a manner that maintains proportionality between the seriousness of the crime (guilt) and the penalty.[83]

From the readings of the provisions of Art 1, the purpose of punishment appears to be positive general prevention.[84] In determining the punishment to be imposed on the convict both the law and the court looks at guilt. The principle of proportionality should not give the impression that the punishment is imposed for vengeance or the criminal law is retributive;[85] threat to or harm to legal good as a measurement for the determination of punishment is still outstanding problem.

### 2.6. The Principle of Legality

The principle of legality appears to be a limitation over administrative discretion rather than the legislative prescription. However, as one of the universally accepted manifestations of the rule of law it is included under Art 2 of the Criminal Code. The principle is bound between the criminalisation principle and the non-retroactivity of the criminal law. It is provided that the criminal law specifies the crime and the applicable measures or punishments. There is no crime and there is no punishment other than those provided for in the criminal law; and there is no crime by analogy.

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[80] The preface of the 1957 Penal Code states that the complexities of social life requires "effective, yet human and liberal procedures be adopted so that legislative prescriptions may have the efficacy intended for them as regulators of conduct."

[81] Criminal Code, Preamble, para 8. In this regard, the authors should not be understood to have condoned the death penalty.

[82] The Preamble of the Criminal Code, para 7 states that in order to help the judge selects from most suitable measure, those measures and punishments are put in a progressive manner from "the lightest to the most severe punishment."

[83] It is made evident in the provisions of Art 1 that it is not only punishment the criminal law provides for; it also provides for measures which the court may order as it finds suitable under the circumstances, including, reprimand, suspended sentence, restraint order, suspension of license, etc.

[84] Dubber, *supra* note 33, at 696 ff. This is the theory of punishment adopted in the 1957 Penal Code which we believe is taken over by the 2004 Criminal Code. In his commentary on Art 1, Graven states that "...prisoners should be made to look forward rather than backward; they should be made to believe that they have a future as useful citizens and should be trusted accordingly rather than be distrusted by reason of what they have done in the past." Graven, *supra* note 36, at 8.

[85] Some argue that in fixing the punishment, the lawmaker uses consequentialist standards while the court uses retributive standards. Beccaria, *supra* note 2, at xxiii.

This principle of legality has four manifestations. *(a) Prospective application of the criminal law* - the criminal law is prospectively applied which is the otherwise known as the principle of the non-retroactivity of the criminal law.[86] Some make fictitious distinction between substantive and procedural law and intend to limit the application of the principle to the substantive law.[87] However, the criminal law is about the crime and punishment. The procedural law to which the principle is not applicable is purely enforcement issues.[88] Also, where the criminal law is amended the one that favours the accused shall be applicable.[89] This rule providing for amended laws also includes that when there are two or more provisions governing the same transaction, the one that is most favourable to the accused should be applicable. The Federal Supreme Court Cassation Division, in *Worku and Shume*[90] and other cases,[91] rendered a binding interpretative decision to this effect.

*(b) The body declaring the law and form the law is presented* - an essential part of the notice is that the criminal law must be made by the body that has the constitutional power to declare such law and it must be published in the official gazette, the *Federal Negarit Gazeta*.[92] Therefore, an act is not criminal nor is it punishable unless it is criminalised by the organ having the power to make such law and it was already declared in the official gazette when the alleged act was committed.

*(c) Clarity of content of the law* - it is stated above that the purpose of criminal law is positive general prevention of crime. It does so by giving due notice of the crimes

[86] Petrig and Zurkinden, *supra* note 53, at 19, 20.

[87] *Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001* had convoluted both substantive and procedural matters. It "defines" the crime of corruption under Art 2. This Proclamation is amended by *Proclamation No 239/2001* in mere 20 days' time regarding two essential matters. It declares the crime of corruption as non-bailable and all under the jurisdiction of the court having material jurisdiction over the subject. The amending Proclamation was applied to already pending cases and the issue arose whether it can be applied retrospectively. "Because it is a procedural matter" some opined, it can be applied retrospectively without contradicting the constitutional principle of non-retroactivity of the criminal law.

[88] Petrig and Zurkinden, *supra* note 53, at 9-12.

[89] Crim. C., Arts 6 and 9. In *Solomon Desalegn v. Southern Regional State Prosecutor* (15 May 2014, Cass. File No 95438, *in* 16 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT), the Cassation Bench gave a binding interpretative decision on the doctrine of the criminal law that the rule that is favourable to the accused shall be applied. Also, see *Habtu Tulu v. Federal Ethics and Anti-Corruption Commission* (22 June 2015, Cass. File No 103775, *in* 18 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

[90] *Worku Fekadu and Shume Arrarso v. Benishangul Gumuz State Prosecutor* (24 January 2013, Cass. File No 75387, *in* 14 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). Petitioners were charged for violation of Art 433 of the Criminal Code for trading in cattle without a licence. They were found guilty and sentenced to fine. The court also ordered for the confiscation of those cattle seized. The Cassation Bench, however, reversed the confiscation order on the ground that it is not a type of punishment stated under Art 433 nor is it justified under Arts 98, 100 and 140 of the Code; and therefore, it finds that the decision of the lower court is contrary to the principle of legality under Art 2(1) and (2).

[91] *Ethiopian Revenue and Customs Authority v. Kebede Tesera and Lencha Zegeye* (01 October 2013, Cass. File No 81178, *in* 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Ahmed Beshir v. Amhara State Prosecutor* (19 February 2014, Cass. File No 91535, *in* 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

[92] *Federal Negarit Gazeta Establishment Proclamation No 3/1995*, Art 2(2). FDRE Const., Art 71(2). Petrig and Zurkinden, *supra* note 53, at 21.

defined and the consequences for their violation in sufficiently clear manner so that the ordinary individual behaves according to the law.[93] The content of the declaration of a crime may be seen in light of the provisions of Art 23 which states the constituent elements of a crime[94] which the prosecutor is also required to prove to obtain a conviction.[95] Those elements need to be stated preferably in a self-contained legislation. The rules must be stated in general statements without referring to a particular individual or group.[96]

*(d) Prohibition of interpretation by analogy* - criminal responsibility is based on pre-declared crime and punishment. If there is not such pre-declared crime or punishment, no such crime or punishment may be created by analogy. This does not, however, prevent the court from interpreting criminal law, although the rules of interpretation are not written nor are they subject to extensive academic discussion here in Ethiopia. In Germany and Switzerland from where our criminal law is borrowed, there are common rules of interpretation developed in practice.[97] Those rules of interpretation are only for the purpose of giving content to the provisions of criminal law.

### 2.7. Non-retroactivity of Criminal Law

Non-retroactivity of criminal law, a principle closely intertwined with that of legality, is adopted both in the Constitution (Art 22) and in the Criminal Code (Art 5).[98] This principle is also meant to limit the power of the state to use criminal law and to protect the citizen from unlimited and unpredictable power of the state. The principle is manifested in different ways. First, criminal law, both in terms of definition of crime as well as determination of the consequent measures and punishments, is applied only prospectively to crimes that are committed after the coming into force of such criminal law. Regarding the Criminal Code, for instance, if an act is committed before the coming into force of the Criminal Code and the act was not criminalised in the prior Penal Code, the act is not a criminal act; and such act is not punishable. But if the act was a criminal act in the repealed Penal Code, the accused would be tried in accordance with the repealed Penal Code. However, if the act is committed before the coming into force of the new Code

[93] Petrig and Zurkinden, *supra* note 53, at 23. However, what diffuses the requirement of clarity in the declaration of the law is that it is declared not only for notice purposes but also for adjudication purposes. There are two categories of readers of the law, the lay man for notice and the professional. The organisation and phraseology is always guided to benefit of the latter. See, for instance, R. Zimmermann, *Statuta suntstricte interpretada? Statutes and the Common Law: A Continental Perspective*, 56 THE CAMBRIDGE L. J. (1997).

[94] *Kebede and Lencha*, *supra* note 91. *Ahmed*, *supra* note 91.

[95] Crim. Pro. C., Arts 111 and 112.

[96] This was one of Beccaria's proposals. Beccaria, *supra* note 2, at 12-13. Petrig and Zurkinden, *supra* note 53, at 23. This is a prohibition of the bill of attainder as it is understood in the US system.

[97] Bohlander, *supra* note 32, at 15. Petrig and Zurkinden, *supra* note 53, at 24-26.

[98] The 2004 Criminal Code is replacing the 1957 Penal Code which had similar provision with a better statement of the law.

and such act was a crime in this new Code but a lesser penalty is imposed, the new Code applies in terms of the punishment. The new Code applies to the case whether the case is still pending or the person is convicted.[99] On the other hand, if the act committed before the coming into force of the new law and the new law decriminalises the act, the act is not a crime and therefore it is not punishable.[100]

### 2.8. The Requirement of State of Mind for Criminalisation of Conduct

In criminalisation of conduct, guilt is an essential requirement because criminal law gives notice for prevention of criminal acts with a guilty mind, not accidents. It is such individuals the law logically demands to behave according to the law. The Criminal Code defines crime as a conduct "prohibited and made punishable by law."[101] It further provides that the commission of a crime is completed when "all its legal, material and moral ingredients are present."[102] Arts 57 ff. of the Criminal Code provide that a person may commit a legally prohibited act but he may be punished only if he acts with guilt.[103] A person cannot be subject to punishment for acts "without there being any guilt on his part, or for acts caused by force majeure, or occurred by accident."[104]

Guilt is either intention or negligence.[105] As much guilt is essential, criminal law is interested in intentional crimes than negligence. The Special Part defining a particular offence should also provide for the element of guilt. Where the criminal law does not provide for guilt, the law assumes the required guilt is intention. Negligent crime is punishable only if the law expressly provides for it.[106] The law further limits negligence in terms of scope; it is only those people who have a duty of care that may be punished for negligence.[107]

The centrality of guilt to criminal law is further solidified by the principle of unity of guilt. Thus, where several same or a combination of criminal acts are done against the same protected right with the same state of mind, it is punished as one crime if one criminal provision covers all the acts.[108] Likewise, if successive or

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[99] FDRE Const., Art 22(2). In *Solomon*, *supra* note 89, the Federal Supreme Court Cassation Bench, gave a binding interpretative decision on the provisions of Crim. C., Art 6, that even though the crime was committed by the time the Federal Supreme Court Sentencing Guideline No 1/2002 was applicable, as the Revised Sentencing Manual No 2/2006 favours the accused, the latter is applied to the case at hand.

[100] The recently adopted *Customs Proclamation No 859/2014*, maintained substantially all acts criminalised in the repealed *Proclamation No 622/2009*; but changed several previously imprisonment punishments into fine.

[101] Crim. C., Art 23(1) para 1.

[102] *Id.*, Art 23(2). *Jemila Mohammed Hagos, et. al. v. Federal Public Prosecutor* (26 February 2009, Cass. File No 38161, *in* 9 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

[103] Crim. C., Art 57(1), para 1.

[104] *Id.*, Art 57(2).

[105] *Id.*, Art 57(1), para 2.

[106] *Id.*, Art 59(2), para 1.

[107] *Id.*, Art 59(1)(b), para 2.

[108] *Id.*, Art 61(1).

repeated acts are committed against the same legally protected right, the person may be punished for one crime not for each repeated or successive acts as it is committed with the same intention or negligence.[109] Where a person commits two or more separate unlawful acts with a single purpose or for the same scheme, each act does not constitute a fresh criminal act; the acts are merged together by the unity of guilt and purpose.[110] Further, where a single act violates several legal provisions[111] or a similar act is committed with a renewed intention,[112] it only aggravates the punishment and it does not constitute a separate crime.

Further, in modern criminal law, criminal responsibility is individual; it is guilt that personalises such criminal responsibility. This is provided for under Art 41 of the Criminal Code. Therefore, a person can be held criminally responsible only for his own act and to the extent of his guilt; equally, anything that helps the accused is to be used only to his own benefit.

It is based on this underlying philosophy that the Criminal Code, both in the principles and in the General Part, as well as the specific provisions, in the Special Part, does not recognise strict or vicarious criminal liability. Likewise, the guilt requirement necessarily precludes imputation of guilt or criminal liability. Therefore, the Criminal Code, as logically and rationally organised, does not impute criminal responsibility from one person to another, whatever the degree of participation those individuals may have in the commission of the crime.[113]

### 2.9. Presumption of Innocence

Presumption of innocence is not an ordinary presumption; it is a tool by which the public prosecutor is required to prove his case to a certain degree in order to obtain conviction.[114] Therefore, the public prosecutor has the burden of proof of all those material facts constituting the crime and the accused is not required to participate. Traditionally, these principles discussed here are in one way or another meant to protect the defence not the prosecution; they are also meant to protect the fairness and integrity of the criminal justice administration. Here, they are meant to limit the formal criminalisation power of the state by using procedural

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109 *Id.*, Art 61(2), para 1.

110 *Id.*, Art 61(3).

111 *Id.*, Art 65.

112 *Id.*, Art 62.

113 The tripartite interpretation of the Criminal Code would make things clear. See Bohlander, *supra* note 32, at 16, 17. Petrig and Zurkinden, *supra* note 53, at 56, 91, 98.

114 For further detail on issues of presumption of innocence, see Simeneh Kiros Assefa, *The Principle of Presumption of Innocence and Its Challenges in the Ethiopian Criminal Justice System*, 6 MIZAN L. REV. 273 (2012); Worku Yaze Wodage, *Burden of Proof, Presumptions and Standards of Proof in Criminal Cases*, 8 MIZAN L. REV. 252 (2014)

aspect of the law, such as, shifting the burden of and lowering the standard of proof.[115]

### 3. Application of the Criminal Law Principles to Other Penal Legislation or Provisions

The Criminal Code is a continental code type; it is the whole corpus of law on the subject having a general part and a special part. The General Part contains general principles that govern the application of the Special Part. The Special Part cannot be enforced without the proper application of the General Part.

The Criminal Code under Art 3, para 1, recognizes the application of "regulations and special laws of criminal nature." The second paragraph of this Article further provides that the basic principles discussed above and others as provided for in the General Part of the Criminal Code are applicable to those regulations and special legislation of criminal nature, unless their application is expressly set aside by such regulations or legislation. For instance, in criminalising conduct, the lawmaker needs to comply with the provisions of Art 1 of the Criminal Code by first establishing that such conduct is the subject of criminal law and that there is no other less intrusive but effective measure.

The nature of those laws the Criminal Code makes reference to and the possibility of precluding the application of the general criminal law principles to those legislation need serious consideration. Continental criminal law is composed of two categories of criminal law: the penal code sometimes referred to as primary criminal law and administrative criminal law which is also referred to as secondary criminal law.[116] Our criminal law, on the other hand, is composed of the Criminal Code and special penal legislations, such as, proclamations for controlling vagrancy, terrorism, corruption, money laundry, and human trafficking[117] which appear to be primary criminal law and Part III of the Criminal Code, governing petty offences. There are also administrative and regulatory legislation in which serious penal provision are include which may be considered the third category.[118]

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[115] See, Lacey's argument, *supra* note 38 and 39, for a broader conception of the notion of criminalisation. D. HUSAK OVER-CRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 41 (Oxford University Press 2008).

[116] Petrig and Zurkinden, *supra* note 53, at 10, 14, 20. Byung-Sun CHO, *Administrative Penal Law and Its Theory in Korea and Japan from a Comparative Perspective*, 2 TILBURG FOREIGN L. REV. 261, 264 (1993).

[117] *Proclamation to Control Vagrancy No 384/2004, Anti-Terrorism Proclamation No 652/2009*, *Corruption Crimes Proclamation No 881/2015*, and *Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No 909/2015*, respectively.

[118] The continental classification of criminal legislation into primary and secondary is based on the severity of punishment and the power to make those laws. The classification of those legislation containing penal provision is only a matter of convenience. Based on those test, they can properly fall under the primary criminal legislation because, they carry severe penalty and often, they are adopted by the HoPR or by a delegation.

The provisions of Art 3 of the 2004 Criminal Code are copies of that of Art 3 of the 1957 Penal Code. The Penal Code makes reference to "Police regulations and special laws of penal nature." The Penal Code was borrowed from continental system. In that system, Police regulations are regulations adopted and enforced by the police.[119] The other part, "special laws of penal nature", is about administrative criminal law. Administrative penal legislations are understood in two ways. The first understanding makes reference to those regulations adopted and/or enforced by administrative agencies. The second understanding refers to those regulations meant for the preservation of the role of administrative agencies coercively.[120]

In continental criminal law, these rules, police regulations and administrative penal laws are known as the rules of infringements;[121] with strict separation of power, their adjudication is given to the courts.[122] The content of those regulations are not as detailed and strict as the ordinary criminal law and often do not require guilt.[123] Such rules are necessary because the penal code, as primary criminal law, contains only the general part and the special part adopted by the HoPR not as flexible to meet the needs of administrative agencies. Our Criminal Code contains, however, both the primary criminal law in the first two parts, and the secondary criminal law contained in Part III governing petty offences. The Code is making a distinction between criminal law and petty offences in defining petty offences as "a violation of mandatory or prohibitive rule issued by a competent authority or when the act is a minor offence not punishable under the criminal law."[124]

Following this distinction, in Part III, Art 734 of the Criminal Code makes specific reference to Art 3 para 2. It states that, unless expressly excluded by a provision in Part III, the general principles of the General Part are applicable to this Part too. For instance, guilt is an essential requirement of the liability of a person for punishment for committing a petty offence;[125] justificatory defences and excuses are applicable to petty offences too;[126] so do aggravation and mitigation grounds.[127] It makes reference to few general principles of criminal law, such as, the principle of legality, Art 736, equal application of the law, Art 737, and applicability of criminal responsibility, Arts 48 - 50.

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119 Generally, see CHO, *supra* note 116, 268 ff.

120 *Id.*, 261.

121 *Id.*, at 268.

122 *Id.*, at 272, 273. There are still exceptions. For instance, see the Austrian 1991 Administrative Penal Act, giving jurisdiction over administrative penal proceedings to administrative authorities, §26(1).

123 CHO, *supra* note 116, at 269.

124 Crim. C., Art 735.

125 *Id.*, Arts 734, 747(1), para 3.

126 *Id.*, Arts 744, 745.

127 *Id.*, Art 745.

Having regard to the minor nature of the violations, preparation and attempt to commit petty offences are not punishable;[128] likewise, incitement, complicity and accessory after the fact are not punishable;[129] corporate entities are not liable to punishment for incitement and complicity.[130] Where a person is held for committing a petty offence, she is not subject to the punishments that are imposed for violation of the criminal law.[131] The punishments attached are arrest from 1 day to 3 months[132] or fine from Birr 1 to Birr 300 or both.[133] These provisions made our Criminal Code Part III conform to the resolutions and recommendations of XIV International Congress of Penal Law.[134]

Therefore, from the foregoing discussion, it is evident that the provisions of Art 3 are referring to such regulations as are contained in Part III of the Criminal Code.[135] It is an otherwise statement that these provisions do not anticipate a separate existence of a major penal legislation listed above. If Art 3, para 1, is understood to have allowed the adoption of major penal legislations, which results in the self-destruction of the Code, such impression is only the result of poor re-drafting of the provision and such legislation cannot preclude the application of the general principles of criminal law.[136]

Second, Art 3 further provides that the general principles of the Criminal Code are applicable to those other regulations and special legislation of penal nature unless their application is set aside by such regulations or legislation.[137] However, as all of those special penal legislation form the corpus of the criminal law, and many of those principles of criminal law are constitutional principles, their application cannot be set aside. None of the legislation adopted so far sets aside the application of any of those principles; in fact, some of those special penal legislation expressly adopt the principles of the Criminal Code.[138] It continues from the foregoing argument that the possibility of exclusion of the application of those principles to these regulations is possible only if such regulations are minor

128 *Id.*, Art 740(1).

