

Introducing Third-Party Litigation Funding in Ethiopia: Implications for Enhancing Access to Justice

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Abstract

In our day-to-day experience, it is common to observe persons encountering challenges to exercise their right to access justice due to costly litigation. The litigation expenses that include the advocate's fee, court fee, and witnesses' expense are so onerous to some litigants that they resist to start litigation. To mitigate this problem, countries introduced an innovative litigation-funding scheme known as third-party litigation funding or alternative litigation funding (ALF). It is a business system that an investor, not a party to the litigation, funds the costs of litigation of a litigant upon the agreement to receive some portions from the recovery. ALF eases litigants to fund their litigation and thereby ensure their right to access to justice. In Ethiopia, there is no legally recognized scheme of ALF. The aim of this article is, therefore, to examine whether Ethiopia should introduce ALF. In doing so, the author employs a doctrinal research approach. Particularly, the study analyzed commentaries and scholarly research reports as major source of insights on the subject. After examining the issue, the author concluded that the situation in Ethiopia especially the limitations in the legal aid program imperatively requires the introduction of ALF. Finally, this article indicates some regulatory concerns of ALF including disclosure of the agreement, privilege and confidentiality, and funder litigation control.

Keywords: *Third-Party Litigation Funding, Access to Justice, Litigation Cost, Regulatory Concerns*

Introduction

A party in litigation commonly expends a cost to exercise the right to access to justice. A litigant, the plaintiff or defendant, has to pay a court fee, cover witnesses' expenses, advocate's fee, and other miscellaneous costs as the case may be. For example, to get legal representation in litigation, one must pay the agreed advocate's service fee in advance or enter a contingency fee arrangement.¹ Yet the advocate's fee in litigation is largely costly for many citizens.²

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¹ Contingency fee means, "where the lawyer discounts or commutes his fee in return for a share of the damages or out-of-court settlement should the action succeed." See Cento Veljanovski, Third party

Consequently, these litigants get frustrated to hire a lawyer in their lawsuit.³ Because of this, persons are obliged to seek legal service from free legal aid service providers. Nevertheless, seeking legal service from free legal aid service providers may not be always successful. This is because, for several reasons, legal aid service providers are not mostly readily accessible to legal service seekers. First, free legal aid service providers' personnel and offices are situated in urban areas and are inaccessible for remote area residents. In addition, free legal aid service is available only for indigent and vulnerable persons. Moreover, it is expensive for litigants to pay court fees. A litigant who wants to start litigation must first pay the court fee. Though there are possibilities whereby parties can institute their cases to the court in a pauper, the pauper scheme is available only in limited situations.

As a result of high costs of litigation, some individuals do not want to commence litigation though they have a fundamental right to access to justice.⁴ Consider the case of a businessperson, who has no cash money other than his businesses, wants to bring legal action in a court of law. In this scenario, the businessperson cannot receive free legal aid or the privilege to sue in pauper for he has business assets. In this instance, the businessperson may be forced to sell one or more of his business to acquire money to pay the costs of the litigation.

Nevertheless, it is wearisome to see that a businessperson loses his business because of litigation costs. Thus, apart from obstructing individuals' right to access to justice, their inability to cover litigation costs could also derail business and investment ventures. To overcome these hurdles to access to justice, countries introduced a new business model whereby an investor, not a party in litigation, funds the legal costs of litigation in exchange for a reward if the funded party wins.⁵ This business model is named third-party litigation funding,⁶ also known as alternative litigation funding or legal

Litigation Funding in Europe, Conference Paper on Third Party Litigation: Civil Justice Friend or Foe?, George Mason University, (2011), p. 6.

² Jarrett Lewis, Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice? *The Georgetown Journal of Legal Ethics*, Vol. 33, (2020), Pp. 687-701, P.687.

³ Mariel Rodak, It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement, *University of Pennsylvania Law Review*, Vol. 155: No. 2, (2006), Pp.503-535, P. 505.

⁴ Anna Schmallgger, Commodification of Claims: The Admissibility of Various Tort Claim Assignments and Implications for Third-party Funding, A Comparative Analysis of Regulation of United States, England, Australia and Germany, LL.M Thesis Leiden University, (2017), p. 1.

⁵ Solas G.M., Third Party Litigation Funding: A Comparative Legal and Economic Analysis and the European Perspective, Ph.D. Dissertation, Maastricht University, (2017), P. 22.

⁶ *Id.*, p. 23.

funding (herein after ALF),⁷ is an arrangement by which a plaintiff or defendant in litigation is financed for his litigation cost including costs of the advocate and court fee by a third-party funder.⁸ The third-party funder will receive some return from the proceeds of the litigation if the case is successful or will receive nothing if the case is unsuccessful.⁹ Such an arrangement is imperative to enhance access to justice to individuals who otherwise could not afford to pay for it.

In Ethiopia, there is no legally recognized practice of ALF. Litigants fund their litigation costs by themselves or through free legal aid service program, if any. However, because of different reasons, access to justice through free legal aid service providers is inefficient, inaccessible, and unsatisfactory.¹⁰ With this in mind, this article tries to analyze the need for introducing ALF in civil litigation in Ethiopia and its implication towards enhancing access to justice.

As regards structure, this article is divided into three sections. The first section explains the conceptual foundation of ALF and the next section examines the development of ALF in common law and civil law jurisdictions. Following that, the third section demonstrates the need for ALF in Ethiopia by highlighting its potential to improve access to justice. Important regulatory considerations are also addressed in this section. Finally, concluding remarks are made in the last section.

1. Overview of Third-Party Litigation Funding

1.1. The Concept of Third-Party Litigation Funding

Different writers provide varying definitions¹¹ for the term ALF. For example, Jackson, R. defines it as;

[a] funding of arbitration or litigation proceedings by a party who (i) has no pre-existing interest in the proceedings, (ii) will be paid out of any amounts recovered as a

⁷ Thomas Healey and Michael B. McDonald, *Litigation Finance Investing: Alternative Investment Return in the Presence of Information Asymmetry*, (2021), p. 3.

⁸ Victoria Sahani, *Third-Party Funding in Dispute Settlement in Africa*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 110, (2016), Pp. 90-92, p. 90.

⁹ Marco de Morpurgo, *A comparative Legal and Economic Approach to Third-Party Litigation Funding*, *Cardozo J. of Int'l and Company Law*, Vol.19, (2011), Pp. 343-412, p. 352.

¹⁰ Anchinesh Shiferaw and Ghetnet Mitiku, *Assessment of Legal Aid in Ethiopia: A Research Report and Proceeding of the National Workshop of Legal Aid Providers*, Center for Human Rights, Addis Ababa University, (2013), P. 94-98.

¹¹ Dmytro Galagan & Patricia Zivkovic, *If They Finance Your Claim, Will They Pay Me If I Win: Implications of Third Party Funding on Adverse Costs Awards in International Arbitration*, *European Scientific Journal*, (2015), Pp. 173-181, P. 173.

consequence of the proceedings, often as a percentage of the sum recovered, and (iii) the funder is not entitled to any payment if the funded party's claim fails.¹²

Similarly, Gian Marco Solas conceptualizes it as “[a] professional practice of funding the dispute costs in exchange for a percentage of the sum recovered, only in case of victory, sometimes entailing the transfer of the claim.”¹³ Still other writers also defined ALF as an agreement where “a person (a non-lawyer funder or lay-man) provides a litigant with funds to prosecute an action in return for a share of the proceeds of the legal action if the litigation is successful.”¹⁴ From the aforementioned definitions, one can infer that ALF is a means of funding any litigation costs based on an agreement in which the funder receives some profit from the proceeds of the case. The funder, however, will not receive any return or will not even recourse to the costs incurred in the litigation provided the funded party loses the case. Hence, ALF is non-recourse. ALF model involves three parties: the funder, the client, and the lawyer.¹⁵ The funder concludes a contractual arrangement with the litigants and may not become a party to the lawsuit unless the funding agreement is made through assignment of claim.¹⁶ In this case, the funder has two goals: (1) to assist the litigant to access justice in a lawsuit who otherwise cannot afford to cover the litigation cost, and (2) to drive a reasonable profit from its investment in the litigation. Where the litigant is a plaintiff, the funder agrees to receive certain percentage of the outcomes of the case, if it is successful.¹⁷ In ALF, unlike a loan, the funding litigant is not required to reimburse the funder, if the case is unsuccessful.¹⁸ Where the litigant is a defendant, the funder will receive a prefixed payment, and may receive additional reward provided the defendant wins.¹⁹

ALF has two models namely, passive (hand-off) and active (hand-on) model.²⁰ In a passive model, the role of the funder is limited to covering the costs of the litigation to

¹² *Id.*, P. 173.

