የኢትዮጵያ ሕግ መጽሔት

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፴፫ኛ ቅፅ
ታሕሣሥ ፪ሺ፲፬ ዓ. ም.

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በዚህ እትም

IN THIS ISSUE

በአዲስ አበባ ዩንቨርሲቲ ሕግ ት/ቤት በዓመት 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።

አድራሻችን፣ ለዋና አዘጋጅ
የኢትዮጵያ ሕግ መጽሔት
የመ.ሣ.ቁ. 1176
አዲስ አበባ፣ ኢትዮጵያ
የስልክ ቁጥር 0111239757
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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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TABLE OF CONTENTS

ARTICLES / የምርምር ፅሁፎች

CASE COMMENT/የፍርድ ትችት

የኢትዮጵያ ድንበር ተሻጋሪ የኢኮኖሚ ሕግጋት ቅኝት፦ ንግድ፣ ኢንቨስትመንት እና የግልግል ዳኝነት

ዘሙድነህ በየነ ሃይሌ እና ዎን ኪዳኔ[*]

አህፅሮተ-ፅሁፍ

ይህ ጽሑፍ የኢትዮጵያ ድንበር ተሻጋሪ የኢኮኖሚ ሕጎችን በተለይም ንግድን፣ ኢንቨስትመንትንና የግልግል ዳኝነትን የሚመለከቱትን ሕጎች እድገቶችንና አሁን ያሉበት ሁኔታን በጥልቀት ይመረምራል። እነዚህ የሕግ እድገቶች ግልፅ ባልሆነ ምክንያት አስቀድመው ይሁንታን ካገኙ የሕግ ሰነዶች የተለዩ መሆናቸውን በግኝቱ የዳሰሰው ይህ መጣጥፍ፤ ተቀባይነት ያለው፣ ምክንያታዊ፣ ሊረጋገጥ የሚችል እና ለሙግት የሚመች ኢኮኖሚያዊ፣ ማህበራዊና ሌሎች ዓላማዎችን ለማሳካት ሲባል ልዩነቶችን መቀነስ እንደሚገባ ምክረሀሳብ ይሰጣል።

መግቢያ

ምንም እንኳን ስያሜው በግርድፉ አሳሳች ቢመስልም በድንበር ተሻጋሪ የኢኮኖሚ መስተጋብሮች ላይ ተፅእኖ ያላቸው የተለያዩ ሕጎች ለምርምርና ለፖሊሲ ትንተና ሲባል በጥቅሉ ድንበር ተሻጋሪ የኢኮኖሚ ሕግጋት በመባል ይጠራሉ።[1] **ይህንን መሰረት በማድረግ**

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[*] **ዶ/ር ዘሙድነህ በየነ ሃይሌ እና ፕ/ር ዶ/ር ዎን ለማ ኪዳኔ ዋና መቀመጫውን በአሜሪካን አገር በዋሽንግተን ዲ.ሲ. ያደረገውና በዓለም አቀፍ የንግድና የኢንቨስትመንት የግልግል ዳኝነት እንዲሁም በሌሎች ድንበር ተሻጋሪ በሆኑ ዓለም አቀፍ የሕግ ጉዳዮች ላይ ዓለም አቀፍ የጥብቅና እና የማማከር አገልግሎትን በመስጠት የሚታወቀው የአዲስ ሎው ግሩፕ ኤል. ኤል. ፒ. (ኤ. ኤል. ጂ.)** [ADDIS LAW GROUP LLP – ALG] **መስራቾች እና ሃላፊዎች ናቸው። ለበለጠ መረጃ የጥብቅና ድርጅቱን ድረ ገፅ** www.addislawgroup.com **ይመልከቱ።**

[1] **በዚህ ጥናታዊ ፅሁፍ "ድንበር ተሻጋሪ ሕግ** (transnational law)**" የሚለው ቃል አገባብ ፊሊፕ ጄሰፕ እ.አ.አ. በ1950ዎቹ ባደረገው ንግግሩ ውስጥ እንደተጠቀመዉ ነው።** The term 'transnational law' … includes "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." **"[ድንበር ተሻጋሪ ሕግ ማለት] ከሀገራዊ ድንበሮች በላይ የሆኑ ድርጊቶችን ወይም ክስተቶችን የሚገዛ ሕግ ነዉ። በተጨማሪም ዓለም አቀፍ እና የግል ዓለም አቀፍ ሕጎችን፣ እንዲሁም ከእንደነዚህ ዓይነት መደበኛ የሕግ ምድቦች ጋር ሙሉ በሙሉ የማይገጥሙ ሌሎች ሕጎችንም ያካትታል።"** Jessup 1956 lectures at Yale Law School, quoted in: Peer Zumbansen, Transnational Law in Jan Smits (ed.), Encyclopedia of Comparative Law. pp. 738-754 (Edward Elgar Publishing: 2006) at. 738. Text available at

ይህ መጣጥፍ የኢትዮጵያን ድንበር ተሻጋሪ የኢኮኖሚ ሕግጋት ምንጮችን በመለየት በተመረጡና አስፈላጊ ተብለው በተለዩ ይዘቶቻቸው ላይ ሂሳዊ ምዘናን ይሰጣል። ይህ የሕግ ዘርፍ ንግድን፤ ኢንቨስትመንትንና የአለመግባባት መፍቻ ዘዴን በተለይም የግልግል ዳኝነትን ያካትታል።

1. የኢትዮጵያ የንግድ ስምምነቶችና ደንቦች

ኢትዮጵያ ባመዛኙ ውስብስብ ከሆነው የዓለም አቀፍ ንግድ ስርዓት ውጭ ራሷን አስቀምጣለች። ምንም እንኳን የዓለም አቀፍ ንግድ ድርጅት አባል ለመሆን አርፍዳም ቢሆን ፍላጎቷን በመግለፅ ሂደቱን የጀመረች ቢሆንም[2] እስካሁን ድረስ እዚህ ግባ የሚባሉ አስገዳጅ የሁለትዮሽ የንግድ ስምምነቶች ያላት አገር አይደለችም። ንግድን የተመለከቱና ኢትዮጵያ አባል የሆነችባቸው ዓለም አቀፍ የሕግ ስምምነቶች የሚከተሉት ናቸው።

(1) እ.ኤ.አ. በኖቬምበር 5 ቀን 1993 በካምፓላ የተፈረመው የምስራቅና ደቡባዊ አፍሪካ የጋራ ገበያ ማቋቋሚያ ዓለም አቀፍ ስምምነት፤

(2) እ.ኤ.አ. በማርች 1996 በናይሮቢ የተፈረመው የበይነ-መንግስታት የልማት ድርጅት (“ኢጋድ”) ማቋቋሚያ ዓለም አቀፍ ስምምነት፤

(3) እ.ኤ.አ. በጁን 23 ቀን 2000 በኮቶኑ የተፈረመው የአፍሪካ፣ ካሪቢያንና የፓስፊክ ቡድን አገራት ከአውሮፓ ሃገራት ጋር የተፈራረሙት የኢኮኖሚ ትብብር ስምምነት፤

(4) የአፍሪካ አህጉራዊ ነፃ የንግድ ቀጣና ስምምነት፤ እና

(5) የአህጉሩ 54 አገሮች በአባልነት የሚገኙበትና የአፍሪካን የኢኮኖሚ ማሕበረሰብ ለመገንባት ያለመው የአቡጃ ዓለም አቀፍ ስምምነት[3]።

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https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1181&context=clpe

[2] ከአስር አመታት በላይ ተስተጓጉሎ የነበረው ኢትዮጵያ የዓለም አቀፍ ንግድ ድርጅትን ለመቀላቀል የምታደርገው ድርድር እ.አ.አ. በ2019 እንደገና ተጀምሯል። ይህ ጽሑፍ በሚፃፍበት ጊዜ የመሳካት ወይም ያለመሳካት ዕድሉ ግልፅ አልነበረም። ለበለጠ መረጃ ይኸን ፅሁፍ ይመልከቱ፡- International Trade Administration (ITA), Ethiopia: Country Commercial Guide at https://www.trade.gov/knowledge-product/ethiopia-trade-agreements

[3] ንግድን የተመለከቱና ኢትዮጵያ አባል የሆነችባቸው ዓለም አቀፍ የሕግ ስምምነቶች እነዚህ ብቻ እንደሆኑ በITA ተገልጿል። https://www.trade.gov/knowledge-product/ethiopia-trade-agreements. የኢትዮጵያ ንግድና ኢንዱስትሪ ሚኒስቴር ድረ-ገጽ በዚህ ጉዳይ ላይ ተጨማሪ መረጃ የለውም። የኢትዮጵያ ንግድና ኢንዱስትሪ ሚኒስቴር ድረ-ገጽ ይመልከቱ። http://www.motin.gov.et/home

ኢትዮጵያ ድሃ ከሚባሉ አገሮች ተርታ የምትመደብ በመሆኗም አሜሪካ[4]፣ የአውሮፓ ህብረትንና[5] ቻይናን[6] ጨምሮ ቀዳሚ ከሚባሉ የንግድ አጋሮች በልዩ ሁኔታ ድጋፍ ታገኛለች።

[4] Office of the United States Trade Representative, The African Growth and Opportunity Act (AGOA), USTR.GOV, https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa [https://perma.cc/Y8JY-C8AH].

> Since its enactment in 2000, the African Growth and Opportunity Act (AGOA) has been at the core of U.S. economic policy and commercial engagement with Africa. AGOA provides eligible sub-Saharan African countries with duty-free access to the U.S. market for over 1,800 products, in addition to the more than 5,000 products that are eligible for duty-free access under the Generalized System of Preferences program.

> **(እ.ኤ.አ. በ2000 ከፀደቀበት ጊዜ ጀምሮ** AGOA **አሜሪካ ከአፍሪካ ጋር ላላት የኢኮኖሚ ፖሊሲ እና የንግድ ግንኙነት አስኳል ነው። በ**Generalized System of Preferences program **መሰረት ከቀረጥ ነፃ ከሆኑ 5,000 በላይ ምርቶች በተጨማሪ** AGOA **ከሰሃራ በታች ካሉ የተመረጡ የአፍሪካ ሀገራት ለሚመጡ ከ1,800 በላይ ምርቶች በአሜሪካ ገበያ ከቀረጥ ነፃ ዕድል ተጠቃሚ እንዲሆኑ አድርጓል።)**

[5] **ይኸን ፅሁፍ ይመልከቱ፦** EU Trade Policy and Africa's Exports, at https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156399.pdf

> The EU is the most open market for African exports. Most African countries have fully free access to the EU market. Other partners offer less favourable conditions for African exports. Europe is by far Africa's largest export market and its main customer. Thanks to EU trade openness, exports of food and manufactured products from Africa to the EU keep increasing.

> **(የአውሮፓ ህብረት ለአፍሪካ ወጪ ንግድ በጣም ክፍት ገበያ ነው። አብዛኛዎቹ የአፍሪካ ሀገራት በአውሮፓ ህብረት ገበያ ውስጥ ሙሉ በሙሉ ከቀረጥ ነፃ ዕድል ተጠቃሚ ናቸው። ከሌሎች የአፍሪካ አጋሮች አንፃር የአውሮፓ ህብረት ገበያ ለአፍሪካ የወጪ ንግድ በይበልጥ ምቹ ነው። አውሮፓ እስካሁን ለአፍሪካ ትልቁን የኤክስፖርት ገበያ እንዲሁም ዋና ደንበኛ ነው። ለአውሮፓ ህብረት ገበያ ክፍትነት ምስጋና ይግባውና ከአፍሪካ ወደ አውሮፓ የሚላከው ምግብ እና በፋብሪካ የተመረቱ ቁሳቁሶች ቁጥር ከጊዜ ወደ ጊዜ እየጨመረ ነው።)**

[6] **ይኸን ፅሁፍ (ገፅ 21) ይመልከቱ፦** From China-Africa to Africa-China: A Blueprint for a Green and Inclusive Continent-Wide African Strategy towards China, at https://developmentreimagined.com/wp-content/uploads/2021/06/blueprint-final-14.06.pdf

> In 2010, China agreed to allow imports from Least Developed Countries (LDCs) under a Duty-Free Quota Free Scheme (DFQF). This scheme was renewed in 2015 and is estimated to cover 97% of tariff lines. However, it has had a limited impact so far. For example, while 99% of all LDC imports into China in 2011 were under the DFQF scheme, China has imported little beyond such commodities from African

ምንም እንኳን ኢትዮጵያ ዘለግ ያለ የገቢ ንግድ የቀረጥ ስርዓትን (import tariff schedules)[7] **ብትቀርፅም፤ የአሜሪካ የዓለም አቀፍ ንግድ እስተዳደር እንደሚጠቁመው የእነዚህ ደንቦች ዓላማ "ገቢን ለማሳደግ እንጂ የሃገር ውስጥ ምርቶችን ለመጠበቅ አይደለም"።**[8] **በመሆኑም የኢትዮጵያን የቀረጦች አጣጣል ስርዓት አስመልክተው በውጭ አስተያየት የሚሰጡ አካላት ኢትዮጵያን የሚስሏት እርሷ አባል በሆነችባቸው አህጉራዊ (ቀጣናዊ) የንግድ ስምምነቶች መሰረት ከተቀረፁት ጥቂት የቀረጥ ስርዓቶች በስተቀር እጅጉን የተጋነነ የገቢ ማስገኛ ስርዓትን የዘረጋች አገር እንደሆነች ነው።**[9]

LDCs. The WTO largely attributes under-utilization of these preference schemes to complex Rules of Origin (ROOs), market access challenges and direct transportation requirements.

(እ.ኤ.አ. በ 2010 ቻይና በቀረጥ-ነጻ ኮታ-ነፃ መርሃ ግብር (DFQF) **ካልበለፀጉ ሀገራት** (LDCs) **ምርቶች እንዲገቡ ፈቅዳለች። ይህ እቅድ እ.ኤ.አ. በ**2015 **ታድሷል፤** 97% **የታሪፍ ምድቦችን ይሸፍናል ተብሎ ይገመታል። ሆኖም ግን እስካሁን ያለው ተፅዕኖ ውስን ነው። ለምሳሌ እ.ኤ.አ. በ**2011 **ከመላው የ**LDC **ወደ ቻይና ከገቡት ምርቶች ውስጥ** 99% **ያህሉ በ**DFQF **አቅድ ስር ሲሆኑ፣ ቻይና በራሷ ፍላጎት ከአፍሪካ** LDC **ከእንደነዚህ አይነት ሸቀጦች ውጪ ሌላ አላስገባችም ማለት ይቻላል። ለዚህም የአለማቀፍ ንግድ ድርጅት እንደ ዋና ምክንያት ያቀረባቸው የልዩ ተጠቃሚነት ዕድል ጋር በተያያዘ የሸቀጦችን መነሻ የሚደነግጉ ውስብስብ ደንቦች** (ROOs)፣ **የገበያ ተደራሽነት ተግዳሮቶች እንዲሁም ሸቀጦችን በሶስተኛ ሀገር በኩል ሳይሆን በቀጥታ የመጓጓዣ መስፈርቶችን ነው።)**

[7] ***ለምሳሌ ይህን መረጃ ይመልከቱ፦*** https://customs.erca.gov.et/trade/customs-division/tariff?lang=en

[8] International Trade Administration (IAT), Ethiopia: Country Commercial Guide at https://www.trade.gov/knowledge-product/ethiopia-import-tariffs

[9] ***ዝኒ ከማሁ።***

Revenue generation, not protection of local industry, appears to be the primary purpose of Ethiopia's tariffs. Goods imported from the Common Market for Eastern and Southern Africa (COMESA) members are granted a 0 to 10% tariff preference, (depending on the type of goods) under the Free Trade Agreement (FTA). Tripartite FTA membership among COMESA, the South African Development Community (SADC), and the East African Community (EAC) members will allow zero tariffs and duties, which will impact Ethiopian trade when it completes the COMESA accession process (timeline for completion is unclear). Customs duties are payable on imports by all persons and entities that have no duty-free privileges. In 2019 Ethiopian customs ceased its policy of reducing, or eliminating, customs duties on imports of knocked-down and semi knocked-down industrial inputs. This new revision has reclassified these products to be treated with basic tariff rates.

(የኢትዮጵያ ታሪፍ ዋና ዓላማ ገቢ ማመንጨት እንጂ የሀገር ውስጥ ኢንዱስትሪ ጥበቃ አይመስልም። በነጻ የንግድ ስምምነት (FTA) **መሠረት ከምሥራቅና ደቡብ አፍሪካ የጋራ ገበያ** (COMESA) **አባል**

2. የኢትዮጵያ የኢንቨስትመንት ሕግ

ከዚህ ቀደም የተደረጉ ጥናታዊ ፅሁፎች በቅርቡ (እ.አ.አ. በ2020) እስከወጣው የኢንቨስትመንት አዋጅና ደንብ ድረስ የነበረውን ጊዜ በማካተት የኢትዮጵያ የኢንቨስትመንት ሕግ ምንጮች፣ ዕድገትና ይዘቶች ላይ ትንተናን ሰጥተዋል።[10] ይህ ክፍል አሁን ባለው ሕግ ላይ ያተኩራል።

2.1. ዓለም አቀፍ ስምምነቶች

ኢትዮጵያ 34 የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶችን የተፈራረመች ስትሆን፤ ከነዚህ ውስጥ 21 ስምምነቶች ብቻ በስራ ላይ የሚገኙ ናቸው።[11] እንደ መንደርደሪያ ባለፉት 4 ዓመታት ኢትዮጵያ ቢያንስ 10 የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶችን ብትፈርምም፤ አንዳቸውም ፀድቀው ወደ ስራ አለመግባታቸውን ማንሳቱ ጠቀሜታ አለው።[12]

ሀገራት የሚገቡ ዕቃዎች እንደየ እቃው አይነት ከ0 እስከ 10 በመቶ የታሪፍ ቅነሳ ልዩ ዕድል ተሰጥቷቸዋል። የCOMESA፣ የደቡብ አፍሪካ ልማት ማህበረሰብ (SADC) እና የምስራቅ አፍሪካ ማህበረሰብ (EAC) አባል ሀገራት መካከል የሶስትዮሽ የነፃ ንግድ ስምምነት ዜሮ ታሪፍ እና ቀረጥ ይፈቀዳል። ይሄም ኢትዮጵያ COMESAን የመቀላቀል ሂደት ካጠናቀቀች በኋላ በሀገሪቷ ንግድ ላይ ተፅዕኖ ያሳድራል (የሂደቱ መጠናቀቂያ ጊዜም ግልፅ አይደለም)። ከቀረጥ ነፃ መብት የሌላቸው ሰዎች እና አካላት ወደ ሀገር ውስጥ ለሚያስገቧቸው እቃዎች የጉምሩክ ቀረጥ ይከፍላሉ። እ.ኤ.አ. በ2019 የኢትዮጵያ ጉምሩክ ከውጭ በሚገቡ በከፊል አሊያም ሙሉ ለሙሉ ባልተገጣጠሙ የኢንዱስትሪ ግብአቶች ላይ የጉምሩክ ቀረጥ የመቀነስ ወይም የማስቀረት ፖሊሲውን አቁሟል። ይህ አዲስ አሰራር እነዚህን ምርቶች በመሠረታዊ የታሪፍ ስሌት እንዲስተናገዱ አድርጓል።)

[10] Won Kidane, The Legal Framework for the Protection of Foreign Direct Investment in Ethiopia, Chapter 26, in THE OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru, et al, ed. OUP, 2019).

[11] ይህን ዳታቤዝ ይመልከቱ፦ Bilateral Investment Treaties (BITs) that Ethiopia signed at https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia [hereinafter Ethiopia BITs] [https://perma.cc/BB72-C4LL].
ዳታቤዙ 35 ስምምነቶችን ያሳያል። ነገርግን በ1964 የተፈረመው የኢትዮጵያ-ጀርመን የሁለትዮሽ የኢንቨስትመንት ስምምነት ተቋርጦ በ2004ቱ ስምምነት ተተክቷል። ከዚህም በተጨማሪ ኢትዮጵያ ከሆንድ እና ደቡብ አፍሪካ ጋር የተፈራረመቻቸው የሁለትዮሽ የኢንቨስትመንት ስምምነቶች በሃገራቱ በተናጠል ተቋርጠዋል። *ዝኒ ከማሁ።*

[12] *ዝኒ ከማሁ።* እነዚህ አራት የሁለትዮሽ የኢንቨስትመንት ስምምነቶች ከ2016 ጀምሮ ተፈርመዋል። በ2009 እና 2016 መካከል ምንም የሁለትዮሽ የኢንቨስትምነት ስምምነት አልተፈረመም። *ዝኒ ከማሁ።*

ይህ የሆነው ህንድና[13] ደቡብ አፍሪካ[14] የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች ላይ የያዙትን ጥርጣሬና የአቋም ለውጥ ለመከተል ታስቦ፤ ወይም ደግሞ በአስተዳደራዊ ዳተኝነት አሊያም በቢሮክራሲ ልግመት እንደሆነ በግልፅ አይታወቅም።

የኢትዮጵያ የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች ፕሮግራም ታሪክ[15] ረጅም ዘመንን ያስቆጠረ ነው። የተጀመረውም ኢትዮጵያ የመጀመሪያውን የኢንቨስትመንት ሕጓን[16] እ.አ.አ. በ1964 ካፀደቀች ከአንድ ዓመት በኋላ እ.አ.አ. በ1964 ነው። እ.አ.አ. በ1964 ከጀርመን ጋር የተፈራረመችው የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነት[17] በዓለማችን ከተደረጉት የመጀመሪያዎቹ ተርታ የሚመደብ ነው። በዓለም የመጀመሪያው

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[13] በተከታታይ የኢንቨስትመንት የግልግል ጉዳዮች ኪሳራ ቅር የተሰኘችው ህንድ በጊዜው የነበሯትን የሁለትዮሽ የኢንቨስትመንት ስምምነቶች በሙሉ በመካድ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች በአዲስ ሞዴል መዋዋል ጀመረች። ስለ ህንድ የኢንቨስተርና የመንግስት አለመግባባት መፍቻ ስርአት (ISDS) እንዲሁም በአዲስ ሞዴል የሁለትዮሽ የኢንቨስትመንት ስምምነቶችን እንደገና ለመደራደር የምታደርገውን ጥረት የበለጠ ለመረዳት ይህን ፅሁፍ ያንብቡ፡- Won Kidane, *China's* and *India's* Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa, LOYOLA UNIVERSITY CHICAGO LAW JOURNAL, Vol. 49, 406-474 (2017) at pp. 445-461.

[14] ምንም እንኳን ደቡብ አፍሪካ እንደ ህንድ የኢንቨስትመንት ግልግል እክሎች ባያጋጥሟትም፣ ተመሳሳይ ተፈጥሮ ያላቸው ችግሮች ሊያጋጥሙ ይችላሉ በሚል ስጋት አጠቃላይ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች አሰራርን እንደገና እንድታሰብ አድርገዋል። ለዝርዝሩ ይህን ፅሁፍ ያንብቡ፡- Won Kidane, Contemporary International Investment Law Trends and *Africa's* Dilemmas in the Draft Pan-African Investment Code, GEORGE WASHINGTON INTERNATIONAL LAW REVIEW, Vol. 50, 523-579, at 557-561.

[15] ከሁለትዮሽ የኢንቨስትመንት ስምምነቶች በተጨማሪ UNCTAD የሚከተሉትን የውጪ ኢንቨስትመንትን በተመለከተ ጉልህ አንድምታ ያላቸውን የሕግ ሰነዶች ይዘረዝራል፡- MIGA Convention1985, UN Code of Conduct on Transnational Corporations (1983), World Bank Investment Guidelines (1992), ILO Tripartite Declaration on Multinational Enterprises (2006), UN Guiding Principles on Business and Human Rights (2011), Permanent Sovereignty UN Resolution (1962), New International Economic Order UN Resolution (1974), Charter of Economic Rights and Duties of States (1974). ለበለጠ መረጃ የሚከተለውን ይመልከቱ፡- https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[16] Decree No. 51 of 1963, Decree to Provide for the Encouragement of Capital Investment in Ethiopia, INTERNATIONAL LEGAL MATERIALS, Vol. 3, No. 1 (January 1964), pp. 41-44.