129 *Id.*, Art 740(2).

130 *Id.*, Art 740(3).

131 *Id.*, Art 746(1).

132 *Id.*, Art 747, para 2.

133 *Id.*, Arts 752(1), para 1; Art 752(2).

134 XIV International Congress of Penal Law held in Vienna 2-7 October 1989, available at <http://www.penal.org/sites/default/files/files/RICPL%201989.pdf> (last accessed on October 7, 2017).

135 That is the kind of regulation even Graven argues for. Graven, *supra* note 36, at 12.

136 Some of the principles mentioned here are constitutional principles, such as, equality before the law and non-retroactivity of criminal law. Because of the constitutional supremacy clause, those principles cannot be set aside by a proclamation that may be adopted by the HoPR.

137 Crim. C., Art 3, para 2.

138 See for instance, *Corruption Crimes Proclamation No 881/2015*, Art 34; *Anti-Terrorism Proclamation No 652/2009*, Art 36(2); *Money Laundering and Financing of Terrorism Proclamation No 657/2009*, Art 26.

offences that either subjects the accused to fine or imprisonment for few days as in contraventions.[139]

Further, as a continental system, criminal law constitutes a single body of law.[140] The application of the principles to those regulations and legislation of penal nature makes them a part of the Criminal Code to constitute that one body of law. That is one of the reasons for the revision of the Criminal Code, to adopt a comprehensive criminal code that incorporates fairly everything.[141] Therefore, our contention is that the provisions of Art 3 should not be understood as allowing the adoption of major penal legislation nor the preclusion of the application of the principles of the Criminal Code to such legislation should the lawmaker chooses to adopt such special penal or administrative legislation with serious consequences. In fact, the integrity of the Criminal Code is one major tool in combating over-criminalisation in the continental system.[142]

## 4. Over-Criminalisation

We are looking at criminalisation as a declaration of conduct criminal by the lawmaker. It is not always easy to determine whether a particular conduct should be criminalised and the discussion is intuitive for the most part. However, if the positive and negative reasons for criminalisation are indicated, then over-criminalisation is an excess of those rules of criminalisation.

Molina identifies three manifestations of over-criminalisation, which are, criminalising conduct that harms trivial interests, criminalising conduct that causes trivial harms and punishing conduct in a way that is not proportional to the harm caused.[143] In addition to these, however, there are other manifestations of over-criminalisation, such as, where criminal law is used as first resort measure, where the criminal law-making power is delegated to administrative agencies, where criminal law is used to achieve some other purposes than prevention of crime, which are not necessarily covered by the three manifestations. There are also other manifestations which do not seem to fit into theories of criminalisation, such as,

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139 Petrig and Zurkinden, *supra* note 53, at 50. The exclusion of the principles is regarding, such as, the requirements of criminal liability, and availability of defence. *Id.*, at 86, 87.

140 It is with this in mind that the 1957 Penal Code was drafted that other legislation containing penal provisions would make reference to the Code. Graven, *supra* note 3, at 281 - 82, 287.

141 Crim. C., Preface, para 4. This is not contrary to Art 51 of the Constitution which provides that the HoPR may adopt criminal law and states may also adopt their own criminal code on areas that is not covered by the federal criminal law.

142 Molina, *supra* note 49, at 130, 131.

143 *Id.*, at 125, 126. For Husak, over-criminalisation is manifested by (a) overlapping offences, (b) risk prevention offences, and (c) ancillary offences. Husak, *supra* note 115, at 36 - 40

shifting the burden of proof on to defendants[144] or lowering the standard of proof for conviction, because they appear to be procedural than substantive.[145]

Over-criminalisation, whatever form it takes, is not tolerable because it is unjust[146] and because it is an unjustified intrusion into the individual's private sphere by the state's coercive power. Based on the identified grounds of criminalisation in Section 2.4, over-criminalisation and its principal manifestations are discussed under two categories, first when criminal law is used as a means other than for the protection of the common good; and second, when criminal law is used as a first resort action.

### 4.1. Criminal Law Used not for the Protection of the "Common Good"

Criminal law has to be used as a protection of the common good and there is no other means to achieve this purpose. It is indicated below that in several special or administrative penal legislation, either of those requirements or both are not met.

#### *4.1.1. Imputing criminal responsibility*

One obvious case of improper criminalisation is imputing criminal responsibility to another. The *Income Tax* and the *Value Added Tax Proclamations* prohibit tax evasion, providing false or misleading information and obstruction of tax administration entailing serious criminal punishment.[147] The respective proclamations further provide that the manager of a company is automatically criminally liable, without their being a need to establish a criminal act or guilt on her part, if the company is liable for such tax crimes. Thus, both proclamations provide that "…the manager of that entity at the time of the commission of the offence is treated as having committed the same offence and is liable to a fine and imprisonment" fixed for the company.[148] The imputation is too remote for the obvious reason that the manager is criminally liable for acts of other employees of the company where the company

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144 For instance, the *Corruption Crimes Proclamation No 881/2015,* Art 21(1) provides that "[a]ny public servant or employee of a public organisation…who (a) maintains a standard of living […beyond what] is commensurate with the official income […]; or (b) is in control of pecuniary resources or property disproportionate to that official income […]" is guilty and is punishable "unless he proves satisfactorily before the court of law as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control."

145 *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005,* regarding standard of proof in confiscation procedure, under Art 33 provides that "[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings." This provision gives the impression that it is mere procedural matter. However, it has a substantive effect – confiscation of property for alleged corruption offence, for which the individual is probably not convicted. Also see Husak, *supra* note 115.

146 Husak, *supra* note 115, at 3.

147 *Income Tax Proclamation No 286/2002*, Arts 96, 97 and 97, respectively. *Value Added Tax Proclamation No 285/2002*, Arts 49, 50 and 51, respectively. These crimes are punishable by lengthy imprisonment and serious fine.

148 *Income Tax Proclamation No 286/2002*, Art 102(1). *Value Added Tax Proclamation No 285/2002*, Art 56(1).

is found guilty. The Cassation Bench of the Federal Supreme Court gave, and is still giving, such binding interpretative decision of those provisions of the proclamations that lack of knowledge on the part of and the absence of the manager from the place of business at the relevant time is not a defence.[149]

The two major changes introduced by these two proclamations were that, first, corporate entities are held criminally liable, and second, if the company is found criminally liable, then the manager is presumed to be guilty. Adopted after those proclamations, the Criminal Code includes both corporate criminal responsibility under Art 34 and tax crimes, such as, those provided for under Arts 349-351. Thus, according to Art 34 of the Criminal Code, a corporate entity may be held criminally liable if "one of its officials or employees commits such crime [...] in connection with the activity of the juridical person with the intent of promoting its interest […]"[150] It further provides that such juridical person is criminally liable if "one of its officials or employees commits a crime as a principal criminal, an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means."

It is made sufficiently clear that this provision of the Criminal Code provides for the liability of corporate entities for the actions of its employees when they acted for the interest of the company and they violated the clear provisions of the law. The justification for such decision by the lawmaker is that, it is the employees that are the eyes and minds of the company and their guilt is imputed to the company. To this extent, it is tolerable because corporate entities do not have natural rights. Even though the Criminal Code does not expressly repeal the provisions of Proclamations, it is these provisions of the Criminal Code that govern corporate criminal responsibility. Therefore, the penal provisions of those proclamations are substituted both in terms of the scope of conduct criminalised and proper determination of guilt of the manager by the Criminal Code. As such, the manager may be guilty of his own conduct committed with guilty mind; he cannot be guilty of company's criminal liability because of actions of other employees of the company.

As the root of the criminal law is the Criminal Code, if the Cassation Bench would have to address the provisions of the Criminal Code first, and interpret the penal

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149 *Tigrai Revenue Development Authority v. Berha Reda* (01 October 2013, Cass. File No 86597, *in* 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Ethiopian Revenue and Customs Authority v. Abkale Endeshaw* (29 October 2012, Cass. File No 74237, *in* 14 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *The Twins Bar and Restaurant PLC and Tsige Wolde v. Ethiopian Revenue and Customs Authority* (22 December 2010, Cass. File No 51090, *in* 11 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT). *Tarekegn G/Giorgis, et. al., v. Ethiopian Revenue and Customs Authority* (17 December 2009, Cass. File No 48850, *in* 10 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

150 As guilt is central in the continental criminal law, it is logically difficult to hold corporate entities criminally liable and its justification requires further study.

provisions of those Proclamations conforming to the basic principles of criminal law incorporated in the Criminal Code via Art 3, those provisions would have been without effect.[151] Unfortunately, the majority in *Ouqubay Bereha*[152] treated the provisions of Art 34 of the Criminal Code and the provisions of those proclamations conforming to each other.

A closely related issue we find very curious is the criminal prosecution and conviction for tax crimes. In the ordinary courts, the charges and the evidences never state and prove the required mental state for committing the crime. For one who believes the moral element is an essential element of such crime might only want to accept the court presumes the existence of such moral element. It is only recently that the Federal Supreme Court Cassation Bench gave a binding interpretative decision that the moral element required for tax crimes is intention.[153]

### *4.1.2. Delegating criminal law-making power to administrative agencies*

It is a principle proposed and adopted since Enlightenment that criminal law be adopted by the lawmaker representing the public.[154] It is the constitutional power of the House of Peoples' Representatives to make criminal law.[155] When it declares a conduct a crime it should declare both the material and moral elements constituting the crime. This is a non-delegable responsibility of the lawmaker. However, the lawmaker generously delegated the criminal law-making power to several administrative agencies. This delegation is effected either directly or indirectly.

*Direct delegation:* - Art 2 of *Money Laundering and Financing of Terrorism Proclamation No 657/2009* lists "accountable persons", individuals or corporate entities, such as, banks, lawyers, and accountants who have the obligation to collect their clients' information and report suspicious activities and transactions (Art 3) the failure of which is a crime punishable by 3 to 5 years' imprisonment and with fine 5,000 to 10,000 Birr (Art 17(3)).

The Financial Intelligence Centre, which would have to be established by Council of Ministers Regulations (Art 21(1)), is authorised to modify this list of individuals

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151 Many believe the nullification of law is based only on constitutional justifications and such power is given to the House of Federation not to the court. We are not pursuing a constitutional argument here; it is purely technical interpretation of the criminal law. However, for the disagreements on the scope and authority of constitutional interpretation, see Getachew Assefa, *All About Words: Discovering the Intention of Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, 24 J. ETH. L. 139 (2010).

152 *Ouqubay Bereha v. Ethiopian Revenue and Customs Authority* (13 March 2015, Cass. File No 100079, *in* 17 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

153 *G. Agripack PLC, et. al., v Ethiopian Revenue and Customs Authority* (11 June 2013, Cass. File No 84623, *in* 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

154 Beccaria, *supra* note 2, at 12-13.

155 FDRE Const., Art 55(5).

and institutions (Art 22(1)). The modified list is required to be published "in a widely circulating newspaper in the country as legal notice." (Art 22(2)). The effect of this modification is criminalisation or de-criminalisation when a person or entity is included or excluded from the list, respectively.

Likewise, the *Urban Planning Proclamation No 574/2008*, foresees the adoption of Council of Ministers Regulations and delegated several matters, including criminal punishments, to be regulated by such Regulations. Thus, Art 58 provides that a person who grants permission which is not properly approved and a person who implements such plan which is not appropriately approved "shall be punished in accordance with the regulations to be issued in accordance with [the] proclamation." In this delegation, the lawmaker delegated the definition of a part of the conduct that constituted the crime as well as the punishment.

In the *Mineral Resources Proclamation No 678/2010*, the lawmaker defined the punishment and left the elements constituting crime to be defined by the Council of Ministers. It provides that submitting inaccurate and misleading information in connection with information required to be submitted to the government "shall be punished with a fine up to Birr 200,000 or an imprisonment up to five years or both." (Art 78(3)). It also provides that "the degree of the offence and the extent of penalty for each offence shall be determined by regulations to be issued for the implementation of [the] Proclamation." (Art 78(4)).

*Indirect delegation:* – almost all administrative or regulative legislation authorise administrative agencies to adopt regulations and directives. For instance, Art 22(1) of the *Biosafety Proclamation No 655/2009* authorises the Council of Ministers to adopt regulations for the implementation of the Proclamation. The Authority is also authorised under Art 22(2) to adopt directives for the implementation of the Proclamation and the Regulations. Art 21(1) (b) further provides that "any person who violates any provision of [the] Proclamation or regulations [sic] or directives issued pursuant to [the] Proclamation shall be punished with a fine from Birr 4,000 to Birr 7,000 or with imprisonment from one year to three years or both." Regulations and directives adopted by the executive do not appear in criminal legislations as such. However, when they are sanctioned by a Proclamation with criminal punishment, those Regulations and directives are then used as a criminal law defining elements of the crime. Such act of criminalisation and punishment is becoming a norm, not an exception.[156]

The HoPR may delegate other law-making power for the efficient administration of government based on specialisation. The criminal law-making is not one of those delegable duties of HoPR for various reasons. First, criminal law is the most

[156] See for example, *Banking Business Proclamation No 592/2008*, Arts 59 and 58(7). *Apiculture Resources Development and Protection Proclamation No 660/2009*, Arts 9 and 8(7). *Radiation Protection Proclamation No 571/2008*, Arts 29 and 28(5). *Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007*, Arts 17 and 16(1)(b).

intrusive state action; it has to be adopted by the HoPR representing the public. It is the essential duty of the HoPR that it cannot be delegated to a non-elected organ. Further, the executive does not have a better specialisation than the HoPR in making criminal law. The universe of criminal law is limited and it does not need frequent action. Therefore, the delegation of such criminal law-making power is unconstitutional.

#### *4.1.3. Criminal law is used to achieve some other purposes than protection of the common good*

It is provided for under Art 1 of the Criminal Code that the purpose of criminal law is prevention of crime. The punishments in the Criminal Code are meant to achieve this purpose. The purpose of those special penal legislation and administrative legislation is not prevention of crime. For instance, the reasons for the adoption of *Commercial Registration and Business Licensing Proclamation No 67/1997* were "to create conducive environment" for commercial activities "in line with the free market economic policy", to "improve the registration and licensing procedures" to promote free market economy, "to restrain illegal commercial activity," to change "the law enacted to serve the previous regimes which are not consistent with the on-going free market economic system," to consolidate the laws "into one proclamation", etc.[157] From this Preamble, one would read at least two things: the new economic ideology, and government administrative efficiency.

Substituting this Proclamation, *Proclamation No 686/2010* maintained the same economic ideology; but it added one thing: that the efficiency in the registration and license system should "enable to attain economic development." It also promises to "tackle illegal activities" by using "international business classifications and by putting the necessary criteria in place."[158]

It would be stating the obvious that the penal provisions included in the proclamation are guided by such objective. That is what the prosecutor has in mind when enforcing the penal provisions of the Proclamation. In fact, after conviction of the accused, when the court determines the sentence it is guided by the purposes of punishment in the Criminal Code which gives a wrong impression that the penal provisions of the administrative regulations are guided by the object and purposes of criminal law. The criminal punishments are included and later increased in order to help the efficiency of the government commercial registration and business licence responsibilities. A bird's eye view of the penal legislation relating to taxes, government finances and property, gives the impression that they promote a certain political ideology, which is not the scope of this paper. These penal provisions are, therefore, meant to enforce that political and economic

[157] Preamble of the Proclamation.

[158] Preamble of the Proclamation. *Proclamation No 686/2010* is repealed by and replaced with *Proclamation No 980/2016* with no substantive change to the penal provisions; see Art 49(2).

ideology. The adoption of some of the special penal legislation appears to be for a different reason. For instance, the preamble of *Anti-Terrorism Proclamation No 652/2009* provides that one of the justifications for the adoption of the proclamation is to enable Ethiopia to discharge her treaty obligations.[159] A purpose other than the protection of the common good is not an acceptable justification; and thus, makes criminal law illegitimate.

### 4.2. Using Criminal Law as First Resort State Action

It is an aspect of the principle of legality that the statement of crime has to be as clear and specific as possible. However, many of the administrative regulations have blanket criminalisation. The proclamations authorise the Council of Ministers to adopt regulations for the proper implementation of the proclamations and a specific agency is authorised to adopt directives to implement both the proclamations and the regulations. The proclamations finally provide for a specific penalty for violation of the provisions of the proclamations, the regulations and the directives without any specific reference to conduct. Usually, such provision is included as a catch-all-basket after the essential conduct that is deemed to be serious is criminalised and severely punished.

For instance, Art 58 of the *Banking Business Proclamation No 592/2009* provides for penalties, the maximum being 15 years, for various activities the lawmaker could foresee at the time of the drafting of the law. Art 79 authorised the Council of Ministers and the National Bank of Ethiopia to adopt regulations and directives, respectively. Art 58(7), then, provides that "[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations[sic] or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with an imprisonment up to three years."

Other proclamations make reference to the provisions of the Criminal Code. However, even when the administrative law refers the criminal liability to the Criminal Code, the criminalisation relates to the whole of the provisions of the respective proclamations.[160] The conduct these proclamations proscribe is not clear. When the criminalised conduct is not clear, the individual cannot behave in conformity with the law nor can the judge decide whether a person accused of violation of such proclamations, regulations and directives is guilty.[161]

A related, but serious, problem is only proclamations and regulations are published in the official gazette, the *Federal Negarit Gazeta*; directives are not published in the

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[159] For an in-depth discussion on the validity of the justifications for the adoption of the Anti-Terrorism Proclamation, see Wondwossen Demissie Kassa, *Criminalisation and Punishment of Inchoate Conducts and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law*, 24 J. ETH. L. 147 (2010).

[160] See, for instance, *Transport Proclamation No 468/2005*, Art 29, and *Rural Land Administration and Use Proclamation No 456/2005*, Art 19.

[161] Beccaria, *supra* note 2, at 17-18. Petrig and Zurkinden, *supra* note 53, at 20 and 23.

*Federal Negarit Gazeta* nor are they widely circulated; often they may not be written in Amharic. The rule of convenience that *ignorance of law is no excuse* works only when such publication requirements are met. Such measures are contrary to the principle of legality and other basic principles of the criminal law. However, the Federal Supreme Court Cassation Division gives such directives effect, as though they are laws published in the official Negarit Gazeta.[162]

### 4.3. Excessive (Disproportionate) Punishment

Under Section 2.5 above, we discussed that punishment has utility and is fixed based on the principles of proportionality and of parsimony.[163] Those punishments that do not comply with the principle of utility or parsimony are excessive. The proposition that a certain punishment is excessive presupposes that there is a fixed punishment for a particular offence in proportion to its severity. There is no such scientific measure of punishment. So far the discussion on the objective and relative determination of punishment is intuitive established by trial and error.[164]

However, looking at the relative changes of punishment through time and among similar or related offences, as well as other objective factors, we can make a reasonably objective discussion on the excessiveness of the punishment. There are at least four relative ways we can show the excessiveness of punishments in some of the administrative and special legislation.

#### *4.3.1. Preferring more severe sentences to less severe ones*

It is an established principle in the criminal law that where there are two competing punishments for the same conduct, the one that favours the accused shall be applied.[165] Contrary to what is provided for in the Constitution and in the General Principles of criminal law, however, the lawmaker consistently opts for excessive punishment. For instance, Art 53(1) of the *Food, Medicine, and Healthcare Administration Proclamation No 661/2009* provides for specific punishments. However, those punishments would be applicable "[u]nless a higher penalty is

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[162] Respondent was charged for violation of the Directives adopted by the National Bank of Ethiopia, written in English. The Federal High Court and Supreme Court declared him 'innocent' but the Cassation Division found him guilty. The court reasons that Directives are also treated as laws wherein the prohibited conduct is provided for and the punishment is provided for in the proclamation. *Ethiopian Revenue and Customs Authority v Daniel Mekonnen* (21 July 2010, Cass. File No 43781, *in* 10 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

[163] Beccaria, *supra* note 2, at xxii.