¹³ Gian Marco Solas, *Third-Party Litigation Funding: A Comparative Analyses*, Ph.D. Thesis, Università degli Studi di Cagliari, (2017), P. 10.

¹⁴ MJ Khoza, *Formal Regulation of Third-Party Litigation Funding Agreements? A South African Perspective*, *PER/PELJ*, (2018), p. 2.

¹⁵ Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, *Cardozo Law Review*, Vol. 36, (2015), Pp. 861-912, p. 870.

¹⁶ Victoria Sahani, *Reshaping Third-Party Funding*, *Tulane Law Review*, Vol. 91: No. 3, (2017), Pp. 405-472, p. 416.

¹⁷ *Id.*, p. 416.

¹⁸ *Id.*, p. 416.

¹⁹ *Id.*, p. 416.

²⁰ Ines Nasr, *Third Party Funding in International Arbitration*, Dissertation for the Fulfillment of Requirements for the degree of Master in Common Law, Republic of Tunisia Ministry of Higher Education and Scientific Research University of Carthage, Faculty of Legal, Political and Social Science of Tunisia, (2015), p. 127.

derive some return, if the case is successful.²¹ The full responsibility to select the attorney and manage issues in the claim other than paying the litigation cost is left to the funded litigant.²² In the contrary, in the active model, the funder is actively involved in the claim by ‘helping in the management of the case, providing resources and lobbying.’²³ Sometimes, the active funder may even buy the lawsuit from the litigant and collects the whole proceeds of the litigation, if the case is successful.²⁴ In such a case, the funder becomes a litigant party to the claim.

Historically, the practice of funding litigation has been practiced since ancient Greek or Roman times.²⁵ In ancient Greek, litigating in a court of law was considered as dignity and power, and even those who lack support from other people were considered as ‘wretched friendless people.’²⁶ However, the primary motive of funding litigation was to get social dominance or political support while the profit-making motive was incidental.²⁷ Nonetheless, the practice of helping litigants of a lawsuit had been prohibited in the middle ages.²⁸ It has been prohibited in common law jurisdictions due to the doctrine of maintenance and champerty.²⁹ Maintenance in this context refers to the “intermeddling of someone who provides financial assistance to either party in the action to defend a claim, when the provider holds no connection or valid interest in the claim itself.”³⁰ Champerty, on the other hand, denotes a subcategory of maintenance in which the “intermeddle enters into an agreement with a party involved in the action for the sole purpose of being compensated from the proceeds of the action.”³¹

These two doctrines of common law countries emerged in the medieval period in response to the practice where the rich individuals fund the litigation of the poor to “attack personal or political enemies.”³² In medieval times, claims were assigned to wealthy individuals as they could influence the outcomes of the claim though they

²¹ Veljanovski, *supra* note 1, p. 6.

²² Solas, *supra* note 13, P. 11.

²³ Nasr, *supra* note 20, p. 127-128.

²⁴ Solas, *supra* note 13, P. 11.

²⁵ Solas G.M., *supra* note 5, p. 41.

²⁶ *Id.*, p. 43.

²⁷ *Id.*, p. 41.

²⁸ *Id.*, p. 41.

²⁹ Ekkachat Sirivichai, Third-Party Funding in Dispute Resolution Proceedings, *Thammasat Business Law Journal*, Vol. 9, (2019), Pp. 205-224, p. 208.

³⁰ Vienna Messina, Third-Party Funding: The Road to Compatibility in International Arbitration, *Brooklyn Journal of International Law*, Vol. 45: No. 1, (2019), Pp. 434-461, p. 442.

³¹ *Id.*, p. 442.

³² *Id.*, p. 442.

have no interest in the suit.³³ For example, in England, it was a tool for economic war between rich landowners.³⁴ Consequently, maintenance and champerty were denounced on the ground that they “encourage speculative lawsuits, needlessly disrupt societal peace, and lead to corrupt practices of law.”³⁵ As such, both practices were criticized as illegal, immoral, and unethical, and those who commit such acts were subject to civil and criminal liability.³⁶

Similarly, though ALF was practiced in ancient Roman times from which most civil law legal systems emerged, it was prohibited in civil law jurisdictions in the medieval age.³⁷ Lawyers or non-lawyer individuals were prohibited from entering a litigation fund agreement with the litigant and receiving profit from the sum recovered, and this prohibition was called Pactum de Quota Litis.³⁸ Moreover, in the medieval period, civil law countries prohibit the agreement to purchase lawsuits to drive profit therefrom, which was called Redemptio Litis.³⁹ However, as time went by, these limitations and prohibitions were relaxed that some countries, especially in the early twentieth century, created exceptions to the old existing prohibition of ALF.⁴⁰ Australia and United Kingdom are the first countries to abolish the common law doctrine of maintenance and champerty.⁴¹

Accordingly, ALF in its modern sense has started in the 1990s in Australia and nowadays, it becomes common practice in many civil and common-law countries.⁴² In Australia, ALF was allowed in bankruptcy litigation, and later, it was extended to all civil matter litigations.⁴³ Particularly, it has been widely practiced in the Australian justice system especially after 2006 when the Australian high court explicitly permits third parties to fund and to control the case in its decision in the lawsuit of Campbells Cash & Carry v. Fostif (emphasis added).⁴⁴ Following Australia, United Kingdom has recognized the practice of ALF since 2005, when the English Court of Appeal in Arkin v. Borchard Lines Ltd allows third-party litigation funder without, however,

³³ Nasr, *supra* note 20, p. 25.

³⁴ Solas G.M., *supra* note 5, p. 41.

³⁵ Messina, *supra* note 30, p. 442.

³⁶ Nasr, *supra* note 20, p. 25.

³⁷ Solas G.M., *supra* note 5, p. 27.

³⁸ *Id.*, p. 27.

³⁹ *Id.*, p. 27.

⁴⁰ Cassandra Burke Robertson, The Impact of Third-Party Financing on Transnational Litigation, *Case Western Reserve Journal of International Law*, Vol. 44: No.1, (2011), Pp. 159-181, p. 164.

⁴¹ *Id.*, p.164.

⁴² Olivier Marquais & Alain Grec, Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France, *Asian International Arbitration Journal*, Vol. 16, (2020), Pp. 50-67, P. 50.

⁴³ Maya Steinit, Whose Claim Is this Anyway? Third-Party Litigation Funding, *Minnesota Law Review*, (2011), Pp. 1269-1336, p. 1279.

⁴⁴ Robertson, *supra* note 40, p.165.

acquiring a power to control the management of the case.⁴⁵ Nowadays, the practice is recognized and flourishing in many countries cognizant of its role to enhance access to justice. Mainly, it has spread out in Australia, Germany, United Kingdom, Ireland, and the USA.⁴⁶ It has also begun to develop in some African and Asian countries such as Hong Kong, Indonesia, South Africa, and Nigeria.⁴⁷ It is being practiced in court and arbitration litigation both nationally and internationally.⁴⁸

1.3. The Role of Third-Party Litigation Funding to Enhance Access to Justice

Since the 1948 Universal Declaration of Human Rights (UDHR), access to justice has been regarded as a fundamental human right ‘guaranteed under, virtually, all universal and regional human rights instruments as well as in many national constitutions.’⁴⁹ The UDHR explicitly states, “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or subordinate laws.”⁵⁰ An individual whose right is violated is entitled to seek an effective remedy by instituting a claim before a competent national tribunal, which includes informal justice institutions. Moreover, most international human rights instruments recognized the right to access to justice, at least indirectly, through other human rights provisions such as the right to be treated equally before the law. International human rights instruments such as International Covenant on Civil and Political Rights, European Convention on human right and the African Charter on Human and People right also indirectly recognize the right to access to justice through other human rights provisions.⁵¹

While the concept of access to justice gets wider recognition in human rights instruments, its meaning is elusive, lacking a single definition. The scholarly literature widely provides the meaning of access to justice, and the author constructs neither a new definition nor comments on the existing definitions. Rather, for this article, access to justice is understood to mean the ‘ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights

⁴⁵ Steinitz, *supra* note 43, P.1281.

⁴⁶ Chen Wenjing, An Economic Analysis of Third Party Litigation Funding, *US-China Law Review*, Vol.16: No. 1, (2019), Pp.34-42, P. 34.

⁴⁷ Leslie Perrin, Third Party Litigation Funding Law Review, 2nd ed., Law Business Research, (2018), p. 1ff.

⁴⁸ Shannon, *supra* note 15, p. 863.