[17] Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, Ger.-Eth., 1964. [ኢንቨስትመንትን ለማበረታታት በየጀርመን ፌደራል ሪፐብሊክና በኢትዮጵያ መካከል የተፈረመ የሁለትዮሽ ዓለም አቀፍ ስምምነት፣ እ.ኤ.አ. 1964። [ከዚህ በኋላ የ1964 ኢትዮ-ጀርመን ስምምነት እየተባለ የሚጠቀስ]]። የዚህ ስምምነት የእንግሊዝኛው ቅጂ እዚህ ድረ-ገፅ ላይ ይገኛ https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1165/download

በመሆኑ ከሚታወቀውና እ.አ.አ. በ1959 በጀርመንና በፓኪስታን መካከል ከተፈረመው የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነት[18] ጋር ኢትዮጵያና ጀርመን እ.አ.አ. በ1964 የተፈራረሙት ስምምነት አንድ ዓይነት ነው።

የጀርመኑ ሞዴል መሰረታዊ የሚባሉትን አብዛኞቹን የኢንቨስተር (ባለሀብት) ጥበቃ መርሆዎችን በግርድፉ የያዘ ነው።[19] ያልተጠበቀ ባይሆንም ሞዴሉ በመንግስታት መካከል ሊኖር ስለሚችል የአለመግባባት መፍቻ ስርዓትን ቢተልምም በባለሀብትና በመንግስት መካከል የሚኖር አለመግባባት የሚፈታበትን ስርዓት አላካተተም።[20]

ኢትዮጵያ ሁለተኛውን የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነት የተፈራረመችው ሶስት አሰርት ዓመታትን ካሳለፈች በኋላ እ.አ.አ. በ1994 ከጣሊያን ጋር ነው።[21] ይህ ከጣሊያን ጋር የተፈረመው የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነት በስራ ላይ የዋለ የመጀመሪያው ስምምነት ነው። በስራ ላይ የዋለውም እ.አ.አ. በሜይ 1998 ነው።[22] በዛን ዘመን የነበሩ የሕግ ዕድገቶች ለድንበር ተሻጋሪ የኢኮኖሚ ጉዳዮች ቅድሚያ አይሰጡም ነበር ቢባል ማጋነን አይሆንም። እ.አ.አ. የ1990ዎቹና የ2000ዎቹ አሰርት ዓመታት ግን የዓለም አቀፍ ስምምነቶች መፈራረም በፍጥነት ያደገበትና በተጓዳኝም ብሔራዊ ህግጋትን የመደንገግ ጉልህ ጥረቶች የተደረጉባቸው ናቸው።[23] የኢትዮጵያ 21 የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች በስራ ላይ የዋሉትም እ.አ.አ. በ1997 እና በ2010 ባሉት ጊዜያት መካከል ነው።[24]

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[18] **በዓለም ላይ የመጀመሪያው እነደሆነ የሚታመነው የሁለትዮሽ የኢንቨስትመንት ስምምነት በጀርመን እና በፓኪስታን መካከል በ1952 ተፈርሞ በ1962 ተፈፃሚ ሆኗል። ሰነዱ በዚህ ድረ-ገፅ ይገኛ** https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959-

[19] **ኢትዮ-ጀርመን ስምምነት፥ *በግርጌ ማስታወሻ ቁ. 17* የተጠቀሰ፥ አንቀጽ 2 (አድልዎ አለመፈፀም) እና አንቀጽ 3 (ደህንነትና ጥበቃ እና ንብረት አለመውረስ)።**

[20] **ኢትዮ-ጀርመን ስምምነት፥ *በግርጌ ማስታወሻ ቁ. 17* የተጠቀሰ፥ አንቀጽ 11 (አለመግባባቶችን መፈቻ ስርአት)።**

[21] **ስለ የኢትዮጵያ-ጣሊያን የሁለትዮሽ የኢንቨስትመንት ስምምነት *መፈረም* (signature) እዚህ ይመልከቱ፦** https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[22] **ስለ የኢትዮጵያ-ጣሊያን የሁለትዮሽ የኢንቨስትመንት ስምምነት *መፅደቅ* (ratification) እዚህ ይመልከቱ፦** https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[23] **አሁን ተፈፃሚነት ስላላቸው የሀገር ውስጥ ሕጎች ገለፃ ከታች ንዑስክፍል 3.2. ይመልከቱ።**

[24] **የመፅደቅ** (ratification) **ሁኔታን ለማወቅ ይህን ድረ-ገፅ ይመልከቱ**

ሁሉም በሚባል መልኩ የዓለም አቀፍ ስምምነቶቹ "ካአድልዎ የነፃ" (non-discrimination)፣ "ፍትሃዊና ሚዛናዊ አገልግሎት" (fair and equitable treatment)፣ "የማይወረስ" (non-exporpriation)፣ እና "በባለሀብትና በመንግስት መካከል የሚደረግ ያለመግባባት መፍቻ ስርዓትን" (Investor-State Dispute Settlement-ISDA) የሚባሉ የኢንቨስትመንትና የባለሀብት ጥበቃ መሰረታዊ የሆኑ መርሆዎችን ያካተቱ ናቸው።[25]

ከእነዚህ ምንጫቸው ድንበር ተሻጋሪ ከሆኑ ሕግጋት የ21 አገራት ባለሀብቶች[26] የሕግ ከለላን ያገኛሉ። ባለሀብቶቹ በተጨማሪነት የሚያገኟቸው ጥቅሞች ባህርይና ስፋት እንደስምምነቶቹ አንቀፆች አቀራረፅ ይለያያል። የስምምነቶቹ አንቀፆች በተመሳሳይ ስለሚነበቡ ብቻ ጥበቃዎቹም አንድ ዓይነት ናቸው ብሎ መደምደም አይቻልም። እንዲያውም በተቃራኒው በአንቀፆቹ አቀራረፅ ላይ የሚታዩ ጥቂት ልዩነቶች በአለመግባባት የመፍቻ ክርክሩ ላይ ከፍተኛ ልዩነትን የሚፈጥሩ ሊሆኑ ይችላሉ።

የኢትዮጵያ የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች ታሪክ በግልፅ በሚታይ መልኩ ባደጉና በታዳጊ አገሮች (North-South) ወይም በታዳጊ አገሮች (South-South) መካከል የሚለውን የተለምዶ ድልድል የሚያፈርስ ነው። ለዚህም ምክንያቱ ግማሾቹ ስምምነቶች ከታዳጊ ኢኮኖሚዎች ለምሳሌም ከየመን፣ ሊቢያና ሱዳን ጋር የተደረጉ ሲሆን፤ ቀሪዎቹ እኩሌታዎች ደግሞ ከበለፀጉ ኢኮኖሚዎች፣ ለምሳሌም ከኔዘርላንድስ፣ ስዊድንና ጀርመን ጋር የተደረጉ በመሆናቸው ነው።[27] ይህም አንድርያስ ሎወንፌልድ በጣሙን ተሰሚ በሆነ መልኩ የዓለምአቀፍ ኢንቨስትመንት ሕግ ስረ መሰረቱ የቅኝ አገዛዝ ህግን መተካት ነው በማለት እንደሚከተለው የሚያጠነጥነውን ሀሳብ የሚደግፍ አይደለም።

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https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[25] ለንጽጽራዊ ትንተና ጥሩ ናሙና የሚሆኑት የመጀመርያው የኢትዮጵያ-ኩዌት (1998) ስምምነት እና የቅርብ ጊዜ የሆነው የኢትዮጵያ-ግብጽ (2010) ስምምነት ነው። ሁለቱም ከዚህ ድረ-ገፅ ላይ ይገኛሉ፡- https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia. ምንም እንኳን አይነታዊ ክፍፍል ቢኖርም መሰረታዊ ህጎች ግን ተመሳሳይ ናቸው።

[26] ግብጽ (2010)፣ ፊንላንድ (2007)፣ ስዊድን (2005)፣ ኦስትሪያ (2005)፣ ሊቢያ (2004)፣ ጀርመን (2006)፣ እስራኤል (2006)፣ ኢራን (2004)፣ ፈረንሳይ (2004)፣ ኔዘርላንድ (2005)፣ አልጄሪያ (2005)፣ ዴንማርክ (2005)፣ ቱኒዚያ (2004)፣ ቱርክ (2005)፣ ሱዳን (2001)፣ የመን (2000)፣ ማሌዥያ (1999)፣ ስዊዘርላንድ (1998)፣ ቻይና (2000)፣ ኩዌት (1998) እና ጣሊያን (1997) በ UNCTAD መዘርዝር መሠረት በቅደም ተከተል ተዘርዝረዋል። https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[27] *ዝኒ ከማሁ።*

> *በአፍሪካና በእስያ የተወሰኑ አገራት የነበረውን ከቅኝ አገዛዝ ነፃ የመውጣት ማዕበልና በሁሉም የሶስተኛው ዓለም አገሮች ይካሄድ የነበረውን የውጭ አገር ባለሀብቶችን ኢንቨስትመንቶች የመውረስ ማዕበልን ተከትሎ በ1960ዎቹ የመጀመሪያ ዓመታት ላይ በኢንቨስትመንት ተቀባይ አገሮች ላይ ለሚጣል ግዴታ ስምምነትን ማግኘት አዳጋች እንደሚሆን ግልፅ ሆነ። ዓለም አቀፍ እርዳታን በመስጠት ቀዳሚ የሆነው የዓለም ባንክም ባንድ በኩል የውጭ ባለሀብቶችን ኢንቨስትመንት የመውረስ ጉዳይ አስመልክቶ በኢንቨስትመንት አመንጪና ተቀባይ አገሮች መካከል የነበረው የተካረረ ጭቅጭቅ እንዴት መፍትሄ እንደሚያገኝ፤ በሌላ በኩል ደግሞ በዚህ መልኩ የሚከሰቱ አለመግባባቶች እንዴት ሊፈቱ እንደሚችሉ መንገዶችን መፈለግ ጀመረ ...*[28]

የተገባ አስተውሎት እጥረት ያለባቸው (paucity of intentionality) **ኢትዮጵያ የፈረመቻቸው የሁለትዮሽ የኢንቨስትመንት ስምምነቶች መኖር ይህን የሎውንፌልድን አመለካከት እውነት ወይም ውሸት አያደርገውም። ምንም እንኳን በግልፅ የሚነገር አሳማኝ ምክንያት ባይገኝለትም፥ እ.አ.አ. በ2010 ገደማ ሁሉም የተፈረሙ የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች በድንገት እንዳይፀድቁ መደረጉ የተገባ አስተውሎት እጥረት ጉዳይ ስለመሆኑ የሚያጠናክር ነው። ከዚህ ቀደም ብሎ እንደተገለፀው ህንድ የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶችን ያፀደቀችበትና አፈፃፀማቸውን የተከታተለችበት መንገድ ቻይና ከተከተለችው እጅጉን የወረደ በመሆኑ ለከፋ አሉታዊ ሁኔታዎች ዳርጓታል።** [29]

2.2. በስራ ላይ ያለው የኢንቨስትመንት አዋጅ

አሁን በስራ ላይ ያለው የኢትዮጵያ የኢንቨስትመንት ሕግ መጋቢት 24 ቀን 2012 ዓ.ም. የወጣው የኢንቨስትመንት አዋጅ ቁጥር 1180/2012 እና የኢንቨስትመንት ደንብ ቁጥር

[28] ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 536 (2nd ed. 2008).

[29] Won Kidane, *China's* and *India's* Investment Treaty Experiences, *ከላይ በግርጌ ማስታወሻ ቁ. 13 የተጠቀሱ።*

474/2020 ነው።[30] ይህ ደግሞ በንጉሰ ነገስቱ ዘመን በ1948ቱ ሕገ መንግስት[31] ስር ፀድቆ ከነበረው የ1955ቱ የኢንቨስትመንት አዋጅ[32] የተጀመረውና በየደረጃው እየዘመነ የመጣው

[30] የኢንቨስትመንት አዋጅ ቁጥር 1180/2012። የተሻሻለውን የኢንቨስትመንት አዋጅ የቀድሞመውን የኢንቨስትመንት አዋጅ ቁ. 769/2004 እና የኢትዮጵያ መንግስት የኢንቨስትመንት ቦርድና የኢትዮጵያ ኢንቨስትመንት ኮሚሽን ማቋቋሚያ የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 313/2006 ተክቷል። የአዋጅ ቁ. 1180/2012፣ አንቀጽ 56ን ይመልከቱ። እንዲሁም የኢትዮጵያ የኢንቨስትመንት ደንብ ቁ.474/2012ን ይመልከቱ። ይህ ደንብ ከዚህ በፊት የነበረውን የኢንቨስትመንት ማበረታቻ እና ለሀገር ውስጥ ባለሀብቶች የተከለሉ የሥራ መስኮች ደንብ ቁ. 270/2005ን በከፊል ሽሯል።

[31] የኢትዮጵያ የተሻሻለው የ1955 ሕገ መንግስት https://archive.org/stream/TheEthiopianConstitution/EC_djvu.txt

[32] Decree No. 51 of 1963፣ ከላይ በግርጌ ማስታወሻ ቁ. 16 የተጠቀሰ። ዘመናዊ የኢንቨስትመንት ጥበቃ እሳቤዎች እ.ኤ.አ. በ1951 በኢትዮጵያ እና በአሜሪካ መካከል በተደረገው የወዳጅነት እና የንግድ ስምምነት ውስጥ ተንፀባርቀዋል። ሰነዱን በዚህ ድረ-ገፅ ማግኘት ይቻላል። http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002815.asp. ይህ ስምምነት በ1994 ተሻሽሏል። ሰነዱን ለማየት ይህን ድረ-ገፅ ይመልከቱ፡- https://www.trade.gov/knowledge-product/ethiopia-trade-agreements. የስምምነቱ አንቀጽ 8 የሚከተለውን ደንግጓል፡-

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

   (እያንዳንዳቸው ተዋዋይ ወገኖች ሁልጊዜም የሌላውን ተዋዋይ አገር ዜጎች ወይም ኩባንያዎችን እንዲሁም ንብረታቸውንና የቢዝነስ ስራዎቻቸውን በተመለከተ ፍትሃዊና ርትአዊ በሆነ መልኩ ማስተናገድ አለባቸው፤ በሕግ አግባብ ያገኙትን መብትም ሆነ ጥቅም የሚነካ ምክንያታዊ ያልሆኑ ወይም አድሏዊ የሆኑ እርምጃዎችን ከመውሰድ መታወቀብ አለባቸው፤ አግባብ ባለው ሕግመሰረት በተደረገ ውል መሰረት ያገኟቸው መብቶች ውጤታማ በሆነ መልኩ እንዲፈፀምላቸው ማድረግ አለባቸው።)

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation.

   (የማናቸውም ተዋዋይ ሀገር ዜጎች ወይም ኩባንያዎች ያላቸው ንብረትና በንብረት ላይ ያሉ ጥቅሞች በሌላኛው ተዋዋይ ወገን ግዛት ወጥ የሆነ ዋስትናና ጥበቃ ሊደረግላቸው ይገባል። ለህዝብ ጥቅም ካልሆነ ንብረታቸው ሊወሰድ አይገባም፤ የሚወሰድም ከሆነ በአፋጣኝ የሚከፈል ፍትሃዊና አጥጋቢ ካሳ ሳይከፈል ሊወሰዱ አይገባም።)

አንዱ የሌላውን ተዋዋይ አገር ዜጋ ከመቀበል ጋር ተዛማጅነት ያለው ሌላ ጉዳይ MFN (Most Favoured Nation) አንቀፅ ነው። አንቀጽ 4 የሚከተለው ይላል፡-

የኢትዮጵያ የሕግ ማመንጨት ጥረት ቀጣይ ሂደት ውጤት ነው። አዋጅ ቁጥር 1180/2012 ቀዳሚውን የኢንቨስትመንት አዋጅ ቁጥር 769/2004 (እንደተሻሻለው) እና የኢትዮጵያን ኢንቨስትመንት ቦርድ እና የኢንቨስትመንት ኮሚሽን ማቋቋሚያ የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 313/2006 የተካ ነው። [33]

ከአዋጁ ስምንት የመግቢያ ዓረፍተ ነገሮች ሁለቱ የውጭ ቀጥታ ኢንቨስትመንትን ማንሳታቸው አዋጁ የድንበር ተሻጋሪ ኢንቨስትመንት ጉዳዮችን የሚገዙ አንቀፆችን እንደሚይዝ ፍንጭ ሰጭዎች ናቸው። [34] **አዋጁ በአገር ውስጥም ሆነ በውጭ ባለሀብቶች ላይ ተፈፃሚ ነው። እንዲያውም ባለሀብት የሚለውን ቃል ሲተረጉመው እንዲህ ይላል፤ ‘‘‘ባለሀብት’ ማለት ኢትዮጵያ ውስጥ ካፒታል ሥራ ላይ ያዋለ የአገር ውስጥ ወይም የውጭ ባለሀብት ነው።’’’**[35]

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1. Nationals of either High Contracting Party shall be permitted, subject to immigration laws and regulations, to enter the territories of the other High Contracting Party and to reside therein for the purpose of engaging in industry, carrying on international trade, or pursuing studies, upon terms no less favorable than those accorded to nationals of any third country.

   (የኢሚግሬሽን ሕጎችና ደንቦች በሚፈቅዱት መሰረት እና ለሌሎች አገራት ዜጎች ከሚደረገው የአተያት ደንቦች ባላነሰ ሁኔታ የአንዱ ተዋዋይ ሀገር ዜጎች ወደሌላኛው ተዋዋይ ሀገር በመግባትና በመኖር በኢነዱስትሪ፣ በዓለም አቀፍ ንግድ ወይም በትምህርት እንዲሳተፍ ይፈቀድላቸዋል።)

[33] **አዋጅ ቁ. 1180/2012 አንቀጽ 56ን ይመልከቱ። ከ2004ቱ አዋጅ በፊት የነበሩት ሕጎች የሚከተሉትን ያካትታሉ (ሁሉም እ.አ.አ.)፡-**
የኢንቨስትመንት አዋጅ ቁጥር 37/1996፤ የኢንቨስትመንት አዋጅ ቁጥር 280/2002፤ አዋጅ ቁጥር 116/1998፤ አዋጅ ቁጥር 168/1999፤ አዋጅ ቁጥር 375/2003፤ አዋጅ ቁጥር 103/1998 (የካፒታል ዕቃዎች ኪራይ ንግድ አዋጅ) እና አዋጅ ቁጥር 543/2007 (የተሻሻለው የወጪ ንግድ ቀረጥ ማበረታቻ ዕቅድ ማቋቋሚያ አዋጅ)፤ የኢንቨስትመንት አዋጅ ቁጥር 769/2012፤ የኢንቨስትመንት ደንብ ቁጥር 270/2012 እንዲሁም የማዕድን ማውጣት አዋጅ ቁጥር 678/2010 እና የነዳጅ ስራዎች አዋጅ ቁጥር 295/1986። ዋናው ተከታይ ህግ የኢንዱስትሪ ፓርኮች አዋጅ ቁጥር 886/2015 ነው። ከ1974 እስከ 1991 በነበረው የወታደራዊ አገዛዝ ወቅት የሕግ አውጭ ተግባራትን በተመለከተ ይህን ሰነድ ይመልከቱ፡- Library of Congress, Ethiopia: A Country Study (1991), at pp. 187-190.

[34] **የኢንቨስትመንት አዋጅ ቁጥር 1180/2012 መግቢያ ይመልከቱ።**

   ወደ አገር ውስጥ የሚገባውን የውጭ ባለሀብቶች ኢንቨስትመንት መጠን እና የተሳትፎ መስክ በማስፋት የዕውቀት፣ የክህሎት፣ እና የቴክኖሎጂ ሽግግር እና ስርጸትን ማፋጠን ተገቢ መሆኑን በመገንዘብ፤ በውጭ እና የአገር ውስጥ ኢንቨስትመንቶች መካከል ትስስርን ማስፋት፣ የኢንቨስትመንት ክልላዊ ስርጭትን ማሻሻል፣ እንዲሁም የውጭ ካፒታል በመጠቀም የአገር ውስጥ ባለሀብቶችን ተወዳዳሪነት ማሳደግ አስፈላጊ መሆኑን በመገንዘብ፤

[35] **የኢንቨስትመንት አዋጅ ቁጥር 1180/2012፣ አንቀጽ 2(4)።**

"የውጭ ባለሀብት" የሚለው ደግሞ እንደሚከተለው ተተርጉሟል፦

> *የውጭ ካፒታል ወደ ኢትዮጵያ በማስገባት ሥራ ላይ ያዋለ፤ ሀ) የውጭ አገር ዜጋ፤ ለ) የውጭ አገር ዜጋ በባለቤትነት የተሳተፈበት ድርጅት፤ ሐ) በማንኛውም ባለሀብት ውጭ አገር የተቋቋመ ድርጅት፤ መ) በዚህ አንቀጽ ንዑስ-አንቀጽ (፭) ፊደል ተራ (ሀ)፣ (ለ) ወይም (ሐ) በተመለከቱት ማናቸውም ባለሀብቶች መካከል በጋራ የተቋቋመ ድርጅት፤ ወይም፤ ሠ) እንደ ውጭ ባለሀብት መቆጠር የፈለገ መደበኛ ነዋሪነቱ ውጭ አገር የሆነ ኢትዮጵያዊ ነው።*[36]

የኢንቨስትመንት አዋጁ ለአገር ውስጥ ባለሀብት ብቻ የተከለሉ የኢንቨስትመንት ዘርፎችን፣ ወይም ከውጭ ባለሀብት ጋር የሚሰሩ በቅንጅት የሚሰሩ ዘርፎች እንዳሉ ደንግጎ ዝርዝሩን ወደፊት ለሚወጣው ደንብ ይተወዋል።[37] ብዙም ሳይቆይ በቀጣይነት የወጣው ደንብም እነዚህን ዝርዝሮች ይዟል።[38]

ለድንበር ተሻጋሪ ጉዳዮች አግባብነት ያላቸው የአዋጁ ክፍሎች የኢንቨስትመንት ጥበቃንና አለመግባባቶችን ስለመፍታት የተደነገጉት ናቸው። የኢንቨስትመንት ጥበቃን አስመልክቶ በሌሎች የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች ውስጥ ከተጠቀሱት ጥበቃዎች ጋር ተቀራራቢነት ያለው አንቀፅ አንድ ብቻ ሲሆን፣ እርሱም ስለ ኢንቨስትመንት ዋስትና የሚደነግገው አንቀፅ ነው። አብዛኞቹ የኢንቨስመንት ዓለም አቀፍ ስምምነቶች ይህን ጥበቃ የሚደነግጉት በከልካይነት አቀራረፅ እንዲህ በማለት ነው፣ "ማንኛውም ተዋዋይ ወገን [ኢንቨስትመንትን] ሊወስድ (ሊወርስ) አይችልም። ሊወስድ (ሊወርስ) የሚችለው ግን ...።" የኢትዮጵያው ሕግ ደግሞ ጥበቃውን በማፅናት ረገድ በተመሳሳዩ ሲደነግግ፣ የአንቀፁን አቀራረፅ ግን እንደሚከተለው በፈቃጅነት ይዘቱ አስቀምጦታል፣ "መንግሥት በዚህ አዋጅ መሠረት የሚካሄድ ማንኛውንም ኢንቨስትመንት ለሕዝብ ጥቅም፣ በሕግ አግባብ፣ እና ያለመድልዎ ሊወስድ ይችላል።"[39] በመቀጠልም "ማንኛውም ኢንቨስትመንት በዚህ አንቀጽ ንዑስ አንቀጽ (፭) መሠረት የሚወሰድ ከሆነ በወቅቱ የገበያ ዋጋ ተመጣጣኝ ካሣ በቅድሚያ መከፈል አለበት" በማለት ደንግጓል።[40]

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[36] *ዝኒ ከማሁ*፣ አንቀጽ 2 (6)።
[37] *ዝኒ ከማሁ*፣ አንቀጽ 6።
[38] *ዝኒ ከማሁ*፣ አንቀጽ 3 እስከ 6።
[39] *ዝኒ ከማሁ*፣ አንቀጽ19(1)።
[40] *ዝኒ ከማሁ*፣ አንቀጽ 19(2)።

ኢንቨስትመንትን የመውረስ (የመውሰድ) መርህ አከራካሪና አጨቃጫቂ የሆነውን ያህል ሌሎች በአወዛጋቢነት የተሞሉ የዓለም አቀፍ ሕግ መርሆዎች ጥቂት ናቸው። ከላይ የተመለከትነው አንቀፅ ምንም እንኳን በቀጥታ ቃል በቃል ባይወስደውም በስፋት ተቀባይነትን ካገኘውና ፅንሰሀሳቡን ባመነጨው በቀድሞው የአሜሪካ የውጭ ጉዳይ ሚኒስትር በሚ/ር ኮርዴል ሁል[41] ስም ከሚጠራው "የሁል ፅንሰሃሳብ" ጋር ተቀራራቢነት አለው። "የካልቮ ዶክትሪን"[42] በመባል ከሚታወቀው ፅንሰሃሳብ ጋር ያለውን ስር የሰደደ ተቃርኖ

[41] የኮርዴል ሁል በጣም ታዋቂው መግለጫ የሚከተለው ነው።

> The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equality and justice.
>
> (ያለ ካሳ ንብረትን መውሰድ በህግ መውሰድ አይደለም። መቀማት ነው። ለወደፊቱ ለመክፈል የተገለጸ ዓላማ ሊኖር ስለሚችል ብቻ ከመቀማት አይተናነስም። መንግሥት የውጪ ሀገር ዜጎችን ንብረት እንዲወስድ፤ ካሳ የሚከፍለውም የሀገሪቷን ኢኮኖሚያዊ ሁኔታ እና ሀገርኛ ሕጎችን በመመርኮዝ ከሆነ፤ በብዙ ሀገራት ሕገ-መንግሥቶችና በዓለም አቀፍ ሕግጋት የተቋቋሙት የንብረት መብት ጥበቃዎች ቅዠት ይሆናሉ። መንግስታት ለመክፈል ከአቅማቸው ወይም ከፍላጎታቸው በላይ የሆነ ንብረት ለመውሰድ ነፃ ይሆናሉ። ይህም ባለቤቶቹን ያለመፍተሄ ያስቀራቸዋል። የውጭ መንግስት የራሱን ዜጎች በዚህ መልኩ የማስተናገድ መብቱን ልንቃወም አንችልም፤ ምክንያቱም ይህ የሀገር ውስጥ ጉዳይ ነው። አንድ የውጭ መንግስት የአሜሪካ ዜጎችን ንብረት በአለም አቀፍ ሕግ ስር የተቀመጠውን የካሳ ሕግ ችላ በማለት መውሰዱን መቀበል አንችልም። ከሱም አልፎ መንግሥት በአንድ ጎን ብቻ ሁኖ ይህን በምክንያታዊነት፤ በእኩልነትና በፍትህ ላይ የተመሰረተን፣ ተቀባይነት ያለውን፣ የዓለም አቀፍ ሕግ መርህ በሀገሪቷ ሕግ መሻር አግባብነት ያለው አይደለም)
>
> U.S. Secretary of State communications to Mexican Ambassador to the United States, Jul. 21, 1938 as quoted in Lowenfeld, *ከላይ በግርጌ ማስታወሻ ቁ. 28* የተጠቀሰ፣ ገፅ 474-475.