[164] *Id.*, at 7. Although it is about the retributive punishment measurement, the research indicates that such measurement of punishment is fairly intuitively shared across cultures. P.H. Robinson and J. Darley, *Intuitions of Justice: implications for criminal law and justice policy*, 81 SOUTHERN CAL. L. REV. 1 (2007).

[165] FDRE Const., Art 22(2). Crim. C., Art 6.

provided under the Criminal Code." This is the consistent drafting pattern of the penal provisions of administrative proclamations.[166]

### *4.3.2. Providing for a more severe sentence for the same or similar crime*

There are various provisions governing different acts; there are more than one provision governing, for instance, license, tax and bribery. There is unstated agreement between the prosecution office and the courts that the civil law rule of interpretation which states the special derogates over the general is applied. Thus, while there is a provision in the Criminal Code that prohibits and punishes doing business without a permit from the appropriate agency, it is the *Commercial Registration and Business Licence Proclamation* punishment that are applied.[167] Often, those special legislation after providing for what constitutes the offence were expected to refer the matter to the Criminal Code for the punishment.[168] While there are criminal law rules governing tax evasion and providing false or misleading information, it is the rules in the special proclamations according to which cases are prosecuted by the Ethiopian Revenue and Customs Authority and are applied by the courts.[169] Evidently, the punishments fixed in those special legislation are much severe than the one in the Criminal Code.

Others appear to have taken a different 'form'. For instance, the *Vagrancy Control Proclamation* defines vagrancy having three elements: that the suspect is (a) able-bodied; (b) has no visible means of income, and (c) does any of those listed activities which is punishable with one and one-half year to two years, and in exceptional gravity, with three years' imprisonment. While vagrancy is a prohibited conduct in the Criminal Code, the Proclamation lists activities. Those activities listed in the *Vagrancy Control Proclamation* are also found in Part III of the Criminal Code as contraventions punishable with fine or detention for few days. See, for instance, Art 842, 846, 854 of the Criminal Code. The major defence in vagrancy

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166 There are similar provisions in several other administrative proclamations, such as, Art 8 of *Apiculture Resources Development and Protection Proclamation No 660/2009*, Art 12(3) of *Environmental Pollution Control Proclamation No 300/2002*, Art 16(1) of *Development, Conservation and Utilization of Wildlife Proclamation No 541/2007*, Art 28 of *Forest Development, Conservation and Utilisation Proclamation No 542/2007*, Art 20 of *Radiation Protection Proclamation No 571/2008*, Art 14 of *Census Proclamation No 449/2005*, Art 19 of *Central Statistics Authority Proclamation No 442/2005*, Art 36 of *Copyright and Neighbouring Rights Proclamation No 410/2004*, Art 20 of *Immigration Proclamation No 354/2003*, Art 45 of *Research and Conservation Proclamation No 209/2000*, Art 20 of *Forest Development, Conservation and Utilisation Proclamation No 542/2007*, Art 21(1) of *Biosafety Proclamation No 655/2009*, and Art 60 of *Business Registration and Trade License Proclamation No 686/2010* which is preserved under Art 49(2) of the newly issued *Proclamation No 980/2016*.

167 *Bazezew Yihun v Amhara Regional State Prosecutor* (24 June 2012, Cass. File No 86388, *in* 15 DECISIONS OF THE CASSATION DIVISION OF THE FEDERAL SUPREME COURT).

168 See, for instance, the provisions of Crim. C., Art 432, 433 and 434. Also see Graven, *supra* note 1, at 284, 287.

169 The various prosecution institutions are brought under one institution - The Federal Attorney General - established by *Proclamation No 943/2016*. However, the substantive criminal laws - both the Criminal Code and various special penal and administrative legislation - remain as they were. The recently adopted *Tax Administration Proclamation No 983/2016,* Art 116(2), gives the impression that the lawmaker has the desire to preserve those penal legislations in the tax proclamations.

proceedings is the accused has employment which clearly indicates vagrancy is a status crime in Ethiopia and thus, discriminatory contrary to the provisions of Art 25 of the Constitution. It is obvious that the criminal law in those special legislation and administrative proclamation is providing for a more severe punish.ment than there is in the Criminal Code for the same conduct.

### *4.3.3. Increasing punishment over time without showing any justification*

In many instances when legislations are revised or replaced, the lawmaker increases the sentence excessively. For instance, the *Commercial Registration and Business License Proclamation No 67/1997* Art 49 penalises a person who engages in commercial activity without a license by "fine equal to double the revenue estimated to have been earned by him during the period of time he operated the business without a valid business license, and with imprisonment from 3 up to 5 years." Likewise, Art 433 of the Criminal Code punishes such person "with simple imprisonment or fine; or with rigorous imprisonment not exceeding five years and fine."

The *Commercial Registration and Business Licensing Proclamation No 686/2010* expressly repealed Proc No 67/97. However, Art 60 punishes a person doing business without a valid license "with fine from Birr 150,000 (one hundred fifty thousand) to Birr 300,000 (three hundred thousand) and with rigorous imprisonment from 7 (seven) to 15 (fifteen) years and the goods and/or the service delivery equipment and/or manufacturing equipment with which the business was being conducted shall in addition be confiscated by the government."[170]

When Proc No 686/2010 increases the minimum punishment from 3 to 7 years and the maximum punishment from 5 to 15 years, there is no justification provided anywhere in the legislation. These punishments are maintained in the recently adopted *Commercial Registration and Business Licensing Proclamation No 980/2016* which introduced additional punishable conduct.[171]

There are few exceptions to the above general statements of increased sentence; cases in point are violation of the Stamp Duty and Customs Proclamations. Use of specific documents without paying a specified amount of stamp duty was made punishable with 10-15 years' rigorous imprisonment and fine Birr 25,000 to

[170] In *Bazezew*, *supra* note 167, Petitioner, as he was caught transporting animal hide using public transport bus which is, later, sold for Birr 2,432, was charged for trading with a license that was not renewed at the time. The Jawi Woreda Court, in Amhara State, convicted him for violation of Art 60(1) of the *Trade Registration and Business Licence Proclamation No 686/2010*, and sentenced him to 7 years' rigorous imprisonment and fined him Birr 150,000.00. As the State High Court rejected his appeal, Bazezew petitioned the State Supreme Court Cassation Bench which reduces the imprisonment to 3 years and 6 months and the fine to Birr 5,000. The Federal Supreme Court Cassation Bench affirmed the decision finding no reason to interfere with the judgment of the State Cassation Court.

[171] Art 49(1) provides for prohibition of use of "false certificate of commercial registration, business license or special certificate of commercial representation."

35,000.[172] In the Tax Administration Proclamation, the imprisonment punishment is reduced to three to five years' rigorous imprisonment while the fine is increased to Birr 25,000 to 50,000.[173] Likewise, the *Customs Proclamation No 859/2014* made several acts that were punishable with imprisonment in the previous law substituted with fine.[174]

#### *4.3.4. Criminal punishments are imposed in conjunction with administrative measures and civil actions*

In all the administrative or regulatory legislation, the respective agencies are given power to take 'appropriate' administrative measure that is suitable to their administrative responsibility. The administrative measure for tax authorities, for instance, is collection of the principal tax with the power of seizure of property of the tax payer,[175] collection of interest on the unpaid amount (the highest commercial lending interest rate plus 25%) and penalty based on certain calculation for late filing, for non-filing and for late payment.[176] There are similar provisions in the VAT Proclamation.[177] Likewise, the Consumer Protection Proclamation has a court to adjudicate administrative and civil matters.[178] The administrative measures provided for under Art 35(3) include, the suspension or cancellation of business license, payment of compensation to the victim to bring him back to his previous competitiveness, the seizure and/or sell of goods, the discontinuance or injunction of the act declared inappropriate.

It is above and beyond these administrative measures, and sometimes civil actions, that criminal liability is to be imposed. Art 49 of the Consumer Protection Proclamation expressly provides that the courts shall impose criminal punishments provided for therein against any person who violates the provisions of the Proclamation on top of the administrative and civil measures by the Authority. Criminal sanctions for doing business without a license, in addition to those administrative measures by the agency, are (a) a fine between Birr 150,000 and Birr 300,000, (b) rigorous imprisonment from 7 to 15 years, and (c) confiscation of the goods and services delivery equipment and/or manufacturing equipment with which the business was being conducted.[179] While those administrative measures would help the agency accomplish its mission, such criminal punishments are plainly disproportionate to any harm that may have been caused by the person.

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172 *Stamp Duty Proclamation No 110/1998*, Art 12(1)(a).

173 *Federal Tax Administration Proclamation No 983/2016*, Art 123(1).

174 See the provisions of Arts 156 ff.

175 *Income Tax Proclamation No 286/2002*, Art 77. *Value Added Tax Proclamation No 285/2002*, Art 31.

176 See, *Income Tax Proclamation No 286/2002*, Arts 76, 86-88, respectively.

177 *Value Added Tax Proclamation No 285/2002*, Arts 45-47.

178 *Trade Practice and Consumer Protection Proclamation No 685/2010*, Art 35.

179 *Trade Registration and Business Licence Proclamation No 686/2010*, Art 60(1). *Proclamation No 980/2016*, Art 49(2).

## Conclusion

In the traditional sense, the constitution is meant to limit the power of the state both in organisation and separation of power as well as by the incorporation of the bill of rights. The bill of rights is principally meant to guarantee the fairness of the process than to regulate criminalisation and punishment. The latter is rather directly governed by the doctrines of criminal law - the purpose of criminal law is protection of the common good by preventing crime.

The continental criminal law tradition, to which Ethiopian criminal law belongs, requires both the positive and negative justifications for criminalisation; short of either of those requirements, the criminal law is not legitimate. Further, other doctrines, such as, non-retroactivity of criminal law and the principle of legality limit the power of the state from using retroactive or vague criminal law; the requirement of guilt also limits the use of criminal law in the absence of such guilt.

The purpose of punishment follows the purpose of criminal law. Punishment is imposed neither to torment the guilty nor to undo the harm; it is imposed in so far as it helps in the prevention of crime. In order to achieve this purpose, the continental criminal law adopted the principles of proportionality and of parsimony - only punishments that has lasting impression on the society and the least painful on the person who undergoes the punishment may be imposed. Therefore, it is not the severity of the punishment but the certainty of prosecution that has such effect.

The examination of the special penal legislation and provisions show that the state uses criminal law, at least at enforcement level, in the absence of guilt, or to achieve some other purposes than the protection of the common good, or as a first resort measure. The punishments are excessive in that they do not seem to consider the relative significance of the good, or the lawmaker explicitly shows preference to severe punishments without justification, and, often such punishments are used in addition to administrative measures and civil actions.

Those legislative actions are contrary to criminal law doctrines, normative and institutional constitutional limitations. In not few cases, those legislation disregard the fact that the criminal law is one body of law, more so, in our case, the criminal law is a codified law. In those legislation, the lawmaker does not show its wisdom regarding the relationship between the General Part of the criminal law and the Special Part. In sum, the lawmaker every time it enacts criminal legislation/provision, it does not seem to have memory of other similar/identical criminal legislation/ provision, the Criminal Code, or a provision contained therein. This resulted in both quantitative and qualitative over-criminalisation.

In order to address the problem of over-criminalisation, the lawmaker should consider that first, the Criminal Code covers almost all matters that are provided

for by the special penal legislation or provisions that are discussed here and several others not mentioned here. Further, the Constitution recognises that the Ethiopian criminal law is codified criminal law. Therefore, the lawmaker should repeal all legislation or provision whose matter are covered by the Criminal Code; where the lawmaker believes the Criminal Code does not cover or does not effectively address a certain 'legal good,' it should govern such conduct by an amendment to the Code. In doing so, the lawmaker would maintain the integrity of the Code. Second, even for those crimes that are intended to be included into the Criminal Code, the lawmaker must first determine, criminalisation is effective as a protection of the legal good intended to be protected by the criminal law, and other measures, such as, administrative measures and civil actions are not as effective. Third, once the lawmaker decides a certain conduct needs to be criminalised, it should clearly state the material and moral elements constituting the crime and make sure such criminal legislation are published in the *Federal Negarit Gazeta,* because in the absence of such action, criminalisation would not be legislative action; it would rather become executive action. Fourth, in determining punishment the lawmaker should be guided by the principles of proportionality and of parsimony; i.e., properly evaluate the relative significance of the good, and determine the punishment that creates lasting impression on the society and is the least painful on the person undergoing the punishment. Fifth, as criminal law is one body of law, in criminalisation of conduct and determination of punishment, regard must always be had to the General Part of the Criminal Code. Finally, the criminal law-making is the institutional responsibility of the House of Peoples' Representatives. As it is its non-delegable responsibility, the criminal law-making power cannot be delegated to any organ.

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# The Right to Defense Counsel in Ethiopia: A Quest for Perfection

*Tsehai Wada*[*]

## *Abstract*

*The right to defense counsel is in short, an arrested or accused person's right to have a state appointed counsel when she cannot afford to hire one. Given its importance in administering an ideal criminal justice system, it is given recognition under major international human rights instruments as well as constitutions and subsidiary laws of many countries. Despite such wide recognition, its implementation is fraught with difficulties. Ethiopian laws, as well as regional and international human rights instruments to which Ethiopia is a party, also recognize this right. Nonetheless, the right is availed by quite a few individuals who came into conflict with the law. This piece attempts to show the legal framework that pertains to the right under discussion, canvass the practice starting from 1965 to date from different academic researches, analyze data collected as recently as 2015 and indicate the shortcomings of both the laws and the practice. In doing so, it discusses the laws and practices of different countries with a view to draw insight from their strengths. The paper identifies that the major hurdle in all these is the lack of a vibrant Public Defenders Office and counsels, among others, and suggests that this institution shall be invigorated, and the relevant laws shall be amended to give full effect to the right.*

**Key terms**: defense counsel, arrestee, accused, public defender's office, human rights

## Introduction

One of the most troubling issues in the administration of the criminal justice system is the case of suspects/accused individuals.[1] Bacause crimes are public matters, the state establishes different institutions to deal with them. Accordingly, police, prosecution offices, courts and jails are found everywhere and all these are run by public money. In all criminal cases there are two parties, i.e., the state and the suspect/accused. Relative to its economic might, the state tries its best to equip these institutions with professionals. The suspects/accused are on the other hand –

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[1] Suspects/accused is here employed as a short form to refer to those arrested at police stations – arrestees - and those who are formally charged and awaiting their fate at trial, respectively.

in most cases,[2] – individuals who have neither the professional capability to defend their cases, nor the financial resource to employ professionals, such as lawyers.

The formal state law[3] is sophisticated and complex so much so that it is not well comprehended even by educated individuals - except lawyers- let alone illetrate individuals. So, it goes without saying that in criminal cases, the suspect/accused is disproportionately less armed compared to the state. Nonetheless, at present, so many international and regional human rights instruments as well as many state constitutions guarantee different rights that may help to ameliorate this imbalance or inequality of arms. Suffice to mention that the right to: equality, fair trial, due process of law, *inter alia*, are pervasive in all such instruments. The right to defense counsel is no less pervasive.

Under international and regional legal instruments, the duty to implement the right to counsel is imposed on the state. Nonetheless, the implementation of the right is fraught with difficulties, for in so many places states have failed to establish or adequately resource the institutions that can be of help for the realization of the right. Such institutions usually do not match the agencies of the criminal justice system, as a result of which indigent suspects/accused are disadvantaged. Best practices of different countries show that there are different institutions that are engaged in providing free legal services to the indigent and these are *inter alia*: public defender offices, legal aid centers, bar associations, etc.

The right to defense counsel is enshrined in the different international and regional human rights instruments to which Ethiopia is a party as well as the national constitution and other substantive and procedural laws of the country. Nonetheless, both the law and the practice leave much to be desired as shall be discussed in the article. The article is thus divided into six parts that deal with: the theoretical framework on the right to defense counsel, the South African experience, the Ethiopian legal framework, the practice, general observations of the law and the practice and future prospects, respectively. It concludes by making some major recommendations that may help in ameliorating the laws and the practice.

## 1. Theoretical Framework

The right to defense counsel is a self-explanatory phrase that may not demand a technical definition. Suffice to mention that it is the right of an arrestee or accused who cannot afford to hire a lawyer.

[2] This is to indicate that corporate bodies can also be made liable for criminal acts, but this is an exceptional situation.

[3] It is alleged that both the substantive and procedural laws of the informal justice system are known by the subjects of the laws. Since this article deals with the formal justice system only, this will not be covered here.

The International Covenant on Civil and Political Rights provides *inter alia* that,

> In the determination of any charge against him, everyone shall be entitled to the following guarnatees, in full equalities.... d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed , if he doesn't have legal assistance, of his right to and to have legal assitance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[4]

The African Charter on Human and Peoples' Rights (1987), also provides that 'Every individual shall have the right to have his case heard. This comprises: the right to defense, including the right to be defended by counsel of his choice.'[5] In addition to these, the United Nations has issued different instruments that deal with the right to defense counsel. All these instruments recognize and provide detailed methodologies by which the right to defense counsel can be realized.[6]

Given the fact that most of our laws have drawn from foreign legal systems, it seems appropriate to touch upon the laws and practices of some countries. It is hoped that knowledge about the laws and practices of other countries can help in identifying the strengths and shortcomings of our laws and to have a global view about the issue at hand. So, the following part deals with this.

A look at the literature on the historical developments of the right to counsel in major democracies evinces that,

> [In England], the right to counsel began to appear at the time of formation of the adversarial system, which developed in the late Sixteenth and

[4] The International Covenant on Civil and Political Rights (hereafter the ICCPR), Art.14 (3).

[5] The African Charter on Human and Peoples' Rights (1987), (hereafter ACHPR) Art.7 (1) (c). In addition to the Charter, the African Commission on Human and Peoples's Rights (ACHPR) has issued some Resolutions petaining to fair trial and these are, *inter alia*: ACHPR Resolution on the Right to Recourse and Fair Trial, Tunis, Tunisia, 1992; ACHPR Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Kigali, Rwanda, 1999 and ACHPR Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa, 2001. See also The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, November 2004.

[6] Details are left out due to space limitation. The most pertinent instruments are: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations, New York, 2013. The Guideline lists a number of international legal instruments, including the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa that it intends to complement and the list is left out here; UN Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Adopted by General Assembly Resolution 43/173 of 9 December 1988, Art.11 (1); and UN Basic Principles on the Role of Lawyers, 1990, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also UN Standard Minimum Rules for the Treatment of Prisoners, 1957, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. These instruments also provide *inter alia* that: the right to defense counsel shall be asserted and exercised at all proceedings, the state shall ensure the provision of sufficient funding and other resources for legal services to the poor, and that interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

> Seventeenth Centuries.[7] …Since 1836 full assurance of the right to counsel has been granted not only in felony but also in misdemeanor trials'.[8]
>
> In France, '[N]ot until 1808 did the Napoleonic Code of Criminal Procedure make it compulsory that the defendant should have a lawyer when tried in the Assize court. French law also required that an attorney represent the accused during the process of pretrial investigation. Soon after that, the accused in France was granted the right to the assistance of an advocate (attorney), and if he or she cannot afford one, then one is to be appointed'.[9]

The position of The European Court of Human Rights (ECtHR) is succinctly described by Open Society as follows:

> Under the recent jurisprudence ... a person must have access to legal assistance when they are placed in custody or their position is significantly affected by the circumstances, which may even be before a formal arrest takes place. In particular, no one should be interrogated or required or invited to participate in investigative or procedural acts without the right of access to legal assistance. Suspects have the right to access the full range of services inherent in legal advice, such as discussion of the case, organization of the defence, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention, from the moment the person's right to an attorney attaches.[10]

In US, for one, the source of the right to defense counsel is the Sixth Amendment that provides that '[I]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense'. According to King, 'It is generally understood…that the drafters [of the US Constitution] did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense'.[11] Nonetheless, though the Sixteenth

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[7] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford University Press 2003); HARRY R. DAMMER & ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS (Greenwood Press 2002); RONALD BANASZAK, FAIR TRIAL RIGHT OF THE ACCUSED (Greenwood Press 2002), as quoted in Luong Thi My Quynh, Guarantee of the Accused Person's Right to Defense Counsel – A Comparative Study of Vietnamese, German and American Criminal Procedure Laws (2011) (Unpublished PhD Dissertation, Lund University and Hochiminh City University), p.14.