⁴⁹ Maya Steinitz, Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements, *University of California, Davis*, Vol. 53, (2019), Pp. 1073-1116, p. 1085.

⁵⁰ Universal Declaration of Human Rights (UDHR), 1948, Art 8.

⁵¹ Mizanie Abate et al, Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia, *Mizan Law Review*, Vol. 11: No.1, (2017), p. 4.

standards.⁵² Yet it is important to note that the mere recognition of the right to access to justice is not a guarantee to realize such a right. It requires avoiding barriers to access to justice such as unaffordable litigation costs. Due to expensive litigation costs, parties with limited finance hesitate to bring their court action and remain uncompensated.⁵³ Even those who can afford to pay the costs of litigation are sometimes discouraged to start their litigation due to uncertainty of litigation outcome i.e., the problem of risk-aversion.⁵⁴ As the outcome of litigation is mostly uncertain, the plaintiff may expect reduced compensation than the costs of the litigation and prefers to abandon initiating litigation.⁵⁵ On top of that, those who decide to initiate the lawsuit always assume the risk of losing the case.⁵⁶ This may also discourage to start the lawsuit. One may also become reluctant to initiate the case when the damage sustained is diffused over many victims.⁵⁷ For example, in case of environmental damage, the damage is dispersed in many victims and no one may will to initiate a lawsuit.⁵⁸ All of these are hindrances to access to justice.

Cognizant of these obstacles to access to justice, countries have implemented different strategies to enable everyone to access justice. Provision of free legal aid to vulnerable and destitute persons had been one of such strategies widely in use over the ages in different countries.⁵⁹ However, at the end of the 20th century, the free legal aid program is criticized as “costly, inefficient, and arbitrary.”⁶⁰ Following this, countries come up with a new business model of litigation financing called ALF. This model enables the claimant to institute a lawsuit who cannot otherwise afford to start the case and thereby advances access to justice.⁶¹ ALF levels the game field for disputing parties and it helps to achieve the public policy mission of securing access to justice to societies.⁶² It also allows litigants to shift associated risks to funders and encourage them to access to justice.⁶³ The funded party begins the suit by avoiding the risks

⁵² Kinfe Micheal Yilma & Tadesse Melaku, ‘Petitioning the Executive in Ethiopia: Trends, Implications and Propriety of Institutionalizing Petitioning’ in Pietro s. Toggia et al (ed.), *Access to Justice in Ethiopia: Towards an Inventory of Issues*, Center for Human Right, Addis Ababa University, 1st ed., (2014), p. 75.

⁵³ Joanna M. Shepherd, *Ideal versus Reality in Third-Party Litigation Financing*, (2011), p. 6.

⁵⁴ *Id.*, p. 7.

⁵⁵ *Id.*, p. 7.

⁵⁶ Morpurgo, *supra* note 9, p. 346.

⁵⁷ Michael Faure & Louis Visscher, *Third Party Litigation and Its Alternatives: An Economic Appraisal*, (2017), P. 2.

⁵⁸ *Id.*, P.2.

⁵⁹ Morpurgo, *supra* note 9, p. 346.

⁶⁰ *Id.*, p. 346.

⁶¹ Steinit, *supra* note 43, p. 1276.

⁶² Thibault De Boule, *Third-Party Funding In International Commercial Arbitration*, Master’s Thesis in Masters of Laws, Ghent University, (2013), p. 25.

⁶³ Steinit, *supra* note 43, p. 1276.

associated with litigation costs in case he loses. The funder wholly assumes the risk related to the litigation cost without even the possibility of recourse if the litigant loses. It also entitles insolvent or small business entities to institute their claim in which they could not otherwise pay for the costs of the litigation and would face a risk of failure to reach for contingency fee arrangements.⁶⁴ This in effect would protect small and insolvent corporations from imminent threats for their existence.

Apart from small or insolvent corporations, big corporations would benefit from ALF. It enables big corporations to keep their cash circulation normal by receiving funds from litigation funders for their litigation.⁶⁵ From the perspective of investors, ALF allows investors to gain some returns from the outcome of the suit without being affected by market conditions.⁶⁶ Litigation funders are investors and benefit by driving reasonable profits from their investment in the litigation. Unless the funded party loses the case, their investment is certain that any market condition would not affect it.

1.4. Critiques over Third-Party Litigation Funding

Though ALF has the aforementioned benefits, it does not escape the criticism of scholars. Some scholars argue that ALF causes an increment of lawsuits, which, in turn, results in delay of justice.⁶⁷ The premise of this argument is that when there is an ALF, everybody will prefer to bring a lawsuit, which he would not otherwise want to start due to the risks and costs associated with the litigation.⁶⁸ This argument, in fact, has been supported by empirical evidences reported in Australia. The evidences particularly confirm that ALF causes an increment of lawsuits.⁶⁹ Yet looking more closely into the latter argument, one could see that it is comparing the incomparable variables of access to justice. Even if ALF causes an increment of lawsuits that probably results in delay in the administration of justice, this should not be a ground for prohibiting ALF. This externality of ALF can be minimized, if not abolished, by increasing the capacity of justice-administering institutions. It can be addressed by increasing the number of courts and their human resources.

⁶⁴ Rachel Howie & Geoff Moysa, Financing Disputes: Third-Party Funding in litigation and Arbitration, *Alberta Law review*, Vol. 57: No. 2, (2019), Pp.466- 502, P.470.

⁶⁵ *Id.*, p. 471.

⁶⁶ *Id.*, p. 471.

⁶⁷ Jason Lyon, Revolution in Progress: Third-Party Funding of American Litigation, *UCLA Law review*, (2010), Pp. 571- 609, p. 590.

⁶⁸ *Id.*, p. 590.

⁶⁹ *Id.*, p. 591.

Scholars also criticized ALF alleging that it increases the institution of frivolous claims.⁷⁰ As the funded litigants are risk-free, they will be encouraged to bring unmerited lawsuits. This criticism is not, however, sound enough to prohibit ALF. Funders obviously evaluate the merit of the lawsuit before they agree to fund the litigation costs.⁷¹ They would not fund unmerited lawsuits, as they are investors who want to drive return from their investment. Even in economics, it is irrational to fund unmerited litigation as an investor.⁷² Rather, it serves as a tool to reduce the institution of unmerited lawsuits.⁷³ Moreover, opponents of ALF criticized the arrangement contending that it becomes a deterrent for settlement of litigation in the negotiation of parties and causes prolonged litigation.⁷⁴ This is based on the logic that, as the litigant shifts all litigation risks to the funder, he will not be interested to accept any dispute settlement offer from the other litigant.⁷⁵ Nevertheless, proponents of ALF provide a counter-argument that ALF does not deter settlement in the negotiation as the funder's payment increases as litigation become lengthy.⁷⁶ Overall, though the debate as to permitting ALF continues, the practice of funding litigations is flourishing in many jurisdictions.

2. Third-Party Litigation Funding in Common Law and Civil Law Jurisdictions

2.1. Third-Party Litigation Funding in Common Law Countries

Though ALF is widely practiced in many common law countries, only countries with relatively well-established experiences are considered for the purpose of this article. Particularly, the article examines the development of ALF in Australia, United Kingdom, and United States. The Australian legal system is where modern ALF model originates and evolve into its advanced form.⁷⁷ In the beginning, ALF was permitted only for insolvency cases in this country.⁷⁸ Currently, however, it is also

⁷⁰ Steinitz, *supra* note 43, P.1299.

⁷¹ Miltiadis G. Apostolidis, *Third-Party Funding in Dispute Resolution: Financial Aspects & Litigation Funding Agreements*, LL.M Thesis in Transnational & European Commercial Law, Mediation, Arbitration and Energy Law, School of Economics, Business Administration & Legal Studies, International Hellenic University, (2017), p. 37.

⁷² J.B. Heaton, *The Siren Song of Litigation Funding*, *Michigan Business & Entrepreneurial Law Review*, Vol. 9: No. 1, (2020), Pp. 139-155, p. 154.

⁷³ Apostolidis, *supra* note 71, p. 37.

⁷⁴ Lyon, *supra* note 67, p. 595.

⁷⁵ *Id.*, p.595.

⁷⁶ *Id.*, p.596 & 597.

⁷⁷ Christopher Hodges et al, *Litigation Funding: Status and Issues*, Research Report, (2012), p.47.