[42] The essence of the Calvo doctrine is that

በማቻቻል ‘‘የሁል ፅንሰሀሳብ’’ ኢንቨስትመንትን የሚወስድ (የሚወርስ) አካል የሚከፍለው ካሳ ‘‘ወዲያውኑ (prompt)፤ በቂ (adequate) እና ውጤታማ (effective)’’ መሆን አለበት የሚሉ በስፋት ተቀባይነትን ያገኙ ግልፅ መርሆዎችን አስተዋውቋል።[43]

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[a]liens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity … The rule that in more than one case it has been attempted to impose on American states is that foreigners merit regard and privilege more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations.

(የካልቮ አስተምህሮ ዋና ይዘት የሚከተለው ነው፡-
በአንድ ሀገር ውስጥ እራሳቸውን ያቋቋሙ የውጪ ዜጎች እንደ ዜጎች ተመሳሳይ ጥበቃ የማግኘት መብት አላቸው እንጅ ከዚያ ለላቀ ከለላ መጠየቅ የለባቸውም። በደል ቢደርስባቸው የሀገሪቱ መንግስት ጥፋተኞችን ለፍርድ እንደሚያቀርብ ሊያምኑ ይገባል እንጂ የገንዘብ ካሳ ጥያቄ ሊያነሱ አይገባም። … ከአንድ በላይ በሆኑ በአሜሪካ ግዛቶች ላይ ለመጣል የተሞከረው ደንብ፣ ለሀገሪቷ ዜጎች እንኳን ከተሰጣቸው የበለጠ ክብር እና ልዩ መብት ለውጭ ዜጎች የሚሰጥ ነው። ይህ መርህ ደግሞ በመሠረታዊነት የሃገራት ከእኩልነት መርሕ ጋር የሚጋጭ ነው።)
Donald R. Shea, "The Calvo Clause" (1955), 17–19, as quoted in Lowenfeld, *ከላይ በግርጌ ማስታወሻ ቁ.* 28 የተጠቀሰ፣ ገፅ 473።

[43] **ስለዚህ መርህ የበለጠ ማብራሪያ፡-** Frank G. Dawson & Burns H. Weston, 'Prompt, Adequate and *Effective*': A Universal Standard of Compensation*?* 30 FORDHAM LAW REVIEW 727 (1962). **የካሳ ክፍያን በተመለከተ በተደጋጋሚ የሚጠቀሰው የአለም አቀፍ ህግ መርህ** PCIJ (Permanent Court of International Justice) **በ** Chorzow Factory **ጉዳይ ላይ የሰጠው መግለጫ ነው፡-**

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decision of international arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; ...

(እንደ አለም አቀፍ አሰራር እና በተለይም በዓለም አቀፍ የግልግል ፍርድ ቤቶች ውሳኔ፤ የህገ-ወጥ ድርጊት ጽንሰ-ሀሳብ ካሳ በተቻለ መጠን የሕገ-ወጥ ድርጊቱን ውጤቶች በሙሉ ማጥፋት እንዲሁም ድርጊቱ ባይፈፀም ኖሮ ሊሆን ወደሚችለው ሁኔታ መመለስ እንዳለበት የሚያትት መሠረታዊ መርህን የያዘ ነው። በአይነት መመለስ፣ ወይም ይህ የማይቻል ከሆነ፣ በአይነት ቢመለስ ሊያወጣ ከሚችለው ዋጋ ጋር ተቀራራቢ ክፍያ መክፈል።)

Permanent Court of International Justice, Case Concerning German Interests in Upper Silesia, P.C.I.J. SERIES A, Nos. 7, 9, 17, 19 (1926–1929) at 47.

አንድ የኢንቨስትመንት አዋጅ ይዘት በስራ ላይ ካሉት የሁለትዮሽ የኢንቨስትመንት ጥበቃ ዓለም አቀፍ ስምምነቶች ለኢንቨስትመንት ከሰጡት ጥበቃ ጋር መሰረታዊ ልዩነት ካለውና ግጭት የሚከሰት ከሆነ፣ አለመግባባቱን ለመዳኘት የሚመረጠው የግልግል ዳኝነት ጉባዔ (ፍርድ ቤት) ወይም ሌላ የፍትሕ መድረክ ገዢው ሕግ የሚመርጠውን የሕጎች ቅደምተከተል ከግምት እንዲያስገባ ግድ ይሉታል። የኢንቨስትመንት ክርክሮች በመሰረቱ በቅድሚያ የሚያተኩሩት ኢንቨስትመንቱ ተወርሷል (ተወስዷል) ወይስ አልተወሰደም የሚለው ጉዳይ ላይ ነው። ኢንቨስትመንቱ ተወርሶ (ተወስዶ) ከሆነ ደግሞ በቀጣይነት ትኩረት የሚሰጠው ጉዳይ የተከፈለው ካሳ በቂና ወዲያውኑ መሆኑ ላይ ነው። የወቅቱን የገበያ ዋጋ የመወሰን ጉዳይ አንድ ኢንቨስትመንት ሲወሰድ (ሲወረስ) ኢንቨስትመንቱ በተወረሰበት ወቅት ወይም እንደሚወሰድ የወሳኙ ዝንባሌ ገሃድ በተደረገበት ወቅት ያለውን የወቅቱን የገበያ ዋጋ መወሰን እጅጉን አስቸጋሪ በመሆኑ ዳኞች ይህንን ተግባር የሚያከናውኑት የተመሰከረላቸው ዋጋ ገማቾችን የሙያ እገዛ በመጠቀም ነው። ከዚህ ጋር በተያያዘ አዲሱ የኢንቨስትመንት አዋጅ "በወቅቱ ባለው የገበያ ዋጋ" (prevailing market value) በማለት የደነገገው መርህ በንፅፅር ሲታይ የተሻለ መሰረትን የጣለ ቢሆንም፤ ተከራካሪ ወገኖች ግን ዋጋን አስመልክቶ የሚሰላበትን ወቅትና ተዛማጅ ጉዳዮችን በማንሳት ልዩነት ሊፈጥሩ እንደሚችሉ መገመት አዳጋች አይሆንም። ይበልጡን ግን ችግር የሚሆነው ገዢው የሁለትዮሽ የኢንቨስትመንት ጥበቃ ዓለም አቀፍ ስምምነት ስለ ዋጋ ግምት ከዚህ የተለየን መርህ ካስቀመጠ ነው። እንዲህ ያለ ዓለም አቀፍ ስምምነት ካለ ግን፣ ስምምነቱ የቅድሚያ መርህን (priority or preemption) ስርዓት በራሱ ደንግጎ ካልያዘ ብሔራዊ ሕጉ ያስቀመጠውን መስፈርት ተፈፃሚ የሚያደርግ ውጫዊ መመዘኛን (ስታንዳርድን) ያስተናግዳል።

ይህ አስተሳሰብ ደግሞ ምናልባትም ዋነኛ ወደ ሆነው አለመግባባቶችን ስለመፍታት ርዕሰ-ጉዳይ ይወስደናል።

3. የኢትዮጵያ ድንበር ተሻጋሪ ያለመግባባትን መፍቻ ስርዓት

ሕጉ ሁለት ሰፊ እንድምታ ያላቸውን ድንበር ተሻጋሪ አለመግባባቶችን የተመለከቱ ጉዳዮች በማንሳቱ ሊወደስ ይገባዋል። እነዚህም ኢንቨስትመንትና ንግድን የተመለከቱ አለመግባባቶች ናቸው።

3.1. የኢንቨስትመንት አለመግባባቶች አፈታት

የኢንቨስትመንት አለመግባባቶችን የመፍቻ መንገዶችን አስመልክቶ በኢትዮጵያ አሁን በስራ ላይ ያሉት ድንጋጌዎች የሚገኙት በኢንቨስትመንት አዋጅ ቁጥር 1180/2012 እና በስራ ላይ ባሉት 21 የሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች ውስጥ ነው።

የኢንቨስትመንት አዋጁ የኢንቨስትመንት አለመግባባት አፈታትን የተመለከተ ራሱን የቻለ ንዑስ ክፍል አለው። የቅሬታ ማቅረቢያ ስርዓትንም አካትቷል።[44] የአቤቱታ ስርዓቱ የኢንቨስትመንት ፍቃድን ስላለመስጠትና ስለመሰረዝ እንዲሁም የኢንአቨስትመንት ማበረታቻዎችን ስለመከልከል ወ.ዘ.ተ ታሳቢ አድርጎ የያዘ ነው።[45] በሀገር ውስጥ ሕጎችም ሆነ በሁለትዮሽ የኢንቨስትመንት ዓለም አቀፍ ስምምነቶች የተሰጡ ቢሆንም እንደዚህ ያሉ አቤቱታዎች በባለሀብት መብቶች ላይ ተፅእኖን የሚያሳርፉ ናቸው።

መሰረታዊ የሆነው መርህ በአዋጁ አንቀፅ 25(1) ላይ እንደሚከተለው ተደንግጓል፥ *"ፊ/ማንኛውም ባለሀብት ከኢንቨስትመንቱ ጋር የተያያዘ ቅሬታ ካለው አግባብ ላለው የኢንቨስትመንት መሰሪያ ቤት አቤቱታ የማቅረብ መብት አለው።"* የአዋጁ የትርጉም ክፍል ደግሞ *"አግባብ ያለው የኢንቨስትመንት መስሪያ ቤት"* የሚለውን ሲተረጉም *"ኮሚሽኑ፥ ከኮሚሽኑ በውክልና ሥልጣን የተሰጠው የፌደራል መንግሥት አካል፥ ወይም የኢንቨስትመንት ፈቃድ ለመስጠት ወይም ኢንቨስትመንት ለማስተዳደር ሥልጣን የተሰጠው የክልል መስተዳድር አካል ነው፤"*[46] ይላል። ኮሚሽኑ የቀረበለትን አቤቱታ ተቀብሎ ውሳኔ እንዲሰጥ የሚጠበቅበት ጊዜም ገደብ ተጥሎበታል።[47] የአዋጁ የተወሰኑ አንቀፆች በባለሀብትና በመንግስት ተቋማት መካከል ለሚነሱ አለመግባባቶች ከፍርድ ቤት ወይም ከግልግል ዳኝነት በመለስ በሰላማዊ መንገድ የሚፈታበትን አካሄድ በማካተት የኢንቨስትመንት ኮሚሽኑ የአለመግባባቶችን መፍቻ የውሳኔ ሀሳቦችን ማቅረብ እንደሚችል ይደነግጋሉ። ይህን አስመልክቶ በአዋጁ የተመለከተው አንቀፅ እንዲህ በማለት ይደነግጋል፦

> *ፊ/ ማንኛውም ባለሀብት በዚህ አዋጅ መሠረት የሚካሄድ ኢንቨስትመንትን አስመልክቶ በፌደራል መንግሥት አስፈጻሚ አካል የተላለፈን በኢንቨስትመንቱ ላይ ጉልህ ተጽዕኖ የሚያደርስ የመጨረሻ አስተዳደራዊ ውሳኔን የተመለከተ አቤቱታ ለኮሚሽኑ የማቅረብ መብት አለው።*

[44] የኢንቨስትመንት አዋጅ ቁጥር 1180/2012 አንቀጽ 25-27 ይመልከቱ።
[45] *ዝኒ ከማሁ።*
[46] *ዝኒ ከማሁ፣* አንቀጽ 2(16)።
[47] *ዝኒ ከማሁ፣* አንቀጽ 26-27።

፪/ የማናቸውም የፌደራል መንግሥት አስፈጻሚ አካል የመጨረሻ አስተዳደራዊ ውሳኔ የጽሑፍ ቅጂ በሰባት (፯) የሥራ ቀናት ውስጥ ለባለሀብቱ ይሰጠዋል።

፫/ በፌደራል መንግሥት አስፈጻሚ አካል በተሰጠ የመጨረሻ አስተዳደራዊ ውሳኔ ቅር በመሰኘት ለኮሚሽኑ የሚቀርብ ማንኛውም አቤቱታ ባለሀብቱ ውሳኔው መሰጠቱን ካወቀበት ቀን ጀምሮ በሰላሳ (፴) የሥራ ቀናት ውስጥ መቅረብ አለበት።

፬/ ኮሚሽኑ በዚህ አንቀጽ ንዑስ-አንቀጽ (፭) መሠረት የቀረበ አቤቱታ መፍትሔ እንዲያገኝ አቤቱታ ከቀረበበት የመንግሥት አካል ጋር በመነጋገር አቤቱታው ከቀረበበት ቀን ጀምሮ በሰላሳ (፴) ቀናት ውስጥ የመፍትሔ ሀሳብ በጽሑፍ ያቀርባል።[48]

የኮሚሽኑ ውሳኔ በጠቅላይ ሚኒስትሩ ወይም ጠቅላይ ሚኒስትሩ የወከለው ሰው በሚመራው ቦርድ ላይ ይግባኝ ሊቀርብበት ይችላል።[49] **በአዲሱ የፌደራል የአስተዳደር ስነስርዓት አዋጅ መሰረት ግን የቦርዱ ውሳኔ በፍርድ ቤት ሊከለስ እንደሚችል ይገመታል።**[50]

በማይገርም መልኩ የቦርዱ ውሳኔ ይግባኝ የማይባልበት ነው። *"የቦርዱ ውሳኔ የሚመለከተው ማንኛውም የፌደራል መንግሥት አካል ውሳኔውን የማክበር እና በውሳኔው መሠረት የመፈጸም ግዴታ አለበት።"*[51]

ከአስተዳደራዊ መንገዶቹ በተጨማሪ አዋጁ ዓለም አቀፋዊውን የባለሀብትና የመንግስት የአለመግባባት መፍቻ ስርዓትን (Investor State Dispute Settlement-"ISDS") **ታሳቢ አድርጓል። ይህን አስመልክቶም የአዋጁ የተወሰኑ አንቀፆች እንዲህ በማለት ይደነግጋሉ፤**

፭/ በሕግ የዳኝነት ሥልጣን በተሰጠው አካል ፍትሕ የማግኘት መብትን ሳይቃረን፤ በዚህ አዋጅ መሠረት የሚካሄድ ኢንቨስትመንትን በተመለከተ በባለሀብት እና

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[48] *ዝኒ ከማሁ፣* አንቀጽ 27 (1-4)።

[49] *ዝኒ ከማሁ፣* አንቀጽ 27(6)። "6/ኮሚሽኑ በዚህ አንቀጽ ንዑስ-አንቀጽ (4) መሠረት ያቀረበውን የመፍትሔ ሀሳብ በመቃወም፣ ወይም የተሰጠው የመፍትሔ ሀሳብ አቤቱታ በቀረበበት የመንግሥት አካል ተቀባይነት ያላገኘ እንደሆነ ባለሀብቱ ለቦርዱ አቤቱታ ማቅረብ ይችላል።" የቦርዱን ስብጥር ለማየት አንቀጽ 30ን ይመልከቱ።

[50] *ዝኒ ከማሁ፣* አንቀጽ 27(9)።

[51] **የፌደራል የአስተዳደር ሥነ-ሥርዓት አዋጅ ቁጥር 1183/2012፣ አንቀጽ 48። "የዚህ አዋጅ አንቀጽ ፵፮ ድንጋጌዎች እንደተጠበቁ ሆነው፦ 1/ ማንኛውም ጉዳዩ የሚመለከተው ሰው የአስተዳደር መመሪያ በፍርድ ቤት እንዲከለስ አቤቱታ ማቅረብ ይችላል፤ 2/ ማንኛውም በአስተዳደር ውሳኔ ጥቅሙ የተነካበት ሰው ውሳኔው በፍርድ ቤት እንዲከለስ አቤቱታ ማቅረብ ይችላል።"**

በመንግሥት መካከል የሚነሳ ማንኛውም አለመግባባት በውይይት ወይም በድርድር ይፈታል።

፪/ የፌደራል መንግሥት የውጭ ኢንቨስትመንትን በተመለከተ የሚነሱ የኢንቨስትመንት አለመግባባቶች በግልግል ዳኝነት እንዲፈቱ ሊሰማማ ይችላል።

፫/ የውጭ ባለሀብት የኢንቨስትመንት አለመግባባትን በሕግ የዳኝነት ሥልጣን ለተሰጠው አካል ወይም ለግልግል ዳኝነት ለማቅረብ ከመረጠ ምርጫው የመጨረሻ እና ሌላኛውን ከመጠቀም የሚያግድ ይሆናል።[52]

ንዑስ አንቀፅ 3 በኢንቨስትመንት ሕግ "ባለሹካ መንገድ" ("fork-in-the-road") **በመባል የሚታወቀውን አንድ ባለሀብት አንድን የኢንቨስትመንት ክስ በተለያዩ የፍትሕ መድረኮች ሊያቀርብ አይችልም የሚለውን መርህ ያስተዋወቀ ነው። ይሁን እንጂ የዚህን ንዑስ አንቀፅ አተረጓጎም አስመልክቶ ጥያቄን የሚያስነሳ ጉዳይ ሊከሰት ይችላል። ይኸውም ቦርዱ የሰጠውን ውሳኔ ፍርድ ቤት በይግባኝ እንዲያየው ማድረግ ከ"ባለሹካ መንገድ" መርህ አንፃር የፍትሕ መድረክ ምርጫ ተደርጎ ሊተረጎም ይችላል የሚልን ጥያቄ ሊያስነሳ ይችላል ወይ የሚል ነው። የሚደቱ ውጤትም "የፍትህ ክልከላ"** (Denial of justice")[53] **ነው በሚል በአንዳንድ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች መሰረታዊ የሕግ ጥሰት ናቸው ተብለው የተደነገጉትን የ"ፍትሃዊና ርትዓዊ አገልግሎት"** (fair and equitable treatment—"FET") **መርህን ጥሰት ጉዳይ ሊያስነሳ ይችላል።**[54] **ይህ ዓይነቱ ከስር ያሉ የፍትሕ አማራጮችን**

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[52] **የኢንቨስትመንት አዋጅ ቁጥር 1180/2012፣ አንቀጽ 28።**

[53] **ጃን ፖልሰን እንዳስቀመጠው፡-** (i) the denial of justice is essentially procedural in nature; (ii) it does not require the State to create a perfect system of justice but rather a system of justice that could correct serious errors; and, more importantly, (iii) the denial of justice requires the exhaustion of local remedies and the showing of a system failure. [(1) **ፍትህ መነፈግ በተፈጥሮው የሥነ-ስረዓት መዛባት ነው፤ (2) መንግሥት ፍፁም የሆነ የፍትሕ ሥርዓት እንዲፈጥር ሳይሆን ከባድ ስህተቶችን የሚያስተካክል የፍትሕ ሥርዓት እንዲፈጥር ነው የሚያስፈልገው፤ በይበልጥ ደግሞ፣ (3) የፍትህ መነፈግ በአንድ ሀገር ውስጥ የመፍትሄዎችን ማሟጠጥ እና የስርዓት ውድቀትን ያሳያል።**] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, (2005) pp. 7-8.