[8] Charles Donahue, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE LAW JOURNAL 1000, 1027-1028 (1964), as quoted in Luong Thi My Quynh, *supra* note 7, at 15; Chowdharay-Best, *The History of Right to Counsel*, 40 JOURNAL OF CRIMINAL LAW 275, 279 (1976), as quoted in Luong Thi My Quynh, *supra* note 7, at 15; Laurie Fulton, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. L. REV., 1599, 1600 (1989), as quoted in Luong Thi My Quynh, *supra* note 7, at 15.

[9] CRAIG M. BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 233-237 (Carolina Academic Press 2007), as as quoted in Luong Thi My Quynh, *supra* note 7, at 17.

[10] Open Society Justice Initiative, *European Standards on Criminal Defence Rights: ECtHR Jurisprudence,* CASE DIGESTS 15 (April 2013), https://www.opensocietyfoundations.org/sites/default/files/digests-arrest%20rights-european-court-human-rights-20130419.pdf

[11] John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARVARD CIVIL RIGHTS – CIVIL LIBERTIES LAW REVIEW 1, 8 (2014). (All citations from this source are omitted.)

Amendment has filled this gap, its generality could not address the issues that arose after its enactment. Accordingly, the US Supreme Court has interpreted the law through successive decisions, and it is now understood to include the right to representation that apply to critical stages, more particularly at pretrial proceedings, pretrial identification procedures, and when one is subjected to police or prosecutor efforts to elicit inculpatory statements and it extends to the time when a person is taken into custody and the police has the duty to inform the person about this right.[12]

## 2. The South African Experience

To the best knowledge of this writer, compared to other African countries, the South African law and experience provide for comprehensive and strong guarantees and almost all forms of approaches that help in the realization of the right to defense counsel are put in practice. Because of the valuable lesson that could be drawn from it, it is worthwhile to explore the South African system at some length here.[13]

According to Mason,

> The South African experience is valuable because the country has established one of the most sophisticated legal aid schemes in the developing world. … The South African experience followed an evolutionary approach to legal aid delivery that went from pro bono to judicare to salaried lawyers'.[14]

The Legal Aid Act of 1969 (as amended in 1971, 1972, 1989, 1991 and 1996) established a Legal Aid Board, that is mandated to 'render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution as well as to provide …legal representation at state expense … where substantial injustice would otherwise result.'[15] The Board, though accountable to the Ministry of Justice, has its own legal personality. Source of finances of the Board consist of: money appropriated by the Parliament in order

[12] For further details See WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE, at Sec.11.1(a) (3rd Ed. Westlaw Next 2012) (All citations from this source are omitted.).

[13] LEGAL AID: INTERNATIONAL EXPERIENCES AND PROMISING PRACTICES FOR LEGAL AID PROVIDERS (Paul Dalton & Hatla Thelle eds., The Danish Institute for Human Rights 2010) have canvassed the laws and practices pertaining to the right to defense counsel in: China, Malawi, The Philippines, South Africa, Uganda, Zambia, Indonesia, and Russia. It can be easily noted that the South African laws and experience are better than the rest by all standards. Moreover, the fact that South Africa is an African nation that is a member of the AU and party to the relevant instruments adopted by it, and that it shares comparatively "common values" with other African nations, its laws and practices are more inspiring to other African nations than the rest, i.e., non-African nations.

[14] David McQuoid Mason, *Holistic Approach to the Delivery of Legal Services - The South African Experience*, *in* A HUMAN RIGHTS TO LEGAL AID 135, 136 (Paul Dalton & Hatla Thelle eds., The Danish Institute for Human Rights 2010) (All citations are omitted.)

[15] Art.2 &3 dA of the Act.

to enable the Board to perform its functions and moneys received from any other source.[16]

> The South African state funded justice centers provide a full range of legal and paralegal services to indigent clients.… [and] the Board has set up a network of fifty-eight justice centers and forty-one satellite offices…The Board now estimates that it defends sixty to seventy five percent of all criminal cases in the regional courts, and ninety percent of all criminal cases in the high courts."[17]

'Courts can direct cases to the Board for evaluation'.[18] The South African experience is known as a "holistic approach", which means that '[T]he maximum is made not only of the public sector legal aid bodies such as national legal aid board or council, but also of legal services providers in the private sector, such as bar associations, public interest law firms, law clinics and paralegal advice offices'.[19] Over all, eleven different approaches are used to provide legal aid and these are: Pro bono legal aid work, state funded *judicare* – ex-officio or referrals to private lawyers, state funded public defenders, state funded legal aid interns in rural law firms, state funded law clinics, impact litigation, cooperation agreements, public interest law firms, university legal aid clinics, street law type clinics, and paralegal advice offices. *Judicare* was the main avenue of providing legal aid before the introduction of the new constitution that made it mandatory to provide the service at state expense. This system was found to be expensive and it is now used in exceptional cases only. The state funded public defenders system employs legally qualified persons to represent the indigent and it is proved to be less expensive and successful. Other approaches, such as impact litigation, cooperation agreements, and public interest law firms are used in those places where the board has no branch offices, [or] in cases of conflict of interest or [when] the issue to be litigated demands expertise.[20]

## 3. The Ethiopian Legal Regime

The 1995 Constitution of Ethiopia currently in force [21] is the fourth constitution in the country's legal history. Its first written constitution of 1931 had no provision that deals with the right to defense counsel. The 1955 Revised Constitution which

[16] Arts.2, 4/1, a-g, and 9/1, a & b of the Act, respectively.

[17] Mason, *supra* note 14, at 137-138.

[18] According to Art.3 of the Act, "Courts before deciding shall ensure that an indigent accused shall be represented by a counsel at state expense, shall take into account, *inter alia*: the personal circumstances of the person, the nature and gravity of the charge and send the case to the Board that will evaluate and report back its findings".

[19] Mason, *supra note* 14, at 135.

[20] For more details, see *Id.*, at 139-162.

[21] Constitution of the Federal Democratic Republic of Ethiopia, *Proclamation No. 1/1995*.

replaced the 1931 Constitution recognized the right.[22] The 1987 Constitution that repealed the latter had also recognized the right.[23]

The 1995 for its part has two provisions that deal with the right under discussion and these read:

1. Art. 20(5) that provides that 'Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense'.
2. Art. 21(2) that provides that 'All persons shall have the opportunity to communicate with, and be visited by…their legal counsel'.

It should be noted here that the former provision is found under Art. 20 that is entitled as "Rights of Persons Accused" and the latter under Art. 21 that is entitled "The Right of Persons Held in Custody and Convicted Prisoners". Though the former is straight forward, it is not clear whether the right to 'communicate and be visited' under the latter provision, also encompasses the right to representation. In addition to the two constitutional provisions, the only provision of a subsidiary law that pertains to the right to defense counsel is Art. 61 of The Criminal Procedure Code[24] that provides that 'Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write'. The article comes under Chapter 2 entitled as "Remand" and the caption of the article reads as "Detained Persons Right to Consult Advocate". The article is limited in scope, and it gives rise to an argument whether this may include representation at any other processes of the criminal justice system. It may, therefore, be concluded that the article as well as Art. 21(2) of the Constitution touched upon the right tangentially but not as their core subject.

In any case, it helps to note that under the current Constitution, 'the Constitution is the supreme law of the land and that all international agreements ratified by Ethiopia are an integral part of the law of the land'[25] and that Ethiopia is a party to major international human rights conventions and regional instruments such as the Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples' Rights. It, therefore, follows that in addition to the Constitution and

[22] The Revised Constitution of Ethiopia, *Proclamation No. 149 of 1955* had provided under Art.52 that 'In all criminal prosecutions, the accused , duly submitting to the court shall have the right to have the assistance of counsel, who if the accused is unable to obtain the same by his own efforts or through his own funds, shall be assigned and provided to the accused by the court.'.

[23] The Constitution of the Peoples' Democratic Republic of Ethiopia, *Proclamation No.1 of 1987* had also provided under Art.45 (3) that 'Any accused person has the right to defend himself or appoint a defence counsel. Where a person is charged with a serious offence and his inability to appoint a defense counsel is established, the state shall appoint one for him free of charge, as determined by law'.

[24] The Criminal Procedure Code of Ethiopia*, Proc. No.185 (1961).*

[25] Art.9 (1&4) of the Constitution of the Peoples' Democratic Republic of Ethiopia.

the subsidiary laws, these conventions are equally applicable and form part of the legal regime in Ethiopia.[26]

### 3.1. Major Legal Gaps and their Consequences

If we leave aside the Criminal Procedure Code's provision and Art.21 of the Constitution, for it is only through a very wide legal interpretation that one can reach at a conclusion that they pertain to legal representation, the only provision that guarantees the right to defense counsel is, Art.20 of the Constitution. It should also be noted that the right is qualified, for in order to be exercised, the accused has to be an indigent and the right is available when a court feels that non-representation will result in 'miscarriage of justice' – a vague standard.

As the laws stand at present, a suspect under police detention cannot lawfully assert this right, for she has to wait till she is formally charged. Nonetheless, though a trial is a major proceeding, the pre-trial proceedings are equally important to determine guilt or innocence and this legal lacuna is just unfortunate, to say the least.

The US experience shows that such assistance shall be given at 'critical stages' in criminal prosecution.[27] These critical stages are *inter alia* 'those instances which will have adverse consequences as to the disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel.'[28] One of these stages is the time when an arrested person is taken into custody by the police which normally continues up to the trial stage and thereafter including appeal. Under the Ethiopian criminal justice system there are a number of pre-trial proceedings that demand the services of a defense counsel. Some of the major proceedings are: arrest, interrogation – by police - and appearance at the nearest court soon after arrest.[29] 'Trial' proper, is a proceeding wherein a suspect is formally charged, admits or denies guilt, cross examines prosecution witnesses, challenges evidences, submit defenses – if any - and appeal if aggrieved by the decision of the court entertaining the case.

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[26] Note that there are some laws enacted with the view to provide free legal aid to the indigent and these will be discussed below under a separate title.

[27] LAFAVE *et.al*, *supra* note 12, Sec.11.2 (b).

[28] *Id.*

[29] Art.29 of the Criminal Procedure Code provides as follows:

> Procedure after arrest :
>
> 1. Where the accused has been arrested by the police or a private person and handed over to the Police…, the police shall bring him before the nearest court within forty-eight hours of his arrest or so soon thereafter as local circumstances and communications permit… [It is also provided that this court can decide on the bail right of the arrestee or that the arrestee shall be kept in custody…See Art.59. Art.19 (3) of the Constitution also guarantees the right to be brought to court within the same time limit.

The importance of assistance by a defense lawyer in pre-trial proceedings cannot be overemphasized. An arrestee may have been arrested for no lawful reason, or may be intimidated through third degree or other unlawful methods to admit guilt – self-incrimination; denied bail though she may be entitled under the law, etc. Thus, if these rights are denied at pre-trial proceedings, it will be difficult if not impossible to reverse their effects at trial. The reversal of course demands the extraordinary efforts of a vigilant defense lawyer or a judge, as the case may be. Moreover, if an accused cannot be represented at trial, for one reason or another, there will be a high probability that the trial will end in unlawful conviction.

It may be argued that the 'exclusionary rule' that prohibits the admissibility of evidence gathered through illegal methods, such as the third degree may help the accused individual escape unlawful conviction. Though Ethiopia has not yet enacted a separate evidence law, the Constitution and the Criminal Procedure Code clearly recognize this right.[30] Though the legal guarantee is laudable, it should be noted that such a challenge can be posed by an accused person who has prior knowledge about it or by a represented accused. Nonetheless, given the fact that most accused in Ethiopia are illiterate and unable to hire their own lawyers, it is very unlikely that they will raise such issues at trial and receive favorable decisions. It will be worth noting that the use of third degree during police interrogation is the rule than the exception and it has been practiced for a long time.[31] Suffice to mention that back in 1966 Professor Fisher had noted that 'The administration of criminal justice in Ethiopia is marred by the frequent claims that convictions are based upon coerced confessions. The present system for adjudicating such claims and for deterring the practices which generate them is inadequate'.[32] Interestingly enough, the situation has not improved even thirty years after this assertion was made by Professor Fisher. A student researcher has found *inter alia* that: interrogating police officers do not tell suspects about their rights, denial of police records of admission of guilt at trial are frequent and cause delays in trial, the common practice in police stations is to call other detainees in police custody to witness admission after subduing the suspect and interrogations are held without the presence of anyone except the suspect and the interrogator.[33] Moreover, the right to be visited by one's counsel and to have free consultation is dispensed with

[30] Art.19(5) of the Constitution - Persons arrested should not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.

Art.27 of the Criminal Procedure Code - A person under interrogation shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence, and any statement which may be made shall be recorded. Note also that the same guarantees are provided under Arts.80 ff. of Criminal Procedure Code that regulate 'Preliminary Inquiry', i.e. a pre-trial proceeding to be held in case when a person is suspected of committing the crimes of homicide or robbery.

[31] For more details see Stanley Z. Fisher, *Involuntary Confession and Article 35, Criminal Procedure Code*, 3 JOURNAL OF ETHIOPIAN LAW 330, 330-338 (1966).

[32] *Id.*

[33] See Dereje Ethicha, The Right of the Accused to Defense Counsel under Ethiopian Law, 25-30 (1996) (Unpublished LL.B. thesis, Addis Ababa University) (On file with the Law Library, Addis Ababa University).

in practice.[34] Reports of third degree use are pervasive in reports of human rights watch dogs and major media outlets that report on criminal trials. A recent research has also disclosed the use of third degree in a particular study area.[35]

It is worth noting that the right to defense counsel is explicitly provided under the Constitution only and that the other laws of the country are silent on the point. Accordingly, except for this Constitutional provision the Criminal Procedure Code's provision on trial says nothing about the right to counsel.[36] Furthermore, it should be noted that the Ethiopian law does not impose any duty either on the police or the judge to inform an arrestee or an accused that she has the right to be represented by a defense counsel or that an interrogation conducted without representation shall be inadmissible. Given the fact that '[The] essence of the adversarial system is challenge ... the proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions...'[37] Such a challenge can be posed by the counsel of an affluent accused, but not an unrepresented illiterate and indigent accused. Thus, it can be concluded that the relevant laws should have given stronger guarantees than those discussed above.[38]

### 3.2 The Case of the Indigent

Unlike civil cases that may affect the property right of a defendant, criminal cases affect and have the potential to jeopardize the life and liberty of an accused. It is for this reason that legal systems require the prosecution to prove a charge beyond any reasonable doubt, that an accused shall be presumed to be innocent till found guilty by a court of law, among others. As the old adage goes, 'Better acquit ten guilty men than punish one innocent man'. This noble idea can be realized only when the accused and the prosecution are armed equally.

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[34] *Id.*, at 30-34.

[35] See Hussein Ahmed Tura, *Indigent's Right to State Funded Legal Aid in Ethiopia*, 2 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 120, 142-143 (2013).

[36] Note that this right is mentioned incidentally in quite a few occasions, such as under Art.127 (1), wherein it is provided that "The accused shall appear personally to be informed of the charge and defend himself. When he is assisted by an advocate the advocate shall appear with him", and Art.136 (3) which provides that "[Prosecution witnesses] shall be examined in chief by the public prosecutor, cross-examined by the accused or his advocate..." See also Art.139 on re-examination. This is all about an accused that has/can afford to hire a lawyer.

[37] The Allen Report, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice', pp. 5-11 (1963) as quoted in YALE KAMSAR, WAYNE LAFAVE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 66 (8th ed., West Publishing Company 1994).

[38] Whether or not the Ethiopian system is adversarial or inquisitive is a subject of debate. Some suggest that, the Criminal Procedure law draws heavily from the Common Law system. Nonetheless, it is clear that the Criminal Procedure Code draws from both systems. See STANLEY Z. FISHER, ETHIOPIAN CRIMINAL PROCEDURE: A SOURCE BOOK xi & xii (Oxford University Press1969).

Given the sophistication and complexity of the substantive, procedural and evidence laws of the formal system, it is simply impossible for anyone who comes into conflict with the law to master these laws. Thus, litigating a criminal case necessarily requires the assistance of a lawyer, in the absence of which there will arise a high probability of convicting the innocent. The services of lawyers are not free commodities and one has to buy them at market price that is mostly unaffordable for the majority of service seekers. Thus, while the rich can buy the service, the indigent will undoubtedly suffer the consequences of wrongful conviction that might result from lack of representation by a lawyer. Under such scenarios, the indigent's right to equality will be violated and they will face the consequences of wrongful conviction, just because they cannot defend their cases ably. Thus, the case of the indigent is one of the troublesome issues in the criminal justice system of so many countries. The following quotes can amply show the predicaments of the indigent in criminal proceedings:

> ……[I]n so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system...it is so clear that a situation in which persons are required to contest serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system thereby occasioned significantly endangers the basic interests of a free community.[39]

Back in 1835, the Supreme Court of Indiana, USA, had noted that,

> [I]t is not to be thought of in a civilized community for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he is too poor to employ such aid … No court could be expected to respect itself to sit and hear such a trial. The defense of the poor in such cases is a duty which will at once be conceded as essential to the accused, to the court and the public.[40]

Best practices of different countries show that there are different mechanisms that are put in place to address the problem. In short these mechanisms aim at providing free legal service to the indigent.

As shown above, under Ethiopian law, free legal assistance shall be given to an indigent when a court feels that 'miscarriage of justice' will ensue if an indigent is not represented. This qualification lacks clarity and is susceptible to different interpretations. As will be shown below, the practice evinces that seriousness of

[39] YALE KESMAR *et.al*, *supra* note 37, at 66.

[40] National Legal Aid & Defender Association (NLDA), History of Right to Counsel, *www/M:\access to just docs\NLADA About NLADA* - History of Right to Counsel.mht, quoting the decision of the Supreme Court, *Webb v. Baird*, (6 Ind. 13), the Supreme Court (1853). (Last accessed on March17, 2016).

the crime for which one is charged is the major criterion used by courts to determine eligibility for free legal service. Moreover, the criteria to determine indigence are problematic.