⁷⁸ Jasminka Kalajdzic et al, *Justice for profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation*, *The American Journal of Comparative Law*, Vol. 61: No. 1, (2013), Pp. 93-148, P. 96.

allowed for class actions, especially in security cases.⁷⁹ It is also permitted to fund large commercial claims more than \$ 500,000.⁸⁰ However, the arrangement is not allowed in case of personal injuries.⁸¹ Three main justifications are cited for the development of ALF in Australia. First, Australia adopts a loser pay litigation cost principle in which the losing litigant pays the litigation cost.⁸² Based on this principle, the losing party pays the litigation costs of the winner as well as his litigation cost. This cost-shifting causes the introduction of ALF in the country. Second, in Australia, the contingency fee arrangement is forbidden. As litigants are prohibited to arrange a contingency fee with their lawyer, they are obliged to look for an alternative litigation funding.⁸³ Thirdly, the existence of limited legal aid service in civil litigation and the absence of litigation cost insurance in the country demands developing ALF in Australia.⁸⁴ Finally, it is important to note that wealthy persons are excluded from the provisions of free legal aid in civil litigations, and this gave rise to the ALF.

Currently, there is no formal or separate regulation of ALF in the country. It is regulated with the existing laws through the “supervision of courts, the Trade Practices Act 1974, the Federal Court of Australia Act 1976, and other State/Territory consumer protection legislation.”⁸⁵ The practice is also subject to the regulations of the Australian Securities and Investment Commission Act 2011, which regulates unfair, unconscionable, misleading, and deceptive agreements.⁸⁶ In Australia, third-party funders are allowed to control the management of the funded lawsuit.⁸⁷

Like the case in Australia, ALF is relatively well developed in the United Kingdom. The development of the practice is largely attributed to (1) the cutting of the legal aid budget by the government and (2) the judicial recognition of the importance of ALF to advance access to justice.⁸⁸ In the beginning, it was exercised in insolvency cases.⁸⁹ Unlike the Australian case, this arrangement in the UK is allowed even in personal

⁷⁹ Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, *Defense Counsel Journal*, (2020), p. 3.

⁸⁰ Morpurgo, *supra* note 9, p. 361.

⁸¹ *Id.*, P. 362.

⁸² Stroble & Welikson, *supra* note 79, p. 3.

⁸³ *Id.*, p. 3.

⁸⁴ Dominique Demougis & Felix Maultzsch, Third-Party Financing of Litigation: Legal Approaches and a Formal Model, (2013), p. 6.

⁸⁵ Law Council of Australia, Regulation of third party litigation funding in Australia, p. 13.

⁸⁶ Jason Geisker & Jenny Tallis, ‘Australia’, in Leslie Perrin (ed.), *Third Party Litigation Funding Law Review*, 2nd ed., Law Business Research, (2018), P. 4.

⁸⁷ Steinitz, *supra* note 43, P. 1280.

⁸⁸ Morpurgo, *supra* note 9, P. 363.

⁸⁹ *Id.*, p. 361.

injury and family (divorce) suits in addition to commercial litigation.⁹⁰ It is also being practiced in arbitration litigation.⁹¹ Most of the entities operating the business of ALF in the country are hedge funds, insurers, and private investors.⁹² In the UK practice, the funder is required to pay the successful adverse litigant's cost.⁹³ As such, the funder pays not only the litigation costs of the funded litigant but also the costs of the successful adverse litigant. Furthermore, the loser party pays the costs of litigation including costs of the successful party (British rule). That is why the funder is required to pay the costs of the successful adverse litigant. Nowadays, ALF is well-practiced and serves as a means to advance access to justice.

Recognizing the importance of ALF in the UK, Lord David Neuberger, the president of the UK's Supreme Court described it as 'the life blood of the justice system.'⁹⁴ Concerning its regulation, in the UK, ALF is mainly regulated by the market itself, through self-regulation, by the association of litigation funders and of course, supervised by the Financial Conduct Authority.⁹⁵ Litigation funders formed an association and come up with a voluntary based code of conduct to regulate their business.⁹⁶ This model of regulation of ALF, however, has been criticized as inefficient since the approach is based on voluntary membership to the association.⁹⁷ Studies show that third-party funders are operating in the UK without, however, becoming a member of the association of funders in the country. In a study conducted by Rachael Mulheron, though there were sixteen litigation funder companies in UK in 2014, only seven of them were members of the litigation funders association.⁹⁸ This shows that voluntary self-regulation invites unregulated market operators.

The other common law country with relatively developed ALF is the USA. In the USA, even though ALF is practiced in commercial litigation, it is mostly practiced in small cases and consumer litigations.⁹⁹ Of course, it is also growing in commercial disputes such as "breach of contract, business torts, antitrust violations, intellectual

⁹⁰*Id.*, P. 363.

⁹¹ Stroble & Welikson, *supra* note 79, p. 5.

⁹² Susan Lorde Martin, Litigation Financing: Another Subprime Industry that has A Place in the United States Market, *Villanova Law Review*, Vol. 53: No. 1, (2008), Pp. 83-116, p. 113.

⁹³ Galagan & Zivkovic, *supra* note 11, P. 174.

⁹⁴ Solas, *supra* note 13, P. 51.

⁹⁵ Stroble & Welikson, *supra* note 79, p. 5.

⁹⁶ Solas, *supra* note 13, P. 51.

⁹⁷ Rachael Mulheron, England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments, *The Cambridge Law Journal*, Vol. 73: No. 3, (2014), Pp. 570-597, P. 578.

⁹⁸*Id.*, P. 578.

⁹⁹Morpurgo, *supra* note 9, P. 362

property infringement, and trade secret theft.”¹⁰⁰ In contrast to the case in Australia and the UK, the contingency fee is allowed in the USA.¹⁰¹ Also, regarding the litigation cost allocation, the loser pays only his cost in the USA.¹⁰² Notwithstanding the USA adopts this cost allocation principle and allows contingency fees, ALF is growing rapidly.¹⁰³ Like the case in the UK, courts in the USA order the funder to pay the winner’s adverse cost.¹⁰⁴ Some states in the USA, particularly, in Florida State, allow the funder to have control over the case including direct participation in the selection of a lawyer and determining how the litigation should be pursued.¹⁰⁵ In the USA, ALF is not regulated at the federal level.¹⁰⁶ Accordingly, states come up with their own regulatory regime of ALF. To this end, Oklahoma, Nebraska, Maine and Ohio enacted specific legislation on ALF.¹⁰⁷ In Maine and Ohio, the legislation on ALF requires funders to be registered in the state authority and to disclose the ALF agreements such as fees and interest rate. Also, funders are required to show evidences to the effect that the funder does not intervene in the process of the litigation.¹⁰⁸

2.2. Third-Party Litigation Funding in Civil Law Countries

Though ALF originates in common law countries, nowadays, it is increasingly growing in civil law countries as well. Similar to the case in common law countries’ experience, the author focuses on the experiences of a few selected civil law countries with established ALF experience. Accordingly, the author considers the experiences of Germany, Switzerland, and Austria.

In Germany, ALF is widely accepted since there is no common law doctrine of maintenance and champerty.¹⁰⁹ The country has a well-developed practice of ALF in both court litigation and arbitration.¹¹⁰ ALF is practiced in legal claims of copyright, labor and employment, trade, corporate, insolvency, and commercial matters.¹¹¹ This

¹⁰⁰ Sean Tompson et al, ‘United States’, in Lesile Perrin (ed.), *Third Party Litigation Funding Review*, (2018), P. 217.

¹⁰¹ Demouglin & Maultzsch, *supra* note 84, p. 8.

¹⁰² *Id.*, p. 8.

¹⁰³ *Id.*, p. 9.

¹⁰⁴ Galagan & Zivkovic, *supra* note 11, P. 174.

¹⁰⁵ *Id.*, P. 174.

¹⁰⁶ Austin T. Popp, *Third-Party Litigation Finance*, *Anderbilt Law Review*, Vol. 72: No. 2, (2019), Pp. 727-756, P.745.

¹⁰⁷ *Id.*, P.745.

¹⁰⁸ Lawrence S. Schaner, *Third-Party Litigation Funding in United States*, (2012), p. 179.

¹⁰⁹ Stroble & Welikson, *supra* note 79, p. 8.

¹¹⁰ Daniel Sharma, ‘Germany’, in Lesile Perrin (ed.), *Third Party Litigation Funding Review*, 2nd ed., Law Business Research, (2018), p. 59.