[54] **በ** FET **እና በፍትህ መነፈግ መካከል ያለው ግንኙነት በደንብ የተረጋገጠ ነው። ለምሳሌ፣ የካናዳ-አውሮፓ ህብረት አጠቃላይ የኢኮኖሚ እና የንግድ ስምምነት አንቀጽ 8.10 የሚከተሉትን ያስቀምጣል፡-**

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

በየደረጃው የማጠናቀቅ ግዴታ ጉዳይ ፅንሰ ሃሳባዊ (theoretical) ብቻ አይደለም፤ እጅጉን ተደጋጋሚ በሆነ መልኩ የሚነሳ አከራካሪ የሆነ ጉዳይ እንጂ።

በተለያየ ደረጃም ቢሆን ኢትዮጵያ የተፈራረመቻቸው ሁሉም (21ዱም) የሁለትዮሽ ኢንቨስትመንት ስምምነቶች ዓለም አቀፋዊውን የባለሀብትና የመንግስት የአለመግባባት መፍቻ ስርዓትን ይዘዋል። በየአሰርት ዓመቱ ከተፈረሙ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች ለአብነት የሚሆኑትን በመውሰድ የአለመግባባቶች መፍቻ አንቀፆቻቸው በየዘመኑ ያሳዮትን ዕድገት ለመተንተን ይረዳል።

በቅድሚያ ከመጀመሪያዎቹ ተርታ የሚመደበውንና የተሰረዘውን እ.አ.አ. በ1963 የተፈረመውን የኢትዮጵያንና የጀርመንን የሁለትዮሽ ስምምነት እንመልከት። የአለመግባባት መፍቻ አንቀፁ እንዲህ በማለት ይደነግጋል፤ ‘‘አንቀፅ 10(1) ከዚህ ስምምነት ጋር በተያያዘ የሚነሱ የትርጉምና የአተገባበር አለመግባባቶች ከተቻለ በሁለቱ ተዋዋይ ሀገሮች መንግስታት ይፈታሉ። (2) አለመግባባቶቹ በዚህ መንገድ ካልተፈቱ ጉዳዩ ከሁለቱ ተዋዋይ ወገኖች ባንደኛው ወገን ጠያቂነት ለግልግል ዳኝነት ጉባዔ ይመራል።’’[55] ከዚህ በመቀጠል ያሉት ንዑስ አንቀፆች የግልግል ዳኝነት ጉባዔውን አባላት ጥንቅርና ጉባዔው የሚመሰረትበትን ሁኔታ ይገልፃሉ። በስምምነቱ ውስጥ ያለ ያለመግባባት መፍቻ አንቀፅ ይህ ብቻ ሲሆን፤ ስምምነቱ በተፈረመበት እ.አ.አ. በ1964 ተዋዋይ ወገኖቹ በባለሀብትና በመንግስት መካከል ሊኖር ስለሚችል አለመግባባት የመፍቻን መንገድ አላካተተም ቢባል አግባብነት ያለው መደምደሚያ ነው።[56]

(a) *denial of justice in criminal, civil or administrative proceedings*;
(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. (አጽንዖት ተጨምሯል) https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ ኢንቨስትመንትን የሚመለከቱ ድንጋጌዎች በምዕራፍ 8 ተካተዋል።

[55] የ1964 ኢትዮ-ጀርን ስምምነት፥ *በግርጌ ማስታወሻ* ቁ. 17 የተጠቀሰ፥ አንቀጽ10።

[56] እንደ አጋጣሚ ሆኖ ይህ የኢትዮ-ጀርምን ስምምነት የተፈፀመው በ ICSID ረቂቅ ሰነድ ላይ ለመወያየት የአለም ባንክ የአፍሪካ የሕግ ምክክር መድረክ እ.ኤ.አ. በ1963 ከታህሳሥ 16 እስከ 20 በአዲስ አበባ

ከላይ እንደተገለፀው እ.አ.አ. በ1970ዎቹና በ1980ዎቹ ዓመታት ኢትዮጵያ የተፈራረመችው የሁለትዮሽ የኢንቨስትመንት ስምምነት የለም። እ.አ.አ. በ1990ዎቹ ጥቂት እንቅስቃሴዎች የታዩ ሲሆን፤ ከነዚህም መካከል እ.አ.አ. በ1998 የተፈረመውና እ.አ.አ. በ2000 የፀደቀው የኢትዮጵያና የቻይናው የሁለትዮሽ የኢንቨስትመንት ስምምነት ዋነኛው ነው። ይህ ስምምነት የቻይና የሁለትዮሽ ስምምነቶች የመጀመሪያ ትውልድ ስምምነት የያዙትንና ዓለም አቀፍ የግልግል ዳኝነትን ለጉዳት መጠን መወሰኛ ብቻ የሚገለገሉበትን አንቀፅ አካትቷል።

> 9(2). አለመግባባቱ በድርድር በስድስት ወራት ውስጥ እልባት ካላገኘ ከተዋዋይ ወገኖች አንደኛው ክሱን የኢንቨስትመንቱ ተቀባይ በሆነው ሀገር ስልጣን ላለው ፍርድ ቤት ማቅረብ ይቻላል። ... (3). ለኢንቨስትመንቱ መወሰድ (መወረስ) ሊከፈል የሚገባውን ካሳ አስመልክቶ በዚህ አንቀፅ ንዑስ አንቀፅ 1 መሰረት በድረድር መፍታት ካልተቻለ፤ እ.አ.አ. በማርች 18 ቀን 1965 በዋሽንግተን ለፊርማ ክፍት የተደረገውን በመንግስታትና በሌሎች መንግስታት ዜጎች መካከል የሚነሳን የኢንቨንስትመንት አለመግባባቶች መፍቻ ዓለም አቀፍ ስምምነትን ሁለቱም ወገኖች እስካፀደቁ ድረስ በዚህ ስምምነት መሰረት በተቋቋመው የኢንቨስትመንት አለመግባባቶች ዓለም አቀፍ ማዕከል ጥላ ስር ለሚመሰረት ጊዜያዊ የግልግል ዳኝነት ጉባዔ ጉዳዩ ከተዋዋይ ወገኖች ባንደኛው ወገን ጠያቂነት ሊቀርብ ይችላል። ባለሀብቱ ግን በዚህ አንቀፅ ንኡስ አንቀፅ 2 የተመለከተውን አማራጭ ለመከተል ከመረጠ፤ ይህ ንኡስ አንቀፅ ተፈፃሚ አይሆንም።[57]

ይህ በግልፅ እንደሚታየው ኢትዮጵያ የተከተለችው የቻይናን አካሄድ ነው። ምንም እንኳ ቻይና ይህን አማራጭ የተከተለችው በወቅቱ የምዕራቡ ዓለም ኢንቨስትመንት ተቀባይ አገር

ከተካሄደው ስብሰባ ከአንድ አመት ገደማ በኋላ ነው። International Centre for Settlement of Investment Disputes (ICSID), The History of the ICSID Convention, ICSIDD.WORLDBANK.ORG, https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention [https://perma.cc/Q2E5-797P] (last visited Jul. 11, 2021). በእርግጥ፥ ከ1964ቱ የICSID ስምምነት በፊት ISDS በአለም አቀፍ ህግ የማይታወቅ ነበር። እንዲያውም አንድ ግለሰብ በሉዓላዊ ሀገር ላይ ክስ በሚመሰርትበት ጊዜ የመሰማት መብቱን ስለሚያስጠብቅለት ያልተለመደ ነገር ሆኖ ሊቆጠር ይችላል።

[57] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, art. 9(2-3), Ethiopia-China, 1998 **[ከዚህ በኋላ** Ethiopia-China BIT **እየተባለ የሚጠቀስ],** https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/732/download [https://perma.cc/PB9M-VHT7]. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/732/ [https:// perma. cc /PB9M-VHT7] ስለ ቻይና የተለያዩ የሁለትዮሽ ስምምነቶች የበለጠ ለማወቅ ይህን ፅሁፍ ይመልከቱ፡- NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES (2009).

በመሆኗ የኃላፊነትን ጉዳይ በመወሰን ረገድ በብሄራዊ ፍ/ቤቶቿ መታየቱ ነፃነቷን ያስጠበቀላት ተደርጎ ቢወሰድም፣ ቻይና የኢንቨስትመንት ላኪ አገር ወደመሆን ስታድግም ይህንኑ መርኋን አልለወጠችም። ለዚህ ምክንያቱ የአካሄድ ወጥነትን ማረጋገጥ፣ የመርህ ጉዳይ፣ ራስን የመቻል ጉዞ ወይም አስተዳደራዊ ችኮነት ስለመሆኑ በእርግጠኝነት ለመናገር ከባድ ነው። ለማንኛውም ይህ አንቀጽ በባለሀብትና በመንግስት መካከል የሚነሳን አለመግባባት አስመልክቶ ኢትዮጵያ በ1990ዎቹ የፈረመቻቸው የኢንቨስትመንት ጥበቃ ዓለምአቀፍ ስምምነቶች የተከተሉትን አካሄድ በመግለፅ ረገድ በምሳሌነት የሚጠቀስ ነው።

ሦስተኛው ናሙና እ.አ.አ. በ2000ዎቹ ከተፈረሙት ስምምነቶች መካከል የኢትዮጵያና የኒዘርላንድስ የኢንቨስትመንት ጥበቃ ዓለምአቀፍ ስምምነት ነው። ስምምነቱ በባለሀብቶችና በመንግስታት መካከል የሚነሱ አለመግባባቶችን መፍታት በተመለከተ ዝርዝርና ዘመናዊ ነው።

> 9(2). አለመግባባቱ በሰላም እንዲፈታ ከተከራካሪ ወገኖች አንደኛው በጠየቀ በስድስት ወራት ውስጥ ካልተጠናቀቀ ተከራካሪው ባለሀብት ጉዳዩን ወደሚቀጥሉት መድረኮች መውሰድ ይችላል፣ (ሀ) መዋዕለ ንዋዩ በፈሰሰበት አገር ወደሚገኝ ስልጣን ወዳለው የተዋዋይ ወገን ፍ/ቤት፣ ወይም (ለ) ተዋዋይ ወገኖች አፅድቀውት ከሆነ እ.አ.አ. በኦክቶበር 14 ቀን 1966 በፀደቀውና በሀገሮችና በተዋዋይ ሀገሮች ባለሃብቶች መካከል የሚነሱ አለመግባባቶችን መፍቻ አለም አቀፍ ስምምነት መሠረት ወደተቋቋመው የኢንቨስትመንት አለመግባባቶች መፍቻ አለምአቀፍ ማዕከል፣ ወይም (ሐ) በዚህ አንቀጽ ንዑስ አንቀጽ 2(ለ) እንደተመለከተው ከተዋዋይ ወገኖች አንደኛው የአለም አቀፍ ስምምነቱ አፅዳቂ ካልሆነ በኢንቨስትመንት አለመግባባቶች መፍቻ ዓለምአቀፍ ማዕከል ስር የማዕከሉ ጽ/ቤት የኢንቨስትመንት ክርክሩን ሂደት በሚያስተዳድርበት የተጨማሪ አገልግሎት መስጫ ስርዓት በሚገዛው ደንብ ወይም፣ (መ) በተባበሩት መንግስታት ድርጅት የዓለም አቀፍ ንግድ ሕግ የግልግል ዳኝነት ደንብ መሠረት በሚቋቋመው ጊዜያዊ ዓለም አቀፍ የግልግል ዳኝነት ተቋም (ፍ/ቤት)። (3) አለመግባባቱ ከመፈጠሩ በፊት በሌላኛው ተዋዋይ ወገን ዜጎች የበላይነት ይተዳደር የነበርና ያንደኛው ተዋዋይ ወገን የተፈጥሮ ሰው (ኩባንያ) ዜግነት ያለው፣ በሀገሮችና በተዋዋይ ሀገሮች ባለሀብቶች መካከል የሚነሱ አለመግባባቶች መፍቻ ዓለም አቀፍ ስምምነት አንቀጽ 25 ንዑስ አንቀጽ 2(ለ) መሰረት የአንደኛው ወገን ዜጋ ተደርጎ ይቆጠራል። (4) የግልግል ዳኝነቱ ውሳኔ የመጨረሻና ይግባኝ የማይባልበት ሲሆን በብሄራዊ ሕጉ መሰረት ተፈፃሚ ይሆናል። (5) እያንዳንዱ የስምምነቱ ፈራሚ አባል የኢንቨስትመንት

አለመግባባቶች እንዲፈቱ ከላይ በተመለከቱት አንቀፆች (paragraphs) ውስጥ ለተሰጡ አማራጭ መድረኮች ለማቅረብ ተስማምቷል።[58]

ይህ ድንጋጌ ዓለም አቀፍ የግልግል ዳኝነትን ሂደት አስመልክቶ በቂ ዝርዝር ጉዳዮችን አሳይቷል። ኢዝራኤል ኬሚካል ሊሚትድ ኤል ኤል ሲ (አይ ሲ ኤል) የተሰኘው ኩባንያ በባለሀብትና በሀገር መካከል የሚካሄድን አለመግባባት አስመልክቶ እ.አ.አ. በ2017 ኢትዮጵያን የከሰሰው ይህንኑ አንቀጽ መሠረት አድርጎ ነው። የዚህ ክስ ዝርዝር ጉዳይ በሚስጥር እንዲያዝ ህግ ስለሚያስገድድ ለማብራራት ባይቻልም፣ ስለክሱ መኖር ግን በሄግ ኒዘርላንድስ የሚገኘው ቋሚው የግልግል ዳኝነት ፍ/ቤት በሪፖርቱ ይዞታል።[59]

በባለሀብትና በመንግስት መካከል የሚኖር አለመግባባት የሚፈታበትን መድረክ (በምህፃረ ቃሉ "አይ ኤስ ዲ ኤስ" በመባል የሚታወቀው) ፈፅሞ ካለመቀበል ወደ ከፊል ቅበላ ማለትም የጉዳት መጠንን በመወሰን ጉዳይ ላይ ብቻ የ"አይ ኤስ ዲ ኤስ"ን መድረክ ወደ መቀበል፣ ከዚያም ሙሉ በሙሉ የአይ ኤስ ዲ ኤስን መድረክ ወደመቀበል የተሸጋገረውና ለ40 ዓመታት ያህል የቆየው አካሄድ እ.አ.አ. በ2010 ላይ እንዲቆም የተደረገ ይመስላል፤ ከዚያን ጊዜ ጀምሮ በኢትዮጵያ የፀደቀ አንድም የሁለትዮሽ ዓለም አቀፍ የኢንቨስትመንት ስምምነት የለም።[60]

3.2. የዓለም አቀፍ ንግድ አለመግባባቶችን ስለመፍታት

እ.አ.አ. በፌብሩዋሪ 2020 የኢትዮጵያ ፓርላማ በውጭ ሀገር የተሰጠን የግልግል ዳኝነት የመቀበልና የማስፈፀም ዓለም አቀፍ ስምምነትን (በአጭር መጠሪያው "የኒውዮርክ

[58] Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, art. 9, Ethiopia-Netherlands, 2003 **[ከዚህ በኋላ** Ethiopia-Netherlands BIT **እየተባለ የሚጠቀስ]**, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download [https://perma.cc/9GYC-ZQBF].

[59] **ስለ ጉዳዩ የተወሰነ መረጃ በዚህ ድረ-ገፅ ይገኛል፦** https://pca-cpa.org/en/cases/153/ [https://perma.cc/455R-BWS2] **ላይ ይገኛል።**

[60] **በኢትዮጵያ የመፅደቅ ሁኔታን በተመለከተ፥ የኢትዮጵያ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች፥** *በግርጌ ማስታወሻ* **ቁ.11 የተጠቀሰ ። ዘገባው እንደሚያሳየው በ2010 እና 2018 መካከል ቢያንስ አራት የሁለትዮሽ የኢንቨስትመንት ስምምነቶች የተፈረሙ ቢሆንም ይሽን ጽሑፍ በፃፉንበት ጊዜ አንዳቸውም በኢትዮጵያ አልፀደቁም። እነዚህ የሁለትዮሽ የኢንቨስትመንት ስምምነቶች ከብራዚል፣ ኳታር፣ የተባበሩት አረብ ኤሚሬቶች እና ሞሮኮ ጋር የተፈፀሙ ናቸው።** *ዝሂ ከማሥ*።

ኮንቬንሽን'' በመባል የሚታወቀውን) አፀደቀ።[61] እ.አ.አ. በአገስት 4 ቀን 2020 ኢትዮጵያ የኒውዮርክ ኮንቬንሽንን በመቀበል አባል ሀገር ሆነች።[62] እ.አ.አ. በኤፕሪል 2 ቀን 2021 ደግሞ ኢትዮጵያ ''የግልግል ዳኝነትንና የዕርቅ አሠራር ሥርዓትን ለመደንገግ የወጣ አዋጅ ቁጥር 1237/2013'' (ከዚህ በኋላ ''የኢትዮጵያ የግልግል ዳኝነት አዋጅ'' ወይም ''የግልግል ዳኝነት አዋጅ'' እየተባለ የሚጠቀስ) አፀደቀች።[63]

አዋጁ በኢትዮጵያ በ1952ቱ የፍትሐ ብሔር እና በ1957ቱ የፍትሐ ብሔር የሥነ-ሥርዓት ሕጎች ውስጥ ተካትተው ይገኙ የነበሩ ድንጋጌዎችን የማሰባሰብና የማሳደግ ሥራ ውጤት ነው።[64] ሕግ አውጪው ይህንን አዋጅ ሲያፀድቅ ከባዶ (በእንግሊዘኛው ''ታቡላ ራሳ'' ከሚባለው) አይደለም የተነሳው። ከታሪካዊ ጠቀሜታው አንፃር አዲሱ የቀደሙትን ድንጋጌዎች በንፅፅር ማንሳት ቢቻልም አዲሱን አዋጅ በራሱ ከመመዘን አንፃር ግን ንፅፅራዊ ትንተናው ብዙም ፋይዳ አይኖረውም።[65] ይህ ክፍል ትኩረት የሚያደርገው በአዲሱ አዋጅ ልዩ ግምት በሚሰጣቸው ድንጋጌዎች ላይ ነው።

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[61] **በዚህ ጉዳይ ላይ ይህን ፅሁፍ ይመልከቱ፦** New York Arbitration Convention, Ethiopia Ratifies the New York Convention, NEWYORKCONVENTION.ORG, https://www.newyorkconvention.org/news/ethiopia+ratifies+the+new+york+convention [https://perma.cc/YFZ6-BGTY] (last visited Jul. 11, 2021).

[62] **የኒውዮርክ ኮንቬንሽን የአባል ሃገራትን ዝርዝር እዚህ ድረ-ገፅ ይመልከቱ፦** https://www.newyorkconvention.org/countries [https:// perma.cc/4V2Y-88UJ]

[63] **የግልግልና ዕርቅ የሥራ ሂደት አዋጅ ቁጥር 1237/2013 [ከዚህ በኋላ ''የኢትዮጵያ የግልግል ዳኝነት አዋጅ'' እየተባለ የሚጠቀስ]**

[64] **ምንም እንኳን አዋጁ በአብዛኛው ቀደም ሲል የነበሩ ድንጋጌዎችን መልሶ ያካተተ ቢሆንም፣ ብዙ ቀደም ሲል የነበሩ ድንጋጌዎችንም በግልፅ ሽሯል።** *ዝኒ ከማሁ፣* **አንቀጽ 78።**

> **አንቀጽ 78፦** ተፈጻሚነት የሌላቸው ሕጎች፦ 1/ ከአንቀጽ 3318 እስከ 3324 ስለ ዕርቅ የተደነገጉት የፍትሐ ብሔር ሕግ ድንጋጌዎች እና ከአንቀጽ 3325 እስከ 3346 ስለ ቤተ-ዘመድ ዳኛ የተደነገጉት ድንጋጌዎች በዚህ አዋጅ ተሽረዋል። 2/ የቤተ-ዘመድ ዳኝን የሚመለከቱት የፍትሐ ብሔር ሥነ-ሥርዓት ሕግ ድንጋጌዎች ከአንቀጽ 315 እስከ 319፣ 350፣ 352፣ 355-357 እና 461 በዚህ አዋጅ ተሽረዋል። 3/ ይህን አዋጅ የሚቃረን ማናቸውም ሌላ ህግ ወይም ልማዳዊ አሰራር በዚህ አዋጅ ውስጥ በተመለከቱ ጉዳዮች ላይ ተፈጻሚነት አይኖራቸውም።
>
> **አንቀጽ 79፦** ተፈጻሚነት ያላቸው ሕጎች፦ የእርቅ ወይም የግልግል ዳኝነት ሒደቱን ወይም ከሂደቱ ጋር ግንኙነት ያላቸው ይህንን አዋጅ የማይቃረኑ የፍትሐ ብሔር ሥነ-ስርዓት ሕግ ድንጋጌዎች ተፈፃሚነት ይኖራቸዋል።

[65] **አዋጁ ወደ ኋላ ተፈጻሚነት አይኖረውም።** *ዝኒ ከማሁ፣* **አንቀጽ 77። አንቀጽ 77 እንዲህ ይላል፦**

> **የመሸጋገሪያ ድንጋጌዎች፦** 1/ ይህ አዋጅ በስራ ላይ ከመዋሉ በፊት የተፈረሙ የግልግል ዳኝነት ስምምነቶች አዋጁ ከመውጣቱ በፊት በነበሩ ሕጎች መሰረት የሚገዙ ይሆናል። 2/ ይህ አዋጅ

ምንም እንኳን አዋጁ ከፍትሐ ብሔር ሕጉና ከፍትሐ ብሔር ሥነ-ሥርዓት ሕጉ ጋር አይቀሬ በሆነ መልኩ ቁርኝነቱን ቢያሳይም፥ በቅርቡ የፀደቀውን የኒውዮርክ ኮንቬንሽን ተግባራዊ ለማድረግ የሚያስፈልገውን ያህል የተባበሩት መንግስታት ድርጅት ሞዴል የንግድ ሕግ ድንጋጌዎችን[66] ጨምሮ ከተለያዩ ምንጮች ሐሳብ ወስዷል።[67]

አዋጁን ለማውጣት አስፈላጊ ከሆኑባቸው ምክንያቶች አንደኛው "ከግልግል ዳኝነትና ከዕርቅ ጋር በተያያዘ የዳበሩ ዓለም አቀፍ አሠራሮችንና መርሆዎችን ታሳቢ በማድረግ በሥራ ላይ ያሉ ሕጎችን ማሻሻል አስፈላጊ በመሆኑ" ነው።[68]

3.2.1. የተፈፃሚነት ወሰን

አዋጁ በብሔራዊና ዓለም አቀፍ የግልግል ዳኝነቶች ላይ ተፈፃሚ ነው። አዋጁ ዓለም አቀፍ የግልግል ዳኝነትን የሚተረጉመው የተዋዋይ ወገኖችን ዋነኛ የቢዝነስ ቦታ እና/ወይም የውል ግንኙነቱ የሚፈፀምበትን ቦታ በማጣመር ነው።[69]

ሥራ ላይ ከመዋሉ በፊት የተጀመሩ የግልግል ዳኝነቶች ወይም የግልግል ዳኝነትን በተመለከተ በፍርድ ቤቶች በመታየት ላይ ያሉ ጉዳዮች፣ የክርክር ሂደቶችና እና የተሰጡ ውሳኔዎች አፈጻጸም ይህ አዋጅ ከመውጣቱ በፊት በነበሩ ህጎች መሰረት ይታያሉ። 3/ ይህ አዋጅ ከመውጣቱ በፊት የግልግል ዳኝነት ስምምነት የፈፀሙ ወይም በሂደት ላይ ያሉ ተዋዋይ ወገኖች በዚህ አዋጅ መሰረት ለመዳኘት መስማማት ይችላሉ።

[66] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration *(1985)* **[ከዚህ በኋላ** "UNCITRAL Model Law" **እየተባለ የሚጠቀስ],** UNCITRAL.UN.ORG. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [https://perma.cc /4V2Y-88UJ]

[67] **የኢትዮጵያ የግልግል አዋጅ፣** *በግርጌ ማስታወሻ ቁ.* 63 **የተቀመጠ፣ መቅድም፡- "ኢትዮጵያ የተቀበለቻቸው እና ያጸደቀቻቸውን ዓለም አቀፍ ስምምነቶች ተግባራዊ ለማድረግ ይረዳል"።**

[67] *ዝኒ ከማሁ።*

[68] *ዝኒ ከማሁ።*

[69] **የኢትዮጵያ የግልግል አዋጅ፥** *በግርጌ ማስታወሻ ቁ.* 63 **የተጠቀሰ፥ አንቀጽ 4።**
1/ አንድ የግልግል ዳኝነት ከዚህ በታች ከተመለከቱት በአንዱ ሥር የሚወድቅ ከሆነ ዓለም አቀፍ የግልግል ዳኝነት እንደሆነ ይቆጠራል፡- ሀ) ተዋዋይ ወገኖች የግልግል ስምምነት በሚፈጽሙበት ወቅት ዋነኛ የቢዝነስ ቦታቸው በሁለት የተለያየ ሀገራት የነበረ ሲሆን፣ ለ) በግልግል ዳኝነት ስምምነቱ የተመረጠ የግልግል ዳኝነቱ ህጋዊ መቀመጫ ወይም በንግድ ወይም በውል ግንኙነት ውስጥ ያሉ ዋነኛ ግዴታዎች የሚፈፀምባቸው ወይም አለመግባባቱ የተከሰተበትና የተያያዘበት የተዋዋይ ወገኖች ዋነኛ የቢዝነስ ቦታ ውጭ ሀገር ሲገኝ፣ ሐ) ተዋዋይ ወገኖች የግልግል ዳኝነት ስምምነቱ ጉዳይ ከአንድ በላይ ከሆኑ ሀገሮች ጋር የተያያዘ መሆኑን በግልጽ ሲስማሙ። 2/ ለዚህ አንቀጽ ተፈጻሚነት ሲባል ተዋዋይ ወገኖች ከአንድ በላይ የቢዝነስ ቦታ ያላቸው ሆኖ ሲገኝ

3.2.2. የግልግል ዳኝነት ስምምነት ፎርም፣ የግልግል ዳኝነት ስምምነትን ስለማስፈፀምና ጉባዔው ሥልጣኑን በራሱ መወሰን ስለመቻሉ

የግልግል ዳኝነት ስምምነት ተቀባይነትን እንዲያገኝ የኒውዮርክ ኮንቬንሽን በፅሁፍ መደረግ እንዳለበት ከሚደነግገው ጋር ተመሳሳይነት ባለው መልኩ፣ የግልግል ዳኝነት አዋጁ ይህንኑ በጥቂቱ በማሻሻልና የዘመኑን የመረጃ መያዣ ሥርዓት በመቀበል ለኤሌክትሮኒክ መገናኛ ዘዴም እውቅናን ሰጥቷል።[70] በማያሻማ መልኩ "የኤሌክትሮኒክ ግንኙነት"ን እንዲህ በማለት ተርጉሞታል፥ "... ማንኛውም በኢሜይል የሚደረግ የመረጃ ልውውጥ ወይም በኤሌክትሮኒክ፣ በማግኔቲክ፣ በኦፕቲካል ወይም ተመሳሳይ በሆኑ ዘዴዎች ተዋዋይ ወገኖች የሚያደርጉት የመረጃ መላክ፣ መቀበል ወይም ማከማቸት ተግባር ነው።"[71]