Ethiopia has in fact established Public Defender's Offices that are tangled in so many shortcomings. At the federal level, the Office was established as a de facto institution back in 1993 when thousands of individuals were brought to justice for committing crimes such as genocide during the past military regime. Accordingly, '[It] was established by seed money gained from Danish section of the International Commission of Jurists'.[41] The only piece of legislation that says something about the office is, the Federal Courts' Proclamation No.25/1996 that provides that '… [T]he President of the Federal Supreme Court shall organize the public defense office'. It should be noted that the Supreme Court is not given the power to establish but, to 'organize' which may mean that its *de facto* existence is given recognition. The office does not have its own legal personality and it is accountable to the Federal Supreme Court.[42]

## 4. The Practice

### 4.1. Academic Researches

The practice in the realization of the right to defense counsel in general and free legal service in particular is canvassed by different local researches conducted as far back as 1965. Thus, a short summary of these researches will be in order. The researches that are accessible to this writer are six in number and these are the following:

1. Worku Tafara[43]- According to the late Worku Tafara, there was no Public Defender Office then, and defense attorneys were assigned to indigents based on the whim of the judges who had the legal authority to take measures against those who may dare to refuse to take the assignment. Accordingly, judges assign those lawyers who were attending the trial or even those who were not there. The lawyers used to give the service *pro bono*. Defense attorneys used to

[41] Etitcha, *supra* note 33, at 50. According to Sarkin,

> … By late 1993 it became clear that it was necessary to establish a defence system for former Dergue officials who could not afford private attorneys in order to meet international standards [sic]. Consequently, the PDO was established in January 1994 together with the courts and the Danish section of the International Commission of Jurists (ICJDS)." Jeremy Sarkin, *Transitional Justice and the Prosecution Model: The Experience of Ethiopia,* 3 LAW, DEMOCRACY & DEVELOPMENT 253, 261 (1999).

[42] Regional states' legislations on the subject are omitted due to space limitation. Nonetheless, readers may find these in *inter alia*, Tura, *supra* note 35 and ETHIOPIAN LAWYERS' ASSOCIATION & ETHIOPIAN YOUNG LAWYERS ASSOCIATION, PUBLIC DEFENDER'S SERVICES IN ETHIOPIA (2015).

[43] Worku Tafara, Indigent Defendant's Right to Counsel in High Court Trials in Addis Ababa, (1965) (Unpublished LL.B. thesis), as quoted by Fisher, *supra* Note 38, at 261-265.

be assigned to those charged with 'serious' crimes and indigence was determined based on the attire or the general disposition of an accused at trials.

2. Dereje Ethicha[44] - This research was conducted almost thirty five years after the above work by Worku Tafara. The author's findings include among others that: [In federal courts] defense attorneys were assigned after the accused enters her plea - guilty or not guilty; though counsels used to be assigned from the Public Defender's Office, judges used to assign private attorneys who were attending trial; the Public Defender's Office used to suffer from many shortcomings such as: huge work load, insufficient budget, and generally a substandard and unattractive working environment. Furthermore, the criterion that determines assignment of defense attorneys was, by and large, the seriousness of the crime for which one is charged and there was no uniform standard adopted by regional state courts. In some states, the criterion was a charge that entails a punishment for a minimum of five years imprisonment, while in others it was a maximum of death sentence or for crimes such as homicide, aggravated robbery, etc.

3. Muradu Abdo[45] and Dolores A. Donovan[46] - These researches are desk researches and limited in their scope. Nonetheless, they have thrown light – though incidentally – on the practice at the time of their publication. Accordingly, Abdo states that at federal courts free counsel used to be assigned to those charged with homicide, terrorism, corruption, etc. and the shortcomings of the Public Defender's Office were the same as witnessed by Eticha. According to Donovan, 'In the vast majority of Ethiopian criminal cases, there are no lawyers for the defense'.[47]

4. Hussein Ahmed Tura[48] -Tura did his research on the state of affairs of the criminal justice system in Wollaita Zone – an administrative unit below the regional state. According to him, the Southern Nations, Nationalities and Peoples' Regional State has enacted legislation that guarantees the right to defense counsel, and authorizes the regional Supreme Court to organize a public defender's Office, just like the other regional states. The latter legislation has some provisions that detail the tasks of the office. It is interesting to note that the writer did not mention the service of the Public Defender's Office but instead the services of private attorneys assigned by the local Justice Bureau when they come to renew their license. This may indicate the total absence of

[44] Eticha, *supra* note 33.

[45] Muradu Abdo, *The Indigent's Right to Defense Counsel in Ethiopia*, 3 ETHIOPIAN HUMAN RIGHTS LAW SERIES - HUMAN RIGHTS IN CRIMINAL PROCEEDINGS: NORMATIVE AND PRACTICAL ASPECTS, 140-157 (January 2010).

[46] Dolores A. Donovan, *Leveling the Playing Field: The Judicial Duty to Protect and Enforce Constitutional Rights of Accused Persons Unrepresented by Counsel* 1 ETHIOPIAN LAW REVIEW 27-61 (August 2007).

[47] *Id.*, at 61.

[48] Tura, *supra note* 35.

the Public Defender's Office in the study area. The writer further found out among others that: there is an acute shortage of lawyers, some are conducting business unethically, the use of third degree is pervasive in police stations, and the percentage of unrepresented and convicted persons at different proceedings ranges from 95 –98 percent, in general.

5. Ethiopian Lawyers Association and Ethiopian Young Lawyers' Association[49] - The research is the first of its kind in attempting to gather and analyze data from almost all states – federal and regional. The research findings contain among others, that: almost all regional states follow the federal constitution and other subsidiary laws that guarantee the right to defense counsel and confer the authority to organize Public Defender's Offices on the respective Supreme Courts; most regions have organized their own Public Defender's Offices, though there are still some regions that have not yet done this; the performance of the Offices are as pitiful as described by other researchers above; there are no uniform standards applied to assign the services of public defenders, for in some it is the seriousness of the crime for which one is charged and in other regions it is the indigence of the accused that is taken into account; [though mentioned incidentally] in those situations wherein a defense attorney may be assigned the service is provided at trials but not at pre-trial proceedings.[50]

### 4.2. A Ruling of the Cassation Division of the Federal Supreme Court on the Right to Defense Counsel

It helps to note here that the pertinent law on the jurisdiction of courts provides *inter alia* that: 'Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges sitting shall be binding on federal as well as regional courts at all levels. The Cassation Division may, however, render a different interpretation on (similar) issues some other time.'[51]

Based on this authority, the Cassation Division of the Federal Supreme Court rendered a ground-breaking decision in a case that involved a defendant who was sentenced to death without representation by a lawyer.[52] The accused charged for

[49] Ethiopian Lawyers' Association and Ethiopian Young Lawyers' Association, *supra* note 41.

[50] Note: - The Ministry of Capacity Building published a research finding entitled "Justice System Reform Program Office, '*FDRE Ethiopia Comprehensive Justice System Reform Program, Baseline Study Report*" in February 2005. These 531 pages report has attempted to study almost all agencies of the criminal justice system of the country. Nonetheless, to the dismay of those who were expecting a lot, its contribution to the subject at hand is almost nil, to say the least. The only statements mentioned therein are the following: '[I]n the visited prisons and police stations, a lack/absence of affordable legal aid was obvious. This is the case for all prisoners whether sentenced, on remand or possibly eligible for parole…. The only form of legal advice available to prisoners currently is the one given by Prisoners' Committees that lack the power to represent suspects in courts.' pp.120-121.

[51] Art.2 (1), paragraph 2, *The Federal Courts Proclamation Re-amendment Proclamation No. 454/2005.*

[52] Cassation File No.37050 published in '*Decisions of the Cassation Division of the Federal Supreme Court*', (Federal Supreme Court, Ethiopia, Vol.9, November 2003 Ethiopian Calendar), pp. 173-175. The judgment is written in

committing first degree homicide, requested to be represented at the lower courts, but this could not be fulfilled, for one reason or another. After conviction and sentencing, the convict appealed to all relevant courts, including the region's Supreme Court Cassation Division, but to no avail. The Federal Supreme Court, however, noted among others that, the appellant is denied his constitutional right to defense counsel, quashed the sentence and remanded the case to the first instance court, and further ordered that the appellant shall be represented and the case shall be entertained by judges other than those who participated in it in the past.

The court, though incidentally, admonished lower courts and further ruled *inter alia*, that: the right has to be availed at all proceedings; courts have the duty to inform an accused that she has the right to be represented by a counsel of her own choice and she should also be given sufficient time to prepare her defense. The court did not expressly rule that these rights shall be availed by those charged for 'serious crimes' alone.

## 5. General Observations of the Law and the Practice

It is shown above that both the law and practice in Ethiopia leave much to be desired. The following part, therefore, attempts to shed more light on contemporary and very recent practices.[53]

### 5.1. On the status and performance of the Public Defenders' Office[54]

Both in 2013 and 2015, interviewees from the Public Defender's Office disclosed among others, that the Office suffers from shortage of skilled professionals, sufficient and independent budget, and heavy workload that is not commensurate with its human resource. Moreover, it has never represented indigents out of its own initiative, but only when ordered by court, and it has not represented suspects at pre-trial proceedings. The number of public defenders employed and working at the Office in 2013 was 17 and the number reached 22 in 2015. In the latter case only 14 were graduates with first law (LLB) degrees. This sharply contrasted with the professional resource of the prosecution office in the capital city and the Federal Ministry of Justice that had on average 200 Public prosecutors between

Amharic, the working language of the Federal Government of Ethiopia, and the translation is mine. See, Case Report, 27 JOURNAL OF ETHIOPIAN LAW 139-142 (2015).

[53] Some facts and figures contained herein were observed and gathered during a field research in mid-2013 and 2015. The latest data gathering effort was sponsored by Addis Ababa University School of Law's Legal Aid and Public Interest Project and the findings were presented at a workshop on December 31, 2015. See Tsehai Wada, The Right to Defense Counsel in Ethiopia: The Law and the Practice, *Proceedings of Seminar Series of the School of Law, Addis Ababa University*, Vol. 1, May 2016, pp. 33-44.

[54] These observations reflect the experience of the Office at the capital city that also includes the Federal Ministry of Justice that prosecutes crimes under federal jurisdiction.

2009 and 2011.[55] A significant number of these prosecutors have second degrees in law.[56] A contrast between the number of prosecutors and public defenders serving at federal level evinces a huge gap. Accordingly, the number of prosecutors was close to 200 while that of the public defenders – as shown above – was a maximum of 22 that is close to 1 public defender for each 10 prosecutors. With regard to the percentage of representation and based on the latest data, i.e. 2010/2011, the total number of individuals prosecuted for crimes was 56,256. Assuming that at least 10% of them can afford to hire lawyers, close to 50,000 accused need legal assistance and the 22 public defenders cannot by any stretch of imagination render their service to all – one for 2,300. It is believed that these figures speak volumes.

### 5.2. On the performance of the Federal Ministry of Justice

Art.49 of the Federal Courts Advocates' Code of Conduct[57] provides that 'Any advocate shall render at least 50 hours of legal service, free of charge or upon minimum payment. The service shall be rendered to, *inter alia*, persons who cannot afford to pay, charity organizations, civic organizations, and community institutions'. The Ministry thus assumes authority to see to it that advocates have actually rendered this service. Back in 2013 officers of the Ministry imparted to data collectors that till 2000 EC [2008 G.C], there were no much demands from the public for *pro bono* service, though the number swelled to 500 in 2005 of which it was only ten individuals who came seeking service on criminal matters.[58] Moreover, the Ministry does not have any mechanism or guideline pertaining to the control and follow up of the services of advocates.

The interviewees further mentioned that the absence of a standard to prove indigence had created problems in delivering the service and further opined that as the Ministry is in charge of prosecution, its role in assigning lawyers for *pro bono* service may give rise to conflict of interest.[59]

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[55] Central Statics Agency of Ethiopia, data on *Law and Order* (2012). The database contains data for the four years prior to 2012 and no data thereafter.

[56] There is no disaggregated data based on regions and the following is a national data. Accordingly, in 2010, 2011 and 2012, there were 46 LLM holders out of 5476; 24 out of 1600 and 24 out of 1910 prosecutors, respectively for each year. *Id.*

[57] Council of Ministers *Regulation No.57/1999*.

[58] The Federal Ministry of Justice has "facilitated 50 hours of free legal service for 314 citizens…[in 2012-2013]", See FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA GOVERNMENT COMMUNICATION AFFAIRS OFFICE, ETHIOPIA YEAR BOOK 2012-2013[English version] 196 (2013).

[59] It helps to note that neither the Regulation mentioned above nor the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 provides that failure to provide *pro bono* service shall entail consequences. See Art.15 (1) of the latter. The 2015 interview did not elicit anything new except that there is an acute shortage of private practitioners who volunteer for the service.

### 5.3. Nascent Efforts in establishing Free Legal aid Centers

Prior to 2009, quite a few civil society organizations had been engaged in advocacy services that include free legal aid to the indigent and the marginalized. Nonetheless, a law enacted in 2009 curtailed their activities by requiring them among others, to raise ninety percent of their income from local sources.[60] It appears that their shrinking numbers, if not total disappearance, has created an opportunity for law schools to launch and run their own legal aid projects. Accordingly, though some law schools were originally sponsored by the Ethiopian Human Rights Commission that provided them with seed money, now many of them run such projects by their own, mostly with funding assistance from external sources. The Addis Ababa University School of Law Legal Aid and Public Interest Project is a case in point.

## 6. Future Prospects

There are, at least, three instruments that may throw light on the future prospects on the right to defense counsel and bode well for the future. These are the 'Criminal Justice Policy of the Federal Democratic Republic of Ethiopia', Megabit 2003 [2011 G.C.], the 'Draft Criminal Procedure Code of the Federal Democratic Republic of Ethiopia', 2009 E.C. [2016/2017 G.C.] and the 'National Human Rights Action Plan' (2013). The former is a policy document that needs to be incorporated into the substantive as well as the procedure laws, while the second, being a draft will have no legal effect till its formal enactment by the legislature. The third may be simply taken as a general guideline to design future laws. Despite these, it may be hoped that the proposed remedies embodied in them may see the light of day sometime in the future.

The Criminal Justice Policy provides among others that: Accused persons shall have the right to counsel who shall have equal opportunity with the prosecution; the right can be exercised at every stage of proceedings starting from arrest and free legal assistance and shall be provided to indigents and only when it is felt that justice will be miscarried if an accused is not represented. Moreover, it promises to establish a Public Defenders Office.[61]

The Draft Criminal Procedure Code of 2009 (EC) (2016/2017),[62] that replaced an earlier draft issued in 2000(GC) contains some provisions pertaining to the issue at

[60] For more details on this particular point see Kumlachew Dagne and Debebe Haile Gebriel, *Assessment of the Impact of Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia* (Task Force on Enabling Environment for Civil Society Organizations in Ethiopia, June 2012).

[61] See Art.4.7 of the document. The documents are written in Amharic – the working language of the federal government of Ethiopia and translations are mine.

[62] See Arts.10, and 18(1). There are also other provisions placed sporadically that pertain to the subject at hand. See, Arts. 23, 57, 126, 189, 193, 255, and 257. It will be interesting to note that back in 1990, during the military regime, there was an attempt to revise the major laws of the country. Accordingly, the then Ministry of Law and Justice had prepared a draft Criminal Procedure Code that contained some provisions that requires among

hand. The most prominent contribution of the draft is that it mandatorily requires that juvenile offenders, those charged for crimes punishable with imprisonment for a minimum of five years of imprisonment together with those whose right is expressly recognized by law have to be represented by defense counsel. The draft also recognizes the Office of Public Defenders as one of the institutions of the justice system. The right to representation attaches from the time a suspect is arrested or an accused is charged. The Human Rights Action Plan promises to guarantee the same rights indicated above in an almost identical manner. It also promises that efforts will be exerted to make available sufficient number of public defenders at Supreme and High Courts.[63]

## Conclusion and Implications

According to King, '[T]he right to counsel is the "master key" to all of the other rights – protecting and reliability – ensuring rules of criminal procedure…'[64] and

> Of all the rights which the constitution guarantees the criminal accused, the right to counsel is possibly the most valuable. That is because having a lawyer affords meaningful access to all other rights, and without legal aid advice many other important rights are reduced to paper significance.[65]

Despite this stark truth, the criminal justice system of many countries cannot yet fully achieve the full realization of the right. Even in those countries that have a long history of providing free legal service and the means to do it, the performance of the service providing agencies are found to be much below the standard. According to one writer who wrote on the situation in US,

> Nobody observing the current state of indigent defense representation in the country today could credibly say that the system is functioning well. Even in that universe of cases requiring court-appointed counsel, the system has utterly failed to provide a robust and zealous defense counsel for those accused of crime…...[66]

Researchers have shown that the European practice falls short of ideal standards so much so that many suspects and accused persons are left "….in a vulnerable position: without legal assistance, without knowledge of the case against them, and

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others: mandatory appointment of defense counsels to the indigent and the exercise of the right at every proceedings including during interrogations. This draft could not, however, see the light of day, due to a change of government that took place in 1991. For further details see Abdo, *supra* note 44, at 143, 144 Foot Note No.12.

[63] *The Federal Democratic Republic of Ethiopia, National Human Rights Action Plan*, 2013-2015 (July 2013, Addis Ababa).Unofficial translation. For details see Sections 2.3.5 (3)(4), 2.4.5 (2)(4) and 2.5.5(3)(6), at pp.38, 45 and 52. The document is the result of a joint effort by many stakeholders including the Ethiopian Human Rights Commission. The name of a specific author is not shown.

[64] King, *supra* note 11, at 6.

[65] FISHER, *supra* note 38, at 246.

[66] King, *supra* note 11, at 42, 43.

without the ability to apply for pretrial release. This can have catastrophic impacts on a person's life."[67]

If the US and European practices can be criticized so harshly, one wonders what one can say about the reality in Ethiopia, where the right to defense counsel is not taken as a serious issue both under the law as well as the practice. As discussed in this paper, the major shortcomings of the law and the practice, among others, are that:

- The right is recognized under the Constitution only and the other subsidiary laws do not provide ideal standards;
- The right is not exercisable at all proceedings, more particularly at pre-trial proceedings;
- The Public Defenders' Office suffers from multiple shortcomings, such as independent legal personality, sufficient budget, etc.;
- The provision of *pro bono* legal service by private practitioners is much more below standard and there is no guideline put in place to follow up its realization;
- The constitutional precondition, i.e. "Miscarriage of Justice" lacks clarity and is susceptible to different interpretations.

All these and more can be rectified by enacting suitable laws and creating an ideal atmosphere for the realization of the right. Nonetheless, the different documents that promised a better future have not yet seen the light of day. The Draft Criminal Procedure Code that was expected to be enacted almost twenty years ago is a case in point. Whether or not the other documents will also see the light of day in the near future remains to be seen. Given the dismal situation that prevailed for almost half a century – as witnessed by the local researches discussed above - it will not be that wrong to conclude that Ethiopian suspects/accused are so far left to stew in their own juice. But, this should not be allowed to continue for there is no benefit to be accrued. Thus, the study implies that the following measures need to be taken as soon as possible in order to take meaningful steps towards the realization of the right to defense counsel.

1. A robust Public Defenders' Office with an independent legal personality should be established. It may be argued the country's economic situation can/may not allow for the establishment of such an institution. Nonetheless, given the recently achieved two digit economic growth,

[67] Open Society Justice Initiative, *supra* note 10, at 3. For more on European practice see also Zaza Namoradze, *'The Right to Early Access to a lawyer in Criminal Proceedings in Europe: Standards and practices' (*Open Society Justice Initiative, ILAG, 2009), at 17.

establishing a competent Public Defenders Office may not be that difficult if there is the will.