¹¹¹ U.S. Chamber Institute for Legal Reform, *Third Party Financing: Ethical and Legal Ramifications in Collective Actions*, (2009), P. 8.

funding arrangement has developed in Germany due to the restriction made in the contingency fee arrangement and the losing party paying cost-shifting approach.¹¹²

On the one hand, though a contingency fee is allowed in Germany, the advocate cannot be refunded by the client the costs of the court and adverse costs of the successful party.¹¹³ Regarding regulation, in Germany, there is no special regulatory regime to ALF. Litigation funders are treated in the provisions of partnership, though with some objections from scholars, and court decisions.¹¹⁴

In Switzerland, ALF has been practiced for a decade and it is growing fast.¹¹⁵ A decade ago, the 2003 Zurich Cantonal Act of Switzerland on the Legal Profession (the Zurich Lawyers Act) made illegal the acts of funding on “a commercial basis and against a participation in the success of the suit.”¹¹⁶ Nevertheless, Switzerland's court had amended this provision of the Zurich Cantonal Act justifying that it limits individuals' freedom of commerce.¹¹⁷ This decision automatically invites litigation funders to enter the litigation-funding market in Switzerland. Moreover, the prohibition of the contingency fee arrangement¹¹⁸ between the attorney and client-that prohibits an agreement by a lawyer based on a “full-success fee” arrangement¹¹⁹-in effect introduced ALF in Swiss.

The contingency fee agreement is also prohibited if the payment modality is fully based on a contingency fee arrangement. It is, however, possible to enter a contingency fee partly for an additional payment by receiving a part fee irrespective of the success of the case.¹²⁰ Though ALF is widely practiced in Switzerland, there is no specific legislation that regulates it; evidencing that there is neither self-regulation nor government regulation.¹²¹

ALF is also a growing in Austria recently, which is getting acceptance in the court decisions.¹²² The supreme court of Austria passed a landmark decision in 2013 in

¹¹² Demougin & Maultzsch, *supra* note 84, P. 4.

¹¹³ *Id.*, p.4.

¹¹⁴ Sharma, *supra* note 109, p. 61 & 62.

¹¹⁵ Solas, *supra* note 13, P. 74.

¹¹⁶ Martin Bernet & Urs Hoffmann- Nowotny, ‘Switzerland’, in Leslie Perrin (ed.), *Third Party Litigation Funding Law Review*, 2nd ed., Law Business Research, (2018), P. 155.

¹¹⁷ Solas, *supra* note 13, P. 74.

¹¹⁸ *Id.*, P. 74.

¹¹⁹ Bernet & Nowotny, *supra* note 116, P. 155.

¹²⁰ *Id.*, P. 155.

¹²¹ *Id.*, P. 158.

¹²² Solas, *supra* note 13, P. 75.

which the court officially legalize the ALF investment in the country.¹²³ Yet it is worth noting at this juncture that, while ALF is rapidly growing in Austria, it doesn't receive sufficient attention of governmental regulation.¹²⁴ As a way to fill this gap, courts evaluate ALF arrangements by applying some related rules of professional rules of advocates in country.¹²⁵

3. Introducing Third-Party Litigation Funding in Ethiopia: Its Implications to Access to Justice and Regulatory Concerns

3.1. The Legal Recognition of Access to Justice in Ethiopia: An Overview

Unlike the case in the international human rights instruments, access to justice is explicitly recognized in the constitution of the Federal Democratic Republic of Ethiopia (FDRE). The constitution expressly grants every person the right to “bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.”¹²⁶ Thus, everyone has a right to access justice by bringing justiciable matters to a regular court, administrative tribunal, the constitutional tribunal (if any), labor tribunal, arbitration tribunal, and other bodies with judicial power. One can seek justice over civil, administrative, or criminal matters. Moreover, the constitution also allows access to justice to be exercised through individual or collective actions.¹²⁷ Individually, one may move to get remedy for violation of his right by instituting a claim before an organ with competent judicial power. One may also seek justice for collective damage or violation of the rights of many individuals. This is particularly important to realize access to justice in environmental harms, which mostly violates the rights of numerous persons. Besides, as international agreements ratified by Ethiopia are integral parts of the Constitution,¹²⁸ provisions of international human rights instruments on access to justice are also parts of the FDRE constitution. Overall, access to justice is a constitutionally guaranteed right in Ethiopia.

¹²³ Marcel Wegmiller & Jonathan Barnett, ‘Austria’, in Leslie Perrin (ed.), *Third Party Litigation Funding Law Review*, 2nd ed., Law Business Research, (2018), p. 21.

¹²⁴ *Id.*, p. 22.

¹²⁵ *Id.*, p. 22.

¹²⁶ The Constitution of the Federal Democratic Republic of Ethiopia, Art. 37/1.

¹²⁷ *Id.*, Art. 37/2.

¹²⁸ *Id.*, Art. 9/4.

3.2. Available Litigation-Funding Options and Their Limitations

In any judicial system, litigation entails costs ranging from attorney fee to court fee, adverse cost of the winning party, costs for witnesses, and other miscellaneous costs including costs for material duplication. The magnitude of these sets of costs is always a variable in the course of the litigation. As a rational person, a litigant always weighs these costs and looks for options of minimizing these costs, including those provided by the law. Before embarking on the available options of funding the litigation, it is important to investigate the cost-shifting rules recognized under the Ethiopian civil litigation system. Normally, there are three approaches of cost-shifting practiced in different jurisdictions namely, the losers pay; parties cover their own cost, and judge-based principles.¹²⁹ In a loser pay principle, the loser indemnifies the costs and fees of the successful litigant.¹³⁰ The loser pays all necessary costs of the winning litigant in addition to his costs. Such an approach is mostly employed as a means of discouraging the losing party from bringing unmerited claims. The second principle is that litigants are required only to cover their costs.¹³¹ No litigant may be required to reimburse the costs of the other litigant. In a judge-based approach, the cost-shifting is entirely left to the discretion of the rendition court.¹³² The rendition court decides who should pay the litigation cost and how much should that litigant pay.

Turning to the case in Ethiopia, we can observe from the civil procedure code that Ethiopia has adopted a judge-based cost-shifting approach in civil litigation. The Ethiopian Civil Procedure Code unambiguously stipulates:

Unless otherwise provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have a full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.¹³³

From this stipulation, one can understand that the rendition court has full discretion to decide as to whom, how much and out of what property the cost should be paid. As the mandate to decide on the cost-shifting is in the discretion of the court, both litigants are at risk of paying litigation costs i.e., the cost-shifting decision of the court is

¹²⁹ Kabsay Giday, Allocation of Cost and Fees of Civil Litigation in Federal Supreme Court Cassation Division: 'Does One Approach Really Fit All?', *Oromia Law Journal*, Vol.7, No.1, (2018), pp. 24-43, p. 28.

¹³⁰ *Id.*, p. 31.

¹³¹ *Id.*, p. 31.

¹³² *Id.*, p. 31 & 32.

¹³³ Civil Procedure Code of the Empire of Ethiopia, 1965, Decree No. 52, Art. 462.

unpredictable. The rendition court may order either each litigant to cover the cost or order the loser or winner litigant to pay litigation costs. Generally, in Ethiopia, the issue of who shall bear the litigation costs and how much the cost bearer pays are left to be decided by judges.

Moreover, in Ethiopia, there are different alternatives to fund the litigation of a lawsuit. A litigant may use self-litigation funding, government funding, free legal aid providers funding, or lawyer funding in their *pro bono* service obligation as the case may be. Litigants opt for either of these options depending on their economic resources to cover the costs of litigation. This section explores all these available options of funding and their limitations to ensure access to justice.

3.2.1. Self-Litigation Funding

Self-litigation funding is the prime means of funding litigation costs in Ethiopia. Litigants are supposed to cover the court fees, attorney's fees, and other costs. However, this mode of litigation funding has some limitations. First, in self-litigation funding, the litigant cannot shift the possible risks associated with litigation. Initially, a litigant pays himself the cost regardless of the prospective settlement of the claim. Upon the final settlement, the cost may be shifted to the losing party or kept at the originally paying litigant depending on the court's decision. This becomes frustrating especially when the losing party is ordered by the rendition court to pay the costs of the winning litigant.

Hence, though wealthy litigants could fund their litigation, they always assume the risks related to the cost. Second, self-litigation funding may affect negatively even the wealthy litigant's daily financial flow. For example, a corporation's business operation may be stuck if it pays its business-operating budget for litigation costs. This spoils the normal business operation of the litigants. It may also result in the sale of the only asset that a litigant has during the litigation. This may substantially damage the property rights of a litigant. Litigation cost is so costly that it is burdensome even for wealthy litigants and completely unaffordable for ordinary litigants.¹³⁴ It costs the litigant an arm and a leg. Thus, in some cases, self-litigation funding may not be an appropriate means to ensure access to justice in the country.