የግልግል ዳኝነት ስምምነቱ "የማይፀና ወይም ተፈፃሚ" ስለመሆኑ ጉዳዩ የሚመለከተው ፍ/ቤቱ ካልወሰነ በስተቀር የግልግል ዳኝነት ስምምነቶች ተፈፃሚ ናቸው።[72] ምንም እንኳን ግቡ የግልግል ዳኝነት ስምምነትን ተፈፃሚ የሚያደርገውን የኒውዮርክ ኮንቬንሽንን አንቀጽ II ተፈፃሚ ማድረግ ቢሆንም፣ የግልግል ዳኝነቱን ስምምነት ተፈፃሚ ለማድረግ ወይም ውሳኔን ስለሚሰጠው አካል ስልጣን የተለየ መመዘኛን (ስታንዳርድ) ስለማስቀመጡ ግልፅ ባይሆንም፣ አዋጁ በአንቀጹ አቀራረፅ ላይ ለውጥ አድርጓል። ለውጦቹን በሚከተለው የአንቀጽ አቀራረፆች ውስጥ እንመለከታለን።

> **በአንድ የግልግል ዳኝነት ስምምነት ውስጥ በሚወድቅ አለመግባባት ላይ ለፍርድ ቤት ክስ ሲቀርብና ተከሳሹ በመጀመሪያ ደረጃ መቃወሚያ የግልግል ዳኝነት ስምምነት ያላቸው በመሆኑ በዚያው አግባብ መታየት እንዳለበት ተቃውሞውን ካቀረበ ፍ/ቤት ክሱን ውድቅ በማድረግ በግልግል ዳኝነት ስምምነቱ መሠረት ጉዳያቸውን እንዲጨርሱ ሊያሰናብታቸው ይገባል።[73]**

ይሁን እንጂ ይህ ዓይነቱ ድንጋጌ ቢኖርም ፍ/ቤቱ "...የግልግል ዳኝነት ስምምነቱ የማይሆን በሆነ ጊዜ ጉዳዩን ለማየት ይችላል።"[74] የኒውዮርክ ኮንቬንሽን ደግሞ እንዲህ በማለት ደንግጓል፦

ለግልግል ስምምነቱ ቅርበት ያለው የቢዝነስ ቦታ እና ምንም የቢዝነስ ቦታ የሌላቸው ከሆነ የተዋዋይ ወገኖች መደበኛ መኖሪያ ቦታ እንደ ዋነኛ የቢዝነስ ቦታቸው ተደርጎ ይወሰዳል።

[70] *ዝኒ ከማሁ፥* አንቀጽ 6(1-4)።

[71] *ዝኒ ከማሁ፥* አንቀጽ 6(5)።

[72] *ዝኒ ከማሁ፥* አንቀጽ 8(2)።

[73] *ዝኒ ከማሁ፥* አንቀጽ 8(1)።

[74] *ዝኒ ከማሁ፥* አንቀጽ 8(1)።

> በዚህ አንቀጽ መሠረት በግልግል ዳኝነት የሚፈታ ጉዳይ ወደ ፍርድ ቤት ቀርቦ እንዲታይ ጥያቄ ከቀረበበት ፍርድ ቤቱ የግልግል ዳኝነት ስምምነቱ ዋጋ ያጣና ፈራሽ፤ የማይተገበር ወይም ሊፈፀም የማይችል መሆኑን ካላረጋገጠ በቀር ከተከራካሪ ወገኖች ባንደኛው ጥያቄ መሰረት ጉዳዩ በግልግል ዳኝነት እንዲፈታ ይመራዋል።[75]

በኮንቬንሽኑ የተደረደሩት "ዋጋ ያጣና ፈራሽ (null and void)፣ የማይተገበር (inoperative) ወይም ሊፈፀም የማይችል (incapable of being performed)" የሚሉት የእያንዳንዱ ቃላት ትርጉም ለሰፊ ሙግት የበቁ ናቸው።[76] ባሁኑ ሰዓት ግን በእያንዳንዱ ቃል ላይ መግባባት የተደረሰበት የሕግ ሳይንስ ተፈጥሯል። የኢትዮጵያ ሕግ አውጪ የቃላት ለውጦችን ለምን እንዳደረገ በግልፅ ባይታወቅም፤ "የሚሻርና የማይፀና፣ የማይተገበር ወይም ሊፈፀም የማይችል" ከሚሉት ቃላት ጋር ተመሳሳይ ትርጉም የያዙ ሌላ ቃላትን ተጠቅሟል።

የፀና የግልግል ዳኝነት ስምምነት ስለመኖሩ መወሰን ያለበት ፍርድ ቤት ነው ወይስ የግልግል ዳኝነት ጉባዔው ለሚለው ጉዳይ አዋጁ የኒውዮርክ ኮንቬንሽንን ተፈፃሚ በማድረግ ረገድ በስፋት ተቀባይነትን ካገኘው ከተባበሩት መንግስታት ድርጅት የአለም አቀፍ ንግድ ሕግ ሞዴል ድንጋጌ እጅጉን ርቋል። የሞዴል ሕጉ አንቀጽ 16 እንዲህ በማለት ይደነግጋል፦

> ጉባዔው ስልጣኑን በራሱ መወሰን ስለመቻሉ፦ (1) የግልግል ዳኝነት ስምምነት መኖርና አለመኖርን አስመልክቶ የሚቀርብ ተቃውሞን ጨምሮ ጉባዔው ሥልጣኑን ለመወሰን ሊወስን ይችላል። ለዚህ ሲባል በስምምነት ውስጥ የተቀረፀው የግልግል ዳኝነት አንቀጽ ከሌሎቹ የስምምነቶቹ አንቀፆች ተነጥሎ በራሱ እንደቆመ ስምምነት ይቆጠራል። ጉባዔው ስምምነቱ (ውሉ) ዋጋ ያጣና ፈራሽ (null and void) ነው በማለት መወሰኑ የግልግል ዳኝነት አንቀጹን በሕግ አግባብ *(ipso jure)* ዋጋ ሊያሳጣው አይችልም።[77]

ይህ አንቀጽ ጉባዔው ሥልጣኑን በራሱ መወሰን ይችላል የሚለውን (competence-competence) መርህና ከዋናው ውል የተለየና ራሱን የቻለ (separability) በመባል

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[75] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II (3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 **[ከዚህ በኋላ** "New York Convention" **እየተባለ የሚጠቀስ].**

[76] **በእነዚህ ርዕሶች ላይ የተደረጉ ውሳኔዎችን ከሚከተለው ምንጭ ማግኘት ይቻላል፦** New York Arbitration Convention Court Decisions. New York Arbitration Convention, Court Decisions, newyorkconvention.org, https://www.newyorkconvention.org/court+decisions [https://perma.cc/A9QB-42UW].

[77] UNCITRAL Model Law, ***በግርጌ ማስታወሻ ቁ.*** 66 **የተጠቀሰ፣ አንቀጽ**16(1)።

የሚታወቁትን ሁለት መርሆዎችን ያቀፈ ነው። እነዚህ ሁለት የታወቁ መርሆዎች የብሔራዊም ሆነ የዓለም አቀፍ የግልግል ዳኝነት የሕግ ሥርዓቶች ዋነኛ ምሰሶዎች ናቸው።

በጥቂቱም ቢሆን ለየት ባለ ቋንቋ ቢቀረፅም የኢትዮጵያው አዋጅም ጉባዔው ሥልጣኑን በራሱ መወሰን ይችላል የሚለውን መርህና ከዋናው ውል የተለየና ራሱን የቻለ ነው የሚለውን ሌላኛውን መርህ አካትቶ የያዘ ነው።

> በተዋዋይ ወገኖች መካከል የፀና የግልግል ዳኝነት ስምምነት መኖር አለመኖርን ጨምሮ ጉዳዩን የማየት ሥልጣን አለኝ ወይም የለኝም በሚለው ላይ ጉባዔው የመወሰን ሥልጣን አለው። ለዚህ ዓላማ ሲባል በአንድ ዋና ውል ውስጥ የተካተተ የግልግል ዳኝነት አንቀጽ ከዋናው ውል እንደተለየ እና ራሱን እንደቻለ ውል ይቆጠራል፤ የዋናው ውል ፈራሽ እና ዋጋ የሌለው መሆን የግልግል ዳኝነት አንቀጹን ዋጋ እንዲያጣ እና ፈራሽ እንዲሆን አያደርገውም።[78]

ነገር ግን የግልግል ዳኝነት ጉባዔው ከፍ/ቤቱ የተለየ ውሣኔን በማሳለፍ ጉዳዩን የተወሳሰበ ሊያደርገው እንደሚችል ከወዲሁ ማመን ይቻላል።[79] ከዚህ አንፃር እነዚህን ሁለት

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[78] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀጽ 19(1)።

[79] ይህ ሁኔታ በሚከተለው ታዋቂ የአሜሪካ ሀገር ፍርድ የታየ ጉዳይ ነው፡- Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 986 (2d Cir. 1942).

> (b) If the issue of the existence of the charter party were left to the arbitrators and they found that it was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made. Such a conclusion would (1) negate the court's prior contrary decision on a subject which, admittedly, the Proclamation commits to the court, and (2) would destroy the arbitrators' authority to decide anything and thus make their decision a nullity.
>
> [(ለ) የቻርተር ፓርቲው የመኖር ጉዳይ ለግልግል ዳኞች ከተተወ እና ፈፅሞ እንዳልተደረገ ከደመደሙ፣ ያለማወላወል (እብዶች ካልሆኑ በቀር) የግልግል ስምምነቱ ፈጽሞ አልተደረገም ብለው ለመደምደም ይገደዳሉ። እንዲህ ዓይነቱ መደምደሚያ፡- (1) ፍርድ ቤቱ ቀደም ሲል በተመሳሳይ ጉዳይ በአዋጁ በተሰጠው ስልጣን መሰረት የሰጠውን ውሳኔ የሚቃረን ይሆናል፤ እንዲሁም፣ (2) የግልግል ዳኞች በማናቸውም ጉዳይ የመወሰን ሥልጣናቸውን የሚያጠፋና ውሳኔያቸውንም ውድቅ ያደርገዋል።]
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> Philip G. Phillips, The Paradox in Arbitration Law*:* Compulsion as Applied to a Voluntary Proceeding, 46 HARV. L. REV. 1258, 1270-1272 (1933); Philip G. Phillips, A *Lawyer's* Approach to Commercial Arbitration, 41 YALE L.J. 31 (1934); GEORGE J. WILLISTON, WILLISTON ON CONTRACTS 5369-5379 (Rev.ed.1938). Although this case's significance is on separability and is now outdated, it's description of the competence-competence anomaly is still instructive.

መርሆዎች አስመልክቶ የኢትዮጵያው አዋጅ የተከተለው አቀራረጽ በግልግል ዳኝነት የሕግ ሳይንስ ውስጥ ሁሌ ችግር ሆነው ለሚነሱ ለነዚህ ጉዳዮች መፍትሄን አልሰጠም።[80]

3.2.3. ለግልግል ዳኝነት ስለሚቀርቡና ስለማይቀርቡ ጉዳዮች

የሕዝብ ጠቀሜታን የተመለከቱ የሕግ ጉዳዮችን አስመልክቶ የአሜሪካ ጠቅላይ ፍ/ቤት እ.አ.አ. በ1984 በ"ሚትስቡሺና በሶለር" ላይ ውሳኔን ካሳለፈ ጊዜ ጀምሮ ከዚህ ቀደም በዓለማችን ለግልግል ዳኝነት መዝገብ[81] የማይቀርቡ ተብለው ተገድበው የነበሩ ጉዳዮች በየጊዜው እየተቀናነሱ በመሄድ ላይ ናቸው።

በ"ሚትስቡሺና በሶላር" የክርክር ጉዳይ ላይ ጠቅላይ ፍ/ቤቱ "የሸርማን ሕግ"[82] በመባል የሚታወቀውን የአሜሪካንን የንግድ ውድድርና የሸማቾች ጥበቃን አዋጅ መሰረት በማድረግ የሚነሱ የክስ ምክንያቶች በግልግል ዳኝነት ሊታይ እንደሚችል በመፍቀዱ ዓለም አቀፍ የግልግል ዳኝነትን[83] በሚያበረታታ መልኩ በ"ብሬመን እና ዛፕታ" መካከል በነበረው ክርክር የተጀመረው ሂደት ተጠናክሮ እንዲቀጥል አድርጓል።[84]

የኢትዮጵያው የግልግል ዳኝነት አዋጅም በግልግል ዳኝነት የማይታዩ ዝርዝር ጉዳዮችን ለይቶ አስቀምጧል። የሚከተሉት ጉዳዮች ለግልግል ዳኝነት አይቀርቡም፦

1. የፍች፣ የጉዲፈቻ፣ የአሳዳሪነት፣ የሞግዚትነትና የውርስ ጉዳዮች፤
2. የወንጀል ጉዳዮች፤
3. የግብር ጉዳዮች፤
4. መክሰር ላይ የሚሰጥ ውሳኔ፤
5. የንግድ ማህበራት ላይ የሚሰጥ ውሳኔ፤

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[80] መሰረታዊው የግልግል ዳኝነት ሥነ-ሕግ ከግልግል ስምምነቶች አፈፃፀም ጋር በተያያዘ የፍርድ ቤቶች እና የግልግል ተቋማት ሚና(ስልጣን) ምን መሆን እንዳለበት ለመለየት ይመረምራል። በዚህ ጉዳይ ላይ በጣም አስተማሪ ሁለት ፍርዶች የሚከተሉት ናቸው፡- Fiona Trust Holding Corp and Ors v. Privalov and Ors [2006] EWHC 2583 (Comm); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

[81] Mitsubishi v. Soler Chrysler -Plymouth, 473 U.S. 614 (1985).

[82] *ዝኒ ከማሁ፥ ከገፅ* 473-73።

[83] ይህ በመሰረቱ በ Wilko v. Swan ፍርድ አንፅኦት የተሰጠውንና በብዙ ቀደምት ፍርዶች የተመለከተውን "የኢንቨስተሮችን ደህንነት የሚመለከቱ ጉዳዮች ለግልግል ዳኝነት አይቀረቡም" የሚለውን ደንብ ይሽራል። Wilko v. Swan, 346 U.S. 427, 438 (1953).

[84] The Bremen v. Zapata Off-shore Co., 407 US 1, 9-10 (1972).

6. የሊዝ ጉዳይን ጨምሮ አጠቃላይ የመሬት ጉዳዮች፤
7. አስተዳደራዊ ውሎች፥ በልዩ ሁኔታ ካልተፈቀደ በቀር፤
8. የንግድ ውድድርና ሸማቾች ጥበቃ፤
9. በሕግ ለሚመለከታቸው አስተዳደራዊ አካላት በተሰጠ ሥልጣን ስር የሚሸፈኑ አስተዳደራዊ አለመግባባቶች፤
10. በግልግል እንዳይታዩ በሕግ የተከለከሉ ሌሎች ጉዳዮች።[85]

ይህ ዝርዝር እ.አ.አ. በ1980ዎቹ ወይም ከዛ በፊት በተለያዩ የዓለማችን ክፍሎች ተዘርዝረው ከነበሩት ጋር ተመሳሳይነት አለው። እየዘመነ የመጣውን የድንበር ተሻጋሪ ንግድ ጉዳይ ፍላጎት ከግምት በማስገባት ቀድሞ በ‘‘ዊልኮ እና ስዋን’’[86] መዝገብ ላይ የተወሰነውን በመሻር በ‘‘ሚትስቡሺና በሶለር’’ እንዲሁም በ‘‘ሮድሪገዝ ዴ. አውጃስ እና ሼርሰን /አሜሪካን ኤክስፕሬስ ኢንክ’’ መዝገቦች ላይ ጉዳዩ በግልግል ዳኝነት ሊታይ እንደሚችል በመወሰኑና ዓለም አቀፋዊ ተቀባይነትን ካገኘው አካሄድ ጋር መጣጣሙ፤ በተቃራኒው ደግሞ ቀደም ብሎ እንደተጠቀሰው በኢትዮጵያው አዋጅ አንቀጽ 7(8) ላይ ‘‘የንግድ ውድድርና ሸማቾች’’ ጉዳይ በግልግል ዳኝነት ከማይታዩ ጉዳዮች ተርታ መግባቱ ትኩረትን የሚስብ ጉዳይ አድርጎታል። በ1980ዎቹ በብዙ ሀገሮች የነበሩ ዘመናዊ ዕድገትን[87] የሚፃረሩ መርሆዎችን

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[85] **የኢትዮጵያ የግልግል ዳኝነት አዋጅ፥ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፥ አንቀጽ 7።**

[86] Wilko v. Sawn was overruled by Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 486 (1989). (“Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.”)

[87] **በአውሮፓ ግዛቶች ውስጥ ስላለው ስለእነዚህ ዘመናዊ አዝማሚያዎች ማብራሪያ ይህን ሰነድ ይመልከቱ፦** Komninos, Assimakis, Arbitration and EU Competition Law, (April 12, 2009). Available at SSRN: https://ssrn.com/abstract=1520105. “All these elements of competition law had led in the past to the exclusion of the arbitrability of antitrust-related disputes, because of their public policy (ordre public) nature. This attitude, however, was reversed in the 1980s and early 1990s and it can now be said with certainty that arbitrability of competition law disputes is generally accepted in all jurisdictions with developed antitrust regimes.” **(‘‘ቀደም ሲል እነዚህ ሁሉ የውድድር ህግ ደንቦች የፐብሊክ ፖሊሲ ፀባይ ያላቸው በመሆኑ ከፀረ-ውድድር** (anti-trust) **ጋር የተገናኙ ጉዳዮች በግልግል ዳኝነት እንዳይታዩ ይከለከል ነበር። ይሁን እንጂ ይህ አመለካከት በ1980ዎቹ እና በ1990ዎቹ መጀመሪያ ላይ ተቀልብሶ በአሁኑ ጊዜ ከውድድር ሕግ ጋር የተያያዙ አለመግባባቶችን በግልግል መፍታት በአጠቃላይ በሁሉም የዳበረ ፀረ-ውድድር** (anti-trust) **የህግ ስርአት ባለባቸው ሀገሮች ሁሉ ተቀባይነት እንዳለው በእርግጠኝነት መናገር ይቻላል።’’)** Citing numerous useful authorities beyond the US cases cited above. Some more useful authorities cited include: in France CA Paris, 19.5.1993, Labinal SA v. Mors and Westland Aerospace Ltd., (1993) Rev.Arb. 645; In Italy, Corte di Cassazione, 21.8.1996, no. 7733, Telecolor SpA v. Technocolor SpA, 47 Giust.Civ. I-1373 (1997); In England &Wales, ET Plus SA et al. v. Welter et al. (Comm.), [2006] Lloyd’s Rep. 251; [2005] EWHC 2115.

በመሻር በአዲስ የተካውን አካሄድ በሚፃረር መልኩ የኢትዮጵያው የ2013ቱ አዋጅ ቀሪ የተደረጉ መርሆዎችን አካቶ ይዟል።

በተመሳሳይ መልኩ ሌሎች ትኩረት ከሚሹ ለግልግል ዳኝነት የማይቀርቡ ተብለው ከተያዙ ዝርዝሮች መካከል በንዑስ አንቀጽ 7 ሥር የተመለከተውን "በልዩ ሁኔታ ካልተፈቀደ በስተቀር" የአስተዳደራዊ ውሎች፣ እንዲሁም በንዑስ አንቀጽ 9 ሥር የተመለከተውን "በሕግ ለሚመለከታቸው አስተዳደራዊ አካላት በተሠጠ ሥልጣን ሥር የሚሸፈኑ አስተዳደራዊ አለመግባባቶች" የሚሉት ይገኙበታል።

ወደፊት የሚወጡ ሌሎች ሕጎች ወይም ፍ/ቤቶች የሚሰጧቸው የሕግ ትርጉሞች የእነዚህን ገደቦች ምንያህሌነት የሚወስኑት ቢሆንም፣ አስተዳደራዊ ውሎች በግልግል ዳኝነት መታየት ስላለባቸው ጉዳይ በቀደምት ሕግጋቱም ቢሆን ብዥታ የነበረበት ነበር።[88] አስተዳደራዊ ውሎች በግልግል ዳኝነት የማይታዩ ጉዳዮች ሆነው የተቀረፁት በኢትዮጵያ ብቻ አይደለም። መሠረቱና ምንጩም ብዙዎቹ የሲቪል ሕግ ሥርዓት ተከታዮች የተቀበሉት (እ.አ.አ.) የ19ኛው ክፍለ ዘመን የፈረንሳይ ሕግ ነው። ይሁን እንጂ አሁን ያለው የዘመነው ዝንባሌ ግን አስተዳደራዊ ውሎችም ቢሆኑ በግልግል ዳኝነት እንዲታዩ መፍቀድ ነው። ሚ/ር ጌሪ ቦርን ይህን አስመልክቶ በጥቅሉ እንዲህ በማለት ፅፏል፦

> ያለፉት አራት አሥርት አመታት የፈረንሳይ የሕግ እድገት ውጤት ዓለም አቀፍ ይዘት ያላቸው አስተዳደራዊ ውሎች በግልግል ዳኝነት አይታዩም የሚለውን ገደብ በአብዛኛው የቀነሰ ነው። የፍትሐ ብሔር ሕጉ ለግልግል ዳኝነት በማይቀርቡ ጉዳዮች ላይ በስፋት (እና ኃላቀር) በሆነ መልኩ የደነገገው ቢኖርም፣ እንዲሁም እነዚህ ድንጋጌዎች በተመሳሳዩ በስፋት ታሪካዊ ትርጉም የተሰጠባቸው ቢሆኑም፣ የፈረንሳይ ፍ/ቤቶች ለግልግል ዳኝነት የማይቀርቡ ጉዳዮችን ከጊዜ ወደ ጊዜ እያጠበቧቸው መጥተዋል። በውጤቱም ለግልግል ዳኝነት የማይቀርቡ ጉዳዮች ተብለው የሚታዩት አስገዳጅ በሆነ ወጥ ሕግ (ድንጋጌ) ውስጥ በግልፅ ተለይተው የተቀመጡ ጉዳዮች ብቻ ናቸው። በቅርቡም በተከለሰው የፈረንሳይ የግልግል ዳኝነት ሕግ ውስጥ ይህን የሚለውጥ ውጤት አልተመለከተም።[89]

[88] በቀድሞው የኢትዮጵያ የግልግል ሕግ ላይ የበለጠ ማብራሪያ ለማግኘት ይህን ፅሁፍ ይምልከቱ፦ Zekarias Keneaa, Arbitrability in Ethiopia: Posing the Problem, J. OF ETHI. LAW VOL. XVII (1994).

[89] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 964 (2nd ed.), at 957-1045.

የተለየ ባይሆንም[90] የኢትዮጵያ የግልግል ዳኝነት አዋጅ የተቃራኒውን ጎራ በመያዝ ይህ ጉዳይ በግልግል ዳኝነት ሊታይ የሚችለው በግልፅ በሕግ ሲፈቀድ ብቻ ነው ይላል። በመሆኑም ድንበር ተሻጋሪ በሆኑ የአስተዳደር ውሎች ውስጥ የገቡ የግልግል ዳኝነት አንቀፆች ተፈፃሚ የሚሆኑት የግልግል ዳኝነት አዋጅ በጥቅሉ የከለከለውን ልዩ ሕጉ በግልፅ ከፈቀደ ብቻ ነው።

ስፋት ባለው መልኩ ይህን ገደብ የሚጥሰው የኢንቨስትመንት አዋጅ እንዲህ በማለት ይደነግጋል። "2/ የፌደራል መንግስት የውጭ ኢንቨስትመንትን በተመለከተ የሚነሱ የኢንቨስትመንት አለመግባባቶች በግልግል ዳኝነት እንዲፈቱ ሊስማማ ይችላል።"[91] ይህ አንቀጽ አስተዳደራዊ ውሎች "በሕግ ካልተፈቀደ በስተቀር" ለግልግል ዳኝነት የማይቀርቡ ጉዳዮች መሆናቸውን ከሚደነግገው የግልግል ዳኝነት አንቀጽ 7(7) ጋር ተጣምሮ ሲነበብ በግልፅ የሚያሳየው የግልግል ዳኝነቱ አዋጅ በስራ ላይ ከዋለ በኋላ በፌደራል መንግስት ተቋማት የተፈረሙ ኢንቨስትመንትን የተመለከቱ አስተዳደራዊ ውሎች በግልግል ዳኝነት ሊታዩ እንደሚችሉ ነው።

ሌሎች በልዩነት ሊጠቀሱ የሚገባቸው ምሳሌዎች ዘርፍ ተኮር ናቸው። የማዕድን ሥራ አዋጅ ቁጥር 678/2010[92] እንመልከት። አግባብነት ያለው አንቀጽ እንዲህ ይላል፡- "ጉዳዩ በጋራ ውይይት ሊፈታ ካልቻለ በስምምነት ውስጥ በተመለከተው ሥነ-ሥርዓት መሠረት በግልግል ዳኝነት ታይቶ ይወሰናል። በግልግል ዳኝነት የሚሰጠው ውሳኔ የመጨረሻና በተዋዋይ ወገኖች ላይ የፀና ይሆናል።"[93]

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[90] ለንፅፅር የግብፅን ሕግ ይመልከቱ፡- Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters [hereinafter Egyptian Arbitration Law] available at http://www.crcica.org.eg/LawNo271994.pdf [https://perma.cc/3ETQ-64XG]. ውሉ በሚደረግበት ጊዜ የሚመለከተው ሚኒስትር ካልፈቀደ በቀር ከአስተዳደራዊ ውሎች ጋር የተያያዙ አለመግባባቶች ለግልግል እንደማይቀርቡ ይደነግጋል። በዚህ ነጥብ ላይ አጠር ላለ ማብራሪያ የሚከተለውን ፅሁፍ ይመልከቱ፡- Fatma Salah, New Approval Required for Government Contracts and Arbitration Agreements in Egypt, Kluwer Arbitration Blog, Feb. 21, 2021, http://arbitrationblog.kluwerarbitration.com/2021/02/21/new-approval-required-for-government-contracts-and-arbitration-agreements-in-egypt/ [https://perma.cc/7UD4-FUHV].