It will be interesting to note that elsewhere the same issue has been the subject of a court ruling back in 1963 wherein a court noted that

> [G]overnments spend vast sums of money to establish machinery to try defendants accused of crime. Why would governments do this… unless the presence of a professional prosecutor was necessary for the proper functioning of the legal system? And if the presence of the prosecutor was necessary, then so too was the presence of defense counsel.[68]

With regard to the predicament of the indigent, it will be worth noting that 'While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its determination of justice.'[69] If the need to establish a vibrant Public Defenders' Office arises, emulating the South African system will be the best option. Furthermore, lessons can be learnt from the laws and practices of Brazil that exhibit the following major features:

> With constitutional amendment No. 45 of 2004, the Federal Public Defender's Office came to have its own council, and councils were also created at state level. These councils are meant to be the highest normative and decision-making bodies of their institutions. Regarding career security, public defenders – like judges and prosecutors – are functionally independent in their roles, including in their terms of office, and there is no possibility of salary reduction. The law that governs the Public Defender's Office provides for competition in the filling of posts, sets out the makeup of the board and established the institution's functional and administrative independence.[70]

2. The Constitution as well as the relevant subsidiary laws should be amended in such a way that requires the provision of the right at all proceedings, including pre-trial proceedings.

3. The service of private practitioners in providing *pro bono* legal service cannot be overemphasized. But, given the prevailing practice, the system cannot exploit this resource. Thus, professional associations should be urged to discharge this obligation. In this regard it will be worth to note that *pro bono* service is not necessarily favored, for "….it allows the government to avoid its obligation to pay for counsel and generally results in a lower quality of representation because the lawyer is serving unwillingly and may have no

[68] *Gideon v. Wainwright*, 372 at 344 (1963), in King, *supra* note 11, at 10.

[69] YALE KAMISAR *et.al*, *supra* note 37, at 65.

[70] Ligia Mori Madeira, *Institutionalization, Reform and Independence of the Public Defender's Office in Brazil*, 8 BRAZILIAN POLITICAL SCIENCE REVIEW 48, 52 (2014) as quoted in ETHIOPIAN LAWYERS ASSOCIATION AND ETHIOPIAN YOUNG LAWYERS' ASSOCIATION, *supra* note 41, at 19.

criminal law experience."[71] Be this as it may, encouraging lawyers to partake in this novel professional duty is an option that cannot be overemphasized.

4. It is also suggested that civil society organizations should be encouraged to provide free legal aid and the nascent efforts of the different law schools should continue with a view to render sustainable service.
5. All those interested in the delivery of free legal service should do their best to ensure that the binding decision of the Cassation Division of the Federal Supreme Court resonates well throughout the judicial system.
6. At last, if the need to revise the country's pertinent laws arises, it will be advisable to draw from the principles enshrined in relevant international and regional instruments.[72]

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[71] NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INTERNATIONAL LEGAL AID AND DEFENDER SYSTEM DEVELOPMENT MANUAL: DESIGNING AND IMPLEMENTING LEGAL ASSISTANCE PROGRAMS FOR THE INDIGENT IN DEVELOPING COUNTRIES 132 (2010), as quoted in ETHIOPIAN LAWYERS' ASSOCIATION AND ETHIOPIAN YOUNG LAWYERS' ASSOCIATION, *supra* note 41, at 10-11.

[72] The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (2001), Art. H (2) and United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations, New York, 2013, can be adopted as models, for they contain detailed standards on the right to counsel.

# Reflections on African Democracy: The Rugged Terrain of the Past, Current Challenges and Issues of Contextualization

*Aschalew Ashagre Byness*[*]

**Abstract**

*In Africa, the expectation was that decolonization would be followed by democratization. However, this expectation was dashed particularly in the first three decades following the independence of most African countries. Because of this, serious pro-democracy movements appeared in the continent starting from the late 1980s which resulted in meaningful improvements. Nonetheless, the quest for genuine democracy has still been a real question throughout the continent. The purpose of this piece is to examine as to why the quest for democracy remained unfulfilled to date, the trend of democracy since the 1990s, the gains and the shortfalls, and the current challenges to democracy in the continent. It will also discuss whether accepting the Western Liberal democracy wholesale is right or not and whether there is a need to make some sort of contextualization so that democracy can gain ground in the continent. The author argues that despite the challenges and obstacles to democracy in the Continent, Africa has to work hard to make democracy real since no other form of governance seems to be more suitable to the continent. To this end, the countries of the continent should work aggressively and sincerely to entrench democracy by overcoming the challenges and removing the obstacles as much as possible. Nonetheless, the author believes that accepting the Western Liberal democracy without contextualization to the African reality does not seem to be appropriate.*

**Key terms***:* Africa, democracy, liberal democracy, challenges to democracy, contextualization

## Introduction

Although there is no illusion that democracy is a perfect and infallible form of governance, there is an overwhelming consensus that it is the most acceptable system of government in the world today. In the post-colonial Africa, there are various issues surrounding democracy which have attracted interests of various

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African and international scholars from different disciplines. As a result, numerous researches have been conducted on democracy in Africa. This does not, however, mean that issues and problems concerning democracy in this continent have been exhaustively dealt with. Because of the continental and international economic, political and social dynamics, the discussions and arguments on democracy are still unabated.

Therefore, my objective in this piece is to discuss selected issues pertaining to democracy in the context of Africa. By engaging in the doctrinal analysis of the existing literature, I attempt to explore as to why post-colonial Africa failed to realize democracy from the 1960s to the 1990s. The trend of democracy in Africa after the 1990s democratic movements and the gains made and shortfalls observed will also be discussed. Finally, I will comment on the important issue of whether it is wise for Africa to accept the Western Liberal democracy without modification or whether we need to engage in contextualization.

This note proceeds as follows. Following this introduction, Section 1 discusses the origin, definition, features, principles and types of democracy. The second section is devoted to the discussion of the history, processes and challenges of democracy in Africa. Under the third section, issues pertaining to contextualization of democracy in Africa will be discussed. Finally, a brief concluding remarks is provided.

## 1. Some Preliminary Points on Democracy

### 1.1. Origin and Definition of Democracy

It is generally agreed that the concept of democracy is traceable to ancient Greeks particularly the city state of Athens in the fifth century B.C. The word 'democracy' comes from the combination of two Greek words 'Demos' meaning people and 'Kratos' meaning power or rule. Democracy, therefore, means 'rule by the people' despite the fact that the Greek word was originally meant to refer to the poor or the masses.[1] The central political institution in Athens during the fifth and sixth centuries B.C was what was called the Assembly. This institution was comprised of 5000 to 6000 members.[2] It was open to every adult citizen though women, slaves and foreigners were excluded from being members of the Assembly. As far as its power was concerned, the Assembly was able to decide on almost all domestic issues by simple majority vote without any legal restrictions. Leaders of the Athenian Assembly were not elected; rather, they were chosen by lot as there was a strong belief that every citizen was able to hold public office.[3]

[1] KONRAD-ADENAUER-STIFTUNG, CONCEPTS AND PRINCIPLES OF DEMOCRATIC GOVERNANCE AND ACCOUNTABILITY: A GUIDE FOR PEER EDUCATION, 2 (2011), available at *www.Kas.De/Wf/Doc/Kas_29779-1522-2-30.Pdf?11121919022, accessed on November 30, 2017.*

[2] *Id.*

[3] *Id.*

However, in our modern world, the concept of democracy is one of the most perplexing concepts. This is so because the word is very popular. Its popularity has threatened the term's undoing as a meaningful political concept. Because democracy is considered as 'a good thing', it has come to be used as a little more than a 'hurray word' implying approval of a particular set of ideas or a system of rules. An author averred that democracy is perhaps the most 'promiscuous' word in the world of public affairs.[4]

It is argued that democracy as a concept is a much contested concept just like aesthetics, ethics and other political/moral concepts. Though it is possible to agree on basic elements of democracy, it is not possible to reach an agreement regarding its exact meaning, resulting in difference of understanding on its application.[5] It means different things to different people and societies starting from the classical times.[6] Hence, the term democracy has remained a relative concept since it no longer means the same to all peoples and cultures at all times.[7] To date, there has not been an acceptable scientific definition of democracy though it is agreed that free competition among political parties, periodic elections and respect for the fundamental freedoms of thought, expression and assembly are its defining features.[8]

According to Tony Smith, 'democracy pertains to free elections contested by freely organized political parties under universal suffrage for control of the effective centers of governmental power.'[9] However, this definition is not acceptable to some writers who believe that it is based on the Western concept of liberal democracy reflecting the Anglo-American cultural bias.[10] According to Richard Joseph, 'the dominant way of characterizing democracy according to a set of 'electoralist', 'institutionalist' and 'proceduralist' criteria must be expanded into a broader conceptualization.[11] On this point, Makinda proposed that 'democracy should be conceived as a way of government firmly rooted in the belief that people in any society should be free to determine their political, economic, social and cultural systems.'[12]

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[4] *Id*, at 10.

[5] In this regard, See Gavin Williams, *Democracy as Idea and Democracy as Process in Africa*, 88 THE JOURNAL OF AFRICAN AMERICAN HISTORY 339, 339-360 (2003).

[6] See Apollos Okwuchi Nwauwa, *Concepts of Democracy and Democratization in Africa Revisited*, *in* DEMOCRACY AND GLOBALIZATION 1, 4 (Charles Nieman ed, Kent State University Press, 2005).

[7] *Id.*, at 6.

[8] See Cherif Bassiouni, *Toward a Universal Declaration on the Basic Principles of Democracy: From Principles to Realization*, in DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT 1, 1-19 (Inter-Parliamentary Union1998).

[9] See TONY SMITH, AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE 20TH CENTURY 13(Princeton University Press 1994).

[10] Nwauwa, *supra* note 6, at 6.

[11] Richard Joseph, *Democratization in Africa after 1989: Comparative and Theoretical Perspectives*, 29 COMPARATIVE POLITICS 363, 365 (1997).

[12] Samuel M. Makinda, *Democracy and Multi-Party Politics in Africa*, 34 JOURNAL OF MODERN AFRICAN STUDIES 555, 557 (1996).

The foregoing discussion is hoped to show that the term democracy is a subject of varied understanding. That is why democracy may mean

> a system of rule by the poor and disadvantaged; a form of government in which people rule themselves directly and continuously without the need for professional politicians or public officials; a society based on equal opportunity and individual merit, rather than hierarchy and privilege; a system of welfare and redistribution aimed at narrowing social inequalities; a system of decision making based on the principle of majority rule; a system of rule that protects the rights and interests of minorities by planning checks upon the power of the majority; a means of filling public offices through competitive struggle for the popular vote; a system of government that serves the interests of the people regardless of their participation in political office.[13]

### 1.2. Features and Principles of Democracy

Since democracy is more than a set of specific government institutions, it hinges on a well understood group of values, attitudes and practices. These values, attitudes and practices take different forms and expressions depending on cultural and societal differences around the world.[14] Although it is not possible to exhaustively provide all basic features of democracy here, writers have enumerated the most important ones. Accordingly, the following have been recognized as the basic features of democracy. The first feature is the presence of a government in which power and civic responsibility are exercised by all adult citizens directly or through their freely elected representatives.[15] The second feature of democracy is the principle of majority rule where decisions are made by majority and have to be accepted by all, though the view points of minority should be respected and protected.[16] The third feature of democracy is decentralization of power to guard the people against all powerful central governments. Fourthly, democracy is characterized by the protection of human rights such as freedom of speech, religion, the right to equal protection under the law, the opportunity to organize and participate fully in political, economic and cultural life of society.[17] The conducting of free and fair elections regularly which are open to all citizens of voting age is also another feature of democracy.[18]

[13] Concepts and Principles of Democratic Governance and Accountability, *supra* note 1, at 8.
[14] *Id*, at 4.
[15] Nwauwa, *supra* note 6, at 11.
[16] *Id.*
[17] *Id.*
[18] *Id.*

## 2. Democracy in Africa: History, Process, Challenges and Issues of Contextualization

### 2.1. Sketching the Background: Indigenous Roots, Foreign Occupation and Era of Despotism

It is widely accepted that democracy was not unknown to pre-colonial African societies. According to writers, there was radical republicanism of the lineage system of government and decentralization of power. Even in the case of centralized kingdoms, there existed major forums that would enable citizens to challenge the royals and their bureaucracies.[19] In this regard, 'the evidence suggests that, while there was inequality in the societies of pre-colonial Africa, those who held positions of privilege had to assure that the benefits created by societies were widely shared.'[20]

When imperial powers occupied Africa, they imposed local rulers on societies that had long resisted political authority. In the case of societies which had chiefs, the colonial powers either removed the chiefs and imposed their own rulers or forged opportunistic alliances with chiefs exercising power over their societies.[21] As it is well documented, chiefs got the opportunity to maneuver in the contested space between the colonizers and the people with the purpose of pursuing their own agenda. The chiefs resorted to exploiting their political positions to acquire and sell land, levy and collect tax revenues, and promote the benefits of their kin within the framework of the new political order. The emergence of colonialism enabled these chiefs to avoid many of the restraints which could limit their powers before the advent of colonialism.[22]

As a matter of fact, the 20th century was full of global conflicts. Of these global conflicts, the Cold War Era, which emerged following the conclusion of the Second World War, was important as it brought the Soviet Union and the USA to the center of the global stage. Despite their ideological differences, these two countries helped Africans to free themselves from the European colonial dominance.[23] The anomaly, however, was the African forces that took over the colonial states were not able to endorse open political competition, an important feature of democracy, while they celebrated self-government and end of colonial rule. In addition, they declined to give recognition and protection to the rights of political expression and public assembly.[24] Opposition political parties also encountered serious problems in the hands of their fellow Africans. Although many African countries gained independence starting from the 1960s, several

[19] Robert H. Bates, *Democracy in Africa: A Very Short History*, 77 SOCIAL RESEARCH 1133, 1134 (2010).
[20] *Id.*
[21] *Id*, at 1135.See Also GLUCKMAN, M., CUSTOM AND CONFLICT IN AFRICA (Blackwell 1955).
[22] Robert Bates, *supra* note 19, at 1135.
[23] *Id.*
[24] *Id.*

countries established a single party system. To be specific, by 1960, nine countries formed one party regimes while by 1970s, seven countries imposed single party rule on their people.[25]

Throughout the second half of the 20th century assumption of political power by the military was a common phenomenon in the continent.[26] Military intervention in the form of coup d'état was the visible and recurrent feature of the post-colonial Africa.[27] As a result, it was only few democratically elected presidents that were able to complete their terms without being removed from power by a military coup.[28] The military establishment became a strong force in the political process and it arrogantly believed that it had an unquestioned right to make an intervention in the political process.[29] However, military regimes had their own justifications for their intervention in politics and resorting to coups. For instance, they justified coups based on a need to save a given country from breaking up or the need to address economic and social problems prevailing in the given country. Military regimes seized power declaring that their intervention was meant to rectify the ills of the government removed by them.[30] When military regimes assumed power, they made clear commitments to respect civil rights, to promote economic development and to lay a firm foundation for an enduring democratic order. These false promises were being made with a view to capturing the attention of the general public to consider them as a messiah capable of solving all the problems of the country concerned.[31] Military regimes in Africa were built on the theory of legal positivism which believed to rule by force disregarding the consent of the governed. They were essentially known for dictatorship whose *modes operandi* was absolutely incompatible with constitutional democracy.[32]

In governing a nation, the military was omnipresent giving no recognition to any constitutional restraint. Military regimes had a clear contempt of law and legal rules. Rather, they cared only about achieving their own objectives. It was unthinkable to talk about accountability and respect for human rights. The courts played no role to ensure the legality of governmental actions. Under such military regimes, the ruling dictator viewed law as an instrument employed by the state for the purpose of preservation of authority. The sole purpose of the law was to consolidate state power and to induce compliance under the threat of sanctions. As a result, laws and institutions that would facilitate the enjoyment of rights were not

[25] *Id.*
[26] See Paul Beckett and Crawford Young, *Introduction: Beyond the Impasse of 'Permanent Transition*, *in* DILEMMAS OF DEMOCRACY IN NIGERIA 1, 1 (Paul A. Beckett & Crawford Young eds., 1997).
[27] See SAMUEL DECALO, COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS (2nd ed., 1990).
[28] Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 573, 585(2000).
[29] *Ibid.*
[30] *Id*, at 586.
[31] *Id.*
[32] *Id.*

able to serve their purposes since they were either abrogated or seriously circumscribed.[33] Because military regimes were working for the sole purpose of achieving their own short range political and economic objectives, they were not interested in establishing constitutional democratic orders. To achieve their objectives, they were engaged in violating constitutional and civil liberties.[34]

For instance, in Nigeria, all military regimes promulgated a decree called the Constitution Suspension and Modification Decree which conferred plenary power on the military to disregard or dismantle the then existing legal and political institutions. As a result, parts of the constitution were suspended, abrogated and modified; political parties were disbanded and civil liberties were severely restricted. Such decree would often herald the desire of the military to neutralize legal rules and processes that would otherwise harness the undue exercise of state power. The military regime was able to accomplish these using four distinct mechanisms. These were: the arrogation to itself of legislative and executive power, the insulation of legislative and executive actions from judicial review, the abridgement of civil liberties and the assigning of adjudicatory functions to tribunals.[35]

### 2.2. The Struggle for Democracy in Africa

In Africa, the struggle for genuine democracy is not a recent phenomenon. Rather, it started immediately following independence from the colonial domination. Unfortunately, the African masses soon realized the reluctance of the new leaders of Africa, who inherited power from the colonial masters, to fulfill the promises of nationalist struggles although they had high expectation for democracy. Contrary to the expectation of the African masses, the new rulers firmly occupied the seats of power and controlled allocation of resources and power. Consequently, there was concentration of resources in urban centers resulting in marginalization of rural people and areas. Though such marginalization affected the whole people, women in particular were victims of marginalization.[36] To mention but few examples, in Kenya under Jomo Kenyatta, Nigeria under Abubakar Tafawa Balewa, Ghana under Kwame Nkrumah and Senegal under Leopold Sedar Senghor as well as in other post-colonial societies, the relationship between the people and the leaders was not harmonious; rather, it was characterized by antagonism, suspicion and violence.[37]

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[33] *Id.*, at 591.

[34] *Id.*

[35] See generally Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes*, 10 HARVARD HUMAN RIGHTS JOURNAL (1997.)

[36] Julius O. Ihonvbere, *Where Is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy*, 43 AFRICA TODAY 343, 344 (1996).