¹³⁴ Kokebe W. Jemaneh, 'Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach' in Pietro s. Toggia et' al (ed.), *Access to Justice in Ethiopia: Towards an Inventory of Issues*, Center for Human Right, Addis Ababa University, 1st ed. (2014), p. 37.

3.2.2. Government Funding

Most of the time, government litigation fund is available in criminal cases.¹³⁵ The government is striving to ensure access to justice for defendants in a criminal charge by authorizing the general attorney and public defender office to render free legal services to the criminally accused person.¹³⁶ The government also provides free legal aid services in civil matters but for selected individuals. Looking into the Federal Attorney-General Establishment Proclamation of Ethiopia, one could see that the General-Attorney has the power and responsibility to deliver free legal aid to vulnerable societies. Specifically, the Attorney-General has the power and duty to “conduct litigation by representing citizens without financial capacity to institute civil action under federal courts especially women, children, disabled and elderly.”¹³⁷ According to this provision, the General-Attorney may fund litigation of women, children, disabled, elderly, and others who cannot afford to pay litigation costs by representing the litigants directly. Correspondingly, the General-Attorneys of the regional states have a duty and power to represent financially weak and/or poor individuals.¹³⁸ Furthermore, the government is rendering free legal aid service to children through the Children’s Legal Protection Center established under the Federal Supreme Court.¹³⁹ The government is also rendering free legal aid service to the poor through the legal aid wing of the human rights commission.¹⁴⁰

Yet, such services rendered by the government suffer from some limitations. The General-Attorney litigation funding is limited only to avoid the attorney fees. Lawyers of the General-Attorney prepare legal documents; provide advice on civil legal matters and represent in a court of law without requiring any fee from the litigants. Other costs of litigation are still borne by the litigant. A litigant should cover court fees, costs of the winning party if the court orders so, and other miscellaneous costs of litigation. Besides, the government-delivered legal aid service is criticized as inaccessible geographically and available only for vulnerable and/or poor persons i.e., those with

¹³⁵ Mizanie Abate et al, *supra* note 51, p. 8.

¹³⁶ *Id.*, p. 8.

¹³⁷ The Federal Attorney General Establishment Proclamation, (2016), Federal Negarit Gazzeta, Proc. No. 943, 22nd year, No. 62, Art. 6/4 (e).

¹³⁸ For example, the Attorney General of the Amhara National Regional State has the power and duty, among others, to provide free legal assistance in civil matters to those persons who cannot afford to pay the litigation costs, vulnerable children, poor women, persons with disabilities, the elderly and patients of HIV/AIDS (The Amhara National Regional State Office of Attorney General Establishment Proclamation, (2018), Zikre Hig Gazette, Proc. No. 263, 23rd year, No. 25, Art. 6/8 (k)).

¹³⁹ Mizanie Abate et al, *supra* note 51, p.9.

¹⁴⁰ Mohammed Abdo, ‘Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach’ in Pietro s. Toggia et’ al (ed.), Access to Justice in Ethiopia: Towards an Inventory of Issues, Center for Human Right, Addis Ababa University, 1st ed. (2014), P. 178ff.

medium income cannot receive free legal aid service from the government.¹⁴¹ Because of these shortcomings, it is hardly possible to say that government-delivered free legal aid service adequately avoids litigation cost and ensures access to justice for all individuals.

3.2.3 University or NGO Legal Aid Center Funding

The other available litigation funding option in Ethiopia is funding by university or NGOs affiliated legal aid centers. The Ethiopian universities are rendering free legal aid to vulnerable societies by establishing legal aid centers under the auspices of law schools in the nearby cities or towns.¹⁴² The majority of law schools of the Ethiopian Universities have established free legal aid centers to serve the poor and vulnerable parts of the community and thereby achieve their community service mission.¹⁴³ They provide legal services including legal advice, preparation of pleadings, legal awareness, and court representations. By doing so, they are funding litigation costs_ avoiding costs to be incurred for attorney's fee, and contributing positively towards ensuring access to justice. Equally, NGOs are working on enhancing access to justice, especially for the vulnerable citizens by rendering free legal aid services through their Free Legal Aid Centers.¹⁴⁴

Owing to different factors, these types of litigation funding are not, however, sufficient to realize access to justice. Most legal aid centers of law schools are facing financial constraints.¹⁴⁵ Though most university-affiliated legal aid centers, initially, were established with the financial support of the Ethiopian Human right Commission,¹⁴⁶ nowadays, they are carrying out their service through the support of their university, or

¹⁴¹ Mizanie Abate et al, *supra* note 51, p. 9.

¹⁴² For example, Mekele University which is well known for providing free legal aid has been helping the vulnerable groups of the society to access justice since 2004 (Anbesie Fura Gurmessa, The Role of University-Based Legal Aid Centers in Ensuring Access to Justice in Ethiopia, *Beijing Law Review*, Vol. 9, (2018), Pp. 357-380, p. 371). Similarly, Bahir Dar University School of law has also provided free legal aid through its free legal aid center known as Bahir Dar University Free Legal Aid Center, BDU FLAC, since 2005 (Bahir Dar University Free Legal Aid Center, Annual Report, (2019), p.1).

¹⁴³ Anchinesh Shiferaw and Ghetnet Mitiku, *supra* note 10, P. 58

¹⁴⁴ Ethiopian Women Lawyers' Association (EWLA) is the pioneer in this regard. It is providing free legal service to the disadvantaged woman whose right is violated (Ethiopian Women Lawyers' Association (EWLA), Legal Aid Services, <https://ewla-et.org/legal-aid-service/>, accessed on July 23/2021).

¹⁴⁵ Anbesie Fura Gurmessa, *supra* note 142, p. 374.

¹⁴⁶ *Id.*, p. 374.

NGOs.¹⁴⁷ However, some legal aid centers are not supported by universities or NGOs to the required level and this becomes a barrier to them achieving their mission.¹⁴⁸

Besides, university-affiliated legal aid centers are facing getting well-qualified legal experts.¹⁴⁹ Universities use employed legal experts in addition to instructors and students to render legal aid to vulnerable societies. However, due to the financial constraint and low salary scheme of employed legal experts, it is hardly possible that legal aid centers employ legal experts.¹⁵⁰ Moreover, legal aid centers of NGOs or universities are inaccessible as most of them are centered in urban areas, and geographically too remote for considerable number of needy citizens.¹⁵¹ Their services are limited to urban communities. Even for such communities, the service of the centers is limited to avoiding litigation costs that may be paid to the advocate. That is, the free legal aid centers do not cover other costs of litigations including court fees, witnesses' expense, and adverse costs of the successful party, if any. Hence, NGOs or University affiliated legal aid litigation funding is full of drawbacks to ensure access to justice.

3.2.4. Lawyer Funding in the *Pro Bono* Service Scheme

Litigation costs may also be funded by the *pro bono* legal service of advocates working in Ethiopia. In this mode of service, advocates working in their private capacity are mandatorily required to render free legal service for vulnerable citizens.¹⁵² At the federal level, the previous federal advocacy law imposes an obligation on every advocate licensed by the federal government to render free legal aid to vulnerable or poor individuals for at least fifty hours per year.¹⁵³ The new federal advocacy licensing and registration proclamation, however, changes the fifty hours requirement. Rather, the new federal advocacy licensing and administration proclamation requires advocates to provide a free legal aid service at least for three separate cases.¹⁵⁴

¹⁴⁷ For example, if we look at the experience of Bahir Dar University Free Legal Aid Center, it is funded by the university budget, which is nearly one million Ethiopian birr annual budget (Interview with Fikreabnet Fikadu, Former vice Coordinator, Bahir Dar University Free Legal Aid Center, (15 July 2021)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ If we see the experience of Bahir Dar University Free Legal Aid, there is continued legal experts resignation from their job due to low salary scale; and it is difficult to retain a legal expert in the employed post for more than six months. (Interview with Fikreabnet Fikadu, Former vice Coordinator, Bahir Dar University Free Legal Aid Center, (15 July 2021)).

¹⁵¹ Anchinesh Shiferaw and Ghetnet Mitiku, *supra* note 10, P. 67 & 68.

¹⁵² Mohammed Abdo, *supra* note 140, P. 162.

¹⁵³ Mizanie Abate et al, *supra* note 51, p.10.

¹⁵⁴ The Federal Advocacy Licensing and Administration Proclamation, (2021), Federal Negarit Gazzeta, Proc. No. 1249, 27th year, No. 42, art. 31/1.