[91] የኢንቨስትመንት አዋጅ ቁጥር 1180/2012፣ *በግርጌ ማስታወሻ ቁ.* 30 የተጠቀሰ፣ አንቀፅ 28(2)።

[92] ማዕድን የማውጣት አዋጅ ቁጥር 678/2010።

[93] *ዝኒ ከማሁ*፣ አንቀጽ 76(2)። የቀሩት የዚሁ ድንጋጌ ንዑስ ክፍሎች፡-

> 76. አለመግባባቶችን ስለመፍታት፡- 1/ የማዕድን ቅኝት፣ ምርመራ፣ ይዞ መቆየት ወይም ማምረትን ከተመለከተ ስምምነት በመነጨ፣ በስምምነቱ አተረጓጎም፣ መጣስ ወይም መቋረጥ ምክንያት ወይም ከእነዚሁ ጋር በተያያዙ ምክንያቶች በመንግስትና በባለፈቃድ መካከል የሚፈጠር

የነዳጅ ሥራዎች አዋጅ ቁጥር 295/1978 በተመሳሳዩ እንዲህ በማለት ይደነግጋል፡- ‘‘ይህ ጉዳዩ በጋራ ውይይት ሊፈታ ካልቻለ በነዳጅ ስምምነት ውስጥ በተመለከተው ሥነ-ሥርዓት መሠረት በግልግል ዳኝነት ታይቶ ይወሰናል።’’[94]

ኢንቨስትመንትን የተመለከቱ የአስተዳደር ውሎችንና ዋና የተባሉ የተፈጥሮ ሀብት ዘርፎችን አስመልክቶ የአስተዳደር ውሎች ለግልግል ዳኝነት የማይቀርቡ መሆናቸውን የሚደነግገው አዲሱ የግልግል ዳኝነት አዋጅ ድንበር ተሻጋሪ ለሆኑ ከፍተኛ ጉዳዮች ብቻ በልዩ ሁኔታ የሚፈቀድበትን አግባብ አመቻችቷል።

3.2.4. የግልግል ዳኞችና የግልግል ዳኝነት ተቋማት

አዋጁ ተዋዋይ ወገኖች በዜግነት ላይ ልዩነት ሳያደርጉ የግልግል ዳኞቻቸውን መምረጥ እንደሚችሉና፣ አንደኛው ወገን ዳኛን ለመምረጥ ካልፈለገ ወይም በጋራ ሦስተኛ ዳኛን መምረጥ ካልቻሉ ዳኛን የመሰየም ሥልጣኑን ለፌደራል የመጀመሪያ ደረጃ ፍ/ቤት ሠጥቷል።[95] ፍርድ ቤቱ በግልግል ዳኞች አሿሿም ላይ የሚሰጠው ውሳኔ ይግባኝ የማይቀርብበት ነው።[96] የአንድን የግለግል ዳኛ ገለልተኛነትና ነፃነት መሠረት አድርጎ የሚነሳ ተቃውሞ በመጀመሪያ በራሱ በግልግል ዳኝነት ጉባዔው ውድቅ የተደረገበት ሰው ቅሬታውን ይግባኝ ለማይቀርብበት ውሳኔ ለፌደራል የመጀመሪያ ደረጃ ፍ/ቤት ሊያቀርብ ይችላል።[97] ቅሬታውን የመመዘኛው መስፈርትም በስፋት ተቀባይነትን ያገኘው ‘‘ገለልተኛነቱንና ነፃነቱን

ማንኛውም ክርክር፣ አለመግባባት ወይም የይገባኛል ጥያቄ በተቻለ መጠን በጋራ ውይይት ይፈታል። ... 3/ በግልግል ዳኝነት በሚሰጠው ውሳኔ ቅር የተሰኘ ማንኛውም ወገን ቅሬታውን ለሚመለከተው ፍርድ ቤት ይግባኝ እንዲታይለት ማቅረብ ይችላል።

[94] አዋጅ ቁጥር 295/1986፣ የፔትሮሊየም ኦፕሬሽንን ለመቆጣጠር የወጣ አዋጅ፣ አንቀጽ 25(2)።

[95] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀፅ12(3)።

(ለ) በዚህ ንዑስ አንቀጽ ፊደል ተራ (ሀ) የተደነገገው ቢኖርም አንደኛው ወገን ዳኛ እንዲመርጥ በሌላኛው ወገን ማስታወቂያ በተሰጠው በ30 ቀናት ውስጥ ዳኛ መምረጥ ካልቻለ ወይም ሁለቱም ዳኞች ከተመረጡ በ30 ቀናት ውስጥ የሦስተኛ ዳኛ ምርጫ ላይ መስማማት ካልቻሉ ወይም አንድ ዳኛ ባለበት የግልግል ዳኝነት ሁለቱም ወገኖች መስማማት ያልቻሉ እንደሆነ በአንደኛው ወገን ጠያቂነት የመጀመሪያ ደረጃ ፍርድ ቤት ዳኛውን ይሰይማል።

[96] *ዝኒ ከማሁ*፣ አንቀጽ 12(7)።

[97] *ዝኒ ከማሁ*፣ አንቀጽ 15(4)። ‘‘ያቀረበው ተቃውሞ ውድቅ የተደረገበት ሰው ውጤቱ በተነገረው በ30 ቀናት ውስጥ ለመጀመሪያ ደረጃ ፍርድ ቤት ቅሬታውን ማመልከት ይችላል፤ ፍርድ ቤቱ የሚሰጠው ውሳኔ ይግባኝ አይቀርብበተም።’’

ያጓደሉ አሳማኝ ጥርጣሬ ውስጥ የሚከቱ ሁኔታዎች ሲፈጠሩ" በግልግል ዳኛው መመረጥ ላይ ቅሬታ ሊቀርብበት ይችላል የሚለው መርህ ነው።[98]

በአዋጁ ከተካተቱ አበይት ተጨማሪ ጉዳዮች አንደኛው በሀገር ውስጥ ሊቋቋሙ ስለሚችሉ የግልግል ዳኝነት ማዕከላት ማንሳቱ ነው። በመንግስት ወይም በግል ተቋቁመው ጎን ለጎን ሊሰሩ የሚችሉ ተቋማት እንደሚኖሩ ታሳቢ ያደርጋል። ከዚህ ጋር በተያያዘም አግባብነት ያለው የአዋጁ አንቀጽ የሚከተለውን ደንግጓል፡-

> II. የግልግል ዳኝነት ማዕከላት ፩/ የግልግል ዳኝነት በመንግስት ወይም በግል ሊቋቋም ይችላል። ፪/ የፌደራል ጠቅላይ አቃቤ ህግ የግልግል ዳኝነት ማዕከላትን ይቆጣጠራል፤ ፈቃድ ይሰጣል፤ ያድሳል፤ የሚቋቋሙበትን መስፈርቶች ያወጣል፤ ዝርዝሩ የሚኒስትሮች ምክር ቤት በሚያወጣው ደንብ ይወሰናል። ፫/ ይህ አዋጅ በስራ ላይ ያሉ የግልግል ዳኝነት ተቋማት እንዳይቀጥሉ አይከለክልም።[99]

ይህ ፅሁፍ እስከ ተዘጋጀበት ጊዜ ድረስ ዝርዝር ደንቡ ባይወጣም የጣልቃ ገብነት ደረጃው ወደተፈለገው አቅጣጫ ሊጎተት የሚችልን የመንግስትን የፍቃድ መስጠትና የመቆጣጠር ሥልጣንን ያካተተ ነው።

3.2.5. ጊዜያዊ የመጠባበቂያ እርምጃ

ጊዜያዊ የመጠባበቂያ እርምጃን የተመለከተው የአዋጅ ክፍል እ.አ.አ. በ2006 በወጣው የተባበሩት መንግስታት ድርጅት (ተ.መ.ድ) የዓለም አቀፍ ንግድ ሕግ ኮሚሽን (UNCITRAL) ድንጋጌዎች ውስጥ የተጠቀሱትን መለያዎች ከመያዙም በላይ በብዙ ብሔራዊ የግልግል ዳኝነት ሕግጋት *(Lex arbitri)* ስለጉዳዩ ከተጠቀሰው በላይ በዝርዝር የተደነገገበት ነው ማለት ይቻላል። ምናልባትም ዝርዝር ከሆኑት ጉዳዮች መሀል ሊጠቀሱ የሚገባቸው ጉዳዮች በተ.መ.ድ. የኒውዮርክ አለምአቀፍ ስምምነት የፍርድ አፈፃፀም ጥያቄዎች ውድቅ የሚደረጉባቸውን ምክንያቶች ጨምሮ ከተደነገገው የውጭ ሀገር የግልግል ዳኝነት ፍርድ አፈፃፀም ጋር ተመሳሳይ በሆነ መልኩ የተመለከቱት የጊዜያዊ የመጠባበቂያ እርምጃ አፈፃፀም ንዑስ አንቀፆች ናቸው። እንዲህ ይላሉ፡-

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[98] *ዝኒ ከማሁ፥* አንቀጽ 14። "የግልግል ዳኞች መቃወሚያ፡- 1/ የአንድን ዳኛ መመረጥ መቃወም የሚቻለው ገለልተኛነቱን እና ነፃነቱን ወይም በግልግል ስምምነቱ ላይ የተቀመጡ መስፈርቶችን የማያሟላ መሆኑን አሳማኝ ጥርጣሬ ውስጥ የሚከቱ ሁኔታዎች ሲፈጠሩ ብቻ ነው።"

[99] *ዝኒ ከማሁ፥* አንቀጽ 18።

፩/ የውጭ ፍርዶችን እውቅና ስለመስጠት እና አፈፃፀምን በተመለከተ የተደነገገው እንደተጠበቀ ሆኖ፣ የተሰጠበትን ሀገር ከግምት ሳያስገባ በጉባዔ የተሰጠ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ አስገዳጅነት ይኖረዋል።

፪/ ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ መፈፀም ካልቻለ አንደኛው ወገን ትዕዛዙ እንዲፈፀምለት ለፍርድ ቤት ሊያመለክት ይችላል። [100]

ጊዜያዊ የመጠባበቂያ እርምጃ እንዲፈፀም የሚቀርብ ጥያቄ ተቀባይነት የሚያጣባቸው ምክንያቶች የግልግል ዳኝነት ፍርዱ ተቀባይነት እንዳያገኝ ከሚያደርጉት ድንጋጌዎች ጋር ተመሳሳይነት አላቸው። [101] በዚህ ረገድ አዋጁ በብሔራዊም ሆነ አለም አቀፍ ደረጃ በሚሰጡ ጊዜያዊ የመጠባበቂያ እርምጃዎች መካከል ልዩነትን አያደርግም። ተዋዋይ ወገኖች ጊዜያዊ የመጠባበቂያ እርምጃ ትዕዛዝ እንዲሰጥላቸው የግልግል ዳኝነት ጉባዔውን ወይም በቀጥታ ፍርድ ቤቱን መጠየቅ እንደሚችሉ በአማራጭ ተደንግጓል። [102] እንደቻይና ባሉ አንዳንድ አገሮች ከሚደረገው በተቃራኒ በዚህ አዋጅ ተዋዋይ ወገኖች ወይ ወደ ግልግል ዳኝነት ጉባዔው አሊያም በቀጥታ ወደ ፍርድ ቤት መሄድ ይችላሉ። በቻይና የግልግል ዳኝነት ሕግ መሠረት ግን ተዋዋይ ወገን በአስገዳጅ በቅድሚያ ማመልከት ያለበት ጉዳዩን ካየ በኋላ ወደ ፍርድ ቤት ማስተላለፍ ወዳለበት ወደ ግልግል ዳኝነት ኮሚሽን ነው። [103]

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[100] *ዝኒ ከማሁ*፣ አንቀጽ 25(1-2)።

[101] *ዝኒ ከማሁ*፣ አንቀጽ 26።

[102] *ዝኒ ከማሁ*፣ አንቀጽ 27። "የግልግል ዳኝነቱ መቀመጫው በየትኛውም ቦታ ያደረገ የግልግል ዳኝነት ከግምት ሳይገባ ተዋዋይ ወገኖች የጊዜያዊ መጠበቂያ እርምጃ ትዕዛዝ እንዲሰጥላቸው ፍርድ ቤትን ሊጠይቁ ይችላሉ።" ምናልባትም አዲሱ የግልግል አዋጅ ከፀደቀበት ጊዜ ጀምሮ ለመጀመሪያ ጊዜ ለጊዜያዊ እርምጃ የቀረበው ዓለም አቀፍ ማመልከቻ በቅርቡ በኢትዮጵያ ፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 275955 የቻይና ናሽናል ፔትሮሊየም ኮርፖሬሽን (BGP) በፖሊ-ጂሲኤል ፔትሮሊየም ኢንቨስትመንት ኃላፊነቱ የተወሰነ የኢትዮጵያ ቅርንጫፍ እና POLY-GCL ፔትሮሊየም ኃላፊነቱ የተወሰነ ኢንቨስትመንት (POLY-GCL) ላይ የቀረበው ማመልከቻ ነው። ፍርድ ቤቱ የቢጂፒን ጥያቄ ተቀብሎ POLY-GCL በኢትዮጵያ አጋዴን ክልል የሚገኘውን የነዳጅ ፍለጋና ማውጣት ፍቃድን የማስተላለፍ፣ የመሸጥ ወይም በእዳ መያዣነት የመጠቀም መብቶችን (የኮንሴሽን መብቶችን) የማገድ እና ተጠሪዎች በኢትዮጵያ ንግድ ባንክ ያላቸው የባንክ ሂሳብ እንዲታገድ ትዕዛዝ ሰጥቷል። በሆንግ ኮንግ አለምአቀፍ የግልግል ዳኝነት የተቋቋመው አለም አቀፍ የግልግል ዳኝነት የመጨረሻውን ብይን እስከሚሰጥ ድረስ የፍርድ ቤቱ ትዕዛዝ ፀንቶ እንደሚቆይ በግልፅ ተናግሯል።

[103] Arts. 25, 68, Arbitration Law of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995), 1994 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 8 (China). Available at http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html [https://perma.cc/KFC8-8435].

በብዙ የሕግ ሥርዓቶች ተቀባይ እንደሆነው ጊዜያዊ የመጠባበቂያ እርምጃ እንዲሰጠው ያመለከተ ወገን ዋስትና እንዲያቀርብ ሊጠየቅ ይችላል።[104] አስገዳጅ ያለመሆኑን ግን ልብ ይሏል።

3.2.6. በግልግል ዳኝነት ውሳኔ ላይ ሊቀርቡ ስለሚችሉ አቤቱታዎች

ሀ. የግልግል ዳኝነት ውሳኔን ስለመቃወምና ስለማሻር (Annulment)

በግልግል ዳኝነት ውሳኔ አቤቱታ ስለሚቀርብባቸው ሁኔታዎች የሚደነግጉ ሁለት አንቀፆች በኢትዮጵያ የግልግል ዳኝነት አዋጅ ውስጥ ይገኛሉ። የመጀመሪያው "የግልግል ዳኝነት ውሳኔን ስለመቃወም" በሚል ርዕስ ስር የተደነገገው ነው።[105] ሌላው ደግሞ በስፋት የሚታወቀው የግልግል ዳኝነት ውሳኔን ስለመሻር የሚደነግገው አንቀጽ ነው።[106] ተዋዋይ ወገን ሆነም አልሆነም፣ ነገር ግን በግልግል ዳኝነቱ ሂደት ውስጥ የክርክሩ ተሳታፊ መሆን ሲገባው ያልተሳተፈ ከሆነ የግልግል ዳኝነት ውሳኔ መተላለፉን ባወቀ በ60 ቀናት ውስጥ ውሳኔውን መቃወም እንደሚችል አዋጁ ይደነግጋል።[107]

ይህ ዓይነቱ ድንጋጌ ያስፈለገበት ምክንያት በጉዳዩ ላይ የሚያገባቸው አካላት መብት ሳይከበርና የሥነ-ስርዓት ፍትህ ሳይጠበቅ የግልግል ዳኝነቱ እንዳይፈፀም ለማድረግ ነው። በተመሳሳዩም በግልግል ዳኝነቱ ጣልቃ ገብቶ የነበረ ሦስተኛ ወገን በውሳኔው ላይ ወይም በውሳኔው አፈፃፀም ላይ መቃወሚያ ማቅረብ እንደማይችሉ አዋጁ ይደነግጋል።[108] በአንቀጹ የግልባጭ ንባብ ሥርዓት *(a contrario* reading) ጣልቃ እንዲገባ አመልክቶ ያልተፈቀደለት ሦስተኛ ወገን በአዋጁ አንቀጽ 48 ንዑስ አንቀጽ 5 በተመለከተው መሠረት በፍትሐ ብሔር የሥነ-ስርዓት ሕጉ ውስጥ የተደነገጉት ድንጋጌዎች ከዚህ አዋጅ እስካልተቃረኑ ድረስ የተሰጠውን የግልግል ዳኝነት ውሳኔና አፈፃፀሙን መቃወም ይችላል።[109]

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[104] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀጽ 21(3)።

[105] *ዝኒ ከማሁ*፣ አንቀጽ 48።

[106] *ዝኒ ከማሁ*፣ አንቀጽ 50።

[107] *ዝኒ ከማሁ*፣ አንቀጽ 48(1)።

[108] *ዝኒ ከማሁ*፣ አንቀጽ 48(2)፡ "መቃወሚያውን የሚያቀረበው ሶስተኛ ወገን አስቀድሞ ጉዳዩን ሲመለከተው በነበረው ጉባኤ አቤቱታውን አቅርቦ በግልግል ዳኝነት ሂደቱ ጣልቃ ገብቶ ከነበረ፣ በዚህ አንቀጽ ንዑስ አንቀጽ (፭) መሠረት መቃወሚያውን ማቅረብ አይችልም።"

[109] *ዝኒ ከማሁ*፣ አንቀጽ 48(5)።.

በግልግል ዳኝነት ውሳኔ ላይ የመቃወም አቤቱታን ለማቅረብ ተዋዋይ ወገኖችና ሦስተኛ ወገን የሚታዩት በተለያየ መንገድ ነው። የክርክሩ ተካፋይ መሆን ይገባው የነበረ ግን ያልተካፈለ ተዋዋይ ወገን የግልግል ዳኝነት ውሳኔ እንዳይፈፀም የሚቃወም ከሆነ፣ ፍርድ ቤቱ ጉዳዩን ተመልክቶ ውሳኔውን በማሻሻል ለግልግል ዳኝነት ጉባዔው እንዲመልሰው አዋጁ ይደነግጋል። ይህ ማለት ግን አንድ የግልግል ዳኝነት ጉባዔ የመጨረሻ ውሳኔውን ከሰጠ በኋላ ህልውናው ያበቃለት ስለሚሆን *(functus officio)* ፍርድ ቤቱ ራሱ ጉዳዩን አይቶ የመጨረሻ ውሳኔን ካልሰጠ በቀር የሚመራለት የግልግል ዳኝነት አካል ሊኖር እንደማይችል ልብ ይሏል። [110]

የመቃወሚያ አቤቱታ አቅራቢው ሦስተኛ ወገን ከሆነ ግን ፍርድ ቤቱ ጉዳዩን በራሱ በመመርመር የግልግል ዳኝነት ውሳኔውን በከፊል ወይም ሙሉ በሙሉ ሊሽረው ወይም ሊያሻሽለው እንደሚችል አዋጁ ይደነግጋል። ይህ ማለት ደግሞ ተከራካሪ ሆኖ መቅረብ የነበረበት ወገን ሳይገባ በመቅረቱ ምክንያት የግልግል ዳኝነት ስምምነቱ ውድቅ እንደተደረገ ያስቆጥረዋል። [111] ሦስተኛው ወገን በክርክሩ ጣልቃ እንዲገባ ጠይቆ ጉባዔው ጥያቄውን ካልተቀበለው፥ በአፀፋ መልኩ ፍርድ ቤቱ እጅጉን ተመጣጣኝ ባልሆነ መልኩ ጉዳዩን ሙሉ በሙሉ በማየት ፍርድ ሊሰጥ ይችላል።

ለማንኛውም ይህ አንቀጽ በጥንቃቄ ሲመረመር የሦስተኛ ወገን ጣልቃ መግባትን አስመልክቶ ለግልግል ዳኝነት ጉባዔውና ለፍርድ ቤቱ የተከፋፈለውን የሥልጣን ልክ በግልፅ የሚያሳይ ነው። በግልግል ዳኝነቱ ሂደት የመጨረሻ ስልጣን ያለው ፍርድ ቤት መሆኑንም አመላካች ነው።

ሌሎች ትኩረት የሚሹ አንቀፆች ደግሞ የግልግል ዳኝነት ውሳኔን ስለመሻር የተመለከቱት ናቸው። በብዙ ሀገሮች እንዳለው የኢትዮጵያውም አዋጅ የግልግል ዳኝነት እንዳይፈፀም የሚያደርጉ ምክንያቶችን ከኒውዮርኩ ኮንቬንሽን አንቀጽ V ባመዛኙ የወሰደ ይመስላል። [112]

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[110] *ዝኒ ከማሁ*፥ አንቀጽ 48(3)።

[111] *ዝኒ ከማሁ*፥ አንቀጽ 48(4)።

[112] *ዝኒ ከማሁ*፥ አንቀጽ 50። የዚህ ድንጋጌ የአማርኛውና የእንግሊዝኛው ቅጅ ልዩነት ያላቸው ይመስላል። ይሄ ልዩነት ታስቦበት ሳይሆን፥ የአማርኛው ጽሑፉ ቀጥታ ወደ እንግሊዘኛ ሲተረጎም የተፈጠረ ይመስላል። "ሀ)አመልካቹ ላይ ተፈፃሚነት ባለው ሕግ መሠረት የግልግል ስምምነት ለማድረግ የሚያስችለው ችሎታ የሌለው እንደሆነ፤ ለ) የግልግል ዳኝነት ስምምነቱ በተዋዋዮች በተመረጠው ሕግ ወይም በኢትዮጵያ ሕግ መሠረት ዋጋ የሌለውና ፈራሽ የሆነ ወይም ጊዜው ያለፈ እንደሆነ፤ ሐ) አቤቱታ አቅራቢው የግልግል ዳኞች ስለመሾማቸው፣ ስለ ግልግል ዳኝነተ ሂደቱ በቂ ማስታወቂያ ያልተሰጠው መሆኑን ሲያሳይ ወይም በሂደቱ ለመሰማት አለመቻሉን ሲያስረዳ፤ መ) የግልግል ዳኞች በሂደቱ በገለልተኝነታቸው ወይም ነፃነታቸውን

ይህ ደግሞ ሊሆን የቻለው የኒውዮርኩ ኮንቬንሽን የግልግል ዳኝነት ውሳኔ የሚሻርባቸውን መሠረቶች ለኮንቬንሽኑ አባል አገራት ብሔራዊ ሕግጋት አሳልፎ ስለሰጠ ነው።