[37] *Id.*

On account of absence of trust in the elites (the leaders), several self-help associations, trade unions and opposition political associations mushroomed in several countries of the continent. Although decolonization was originally thought to be important bedrock for democracy and democratization, people came to consider independence as a kind of punishment. This is because independence was soon followed by misery, pain, dashed hopes, terror, exploitation, marginalization, frustration and hopelessness.[38] These bad consequences in post independence Africa came into the picture as a result of African leaders becoming cruel dictators and life presidents. There were leaders who consider themselves as little gods. Hence, women, students, workers, the unemployed and professionals began to call for a genuine second independence - realizing democracy and democratization in the continent.[39]

The democracy movement in Africa was a social protest motivated by various factors. Chief among these factors are: the failure of the post-independence states to live up to the expectations of the people, the inability of the state to build hegemony and to promote national unity, the unwillingness of the state to resolve minority issues, inability of the state to promote development in rural areas, to provide infrastructure and basic needs and to democratize the political landscape.[40] In addition, the struggles for democracy in the 1980s were encouraged by the emergence of new organizations focusing on human rights, gender equality, environmental protection, democratization and the like.[41]

Despite their costs in terms of material and human losses, the new struggles for democracy in the African Continent did not remain fruitless. Rather, they produced a number of positive consequences.[42] The major ones are the following. First, the struggles encouraged challenges to authoritarian military and repressive one party regime. Secondly, they encouraged the appearance of new political parties and movements; thirdly, they facilitated the re-composition or rejuvenation of political and social movements that were seriously suppressed, marginalized and intimidated in the past; fourth, because of the struggles, many political organizations engaged in the development and support of political programs; fifth, as a result of the struggles, new leaders emerged. These new leaders were not part of the independence struggle having no connection or affiliation with the discredited detested authoritarian regimes; sixth, as a result of the new struggles for democracy, the political landscape was opened up for articulation of alternative political programs in many African states such as Togo, Nigeria, Kenya, Malawi and the like. Because of this, many Africans who were abroad came back to their respective home countries; there appeared debating on ideas openly. Freedom of

[38] Ihonvbere, *supra* note 36, at 345.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*, at 349.

the press was also the fruit of the opening up. Academic institutions were liberated from siege and considering intellectuals as enemies of government was reduced. Seventh, the struggles resulted in the reconstruction of ideological agenda free from the leftist or rightist hard lines of the 1960s and 1970s.[43]

Nonetheless, the new movement for democracy faced various challenges resulting in absence of sustainable democracy in the continent still now. This is basically attributable to the fact that many new leaders were nothing more than emergency democrats who tried to pretend to be democrats to the international community and exploit the political frustration and pains of the people. Because these leaders had abnormal fixation for power, they suppressed democracy and spent much money, time and energy for the purpose of liquidating real and imaginary opposition. They were also willing to share power with the 'devils of yesterday' as was witnessed in several countries.[44] The problems of the new political leaders were best summarized by Nzongula-Ntalaja in the following words:

> Like most of the petit-bourgeois leaders of the independence struggle, the new leaders are for the most part self-centered seekers of political power and material benefits. Their main preoccupation [was] to position themselves for political office in the new dispensation of the post-authoritarian era. Evidence from both failed and aborted transitions (Zaire, Togo, Kenya, Gabon, Cameroon, Ghana, Sudan) and countries where elected governments have replaced the former dictators (Benin, Mali, Niger, Congo, CAR, Zambia, Malawi) suggests that there is little commitment to democratization as a process within the political class as a whole, even among prominent leaders of the democratic opposition or the democracy movement. Both power-holders and those seeking to replace them share a common political culture, one *that puts less emphasis on respect for the democratic process of open debate and transparent decision making than on deal making among politicians*. [45] (Emphasis mine)

According to Nzongula-Ntalaja, the brand of politics effectively practiced by many of the new movements reflected a political culture where principle gave way to opportunism. Decisions taken at democratic gatherings could easily be changed by politicians who were determined to serve their own self-interests.[46] The thirst for power encouraged 'political prostitution, grandstanding corruption, intolerance and strategic alliances that directly compromised the ability of the new movements and parties to make a difference. Motivated by hunger for power, the new leaders were engaged in manipulating and dividing the opposition.'[47]

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[43] *Id.*

[44] *Id.*, at 353.

[45] See Georges Nzongola-Ntalaja, *Democratic Transitions in Africa*, 9 NEWSLETTER OF THE AFRICAN ASSOCIATION OF POLITICAL SCIENCE 1, 2 (June-September 1995).

[46] *Id.*, at 3.

[47] Ihonvbere, *supra* note 36, at 355.

Although there was hope in the new democratic movements and struggles, they faced various serious challenges and democracy remained a nightmare at the close of the 20th century. Some of the major challenges and limitations in this regard were the following. First, the new movements were not able to nurture and win the support of new political constituencies which could have extricated the movements from elite politics and the well-established manipulation and exploitation of primordial differences and loyalties.[48] Secondly, the prodemocracy movements and the new political parties devoted much of their time to get support and legitimacy from the outside world.[49] Thirdly, because the prodemocracy movements were in search of foreign exchanges to set up their political agendas, they became dependent on international funding agencies which in turn damaged the originality, creativity and effectiveness of the new governments.[50] Fourth, the new movements had a difficult time to mobilize their members because they were largely based in urban centers, their programs were elitist, they articulated issues that could not reflect the struggles and aspirations of the majority, of heavy reliance on ethnicity, region, religion so on and so forth.[51]

### 2.3. A Sketch of Trends of Democracy in Africa since the 1990s

It has earlier been indicated that democracy did not take ground in the continent throughout the second half of the 20th century despite the fact that there were various struggles towards this end. As we know, Africa was late adopter of democracy in its modern sense though there were indigenous roots to democracy. Before the 1990s there were only handful of countries which adopted multiparty system and multiparty election. Mentionable in this regard were Botswana, Mauritius, Senegal and the Gambia.[52] After the 1990s multiparty elections rapidly spread across the continent because of internal and external pressures. As far as the internal pressures are concerned, protests and demonstrations by civil society organizations, discontented students and labor organizations are mentionable while the influences of donors and international financial institutions have been external pressures.[53]

However, there have not been genuine democratic transitions since many of the political elites have embraced democracy as a tactic to avoid full reform programs.

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[48] See Ernest Wamba-Dia-Wamba, *Beyond Elite Politics of Democracy in Africa*, 6 QUEST: PHILOSOPHICAL DISCUSSIONS 28-43(June 1992).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] STEPHANIE M. BURCHARD, DEMOCRACY TRENDS IN SUB-SAHARAN AFRICA, FROM 1990 TO 2014 11 (Institutte of Defense Analysis, 2014), Available at https://www.Ida.Org/Idamedia/Corporate/Files/Publications/Ida.../Iad/.../D-5393.Pdf, accessed on January 2, 2018. Unfortunately, The Gambia experienced a coup in the 1990s and freedoms were extremely indeed under the reign of Yahiya Jameh until he was removed from power by Adama Baro in an election held in 2015.

[53] In This Regard, See Thad Dunning, *Conditioning the Effects of Aid: Cold War Politics, Donor Credibility, and Democracy in Africa*, 58 INTERNATIONAL ORGANIZATION 409, 409-423 (2004).

Consequently, many African countries have seen incomplete democratic transition.[54] Because of the incompleteness of the transition, the political institutions exist on paper lacking capacity in practice.[55] The transitions to democracy have not constrained the powers of the executive resulting in the presence of what is called *hyper-presidentialism*, which has dwarfed other political institutions.[56] For instance, many African presidents have extensive appointment powers over other branches of government. In addition, the presidents have unlimited rights of legislative initiation. Such powers of the presidents have made the legislatures to serve as a rubber stamp that allows the executive to do whatever it wants to.[57] Other political institutions necessary for the proper functioning of a balanced democracy are compromised. Political parties are also relatively weak serving only the interests of individual politicians to access political power.[58] Worst of all, the judiciaries have been given the least attention and are probably the least developed democratic political institutions in many countries of the continent.[59]

Because of the incomplete transition to democracy, the military has once again resorted to military coups to assume political power.[60] Writers argue that the military today is interested in political intervention for the purpose of curtailing the powers of an overly aggressive power-hungry executive and hence some writers refer such coups as 'democratic coups' or "democratic reset.' For instance, the military intervened in Burkina Faso in 2014 and in Niger in 2010 following the outbreak of popular protests in each country. The protests in each country were caused by the attempt of the presidents of these countries to circumvent the constitution to stay in power longer than prescribed in the respective constitutions.[61]

Although African elites are reluctant to erect substantive and procedural democracy in the continent, studies show that the general public is anxious to see

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[54] See Victor O. Adetula, *Measuring Democracy and Good Governance in Africa: A Critique of Assumptions and Methods*, *in* AFRICA IN FOCUS: GOVERNANCE IN THE TWENTY-FIRST CENTURY (Kwandiwe Kondlo And Chinenyengozi Ejiogu eds., Hsrc Press 2011).

[55] See Gabrielle Lynch and Gordon Crawford, *Democratization in Africa 1990–2010: An Assessment*, 18 DEMOCRATIZATION 275, 275-310 (2011).

[56] See Oda Van Cranenburgh, *'Big Men' Rule: Presidential Power, Regime Type and Democracy in 30 African Countries*, 15 DEMOCRATIZATION 952, 952-972 (2008).

[57] *Id.*

[58] Giovanni M. Carbone, *Political Parties and Party Systems in Africa: Themes and Research Perspectives*, 3 WORLD POLITICAL SCIENCE REVIEW (2007). See also Matthias Basedau, *Survival and Growth of Political Parties in Africa: Challenges and Solutions towards the Consolidation of African Political Parties in Power and Opposition*, Conference Paper, February 27 – March 1, 2005, Accra; La Palm Royal Beach Hotel, Accra, Organized By The Friedrich-Ebert-Stiftung (FES) and the Institute of African Affairs (Institut Für Afrika-Kunde, Iak), Hamburg, Germany, available at: www.Library.Fes.De/Pdf Files/Bueros/Ghana/50248.Pdf, accessed On February 2, 2018.

[59] Regarding the Problems Surrounding judicial independence in developing countries see Vyas Yash, *The Independence of the Judiciary: A Third World Perspective*, 11 THIRD WORLD LEGAL STUDIES (1992).

[60] Gabrielle Lynch and Gordon Crawford, *supra* note 56. See also Kristen A. Harkness, *The Ethnic Army and the State: Explaining Coup Traps and the Difficulties of Democratization in Africa*, 60 JOURNAL OF CONFLICT RESOLUTION 587, 587-616 (2016).

[61] Burchard, *supra* note 53, at 15.

democracy being genuinely put in place. In a survey conducted between 2010 - 2012, seventy two percent of Africans surveyed made it clear that democracy is preferable to other forms of government. [62] As far as the existing quality of democracy is concerned 19 percent said that their country should be considered a full democracy, 36 percent said that their country was full democracy with minor problems and 40 percent said that their country was a democracy with major problems or not a democracy at all.[63]

### 2.4. Challenges to Democracy in Africa

Despite the various problems, it is hoped that Africa will have no choice other than democracy. However, it has to be borne in mind that there are grim challenges that Africa has to grapple with even in the 21st century. Brief explanation of these challenges follows.

#### 1) Political and Leadership Challenges

It is widely agreed that for most African people the new system of governance is suffering from lack of good faith in certain leaders and administrators. Some politicians who have gained leadership positions have tried to corrupt the democratic system of governance just for the sake of satisfying their lust for power and money. These leaders disregard constitutionalism; they try to prolong their stay in power by manipulating constitutional term limits; they are also keen to convert a multiparty democracy into a one-man party state with the purpose of abusing separation of power, ignoring rule of law, undermining judicial independence, interfering with the fundamental rights and promoting parochial interests.[64] The other political challenge is how to avoid the politics of exclusion. Since Africa inherited the "winner-takes-all" mentality from the Western World, there has not been a practice of power sharing or the involvement of other party members in government powers, even in a situation where doing so would serve the national interest.[65] The refusal of governments to adhere to the good governance agenda is another political challenge in Africa. Needless to say, democracy cannot succeed in the absence of viable opposition, equitable decentralization, free, pluralistic and independent media, civil society organizations which have unfettered freedom and a strong commitment to the fight against corruption. To our dissatisfaction, however, all these prerequisites of democracy have not become real in Africa.[66] The bad political leadership manifests itself in the inclination of leaders to foster

[62] *Id.*, for further information, see Afro-Barometer Round 5 Data Analysis; data available at http://www.Afrobarometer.org; accessed on December 16, 2017.

[63] *Id.*

[64] A.A. Adegboye, *Consolidating Participatory Democracy in Africa: The Challenges and the Way Forward*, 9 EUROPEAN SCIENTIFIC JOURNAL 241, 246 (January 2013). See Also Usman A. Tar, *The Challenges of Democracy and Democratization in Africa and Middle East*, 3 INFORMATION, SOCIETY AND JUSTICE 81, 81-94 (July 2010).

[65] *Id.*

[66] *Id.*

ethnic or tribal ascendency in political parties, the military and security forces.[67] The most persistent and terrible leadership failure is the manipulation of election results which has been described as 'rigged election', or 'election manipulation', or 'sham election', or 'stolen verdict' or 'stolen mandate.'[68]

**2) Foreign Interventions**

Though there are some positive aspects of foreign interventions, it has remained to be a challenge to African democracy. Recent research findings have clearly indicated that foreign intervention has the potential to belittle basic ideas of democracy and respect to fundamental human rights.[69] For instance, the sale of arms by state and non-state actors to warring factions in South-Sudan, Democratic Republic of Congo and Central African Republic has aggravated the conflict creating a ground where the seeds of democracy cannot germinate and grow.[70] Chinese increased sale of equipment of torture to several African countries could be inadvertently adding fuel to the fire which has been destroying the foundations of human rights in the continent.[71] Under the guise of the threat of terrorism, several African governments have issued anti-terrorism laws whose implementation has resulted in the abuse of minority groups and obstructing the activities of civil societies and opposition political Parties. In addition, these laws have restricted fundamental rights and freedoms.[72]

**3) Ethnicity**

The problem of ethnicity is not a phenomenon that emerged in the 21st century Africa since it draws its roots from colonial Africa.[73] Currently, negative ethnicity is another important contributing factor inhibiting democratic governance in Africa. Political organizing has been undertaken on ethnic lines as is the case in Kenya[74]

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[67] Japhace Poncian and Edward S. Mgaya, *Africa's Leadership Challenges in The 21st Century: What Can Leaders Learn from Africa's Pre-Colonial Leadership and Governance?*, 3 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE STUDIES 106, 106-112, (May 2015).

[68] Ojo Olawole, Adewunmi E. F. And Oluwole Emmanuel, *Electoral Malpractices and Problems in Africa: A Critical Analysis*, 1 JOURNAL OF RESEARCH AND DEVELOPMENT 11, 11-21 (2013). See Also Khadijah Sanusi Gumbi, *Rigged Re-Elections in Africa and the Legitimacy of Democratic Regimes: A Nigerian Scenario*, 4 INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 237, 237-239 (April 2014).

[69] See William Easterly, Shanker Satyanath and Daniel Berger, *Superpower Interventions and Their Consequences for Democracy: An Empirical Inquiry*, available at www.*Research.Policyarchive.Org/14958.Pdf, accessed on January 15, 2018.*

[70] Adhere Cavince Otieno, Challenges of Consolidation Democratic Governance In 21st Century Africa: The Role Of China (September 2017) (Unpublished MA Thesis, University of Nairobi) www.*Erepository.Uonbi.Ac.Ke/.../Adhere_%20challenges%20of%20consolidating%20democrpdf., a*ccessed on December 6, 2017, P.66.

[71] *Id.*

[72] *Id.*

[73] See Bruce J. Berman, *Ethnicity and Democracy in Africa*, JICA Working Paper, Ethnic Diversity and Economic Instability in Africa: Policies for Harmonious Development (November 2010), available at https://www.Jica.Go.Jp/Jica-Ri/.../Workingpaper/...Att/Jica-Ri_Wp_No.22_2010.Pdf*, accessed on January 3, 2018.*

[74] See Frank Holmquist and Mwangi Wa Githinji, *The Default Politics of Ethnicity In Kenya*, 16 THE BROWN JOURNAL OF WORLD AFFAIRS 101, 101-117 (2009 ).

and Ethiopia.[75] Ethnicity is said to be a challenge to democracy because it goes against meritocracy, creates disunity among the populace and leads to instability. There are a number of examples in Africa in this regard.[76] For instance, the 1994 genocide in Rwanda was a result of negative ethnic politics between Hutus and Tutsis;[77] Kenya was plunged into violence in the aftermath of the 2007 election predominantly organized and executed through ethnic Balkanizing.[78] However, we have to bear in mind that although ethnicity is a serious challenge to democracy, we cannot build democracy in the continent by totally ignoring ethnic differences. Rather what we have to do is trying to strike a balance between national unity and ethnic diversity.[79]

**4) Poverty**

Though it is believed that there has been economic progress in the continent in the 21st century, the number of people living in extreme poverty has increased since 1990. In this regard, studies demonstrate that about 330 million people were in extreme poverty in 2012 in contrast to 280 million people in 1990.[80] Hence, poverty in Africa has made the prospect of democracy very unlikely since studies have established that better performing economies have registered better governance and democratic ideals. This is because poverty afflicted population is vulnerable to manipulations by politicians and other state operators. Poverty also undermines popular sovereignty since there could be electoral malpractices through buying of votes.[81] Owing to poverty, citizens cannot be in a position to acquire critical empowerment tools such as education, making the general public incapable of having a clear understanding of intricacies of modern governance. [82]

[75] See Edmond J. Keller, *Ethnic Federalism and Democratization in Ethiopia*, 21 HORN OF AFRICA 30, 30-43 (2003).

[76] Otieno, *supra* note 70, at 67.

[77] *Id*.; See Also Paul Magnarella, *Explaining Rwanda's 1994 Genocide*, 2 HUMAN RIGHTS AND WELFARE 25, 25-34 (2002).

[78] See Opondo P.A, *Ethnic Politics and Post-Election Violence of 2007/8 in Kenya*, 4 AFRICAN JOURNAL OF HISTORY AND CULTURE 59, 59-67 (2014). There are also many more examples in Africa although it is not possible to mention all of them here because of time and space constraints.

[79] In this regard, see Thomas Hylland Eriksen, *Ethnicity versus Nationalism*, 28 JOURNAL OF PEACE RESEARCH 263, 263-278 (August 1991).

[80] See World Bank Report, *While Poverty In Africa Has Declined, Number of Poor Has Increased*, available At http://www.Worldbank.Org/En/Region/Afr/Publication/Poverty-Rising-Africa-Poverty-Repo, accessed on February 2, 22018. See Also Kathleen Beegle, Luc Christiaensen, Andrew Dabalen and Isis Gaddis, *Poverty in a Rising Africa,* available at www.Un.Org/Africarenewal/...Africarenewal/.../Poverty%20in%20a%20rising%20afric.., *accessed on January 20, 2018*.

[81] Michael Bratton, *Poor People and Democratic Citizenship in Africa*, AfroBarometer, Working Paper No.56, available at https://www.Files.Ethz.Ch/Isn/92114/Afropaperno56_Poor%20people.Pdf, accessed on January 23, 2018.

[82] See Clive Harber, *Education, Democracy and Poverty Reduction in Africa*, 38 COMPARATIVE EDUCATION 267, 267-276 (2002).

**5) Corruption**

Transparency and accountability are among the most important pillars of democracy which are important instruments of combating corruption, be it in Africa or elsewhere in the world. As such, the African people expect the new leaders to promote transparency and accountability which in turn help to control corruption and corrupt practices.[83] Nonetheless, contrary to the expectations of African citizens, public officials and political leaders have immersed themselves into the quagmire of corruption. They have been engaged in illegal, immoral and dishonest practices. Studies have brought to light that corruption and plunder of public resources has remained an important factor hindering democracy in the continent.[84] Worst of all, political corruption is the most important menace to democracy in Africa and other developing countries.[85]

## 3. Issues Pertaining to Contextualization of Democracy in Africa

Despite the fact that there have been various attempts to entrench democracy in Africa, it has failed to properly grow roots. Because of the failure of democracy in Africa, one is obliged to ask whether there is a need to resort to contextualization of democracy so that it may flourish in the continent. This is one of the most important areas which have triggered various arguments among writers in the field. Concerning this issue, there have been three salient schools of thought which are worth discussing here. These are the universalist school of thought, the traditional School of thought and the eclectic approach.

**1) The Universalist Approach and Liberal Democracy: Against Contextualization?**

According to scholars who have written on liberal democracy, such kind of democracy is a model which is universally applicable everywhere in the world and hence it is the most desirable model of democratic government to be embraced by any society. In this regard, writers argue that with the collapse of communism and the victorious emergence of the USA from the Cold War, liberal democracy is globally victorious.[86] It is also argued that industrial development inevitably follows a universal pattern, which is set by the leading capitalist economics of the West - a process which will guarantee an increasing homogenization of all human societies irrespective of their historical origins and cultural differences. Moreover, it is

[83] See Kwabena Gyimah-Brembopong, *Corruption, Economic Growth and Income Inequality in Africa*, 3 JOURNAL OF ECONOMIC GOVERNANCE 193, 193-209 (2002).