Likewise, at the regional state level, advocates are mandatorily required to provide free legal aid for the destitute without receiving any payment in return.¹⁵⁵

Therefore, the mandatory *pro bono* legal service of advocates in Ethiopia is one method of funding litigation costs in the country. Yet, this modality of legal service is not defect free. Particularly, it is found to be an unsatisfactory alternative to litigation funding due to the absence of advocates in the remote provinces.¹⁵⁶

3.2.5. Litigation Funding Through the Pauper Suit Scheme

The other mechanism that avoids or at least reduces the costs of litigation and enables the indigent persons to access justice as equal as wealthy persons by reducing court fee is a suit in pauper. According to the Ethiopian Civil Procedure Code, a litigant may institute a suit in pauper provided the court granted a litigant a pauper certificate.¹⁵⁷ As such, the code under Articles 467 stipulates as: “[w]hosoever is not possessed of sufficient means to enable him to pay all or the prescribed court fee shall be deemed to be a pauper... and may apply for leave to sue as a pauper.”¹⁵⁸ This provision, while it helps indigent persons to bring a lawsuit and access justice without being discouraged by the court fee, it sets a control mechanism to exclude those who could afford a litigation fee. However, a suit in pauper has its own limitations as it avoids only the costs of a court fee in a lawsuit. It does not help to fund or avoid the costs of a lawyer’s fee, the cost of witnesses and other miscellaneous costs. In addition, a suit in pauper is available only for persons who have no sufficient means, cash and non-cash means, to pay the court fee. It does not work if a person has some assets even if he has no cash money at the time of the suit.

3.3. Introducing Third-Party Litigation Funding in Ethiopia: Implications to Advance Access to Justice

3.3.1. The Role of Third-Party Litigation Funding in Advancing Access to Justice in Ethiopia

As stated before, it has been reiterated that the available options of litigation funding in Ethiopia are inadequate to advance access to justice in the country. As briefly discussed in the previous section, all civil litigation-funding options in litigation are

¹⁵⁵ For example, in Tigray Regional State, advocates must provide at least one legal representation to the vulnerable person per year (Mizanie Abate et al, *supra* note 51, p.10).

¹⁵⁶ *Id.*, p.10.

¹⁵⁷ Civil Procedure Code of the Empire of Ethiopia, *supra* note 132, Art. 467ff.

¹⁵⁸ *Id.*, Art. 467/2.

full of shortcomings. Consequently, litigation cost is still one of the impediments to advancing access to justice in the country. Once we understand that the existing litigation funding schemes are not sufficient to ensure citizens' right to access to justice, we need to look for another litigation-funding option to develop in the country. The most acclaimed alternative litigation funding to solve problems in the existing funding options is ALF.

The introduction of ALF in Ethiopia will address many of the shortcomings of the existing civil litigation-funding schemes in the country. It avoids litigants' risks of litigation costs. As explored in the first section, ALF helps litigants to shift risks associated with litigation costs, with the funder assuming the whole risk of litigation costs. At the beginning of the claim, the funder pays litigation costs including the advocate's fee, court fee, and other miscellaneous costs. This payment is non-recourse that the funder cannot claim a refund of litigation cost incurred unless the funded party wins the case. Of course, some who thinks of the non-recourse nature of ALF may wonder about its practicability in Ethiopia. Such concern, however, would not be an issue when we think of the practice of the insurance business in the country. In the insurance business, the insurer buys the risks of the insured item or person with an insignificant premium. Though the insurer receives some premium, it may not sufficient to refund its liability when the damage happens. For example, an insurance business that covers the insurance of a car will compensate the value of the car without the possibility of reimbursement by the owner when the car is damaged on the next day of the conclusion of the insurance. With this in mind, it can be concluded that ALF would be practicable in Ethiopia once the system is introduced.

Unlike the legal aid-funded litigation, in ALF, the funding extends even to court fees, witnesses' costs, and other miscellaneous costs. The funder may also pay the adverse costs of the winning party upon the settlement of the case on the condition that the court orders the losing party to cover the litigation cost of the successful litigant. In ALF, the litigant avoids not only the advocate's fee, but also shifts the adverse costs of the successful party. As Ethiopia adopts judge-based litigation cost determination, the litigant may be ordered to cover even the litigation costs of the other party. In such a case, ALF helps citizens shift the adverse costs to the funding entity. By shifting the litigation costs for another third party, citizens will be encouraged to seek justice. Thus, it levels the playing field of the litigation and litigants will not be reluctant to start litigation.

Further, ALF avoids the financial constraint problems of litigants to fund their claims. Today, we notice a considerable number of individuals failing to fund their civil

litigation. ALF will become a finance source to solve the financial problems of litigants. Notably, it is indispensable for the poor, insolvent, or bankrupt litigant persons who have no options to fund their litigation by themselves. It is even important for non-indigent persons without, however, extra funds other than their daily budget for their business operation.

Finally, ALF is also important to fund class actions, and public interest litigation, which is a missing practice in the country. The absence of litigation funding is one of the reasons for the under-development of public interest litigation. Imagine that a civic-minded citizen in Ethiopia who brings public interest litigation for environmental damage is ordered to pay the litigation cost of the winning party following the loss of the case. This discourages civic-minded persons to bring public interest litigation. ALF will rectify such a problem since the funder bears the litigation cost with no risk of reimbursement if the public interest litigant loses. It also encourages group victims to begin the class action.

Of course, unlike Australia and UK, Ethiopia does not prohibit a contingency fee arrangement. Litigants are free to enter contingency fee arrangements with their advocates in this country. They can agree to the effect that the advocate covers all legal expenses in exchange for sharing the proceeds of the lawsuit. Contingency fee, however, is not an appropriate litigation funding option compared to ALF. Unlike ALF, in a contingency fee arrangement, the litigant pays costs other than the advocate's fee including court fee, evidence production and other miscellaneous costs.¹⁵⁹ Contingency fee does not avoid all categories of litigation costs. In a contingency fee, since the advocate is at a risk of losing the contingent fee, it is criticized that it invites advocates to worry about their contingent fee than the administration of justice to the victim.¹⁶⁰ Thus, the advocate will endeavor to get the agreed contingent fee and the issue of access to justice of the victim becomes subsidiary.

Moreover, the contingency fee arrangement is open for exploitation of litigants by the advocate.¹⁶¹ As clients are mostly not experienced with legal claims, advocates will exploit this advantage by setting onerous terms and conditions in the contingency fee arrangement. For example, they may set a condition to receive a very high portion of

¹⁵⁹ Christopher Mendez, Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs, *Mississippi College Law Review*, Vol. 39: No.1, (2020), Pp.102-123, P. 114.

¹⁶⁰ *Id.*, P. 115.

¹⁶¹ *Id.*, P. 115.

the recovery, thereby opening a space for unjust enrichment of advocates by taking away the needs of the litigants. Hence, ALF avoids even the limitations in the contingency fee arrangements. In general, ALF is the best litigation funding option to resolve financial related impediments of access to justice to citizens in Ethiopia. It is the best alternative litigation funding to fill the loopholes in the existing funding options in the country. Therefore, it can be certainly concluded that Ethiopia needs to introduce a ALF scheme.

3.2.2. Major Regulatory Concerns of Third-Party Litigation Funding

Though there are strong reasons that necessitate introducing ALF in Ethiopia, it has some regulatory concerns that need to be settled by regulation. Major regulatory concerns of ALF are disclosure of the ALF agreement to the court, conflict of interest, privilege, and confidentiality, and funder control of the litigation. The next sections elucidate explores the major regulatory concerns of ALF.

I. Disclosure of Third-Party Litigation Funding Agreement and Conflict of Interest

Disclosure of the ALF agreement is one of the major regulatory issues that attract the attention of scholars and countries. Disclosure of the ALF agreement is important to know the existence of a conflict of interest between the funder, and judges and even between the funder and the advocate.¹⁶² By disclosing the ALF agreement, litigants, arbitrators, and judges can know whether there is a conflict of interest, which would result in the removal of the judge. Though the disclosure of ALF agreement helps to avoid conflict of interest between the funder and the judges, there is no uniform mandatory disclosure requirement in the world. For example, in Hong Kong arbitration law, a party must reveal the presence of the ALF agreement and the identity of the funding organ.¹⁶³ Unlike the case in Hong Kong, the arbitration law of Singapore gives the disclosure requirement to be decided by the arbitration tribunal; thus, following it discretionary power, the tribunal may or may not demand the disclosure of the arbitration-funding agreement.¹⁶⁴

¹⁶² Giorgio F. Colombo and Dai Yokomizo, A Short Theoretical Assessment on Third Party Funding in International Commercial Arbitration, (2018), P. 113.