የግልግል ዳኝነቱ ስምምነት ከብሔራዊ ሕግ አንፃር ዋጋ የሌለውና ፈራሽ የሚሆንበትን ሁኔታ የሚደነግገው የአዋጁ አንቀጽ 50(2)(ለ) በግልፅ አሻሚ የሆነ ጉዳይ የሚታይበት ነው። እንዲህም ይነበባል፡- አንድን የግልግል ዳኝነት ውሳኔ ለማሻር አቤቱታ የሚቀርበው "የግልግል ዳኝነት ስምምነቱ በተዋዋዮች በተመረጠው ሕግ ወይም በኢትዮጵያ ሕግ መሠረት ዋጋ የሌለውና ፈራሽ የሆነ ወይም ጊዜው ያለፈ እንደሆነ" ነው።[113] የኒውዮርኩ ኮንቬንሽን አቻ አንቀጽ ደግሞ እንዲህ ይነበባል፡- አንድን የግልግል ዳኝነት ውሳኔ ለማሻር አቤቱታ የሚቀርበው "በተዋዋዮች በተመረጠው ሕግ መሰረት ወይም ውሳኔ በተሰጠበት ሀገር ሕግ የግልግል ዳኝነት ስምምነቱ ዋጋ የሌለውና ፈራሽ ከሆነ" ነው።[114] ምንም እንኳን ይህ የሚደረግበት ምክንያት የግልግል ዳኝነት ውሳኔ እንዳይፈፀም በሚል ሲሆን፣ በብዙ ሀገሮች ግን እነዚህ ምክንያቶች የግልግል ዳኝነት ውሳኔን ለማሻርም መሠረቶች ተደርገው የሚወሰዱ ምክንያቶች ናቸው። ኢትዮጵያም ይህንኑ አካሄድ ብትከተልም ነገር ግን በተዋዋይ ወገኖች ከተመረጠው ሕግ ውጭ በብቸኛ አማራጭነት የተጠቀሰው የኢትዮጵያ ሕግ እንጂ የግልግል ዳኝነት ውሳኔው የተላለፈበት ሀገር ሕግ አይደለም። ምናልባትም በምክንያትነት የተወሰደው የግልግል ዳኝነት ውሳኔን የማሻር ጉዳይ ስለሆነ ክርክሩ ደግሞ መካሄድ ያለበት በኢትዮጵያ ነው ከሚል ይሆናል። መሠረታዊ የሆነው አሻሚ ጉዳይ ግን የሚመነጨው ውሳኔውን በመቃወም ለማሻር መሰረት (ምክንያት) ከሆነው ጉዳይ ሳይሆን የአማራጮቹ አያያዥ ከሆነው "ወይም" ከሚለው ቃል ነው። "ወይም" የሚለው አያያዥ ቃል የሚያመለክተው ፍ/ቤቱ በራሱ ምርጫ ተዋዋዮች ከመረጡት ሕግና ከኢትዮጵያ ሕግ የፈለገውን ይመርጣል የሚል አሻሚ ትርጉምን የያዘ ነው። ምንም እንኳን የአማርኛው አንቀጽ የተከሰተውን ችግር ፈቺ ባይሆንም ሁለት ሀሳቾን ለምርጫ አቅርቧል። ከሀሳቹ የአቀማመጥ ተዋረድ በመነሳት ሕግ አውጪው ምናልባትም ሊል የፈለገው በተዋዋዮቹ የተመረጠ የሥረ-ነገር ሕግ ከሌለ ፍርድ ቤቱ የሚተገብረው የኢትዮጵያን ሕግ ነው የሚል ሳይሆን አይቀርም።

ጠብቀው ውሳኔ ያልሰጡ ሲሆን ወይም ከተዋዋይ ወገኖች መደለያ በመቀበል ውሳኔ ሰጥተው ከሆነ፤ ሠ) የግልግል ዳኝነት ውሳኔው የተሰጠበት ጉዳይ ከግልግል ዳኝነት ስምምነቱ ወሰን በላይ ውሳኔ የሰጠ ከሆነ፤ ረ) የጉባዔው አመሠራረት እና በሂደቱ የተተገበረው ሥነ-ሥርዓት ከተዋዋይ ወገኖች ስምምነት ወይም በዚህ አዋጅ ከተደነገገው ጋር የሚቃረን እና ውሳኔው ላይ ተጽእኖ ያሳደረ ከሆነ ነው።"

[113] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀጽ 50(2)(ለ)።

[114] የኒውዮርክ ኮንቬንሽን፣ *በግርጌ ማስታወሻ ቁ.* 75 የተጠቀሰ፣ አንቀጽ 5 (1)(ሀ)።

ከዚህ ጋር በተያያዘ ሊነሳ የሚገባው ጉዳይ ምንም እንኳን የኒውዮርክ ኮንቬንሽን አንድ የግልግል ዳኝነት ውሳኔን ለማሻር ሲባል ብቻ ተቃውሞ እንዲቀርብበት በመገደብ ውሳኔው የመጨረሻ መሆኑን ታሳቢ ሲያደርግ፥ የኢትዮጵያው ሕግ ግን በተወሰኑ ምክንያቶች በውሳኔው ላይ ይግባኝ ማቅረብ እንደሚቻልም ይፈቅዳል። ለዚህም ሁለት መንገዶችን ታሳቢ አድርጓል፦ (1) ተዋዋዮቹ ይግባኝ እንዲጠየቅ ከተስማሙ፣[115] ወይም (2) መሰረታዊ የሕግ ስህተት ሲኖር የሰበር አቤቱታ ማቅረብ እንደሚቻል ካልገደ።[116] በሌላ አገላለፅ፣ የግልግል ዳኝነት ውሳኔ ይግባኝ ሊባልበት እንደሚችል ተዋዋዮቹ በስምምነታቸው እስካላሰፈሩ ድረስ የመጨረሻና አስገዳጅ ነው። ህጉ ታሳቢ የሚያደርገው ሁሉም የግልግል ዳኝነት ውሳኔዎች መሠረታዊ የሕግ ስህተት ካለባቸው በፍርድ ቤት በይግባኝ ሊታዩ እንደሚችሉ ነው። ሆኖም ግን ከሚከተሉት ሦስት ሁኔታዎች በቀር ተዋዋዮቹ በስምምነት ይህን የይግባኝ መብት ማስቀረት ይችላሉ፦ (1) ውሳኔው የተሰጠው በርትዕ ወይም የታወቁ የንግድ ልምዶችን መሠረት በማድረግ ከሆነ *(ex aquae et bono)*፣[117] (2) ውሳኔው የተሰጠው በተዋዋዮቹ ስምምነት ከሆነ፣[118] እና (3) በተዋዋዮቹ ስምምነት ውሳኔ የተሰጠው ምክንያቱ ሳይገለፅ ከሆነ።[119]

በአጠቃላይ አዋጁ ከውሳኔ ማግስት ሊቀጥሉ ስለሚችሉ ክርክሮች ሰፊ መድረክን ለተከራካሪ ወገኖች የፈጠረ ቢሆንም፥ የግልግል ዳኝነት ውሳኔን የመጨረሻነት ግን በጉልህ ደንግጓል። ይሁን እንጂ በአንቀጹ 49(2)[120] ላይ የተመለከተው "መሰረታዊ የሕግ ስህተት ሲኖር" የሚለው ሐረግ የኢትዮጵያን ሕግ ብቻ፣ ወይስ የውጭ ሀገርን ሕግ አሊያም ደግሞ ሁለቱንም ስለማካተቱ ግልፅነት ይጎድለዋል። ምክንያቱም አዋጁ የውጭ ሀገር ሕግ ተፈፃሚ ሊሆን እንደሚችል ደንግጓልና።[121] በመሆኑም ሕግ የሚለው ቃል በዚህ ስፍራ የተመለከተው የውጭ ሀገሩንም ሕግ በማካተት ነው ቢባል የተሳሳተ ግምት አይደለም።

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[115] የኢትዮጵያ የግልግል አዋጅ፥ *የግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፥ አንቀጽ 40(1)።

[116] *ዝኒ ከማሁ*፥ አንቀጽ 49(2)።

[117] *ዝኒ ከማሁ*፥ አንቀጽ 49(3) ከአንቀጽ 41(5) *ጋር*።

[118] *ዝኒ ከማሁ*፥ አንቀጽ 49(3) ከአንቀጽ 43 *ጋር*።

[119] *ዝኒ ከማሁ*፥ አንቀጽ 49(3) ከአንቀጽ 44(2) *ጋር*።

[120] *ዝኒ ከማሁ*፥ አንቀጽ 49(2)። ("2/ ተቃራኒ ስምምነት ከሌለ በስተቀር መሰረታዊ የሕግ ስህተት ሲኖር የሰበር አቤቱታ ማቅረብ ይቻላል")

[121] *ዝኒ ከማሁ*፥ አንቀጽ 41(3&4) ("3/ በዚህ አንቀጽ ንዑስ አንቀጽ (1) መሠረት በስምምነት የተመረጠ ሕግ ከሌለ ጉባኤው ከጉዳዩ ጋር ቅርበትና አግባብነት ያላቸውን ሕጎች በመምረጥ ተፈፃሚ ያደርጋል። 4/ ጉዳዩ አለም አቀፍ የግልግል ዳኝነት ይዘት የሌለው ከሆነ ጉባዔው የኢትዮጵያን ሕግ ብቻ ተፈጻሚ ያደርጋል።")

የውጭ ሀገር ሕጎችም አተገባበር በተመለከተ በተዋዋይ ወገኖች ሌላ ስምምነት እስካልተደረሰ ድረስ ለመሰረታዊ የሕግ ስህተት ይግባኝ መብት መሆኑ የውጭ ሀገር ሕግንም ያካትታል። ይህ ዓይነቱ ድምዳሜም ትክክል የሚሆነው አዋጁ ለውጭ ሀገር ሕግ የተለየ ገደብን ባለመጣሉ ነው። የውጭ ሀገር ሕግ ተፈፃሚ በሆነበት የግልግል ዳኝነት ተሸናፊው ወገን ጉባዔው የውጭ ሀገሩን ሕግ የተረጎመበትን አካሄድ ቢቃወም፣ የሰበር ችሎቱ ከትክክለኛው የውጭ ሀገር ሕግ አተረጓጎም ለመድረስ በፍትሐ ብሔር ክርክር የውጭ ሀገር ሕግ በሚመዘንበት መልኩ እንደሚመለከተው ማመን አያዳግትም። ይሁን እንጂ ተቃውሞ የቀረበበት ተፈፃሚ ሕግ ግን የኢትዮጵያ ሕግ ከሆነ፣ አሁን በኢትዮጵያ በስራ ላይ ባለው ሕገ-መንግስት መሰረት ተዋዋዮቹ የሰበር አቤቱታን በራሳቸው ስምምነት መገደብ የሚችሉ አይመስልም። ምክንያቱም በሕገ-መንግስቱ መሰረት የሰበር ችሎቱ መሰረታዊ የሕግ ስህተቶችን የማረም ስልጣን ስላለው ነው። አግባብነት ያለው የሕገ-መንግስቱም አንቀጽ እንዲህ ይነበባል፡- "ሀ) የፌደራሉ ጠቅላይ ፍ/ቤት መሰረታዊ የሆነ የሕግ ስህተት ያለበትን ማናቸውንም የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን ይኖረዋል። ዝርዝሩ በሕግ ይወሰናል።"[122] ተዋዋይ ወገኖች በኢትዮጵያ ሕግ አተረጓጎም ላይ መሰረታዊ የሕግ ስህተት ቢፈፀም በሰበር ችሎቱ ሊታይ አይገባም በማለት መስማማት እንደሚችሉ የግልግል ዳኝነት አዋጁ አግባብነት ያላቸው አንቀፆች መፍቀዳቸው ሕገ-መንግስታዊ ነው ወይ የሚልን ጥያቄ ማስነሳቱም አይቀሬ ነው።[123]

ለ. ለግልግል ዳኝነት ውሳኔ እውቅና መስጠትና ውሳኔን ማስፈፀም

በዓለም አቀፍ ማህበረሰብ አስቀድሞ እንደተፀነሰው የኒውዮርክ ኮንቬንሽን ሙሉ ዓላማው ለግልግል ዳኝነት ውሳኔ እውቅና ስለመስጠትና ውሳኔውን ስለማስፈፀም ነው። በኒውዮርክ ኮንቬንሽን የግልግል ዳኝነትን ስለማስፈፀም የሚያወሳው አንቀጽ II(3) በስምምነቱ ውስጥ የተካተተው በመጨረሻዎቹ ሰዓታት ነው። በቀጣይም በዚህ አንቀጽ ዙሪያ የተደረገው ትንተናና ክርክር የግልግል ዳኝነት ሕግ ሳይንስን አንድ ሦስተኛውን ቦታ የያዘ ሊሆን ችሏል።

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[122] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት፣ አንቀጽ 80(3)(ሀ)።

[123] ጠቅላይ ፍርድ ቤት *በኮንስታ ጆይንት ቬንቸር እና የኢትዮጵያ-ጅቡቲ ምድር ባቡር ኩባንያ ጉዳይ* ላይ የግልግል አዋጁ ከመጽደቁ በፊት በኢትዮጵያ ሕግ መሰረት የሕግ ስህተቶችን ስለመገምገም ሰፊ አስተያየት ሰጥቷል። *ኮንስታ ጆይንት ቬንቸር ከኢትዮጵያ-ጅቡቲ የባቡር ኩባንያ* [2016] 2013-32. የሰበር አቤቱታው በተከታዩ ድረ-ገፅ ይገኛል፡- https://jusmundi.com/en/document/pdf/other/en-consta-joint-venture-v-chemin-de-fer-djibouto-ethiopien-the-ethiopian-djibouti-railway-representing-the-federal-democratic-republic-of-ethiopia-and-the-republic-of-djibouti-petition-for-cassation-review-thursday-26th-may-2016 [https://perma.cc/YP86-DYAW].

የኮንቬንሽኑ አርቃቂ የነበሩት ሚ/ር ፒየር ሳንደርስ የዚህን አንቀጽ በመጨረሻዎቹ ደቂቃዎች ማካተት አስመልክቶ ስለነበረው አስገራሚ ታሪክ እንዲህ በማለት ፅፏል፡-

> የኮንቬንሽኑን ታሪክ በተመለከተ ያደረግሁት ጥናት ባብዛኛው ያተኮረው በኮንፈረንሱ ወቅት 'የደች ፕሮፖዛል' በመባል በሚታወቀው ጉዳይ ላይ ይሆናል። ሐሳቡ የተፀነሰው ኮንፈረንሱ በተጀመረበት በመጀመሪያው ሳምንት ላይ ነበር። ከኒውዮርክ ወጣ ብላ በምትገኝ መለስተኛ ከተማ በሚገኘው የአማቴ ቤት ቅዳሜና እሁድን ለማሳለፍ በዚያ ነበርኩ። አንዲት ትንሽ ተንቀሳቃሽ መተየቢያ በጉልበቴ ላይ አድርጌ በግቢ ውስጥ ተቀምጬ ስሰራ አሁን ድረስ ይታየኛል። ከዚያ ስፍራ ነው አንድ ቀን ፀሀይ እየሞቅሁ ሳለ በኋላ 'የደች ፕሮፖዛል' በመባል የታወቀው ሀሳብ የተፀነሰው። ... በኮንፈረንሱም ማጠናቀቂያ ሰዓት ላይ ነው ይህ አሁን አንቀጽ II ሆኖ የወጣው ስለግልግል ዳኝነት ስምምነት የሚያወሳው አንቀጽ እንዲካተት የተደረገው።[124]

ኮንቬንሽኑ የተፀነሰበትና የተዋቀረበት ዋና ዓላማ የነበረው በአንቀጽ III እና V ስር ስለተካተቱት ለውጭ ሀገር የግልግል ዳኝነት ውሳኔ እውቅና ስለመስጠትና ስለማስፈፀም ነበር። ኢትዮጵያ ዘግይታም ቢሆን በቅርቡ ያፀደቀችውን ኮንቬንሽን ተከትሎ ያወጣችው አዋጅም እነዚህኑ የኮንቬንሽኑን አይነተኛ አንቀፆች የተወሰኑ ማሻሻያዎች በማድረግ አካትታቸዋለች። በአንቀፆቹ ላይ ግን ማሻሻያዎቹን ለምን ማድረግ እንዳስፈለገ ግልፅ አይደለም። ቁልፍ የሆነው አግባብነት ያለው አንቀጽም እንዲህ ይነበባል፡- "፭/ የዚህ አዋጅ አንቀጽ ፬ ወይም ፬፪ ድንጋጌዎች እንደተጠበቁ ሆነው በኢትዮጵያም ሆነ በውጭ ሀገር የተሰጠ የግልግል ዳኝነት ውሳኔ አስገዳጅ እንደሆነ ተቆጥሮ ጉዳዩ በፍርድ ቤት ቢታይ ኖሮ ፍርዱን ሊያስፈፅም ለሚችለው ፍ/ቤት በማቅረብ በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ መሠረት የፍርድ ውሳኔ በሚፈፅምበት አኳኋን ይፈፀማል።"[125]

የአዋጁ አንቀጽ 52(1) ደግሞ እንዲህ ይላል፡- "የግልግል ዳኝነት ውሳኔ እንዳይፈፀም መቃወም የሚቻለው ከዚህ በፊት ውሳኔው እንዲሻር ለፍርድ ቤት አቤቱታ ቀርቦ ውድቅ ያልተደረገ ከሆነ ነው።" የአማርኛው ገዢ አንቀጽ በትክክል ስለመቀመጡ ልብ ይሏል። በሌላ አገላለፅ ውሳኔው እንዳይፈፀም የመቃወም እድል የሚኖረው ውሳኔው እንዲሻር የተደረገው ጥረት ውጤታማ ካልሆነ ብቻ ነው። አቀራረፁ ታሳቢ ያደረገውም ውሳኔን ማሻርና ውሳኔን

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[124] Pieter Sanders, The Making of the Convention, in U.N., ENFORCING ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, U.N. Sales No. E. 99. V. 2, 3-4 (1999), http://www.newyorkconvention.org/travaux+preparatoires [https://perma.cc/P8EB-CTKM].

[125] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀጽ 51(1)።

እንዳይፈፀም መቃወም ተከታትለው እንዲመጡ ነው። ይሁን እንጂ ሁለቱም አቤቱታዎች በአንድ ጊዜ በሁለቱ ወገኖች ሊጀመሩ እንደሚችሉ ከግምት አልገባም። በተግባር በተደጋጋሚ እንደሚታየው ተሸናፊው ወገን ውሳኔውን ለማሻር ወደ ፍርድ ቤት ሲሄድ፣ አሸናፊው ወገን ደግሞ ውሳኔውን ለማስፈፀም እንዲሁ ወደ ፍርድ ቤት ይሄዳል። ውሳኔን መቃወም የሚቻለው ውሳኔውን ለማሻር የቀረበው አቤቱታ ውድቅ ከተደረገ ነው የሚለው እሳቤ ውሳኔው ከተሻረ ውሳኔ ሊፈፀም አይችልምና እንዳይፈፀም ተቃውሞ የማቅረቡን ጉዳይ ዋጋ ቢስ ያደርገዋል።

ሌላው በአዋጁ ለውጥ የታየበት ጉዳይ የግልግል ዳኝነት ስምምነትን የፀና መሆን አለመሆን የሚወስነው ሕግ የትኛው መሆን አለበት የሚለው ምርጫ ነው። በኒውዮርክ ኮንቬንሽን አንቀጽ V(1)(ሀ) ላይ የግልግል ዳኝነት ውሳኔ ሊፈፀም የማይችለው "ስምምነቱ በተዋዋዮቹ በተመረጠው ሀገር ሕግ የማይፀና ከሆነ፣ ወይም ስምምነቱ ስለተመረጠው ሀገር ሕግ የማያነሳ ከሆነ ደግሞ የግልግል ዳኝነቱ ውሳኔ በተሰጠበት ሀገር ሕግ ስምምነቱ የማይፀና ከሆነ ነው። "[126] በመሪነት የሚተገበረው ተፈፃሚ ሕግ "የግልግል ዳኝነቱ ውሳኔ የተሰጠበት ሀገር ሕግ" ነው። የኢትዮጵያው የግልግል ዳኝነት አዋጅ ግን ውሳኔው የትም ሀገር ይሰጥ ይህን በመሪነት የሚተገበረውን ተፈፃሚ ሕግ እንዲህ በማለት በኢትዮጵያ ሕግ ተክቶታል፤ "የግልግል ዳኝነት ስምምነቱ በተዋዋዮቹ በተመረጠው ሕግ ወይም በኢትዮጵያ ሕግ መሠረት ዋጋ የሌለውና ፈራሽ የሆነ ወይም ጊዜው ያለፈ እንደሆነ"።[127] ይህ ዓይነቱ አቀራረፅ ምን የተለየ ጠቀሜታን እንደሚያስገኝ ግን ግልፅ አይደለም።

ሌላው ግልፅ የሆነ ለውጥ የተደረገበት አንቀፅ የሚገኘው በአዋጁ አንቀጽ 52(2)(ረ) ላይ ነው። እንዲህም ይነበባል፡- "ረ/ የግልግል ዳኝነት ውሳኔው የመጨረሻ ደረጃ ላይ ያልደረሰ ከሆነ፥ የተሻለ ወይም ውሳኔው የታገደ ከሆነ።" ይህ ከኒውዮርክ ኮንቬንሽን አንቀጽ V(1)(2) ጋር ተመሳሳይነት እንዲኖረው ሆኖ የተቀረፀ ነው። "ሠ/ ውሳኔው በተከራካሪ ወገኖች ላይ ገና አስገዳጅ ካልሆነ፣ ወይም ከተሻረ፣ አሊያም ውሳኔው በተሰጠበት ሀገር ሕግ ስልጣኑ ባለው ፍ/ቤት ከታገደ።" አዋጁ እገዳንና መሻርን በመነጣጠል በተለያዩ አንቀፆች ሲይዛቸው ውሳኔውን ለመቃወም ደግሞ እንደተጨማሪ መሠረት መሰረዝን ያነሳል። አዋጁ በይግባኝ ሊገኝ የሚችልን መሻር ከግምት ሲያስገባ ኮንቬንሽኑ ግን ውሳኔው የመጨረሻ እንዲሆን ታሳቢ ያደረገ በመሆኑ በይግባኝ የሚገኝ መሰረዝን ከግምት አላስገባም። አርቃቂዎቹ ምናልባትም መሰረዝ (reversal) የሚለውን ቃል ሲጠቀሙ መሻር (set aside) የሚለውን ለመግለፅ ይሆናል። ምንም እንኳ የቃላቱ ትርጉም አንዱ ሌላውን የሚገልፅ ቢሆንም፥ ከላይ

[126] የኒውዮርክ ኮንቬንሽን፥ *በግርጌ ማስታወሻ ቁ.* 75 የተጠቀሰ፥ አንቀጽ 5 (1)(ሀ)።
[127] የኢትዮጵያ የግልግል አዋጅ፥ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፥ አንቀጽ 51(2)(ሀ)።

እንደተገለፀው መሻርንና ተቃውሞን የያዙ የተለያዩ አንቀፆች መኖራቸው የሚያመለክተው ስለይግባኝ በሚያወሱት አንቀፆች በመሠረታዊ የሕግ ስህተት ምክንያት ወይም በሌላ ምክንያት የሚወሰን መሰረዝ (reversal) በይግባኝ የተወሰነ መሰረዝ (appellate reversal) ነው። ይሁን እንጂ ይህን ማለት ደግሞ የተቃውሞውን ጉዳይ ዳግም እንደማንሳት ማለት ነው።

ምንም እንኳን ከላይ ያነሳናቸው ጉዳዮች ለሀገር ውስጥ የግልግል ዳኝነቶች ብቻ ተብለው የተቀረፁ ባይሆንም፥ አዋጁ በአንቀጽ 53 ላይ "በውጭ ሀገር ለተሰጠ የግልግል ዳኝነት ውሳኔ እውቅና ስለመስጠትና አፈፃፀሙ" በሚል ራሱን የቻለ ሰፊ አንቀጽ ይዟል። ይህም አንቀጽ ቢሆን ከኒውዮርክ ኮንቬንሽኑ አቻ አንቀጽ ጋር ሲተያይ የጎላም ባይሆን መጠነኛ ለውጥን ይዟል። ሊነሱ ከሚገባቸው ጥቂት ለውጦች ውስጥ የሚከተሉትን ማንሳት ይቻላል። በውጭ ሀገር ለተሠጠ የግልግል ዳኝነት ውሳኔ እውቅና ስለመስጠትና አፈፃፀሙ የሚያወራው አንቀጽ ከአስገዳጅ አቀራረጽ ላላ ወዳለው የፈቃጅነት (የአማራጭ) አቀራረፅ አዘንብሏል። በተቃራኒው ደግሞ እንዲፈፀም ለፍርድ ቤት የሚቀርብን ጥያቄ የተመለከተው አንቀጽ ደግሞ ላላ ካለው የፈቃጅንት (የአማራጭ) አቀራረፅ ወደ አስገዳጅ አቀራረፅ አዘንብሏል። ይህን በተሻለ መንገድ ለማስረዳት የሚከተሉትን ሁለት አንቀፆች በንፅፅር ማየት ይበጃል።