[84] Robert Mattes and Michael Bratton, *Learning about Democracy in Africa: Awareness, Performance and Experience*, 51 AMERICAN JOURNAL OF POLITICAL SCIENCE 192, 192-217 (2007).

[85] See Mark E. Warren, *What Does Corruption Mean in a Democracy*?, 48 AMERICAN JOURNAL OF POLITICAL SCIENCE 328, 328-334 (April 2004).

[86] Ademola Kazeem Fayemi, *Towards an African Theory of Democracy*, 1 THOUGHT & PRACTICE 101, 107 (June 2009). In this regard, the following two works are very much useful, FAKUYAMA, FRANCIS, THE END OF HISTORY AND THE LAST MAN (Penguin 1992), GYEKYE, K., TRADITION AND MODERNITY: PHILOSOPHICAL REFLECTIONS ON THE AFRICAN EXPERIENCE (Oxford University Press 1997).

contended that all countries undertaking economic modernization must increasingly resemble one another; they must unite nationally on the basis of a centralized state; they must urbanize and replace traditional forms of social organizations with economically rational ones based on function and efficiency and provide for universal education.[87]

When we come specifically to Africa, we find scholars who vehemently argue in favor of liberal democracy. Such writers argue that the problem of underdevelopment in many African countries is not attributable to embracing liberal democracy in their political orderings. It is rather argued that liberal democracy has an inherent potential of guaranteeing development in Africa. Temporary failures of democracy and the economy are attributable to the fact that many African countries are in haste in the struggle to consolidate their democracies and impatient in achieving the developmental pace of the West. It is pointed out that older democracies in the West had certain conditions which facilitated the consolidation of democracy such as economic prosperity and equality enhanced by early industrialization, a modern and diversified social structure where primary roles are played by the middle class, national culture that tolerates diversity and prefers accommodation and a long time span of practicing democracy.[88]

**2) The Traditional School of Thought**

This school of thought is the exact opposite of the universalist school of thought. According to this school, democracy, as it has been practiced in Africa, cannot be sustained and is not capable of solving the bulk of crises the continent is known for. Hence, the proponents of this school believe that an indigenous democratic system, which is more natural to African culture, should be put in place replacing Western idea of democracy which has been struggling to gain ground in the continent.[89]

The question, however, is: do Africans have any indigenous democracy that is capable of replacing the western liberal democracy? It is argued that democracy was not alien to the African society in the pre-colonial period since various societies in different parts of the continent had their own democratic systems.[90] In this regard, Owusu wrote that:[91]

> In the long period preceding colonial rule, Africans experimented with a variety of political structures and constitutions that ranged from direct and

[87] *Id.*

[88] *Id.*

[89] See Nyambe Sumbwa, *Traditionalism, Democracy and Political Participation: The Case of Western Province, Zambia*, 21 AFRICAN STUDY MONOGRAPHS 105, 105-146 (July 2000); See Also Ikechukwu Anthony Kanu, *African Traditional Democracy*, 1 IGWEBUIKE: An African Journal of Arts and Humanities 1, 1-8 (June 2015).

[90] *Id.*

[91] Maxwell Owusu, *Domesticating Democracy: Culture, Civil Society, and Constitutionalism in Africa*, 39 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 120, 135 (January 1997).

> representative democracy to various forms of strong centralized kingdoms and centralized states and state less lineage and age based systems of power distribution.

Other authors wrote that the structure of an African state demonstrates that kings and chiefs used to rule by consent. Although pre-colonial Africans recognized that men are not free from abuse of power, there were measures which were to be taken as a response to abuse of power. The measures, which would range from popular disapproval to movements of succession or revolt, were usually led by members of the royal family or subordinate chiefs.[92]

Hence, the traditionalists argue for the absolute replacement of liberal democracy by an indigenous African democracy. To begin with, Wambia dia Wamba contended that western multiparty system is unrealistic for the African reality. Instead, he advocates a democracy from below rather than imported democracy from the Western World.[93] According to Moshi and Osman, 'liberal democracy has failed in many parts of Africa since the western style political parties organize mainly on class interest which is totally missing in Africa. In addition, these writers argued that the western style multiparty politics ignores the cultural values of the African people which have resulted in the degeneration of the electoral politics into ethnic and communal conflicts.'[94] By the same token, Eboh argues that Western style of democracy is not a true expression of contemporary African political culture. Hence, he argues that there should be an African democracy.[95] Moreover, Kwasi Wiredu argued that Africa's political salvation cannot come from the Western majoritarian democracy in which the party that wins more seats at the elections becomes the ruling party which does not accommodate the concerns of other groups of society.[96]

### 3) Eclectic Approach to Democracy in Africa

As indicated earlier, the universalist and traditionalist approaches are extremely polarized. The golden mean, therefore, is what is called the Eclectic School of Thought which claims that though it is important to adopt certain democratic values and principles from traditional African culture, it is not wise to completely ignore the democratic ideals and practices that have been developed in other cultures.[97] In this regard, Ruch argues that African democracy must not be a blind

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[92] *Id.*, at 136.

[93] Wamba, Ernest Wambia Dia, *Democracy in Africa and Democracy for Africa*, *in* PHILOSOPHY AND DEMOCRACY IN INTERCULTURAL PERSPECTIVE 129 (Kimmerle, Heinz and Fraz M. Wimmer eds.,, Amsterdam, Rodopi 1990).

[94] See DEMOCRACY AND CULTURE: AN AFRICAN PERSPECTIVE (Moshi Lioba and Abdulahi A. Osman, eds.,, Lagos, Adonis & Abbey Publishers 2008).

[95] See Marie Eboh, *Is Western Democracy the Answer to the African Problem?, in* PHILOSOPHY AND DEMOCRACY IN INTERCULTURAL PERSPECTIVE, (Heinz, Kimmerle and Fraz M. Wimmer eds., Amsterdam: Rodopi 1990).

[96] Kwasi Wiredu, *Tradition, Democracy and Political Legitimacy in Contemporary Africa*, *in* REWRITING AFRICA: TOWARD RENAISSANCE OR COLLAPSE? (E. Kurimoto, ed., Osaka: The Japan Center for Area Studies, 2001).

[97] See K GYEKYE, TRADITION AND MODERNITY: PHILOSOPHICAL REFLECTIONS ON THE AFRICAN EXPERIENCE, (Oxford, Oxford University Press 1997).

return to traditional Africa; nor should it be a replication of Western modes of governance. He contends that Africa should map out its own original path without moving from one extreme to another.[98] In addition, it is also argued that some of the evident democratic elements found in indigenous African socio-political organizations should be nurtured and refined for contemporary application to realize political stability in the continent. Hence, scholars argue that 'we should find ingenious ways and means of hammering the autochthonous democratic elements as well as elements inherited from foreign source into acceptable and viable democratic form in the setting of the modern world.'[99]

According to Owlabi, democratic as well as anti-democratic values may exist in traditional cultures. Therefore, he argues that in order to lay a solid foundation for Africa, our return to the past should be seriously cautious in order to avoid falling into a trap venerating an obsolete and anachronistic culture. He rejects the extreme position of the traditionalists as well as the universalists and he suggests that a blend of African as well as Western democratic values may be a useful tool to install a workable African democracy.[100]

## Concluding Remarks

Many African countries achieved their independence from colonialism in the second half of the 20th century. Following this remarkable achievement, the aspiration of Africans was to build democracy since independence from colonial administration would be meaningless in the absence of democracy. However, the aspiration of the African people for democracy was dashed since the era of colonialism was replaced by an era of despotism. In other words, the aspiration for democracy remained fruitless at least in the first three decades after independence - from the early 1960s to end of the 1980s - since the post independence leaders of African countries were not willing to embrace democracy. Rather, military coup d'état was the hallmark of many African countries in the period under consideration.

Starting from the late 1980s, however, there have been serious movements for democracy motivated by internal and external factors. It is possible to conclude that these movements have produced positive effects towards democracy. There have been encouraging trends of democracy and in many parts of the continent though the achievements vary from one country to another. However, the gains are also accompanied by various shortfalls; there are serious rollbacks of democracy in several African countries. In other words, the pace of democracy is not as such admirable given that democracy is very much indispensable for the

[98] E.A RUCH AND K.C ANYANWU, AFRICAN PHILOSOPHY: AN INTRODUCTION TO THE MAIN PHILOSOPHICAL TRENDS IN CONTEMPORARY AFRICA 305 (1981).
[99] GYEKYE, *supra* note 97, at 43.
[100] See Ademola Kazeem Fayemi, *supra* note 86.

people of the continent. Despite the positive moves towards democracy, there are various formidable challenges and obstacles which obstruct democracy in the continent. Chief among these challenges and obstacles are: political challenges, leadership challenges, foreign interventions, ethnicity, poverty, corruption, military intervention and the like. Hence, it is high time for African countries to aggressively work towards democracy by overcoming these challenges and obstacles.

In addition to dealing with the above challenges and obstacles, it is firmly believed that the Western liberal democracy needs to be adapted to the African cultural, social and economic reality so that democracy would work in the continent. In other words, resort to contextualization is obligatory. Nonetheless, it is hardly possible to fully subscribe to the arguments of the traditionalists who preach that Africa should altogether abandon liberal democracy and should turn its face absolutely to African indigenous democracy and traditional institutions. Rather, I personally believe that it will be wise to adopt the arguments of the eclectic approach to democracy since there are relevant values that we can take from the Western democracy and African indigenous values. Nevertheless, African countries should make deep country specific studies on how to make a good blend of the values of liberal democracy and African indigenous values on democracy as the one-size-fits-all approach of some writers does not work for all African countries.

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**Christoph Van der Beken, *Completing the Constitutional Architecture: A Comparative Analysis of Sub-national Constitutions in Ethiopia* (Addis Ababa: Addis Ababa University Press; 2017), pp. 242; Price Birr 62.45.**

*Getachew Assefa (PhD)*[*]

The substantive part of the book begins with an introduction followed by ten chapters and ends with concluding remarks. Beginning with a discussion of the academic literature on constitutions of constituent units of federations (variously called as states, provinces, cantons or lander), the introductory part of the book is devoted to foreshadowing the main contents of the nine succeeding chapters.

Chapter 1 of the book entitled *Historico-Political and Legal Background to the Federal and Regional Constitutions* (pp. 9-24) is devoted to the description of the legal and political developments to 1994/95. Although most of the discussion here attempts to summarize the developments between 1991 and 1994/95, the author has taken the liberty to make some statements on the 19th century historical developments in the country. The overly general statements (pp. 9-10) presenting the socio-political history of the country as only resulting from a one-time north-south movement of power and people is misleading. In my view it should have been well-contextualized and referenced as there are various narratives and historical attestations that needed to be reflected alongside the views handed down here.[1]

Chapter 2 of the book: *The Federal Constitution: A Model and Frame for the Regional Constitutions* (pp. 25-62), as the title indicates, is an attempt at "a succinct overview" (p.25) of the entire content of the federal Constitution. Thus, the author takes us through the whole Constitution by highlighting salient dispensations from its Preamble to its article 106. A rather short Chapter 3 (pp. 63-68) titled, *Background, Basic Features, and Aspirations of the Regional Constitutions* provides the reader with insights on the genesis of the constitutions of states of the Ethiopian federation and discusses the two rounds of constitution-making that took place in the states. The first round of state constitutions were made roughly between 1993 and 1996, some, thus, predating the federal constitution. The second round constitutions

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[1] It is not possible for me to go into detail to explain the various narratives on the formation of the Ethiopian state and society in this review. I refer the reader to the following literature some of which are rather well known: DONALD N. LEVINE, GREATER ETHIOPIA: THE EVOLUTION OF A MULTI-ETHNIC SOCIETY (University of Chicago Press, 1974); TESHALE TIBEBU, THE MAKING OF MODERN ETHIOPIA, 1896-1974 (Red Sea Press, 1995); GEBRU TAREKE, ETHIOPIA: POWER AND PROTEST, PEASANT REVOLTS IN THE TWENTIETH CENTURY (Red Sea Press, 1996); Getachew Assefa, *The Constitutional Right to Self-Determination as a Response to the 'Question of Nationalities' in Ethiopia,* 25(1) INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 1(2018).

replaced the first group and were ushered into existence mostly between 2001 and 2004.

The book discusses the "General provisions and fundamental principles" of state constitutions in its Chapter 4 (pp. 69-77). In this Chapter, in addition to pointing out an interesting sort of unsettled or contradictory positions and changes on the state boundaries and borderings as depicted in the states' constitutions (pp. 69-70), it also describes the fundamental principles of the second chapters of the states' constitutions. Chapter 5 of the book is devoted to "human rights" where the fundamental rights and freedoms enshrined in the state constitutions are discussed largely descriptively. The author has chosen to call all the rights in chapters three of state constitutions as 'human rights' although the textual titles of the chapters do not read as such. Consequently, the author discusses rights such as self-determination up to secession rights as human rights while all state constitutions invariably consider such right as part of 'democratic rights'. Although my argument here does not emanate from the endorsement of the constitutional categorization of the rights and freedoms into 'human' and 'democratic' rights made in the federal Constitution (and emulated by all state constitutions), it is my view that this nuance of the Ethiopian constitutional dispensation needed to be pointed out in the book.

I like to add a few more observations on the discussion in Chapter 5 rather very briefly to reflect my positions which mostly are meant to advise a more cautionary reading of the constitutional provisions. First, on the state constitutions' provisions on the right to movement, the author rightly observes that the latter have placed more rights under the rubric of the right to movement (pp. 81-82) than the analogous provision of the federal Constitution. However, the author overlooks one critical difference in wording introduced in the states' constitutions. Contrary to the federal Constitution, the state constitutional provisions stipulate that in order to enjoy the rights guaranteed under the ambit of the right to movement an Ethiopian citizen has to be 'lawfully' in that regional state. The requirement of lawfulness is only attached to foreign nationals in Ethiopia by the federal Constitution and not to Ethiopian citizens.

Second, while discussing state constitutions' provisions on 'the right to participate in government and public works', (which does not have a counterpart in the federal Constitution) (p. 82), the author did not pay attention to important nuances that exist among the state constitutions in this regard. For example, while constitutions like that of Oromia and Amhara regional states provide that Ethiopian residents of the region who speak the working language of the region has the 'right to be elected or employed to any public office in the region', constitutions of Gambella and Beneshangul-Gumuz do not use the term 'elected' but rather terms 'employed' and 'assigned'. These terms as the reader can see could give rise to practical challenges. The wording in the Gambella and Beneshangul-Gumuz constitutions could give constitutional basis for disenfranchising the

members of the ethno-national groups that are considered 'non-owners' or 'non-founders' of the respective regions. The unconstitutionality of such stipulations should be singled out.

My third observation relates to the author's insightful discussion regarding the apparent mismatch between the federal constitution's secession clause and those of most state constitutions. In short, except the Southern and Somali state constitutions, the rest constitutions make the right to secession conditional upon the showing that internal self determination rights (right to identity, culture, language, history and self-rule within the federation) are abridged or abrogated or encroached upon and that these problems cannot be remedied within the union. As is know the federal Constitution attaches no substantive condition to the exercise of the right to secession. In dealing with the argument that the constitutions of the states that have attached conditions to the claim of the right to secession might be dubbed as violating the federal Constitution, the author divided up the states into two categories: those that are officially/constitutionally homogeneous, such as Oromia and Afar, and those that are constitutionally heterogeneous such as Beneshangul-Gumuz and Southern Nations, Nationalities and Peoples' Regional State (SNNPR) (pp. 85-89). The author argues that in the case of constitutionally homogeneous states the conditionality of secession does not violate the federal Constitution because "although [the people in question in such states] have the right to secede unconditionally as per the federal Constitution, it is equally an expression of their sovereignty [engrained in their respective state constitutions] to restrain themselves and express their commitment not to exercise their right unless certain conditions are fulfilled" (p. 87). The author however argues that this does hold when it comes to states that are constitutionally heterogeneous (pp. 87-89). This distinction supplies an interesting food for thought for students and researchers in the field. But I could not buy the argument made incidentally by the author creating distinction between 'council' and 'legislative council' arguing that only nations/nationalities/peoples with the latter have the right to exercise secession and those with councils can only exercise what he calls 'internal secession, i.e., the right to found one's own state as per art 47(2) of the federal Constitution. I do not think that there is any textual basis in the federal Constitution to support this line of argument. Nor was such a distinction from the drafting history of the Constitution.

Chapters 6 and 7 are devoted, respectively, to "Regional Government Institutions" and "Local Government". In Chapter 6, the author has descriptively analysed the powers and functions of and relationships among the three organs of state governments: the legislature, the executive, and the judiciary. In Chapter 7, nuances of local governments as dealt with in the regional states' constitutions are analysed. Here, the author has enriched the discussion of the states' constitutions with relevant laws enacted by the regional states especially regarding urban local governments. The discussion has shown the ambivalence that undergirds the

states' positions on the latter. The state constitutions regulate more extensively the sub-state rural local governments dubbing them as *Woreda* and *Kebele* stratums. On the contrary, they fail to provide for details on urban local self-governments. As the author has shown, they have chosen to deal with matters of urban local self-government by sub-constitutional legislation. It might be necessary to quickly point out here that although all other constitutions state that urban centres shall have their own self-governments or councils, the Oromia state constitution fails to make any mention of urban centres. The author also discussed the quota arrangements for the titular groups stipulated in the urban local government legislation of some regional states (Beneshangul-Gumuz, Oromia and the SNNPR State's) (pp. 185-186). The analysis begs the question as regards the constitutionality and democratic acceptability of the quota arrangements (apart from the justice and fairness questions) as well as their justificatory basis.

The author has provided a brief description of the "policy Principles and Objectives" of state constitutions in Chapter 8 of the book (pp. 191-194). In Chapter 9, titled as "Miscellaneous Provisions", the book describes mainly the state constitutions' provisions on initiation and ratification of state constitutional amendments where he rightly calls our attention to some nuances in the amendment procedures and rules adopted by the states. In Chapter 10 of the book: *Appraising the Use of Regional Constitutional Space* (pp. 206-226), the author attempted to evaluate how far the states have used their constitutions to exercise the self-rule powers devolved on them by the federal Constitution. This is what G. Alan Tarr calls 'sub-national constitutional space'.[2] The author has shown that the states have made good strides in this regard although more creativity is still lacking. For example, he points out that one area in which the states could be creative is in the design of an impartial institution to interpret state constitutions. The federal Constitution has not made any specific rules regarding what institutions may interpret the states' constitutions. This means that the makers of the states' constitutions could have gone for more suited and neutral institution to interpret their constitutions. The author seems to think that a council of constitutional inquiry with ultimate power to interpret the constitution could be one possibility the states could have adopted. (p. 210). It is regrettable that the states have followed suit with the federal arrangement and went for a body (mostly constitution interpretation commission) with more alignment with the regional legislative and the executive bodies than even the House of the Federation. The author's position is perfectly plausible. My view also is that from where we stand now, we could start by reforming state constitutions to create impartial and independent bodies for constitutional interpretation, perhaps in the form of the German constitutional court or the French Constitutional Council. We could then

[2]See G. Alan Tarr, Explaining *Sub-national Constitutional Space*, 115(4) PENN STATE LAW REVIEW 1133 (2011).

turn to debate how best to redesign the constitutional interpretation arrangement currently in place in the federal Constitution.

I would like to end by saying that overall the book is a good read. It has brought to light an area of constitutional law that is little known. Scholarship on constitutions of constituent units of federations is limited worldwide and the case of the Ethiopian state constitutions is no exception. The book will be of great relevance to researchers and students of public law in Ethiopia and others who are interested in Ethiopian constitutional law. I hope future revisions of the book will enrich it with more constitutional practice to show whether the state constitutions are relevant in real life or not.

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