¹⁶³ Caroline Overgaard & Johan Tufte-Kristensen, Disclosure of Third-Party Funding in Commercial Arbitration, *NJC*, Vol. 2, (2020), p. 8.

¹⁶⁴ *Id.*, p. 8.

In Canada, in case of class action, it is compulsory to disclose the existence of ALF to the court during approval as the court must approve it.¹⁶⁵ Likewise, in Australia class action third-party litigation funding, the party is required to disclose the identity of the funder and its prospective share from the recovery.¹⁶⁶ Unlike these countries, in US, the disclosure requirement varies from jurisdiction to jurisdiction in that some states set mandatory disclosure requirement while other not.¹⁶⁷

By introducing ALF in the country, Ethiopia also needs to set a mandatory disclosure requirement in its ALF regulation to avert the potential conflict of interest between the funder and judges. The existing laws of Ethiopia require judges to resign by themselves or upon the petition of the litigants when there is conflict of interest with either of the litigant party.¹⁶⁸ Similarly, a judge in ALF should also resign from the bench if there is a conflict of interest with the funder as it may cause him to be partial. Nevertheless, this can be done only if there is a disclosure of the identity of the funder in the ALF. Yet, it is important to note that the disclosure should not include the detailed contents of the agreement. It must not be allowed to the extent of disclosing the private concerns of parties. Knowing the identity of the funder is sufficient to avoid conflict of interest. Therefore, upon introducing ALF, Ethiopia needs to come up with a new regulatory regime that requires disclosure of the existence of funding but not the detailed content of the agreement.

II. Privilege and Confidentiality

In principle, the litigation process especially in arbitration is confidential that it is accessible only to advocates, litigants and judges or arbitrators.¹⁶⁹ Materials that the advocate accesses due to his involvement in the litigation are considered as privileged.¹⁷⁰ This principle, however, may be challenged by a funder in ALF. While funding the litigation, the funder would demand to access all litigation-related documents and information to evaluate its investment.¹⁷¹ This may violate the confidentiality of some documents of the client due to which the client would resist allowing the funder to access such documents. Equally, the funder may want that the funded client not to disclose its financial strategy to other potential litigation

¹⁶⁵ Stroble & Welikson, *supra* note 79, p. 12.

¹⁶⁶ *Id.*, p. 12.

¹⁶⁷ *Id.*, p. 12 & 13.

¹⁶⁸ The Federal Courts Proclamation, (2021), Federal Negarit Gazzeta, Proc. No. 1234, 27th year, No. 26, Art. 33/ 1 & 2).

¹⁶⁹ Colombo & Yokomizo, *supra* note 162, P. 118.

¹⁷⁰ *Id.*, P. 118.

¹⁷¹ Wayne Attrill, Ethical Issues In Litigation Funding, IMF (Australia) LTD, (2009), p. 8.

funders.¹⁷² Thus, the nature of the funder-funded party relationship requires the funder and funded party to access the private information of each other. To protect the confidentiality of information of each party, in many countries, it is common that the funder and the funded party to conclude a confidentiality protection agreement.¹⁷³ The confidentiality agreement prohibits the funder from disclosing the confidential information of the funded party, and the funded party from disclosing the confidential financial information of the funder.

To prevent such problems, there are different approaches in common law and civil law countries. In common law jurisdictions, funders are entitled to access the confidential information of the litigation by invoking the ‘common interest’ exception, which allows any party that has an interest in the outcome of the case to access even confidential information.¹⁷⁴ Apart from allowing the funder to access confidential information, funders are required to abide by the principles of confidentiality. They are prohibited from sharing confidential information of the client with another third party. Unlike common law countries, in civil law countries, the confidentiality of the information between the funder and funded party is left to be regulated by their contractual agreement.¹⁷⁵ The funded and the funder conclude a confidentiality agreement not to disclose confidential information of one another. Unlike these options, there are countries like Hong Kong that expressly empower the funder to access confidential information of the funded party through their legislation.¹⁷⁶

In Ethiopia, though there is a confidentiality principle in the relationship between client and advocates, there is no such doctrine regulating the relationship between the litigation funder and the client. This is mainly because the ALF scheme is missing in the entire system. This scenario suggests that Ethiopia— by imperatively introducing the ALF— should regulate access to confidential information of the client by the funder. Given the fact that the funder is a profit seeking entity, it inevitably demands access to confidential information of the litigation as a way to assess the investment risks and cost-benefit analysis. Yet it is important to note that, while these driving forces necessitate the introduction of this scheme, it should be made with a strict duty to protect the confidentiality of the information. Both the funder and funded part should be prohibited from disclosing the confidential information they acquire in their relationship and failure to do so shall be subject to civil and criminal liability.

¹⁷² Mendez, *supra* note 159, P. 121.

¹⁷³ Shannon, *supra* note 15, p. 900.

¹⁷⁴ Colombo & Yokomizo, *supra* note 162, P. 118.

¹⁷⁵ *Id.*, P. 118.

¹⁷⁶ *Id.*, P. 118.

III. Funder Control of the Litigation and Advocate's Professional Independency

The role of the funder in controlling the management of litigation is another prudential area of ALF regulation. Funders prefer to control the litigation to keep their investment safe in the litigation.¹⁷⁷ The funder litigation control includes participation in the advocate selection and determining the litigation strategy of the suit, including terms of settlement of the case out of court.¹⁷⁸ Funder control of litigation has, however, some unwanted consequences. It may expose the advocate to be abused by the direction of the funder while entertaining litigation. For example, the funder may force the advocate to accept a low settlement offer of the other litigant provided the funder would receive an adequate return in the end. The advocate may be obliged to negotiate even at the cost of the client's interest so long as the funder's return is high. It would also deny the advocate to work with professional independence and loyalty to the client.¹⁷⁹ When the funder is allowed to dictate the litigation strategy, the advocate's professional freedom will be lost, denying his role of leading the litigation management. It will also cause the client to 'relinquish [critical] decision-making authority to the funder' during the conclusion of the funding agreement.¹⁸⁰ In such a case, the funder develops a litigation strategy that suits to maximize its profit mission irrespective of the client's interest. These may negatively affect the justice system as the investor's interest outweighs the litigant's interest.

Therefore, to overcome such problems, Ethiopia needs to regulate the role of the funder in litigation management. Funders should be restricted from intervening in the freedom of the client to select the advocate and negotiate the terms and conditions of the service. They should also be prohibited from intervening in the freedom of the advocate in the management of the litigation and in deciding the litigation strategy. Such prohibition limits the unnecessary intervention of investors in the justice system.

Conclusion

Access to justice is a fundamental human right recognized by international and regional human rights instruments, as well as national constitutions. The FDRE constitution entitles every person to bring any justiciable claim before a court or other

¹⁷⁷ David R. Glickman, *Embracing Third-Party Litigation Finance*, *Florida State University Law Review*, Vol. 43, (2016), Pp. 1043-1070, P. 1062.

¹⁷⁸ *Id.*, p. 1062.

¹⁷⁹ *Id.*, p. 1062.

¹⁸⁰ Sasha Nicols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance* Sasha Nicols, *UC Irvine Law Review*, Vol. 5, (2015), Pp. 197-238, P. 230.

competent judicial organs. It is common, however, to see that some individuals face trouble accessing justice due to expensive litigation in the country. Some individuals cannot afford to pay the litigation cost including court fee, advocate's fee, witnesses' expense, and other miscellaneous costs. Thus, individuals are discouraged to start their litigation and seek justice. This obstructs the realization of the constitutional right to access to justice. To limit the impact of this problem, the country employs free legal aid service. Free legal aid service is given by government, NGOs, universities, professional associations, and advocates. However, free legal aid program is inadequate to remedy the litigation cost impediment to access justice in Ethiopia. Legal aid based litigation funding is inaccessible, inefficient, unsustainable, available only to the poor and vulnerable, and does not avoid costs of court fee, witness' expense and miscellaneous costs.

Accordingly, the Author holds that there is a need to introduce ALF in Ethiopia. By introducing ALF, Ethiopia can ensure individuals' constitutional rights since it is the best means to avoid financial barriers to access to justice. Particularly, this funding scheme avoids litigation cost risk to the litigant (risk aversion); it enables litigants to fund their litigation, to access judicial organs, to employ experienced advocate, and to seek justice for any violation without worrying about its litigation cost. In introducing this scheme, Ethiopia should develop a new regulatory framework. In the regulation, an endeavor shall be made to prevent a conflict of interest by requiring disclosure of the ALF agreement, making the funder and funded party to protect the confidentiality of information, and restricting the funder from controlling the litigation.