የአዋጁ አንቀጽ፡-

> በውጭ ሀገር የተሰጠ የግልግል ዳኝነት ውሳኔ ኢትዮጵያ ባፀደቀቻቸው ዓለም አቀፍ ስምምነቶች የሚወድቅ ከሆነ በስምምነቱ መሠረት እውቅና ሊሰጠው ወይም ሊፈፀም ይችላል።[128]

የኒውዮርክ ኮንቬንሽን አንቀጽ፡-

> እያንዳንዱ ተዋዋይ ሀገር የግልግል ዳኝነት ውሳኔዎች አስገዳጅ እንደሆኑ ይቀበላል፤ በቀጣዮቹ አንቀፆች በተመለከቱት ሁኔታዎች መሰረት ውሳኔዎቹ በተላለፉበት ሀገር የሥነ-ሥርዓት ሕግ መሠረት እንዲፈፀሙ ያደርጋል።[129]

በውሣኔ ላይ ሊሰጥ የሚገባን እውቅና አለመቀበልና አለመፈፀምን የሚመለከቱ አንቀፆች ላይ የተስተዋለውን ለውጥ እንደሚከተለው በንፅፅር ማሳየት ይቻላል።

[128] *ዝኒ ከማሁ*፥ አንቀጽ 53(1)።

[129] የኒውዮርክ ኮንቬንሽን፥ *በግርጌ ማስታወሻ ቁ.* 75 የተጠቀሰ፥ አንቀጽ III።

የአዋጁ አንቀጽ 53፣ ንዑስ-አንቀጽ 2፡-

> **በዚህ አንቀጽ ንዑስ አንቀጽ ፩ የተደነገገው እንደተጠበቀ ሆኖ በውጭ ሀገር የተሰጠ የግልግል ዳኝነት ውሳኔ እውቅና ላይሰጠው ወይም ላይፈፀም የሚችለው በሚከተሉት ምክንያቶች ነው።**

የኒውዮርክ ኮንቬንሽን አንቀጽ

> **የግልግል ዳኝነት ውሳኔ እውቅና ላይሰጠው ወይም ላይፈፀም የሚችለው በተሸናፊው ወገን ጠያቂነት እውቅና እንዲሰጥና እንዲፈፀም ጥያቄው በቀረበበት ቦታ ላለና ሥልጣኑ ላለው አካል ቀርቦ የሚከተሉት ከተረጋገጡ ነው።**

የአዋጁ የአንቀጽ አቀራረፅ እንዲያው በቀላሉ አስገዳጅ የሆነውን በአማራጭ ቃል የመተካካት ብቻ አይደለም። ወደፊት አሁን ያልታዩ ክርክሮችን የሚያስነሱ ከመሆናቸውም በላይ እነዚህ ለውጦች እንዲካተቱ አስገዳጅ የነበሩ የፖሊሲ ጉዳዮች ስለመኖራቸው የሚታወቅ ነገር የለም። ወደፊት በጉዳዩ ላይ የሚፃፉ መጣጥፎች በቀጣይ የሚመለከቱት መሆኑ እንደተጠበቀ ሆኖ፣ ላሁኑ የመቃወሚያ ምክንያቶች ተብለው በተዘረዘሩት አንቀፆች ውስጥ አንዳንድ ለውጦች መደረጋቸው ሁኔታዎችን ቀላል አላደረጓቸውም ቢባል ሚዛናዊ ነው።

የኒውዮርክ ኮንቬንሽን አንቀፅ V(1) አቀራረፅ የዓለም አቀፍ የግልግል ዳኝነት ሥርዓት ማጠንጠኛ በሆነ ነጥብ ላይ የተመሰረተ ነው፡- "[የግልግል ዳኝነት] ውሳኔ እውቅና ላይሰጠው ወይም ላይፈፀም የሚችለው በተሸናፊው ወገን ጠያቂነት እውቅና እንዲሰጥና እንዲፈፀም ጥያቄው በቀረበበት ቦታ ላለ ሥልጣኑ ላለው አካል ቀርቦ የሚከተሉት ከተረጋገጡ ነው።"[130] በዚህ አንቀጽ ውስጥ የአስገዳጅነት መገለጫ ከሆነው በእንግሊዘኛው "Shall" ከሚለው ቃል ይልቅ አስገዳጅ ያልሆነው "May" የሚለው የእንግሊዘኛው ቃል በጥቅም ላይ መዋሉ በመላው አለም ሰፊ ክርክርን አስነስቷል። አዲሱ አዋጅ በስፋት ተቀባይነትን ካገኘው አካሄድ የሚርቅ ከሆነ፣ አከራካሪ የሆነውን ጉዳይ የሚፈታ ነው ተብሎ ሊጠበቅ ይችላል። የሚያሳዝነው ግን የኢትዮጵያው አዲሱ አዋጅ ይህ አከራካሪ የሆነውን ጉዳይ ካለመፍታቱም በላይ ይልቁንም፣ ሆነ ተብሎ ላይሆን ይችላል፣ ጉዳዩን ይበልጥ ውስብስብ አድርጎታል።

በኮንቬንሽኑ አንቀጽ ውስጥ የተቀመጠው የአስገዳጅነት ትርጉምን ባልያዘው "… may be refused" በሚለው ሀረግ ዙሪያ ያለውን ክርክር በቅድሚያ እንመልከት። ክርክሩ በአብዛኛው የሚነሳው ውሳኔው በተሰጠበት ሀገር የተሻረን በውጭ ሀገር የተሰጠ የግልግል ዳኝነት ውሳኔ

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[130] *ዝኒ ከማሁ፣* አንቀጽ V(1)፣ አጽንዖት ተጨምሮበታል።

ከማስፈፀም ጋር በተያያዘ ጉዳይ ላይ ነው።[131] በዚህ ጉዳይ ላይ ሁለት የአመለካከት ጎራዎች ተከስተዋል። የመጀመሪያው ጎራ አስገዳጅ ያልሆነው "May" የሚለው ቃል ውሳኔው የተሰጠበትን ሀገር በጉዳዩ ላይ የሚኖረውን አቋም ከግምት ሳያስገባ የግልግል ዳኝነት ውሳኔ ሊፈፀም ይገባል የሚል ነው።[132] ሁለተኛው ጎራ ደግሞ ለቃሉ ትርጉም ቦታ ሳይሰጥ ውሳኔው በተሰጠበት ሀገር የተሻረ ውሳኔ ሊፈፀም አይገባም የሚል አቋምን የያዘ ነው።[133] ከሁለቱ ጎራዎች መካከል የትኛው ይበልጥ ተቀባይነት እንዳገኘ እንኳ ከመግባባት አልተደረሰም።

በኢትዮጵያው አዋጅ በአንቀጹ አቀራረፅ ላይ የተደረገው ለውጥ እነዚህን መፍትሄ ያላገኙ ክርክሮች ያለመፍትሔ እንዲቀጥሉ ከማድረጉም በላይ የግልግል ዳኝነት ከብሔራዊ ሕግ በላይ ነው የሚልን አቋም የሚያራምዱ ደጋፊዎች የሚያቀነቅኑትን አይነት የተለየ አመለካከት እንዲይዙ ሊጋብዝ ይችላል።[134]

አዋጁ ተቃውሞን በተመለከተው አንቀጽ ውስጥ ሌሎች ለውጦችን አካቷል። በመጀመሪያ ምንም እንኳ ኢትዮጵያ የኒውዮርክ ኮንቬንሽንን ለመቀበል በአስገባችው የማፅደቂያ ሰነድ ውስጥ የእንካ ለእንካ መርህን ብታስመዘግብም በአዋጁም ውስጥ እራሱን የቻለ የእንካ ለእንካ መርህን ንዑስ አንቀጽ ቀርፃለች።[135] ምናልባትም ሕግ አውጪው ሌሎች ባለሁለትዮሽ ወይም በአሁን ሰዓት ያሉ ወይም ወደፊት የሚፈረሙ አለም አቀፍ ስምምነቶችን ታሳቢ አድርጎ ሊሆን ይችላል። ከዚህ በመነሳት ጉዳዩ መደጋገሙ ብዙም አሳሳቢ ላይሆን ይችላል።

በሁለተኛ ደረጃ አዋጁ በኒውዮርክ ኮንቬንሽን በአንቀጽ V(1)(መ) ላይ "የጉባኤው አመሰራረትና በሂደቱ የተተገበረው ሥነ-ሥርዓት ከተዋዋይ ወገኖች ስምምነት ጋር የሚቃረን፣

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[131] የአንቀጽ V(1) አጠቃላይ ድንጋጌና የአንቀፅ V(1) (e) ጥምር ንባብ። የአንቀጽ V(1)(e): "ብይኑ በተዋዋይ ወገኖች ላይ ገና አስገዳጅ ካልሆነ ወይም ብይኑ በተሰጠበት ሀገር በሚመለከተው ባለስልጣን ወይም በሀገሪቷ ሕግ የማይፀና ወይም የታገደ ከሆነ።") *ዝኒ ከማሁ*።

[132] ለምሳሌ የሚከተለውን የፍርድ ጉዳይ ይመልከቱ፡- Chromalloy Aeroservices Inc. v. Ministry of Def. of Republic of Egypt, 939 F. Supp. 907 (D.D.C.1996) (ከግብፅ ውጭ የተሰጠ የግልግል ውሳኔ እንዲፈፀም አድርጓል።) ይኸው ፍርድ ቤት አቋሙን በኋላ ቀይሯል። የሚከተለውን የፍርድ ጉዳይ ይመልከቱ፡- Termorio S.A.E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007). Termorio SAESP v. Electranta SP. 487 F.3d 928 (DC Cir. 2007).

[133] ስለዚህ የአስተምህሮ የበለጠ ማብራሪያ ይህን መፅሐፍ ያንብቡ፡- EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010). ፀኃፊው የተለያዩ ንድፈ ሐሳቦችን ካቀረበ በኋላ የራሱን አስተያየት አስቀምጧል። ገፅ 24።

[134] *ዝኒ ከማሁ*።

[135] የኢትዮጵያ የግልግል አዋጅ፣ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፣ አንቀጽ 53(2)(ሀ)።

ወይም የግልግል ዳኝነቱ ከተካሄደበት ሀገር ሕግ ጋር የሚቃረን ከሆነ''[136] የሚለውን ድንጋጌ በሚከተለው ቀይሮታል፦ ''የግልግል ዳኝነት ውሳኔው በማይፀና የግልግል ዳኝነት ስምምነት መሠረት ወይም ውሳኔው የተሰጠበት ሀገር ሕግ በሚፈቅደው መሠረት ባልተቋቋመ ጉባዔ የተሰጠ እንደሆነ''። [137]

የማይፀና የግልግል ዳኝነት ስምምነት አንቀጽንና የጉባዔውን አመሠራረት ሕጋዊነት በአንድነት ከማዋሃዱም በላይ የግልግል ዳኝነት ጉባዔውን አመሠራረት ሕጋዊነት ለመወሰን የሚያስችለውን ገዢ ሕግ ከተዋዋይ ወገኖች ምርጫ ወደ ተፈፃሚው ሕግ ቀይሮታል። እንዲሁ ሲታይ የማይጎዳ ቢመስልም የተዋዋዮቹ ስምምነትና ተፈፃሚው ገዢ ሕግ ሲተገበሩ ወደተለያዩ ውጤቶች የሚመሩ ከሆነ አላስፈላጊ ወደሆነ አተካራ የሚከት ይሆናል።

ሦስተኛ፥ አዋጁ በኒውዮርክ ኮንቬንሽን የሌለ አዲስ አንቀጽን አካቷል። እንዲህም ይላል፦ ''የተሰጠው ውሳኔ በኢትዮጵያ ሕግ መሠረት ሊፈፀም የማይችል እንደሆነ''። [138] እንዲሁ ሲታይ ይህ አንቀጽ በትርጉሙ በኮንቬንሽኑ አንቀጽ V(2)(ለ) ላይ በልዩነት የተመለከተውን የሕዝብ ሞራልን ጉዳይ የያዘ ይመስላል። ይሁን እንጂ አዋጁ እራሱን በቻለው በአንቀጽ 53(2)(ረ) ላይ እንዲያውም የብሔራዊ ፀጥታን ጉዳይ የሕዝብ ሞራል አካል አድርጎ ቀርያታል። [139]

እነዚህ ከላይ የተነሱት አንኳር ጉዳዮች በኒውዮርክ ኮንቬንሽን ላይ የተደረጉ ዓይነተኛ ለውጦች ናቸው። እያንዳንዱ ለውጥ የተደረገበት የፖሊሲ ምክንያት ካለ የአዋጁን አንቀፆች ብቻ በመመርመር በቀላሉ መለየት አይቻልም።

ማጠቃለያ

ከቅርብ ጊዜ ወዲህ ኢትዮጵያ ድንበር ተሻጋሪ የኢኮኖሚ ሕጎቿን በማዘመን ረገድ ጥሩ እመርታን አስመዝግባለች። በንግድ ዘርፍ የአለም የንግድ ድርጅትን ለመቀላቀል ድርድሮችን ጀምራለች። ግዙፉን የአፍሪካን ነፃ የንግድ ቀጣና ፕሮጀክት በሀሴት ተቀላቅላለች። ምንም እንኳን እ.አ.አ. ከ2010 ጀምሮ የሁለትዮሽ የኢንቨስትመንት ጥበቃ ስምምነቶችን ማፅደቅን

[136] የኒውዮርክ ኮንቬንሽን፥ *በግርጌ ማስታወሻ ቁ.* 75 የተቀመጠ፥ አንቀጽ 5(1)(መ)።

[137] የኢትዮጵያ የግልግል አዋጅ፥ *በግርጌ ማስታወሻ ቁ.* 63 የተጠቀሰ፥ አንቀጽ 53(2)(ለ)።

[138] *ዝኒ ከማሁ*፥ አንቀጽ 53(2)(ሐ)።

[139] *ዝኒ ከማሁ*፥ አንቀጽ 53 (2) (ረ)። (''የውሳኔውም አፈፃፀም የህዝብ ሞራል፣ ፖሊሲ እና የህዝብ ደህንነት የሚቃረን እንደሆነ ነው'')።

ዘግየት ብታደርግም፣ አዲስ የኢንቨስትመንት ሕግ በማወጅ አንድ እርምጃን ወደፊት ተራምዳለች። የድንበር ተሻጋሪ ንግድን በተመለከተም የኒውዮርክ ኮንቬንሽንን በማፅደቅ ሁሉን አቀፍ ማስፈፀሚያ የሆነውን ሕግም አውጃለች። በዚህ መጣጥፍ ለማድረግ የሞከርነው እነዚህን አዳዲስ እድገቶች አጠር ባለ መልኩ በሀያሲ እይታ ለመቃኘት ነው።

በእያንዳንዱ ዘርፍ ላይ በጉልህ የታየው የጋራ የሆነው ገላጭ ባህርይ በግልፅ ባልታወቁና አሳማኝ ባልሆኑ ምክንያቶች በአብዛኛው ተቀባይነትን ካገኙ መርሆዎችና አንቀፆች በተደጋጋሚ የመራቅ ወይም የመለየት ጉዳይ ነው። ይህም ከላይ ባየናቸውና በመረመርናቸው ሕግጋት ውስጥ ተከስተዋል። በዚህ ረገድ የአለም የንግድ ድርጅትን ለመቀላቀል መሟላት የሚገባቸውን መመዘኛዎች ባለማሟላት የታየው እጅጉን የማርፈድ ሁኔታ፣ የሁለትዮሽ የኢንቨስትመንት ጥበቃ ስምምነቶች የማፅደቅ ሂደት በዝምታ የመገታቱ ጉዳይ እና ዓይነተኛ የሆኑ የኒውዮርክ ኮንቬንሽን አንቀፆችን በግልፅ የለወጡ አንቀፆች በአዲሱ የግልግል ዳኝነት አዋጅ ውስጥ መካተታቸው ሊጠቀሱ የሚገባቸው ናቸው።

ምናልባትም ከማንኛውም የሕግ ዘርፍ ውስጥ የድንበር ተሻጋሪ የኢኮኖሚ ሕግጋትን የማዘመን ስራ ዋና ዓላማው የየሀገሮች ድንበር ተሻጋሪ ሕግጋት በተቻለ መጠን የተጣጣሙና እንዲዋሃዱ ማድረግ በመሆኑ በማርቀቅ ሂደት ውስጥ በተጓዳኝ ሊታዩ የሚገባቸውን ለውጦች ታሳቢ ያደረገ ሊሆን ይገባ ነበር። እነዚህ ሕግጋት ድንበር ተሻጋሪ የኢኮኖሚ እንቅስቃሴዎች የሚፈልጓቸውን ሥርዓትና ተገማችነት እውን እንዲሆን ያደርጋሉ። በስፋት ተቀባይነትን ባገኙ መርሆዎችና የሕግ አንቀፆች ላይ በማያስፈልግ መልኩ በሀገር ውስጥ በተናጠል ለውጥ የሚደረግባቸው ከሆነ የማዘመን እና የማጣጣም ወይም የማዋሀድ ሥራውን የሚያኮላሽ በመሆኑ ሕጋዊ፣ ሚዛናዊ፣ የሚታይ እና የሚያስጠብቋቸው ኢኮኖሚያዊ፣ ማህበራዊ፣ ወይም ሌሎች አይነት ብሔራዊ ግቦችን የማያራምዱ እስከሆነ ድረስ ሊወገዱ ይገባል።

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THE STATE OF ETHIOPIA'S TRANSNATIONAL ECONOMIC LAW: TRADE, INVESTMENT, AND ARBITRATION

Zewdineh Beyene Haile & Won L. Kidane[*]

Abstract

This article offers a critical appraisal of the evolution and the current state of Ethiopia's transnational economic laws focusing on trade, investment and commercial dispute settlement. It finds with curiosity a considerable degree of departure from established texts for reasons that are not readily evident and recommends limiting such departures to the promotion of legitimate, rational, ascertainable, and defensible economic, social or other types of local objectives.

Key-terms: Investment, arbitration, international trade, BITs, Ethiopia

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LITIGATING CONSTITUTIONAL RIGHTS IN ETHIOPIA: A JOINDER TO MIZANIE ABATE TADESSE

Getachew Assefa Woldemariam[*]

Abstract

This article joins Dr. Mizanie's recent contribution that deals with litigation of constitutional rights in Ethiopia. In his article, Mizanie points out that there has so far been an unacceptably low level of constitutional rights litigation in the country. He contends that one of the reasons for such a state of fact is the non-existence of rules and procedures on constitutional remedies to facilitate litigation-based enforcement of constitutional rights. He attempts to demonstrate this claim by discussing the legal and practical dispensations in areas such as jurisdiction of the Council of Constitutional Inquiry and the House of the Federation and the role of courts in constitutional interpretation; locus standi in constitutional litigation; and constitutional remedies. This article aims at expanding the discourse on constitutional rights litigation by reflecting on Dr. Mizanie's contribution. It is also meant to critically engage with some of the author's viewpoints in order to offer additional perspectives. The article also supplements Mizanie's analysis and offers fresh perspectives by using recent legal developments.

Key-terms: constitutional litigation; constitutional remedies; constitutional rights; House of Federation; Courts; Council of Constitutional inquiry; justiciability; access to justice

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Introduction

In his recent article[1], Dr. Mizanie contends that constitutional remedies that could emanate from the 1995 Constitution of Ethiopia have been rarely applied or enforced. Without denying the possible veracity of the argument that the constitution interpretation modality chosen by the framers of the Constitution may have contributed to this unhappy reality, he argues that "the lack of clear and comprehensive Bill of Rights litigation procedure as well as redress for violations of constitutional rights could also contribute to the current unacceptably low enforcement level of the Bill of Rights of the Constitution via constitutional litigation".[2]

This article is meant to advance the discourse on the litigation of constitutional rights in Ethiopia by mostly expanding on Mizanie's points of view and the arguments presented in the article under consideration. In addition, it attempts to critically review some of his points in order to offer an additional perspective and thereby present a menu of ideas for the reader. Major legal developments after Mizanie's piece was published are also discussed in this article. The article will engage in doctrinal analysis of the relevant legal texts and the literature on constitutional interpretation in Ethiopia and other jurisdictions. The *Travaux Préparatoires* of the 1995 Constitution will also be consulted where necessary. It will also analyze cases decided by the House of the Federation (HoF) that will help the article achieve its purposes.

[1] Mizanie Abate Tadesse, "Rethinking Litigation Grounded Enforcement of Constitutional Rights in Ethiopia", *Journal of Ethiopian Law* 32 (2020), p. 125.

[2] *Id.*

The article proceeds as follows. The next section (section 1) provides a brief summary of Mizanie's main research findings, arguments and contentions. The rest of the article is structured following Mizanie's topical organization of his article. This will help the reader grasp the ideas that are forwarded in relation to the major discussions made by Mizanie. Accordingly, section 2 deals with the jurisdiction of the CCI/HoF and the role of the courts in the interpretation of the Constitution. Section 3 takes up standing (*locus standi*), section 4 deals with the issue of exhaustion of administrative and judicial remedies while section 5 considers constitutional remedies. Finally, the article will offer a brief conclusion.

1. Mizanie A. Tadesse's Major Arguments and Contentions

I do not intend to repeat here the discussions made by Mizanie in the article under consideration. I will rather briefly recap his major contentions in order to be able to make an easy reference to them as I engage with the points of view he has advanced.

In his general comments on the Bill of Rights of the Ethiopian Constitution, Mizanie points out that although the Constitution contains a long list of fundamental rights and freedoms, it is not a prototype of complete bills of rights. He observes that the "lack of explicit recognition of certain human rights; an uncommon classification of constitutional rights into human and democratic rights… attachment of claw-back clauses to a number of civil and political rights and ambiguous limitations to certain human rights; making the right to life derogable [in times of public emergency]; and bad formulation of socio-economic rights" are the most notable defects

of the Constitutional text.[3] He further notes that these and other constitutional gaps could have been remedied if we had "a strong judicial activism".[4]

Dubbing the limited invocation of the constitutionally protected rights before judicial and quasi-judicial bodies in the face of widespread violation of human rights in the country paradoxical, Mizanie surmises that the surest way to bring about "legal accountability and remedy for infringement" is the enforcement of the Bill of Rights of the Constitution.[5] Mizanie says that the constitutional interpretation arrangement designed by the framers of the Ethiopian Constitution "is proven to have a debilitating negative impact on [the] enforcement of constitutional rights of individuals by shielding the legislature and the executive from any meaningful scrutiny".[6] He, thus, laments:

> The most shattering deficiency of the FDRE Constitution, however, is the institutional architecture for the enforcement of constitutional rights. Largely enthused about putting in place at most protection to the group interests and rights of nations, nationalities and peoples (NNP), arguably at the expense of individual rights, not only does it snatch the power of constitutional interpretation from ordinary courts but also put it in wrong hands. The Constitution entrusts litigation-based enforcement of its Bill of Rights to the House of Federation ([HoF]): a non-judicial second house of parliament.[7]

[3] *Id*, p. 127.
[4] *Id.*
[5] *Id.*, pp. 128-29; 130.
[6] *Id.*, p. 142.
[7] *Id.*, p. 130

According to Mizanie, however, the snatching of the power to interpret the Constitution from the ordinary courts and entrusting it to the House of the Federation (HoF) is not alone to blame for the current low level of constitutional rights litigation. As earlier noted, the absence of clear and comprehensive litigation procedure for litigating constitutional rights and the lack of redress for violation of constitutional rights have made a huge contribution to the current state of affairs of constitutional rights litigation in Ethiopia. The main thesis of his article, he notes, is "to canvass whether and the degree to which lack of detail[ed] rules and procedures on constitutional remedies could adversely affect litigation-based enforcement of the Bill of Rights of the Constitution even under the existing institutional arrangement" by focusing on those areas where scholarly inputs have so far been lacking.[8]

In the article, Mizanie discussed the importance of the right to an effective remedy in human rights violations and the obligation of governments in providing it. All international and regional human rights instruments consider the existence of an effective remedy for violations of human rights as the cornerstone of the human rights protection system. He rightly points out that the mere entrenchment of human rights in constitutions if not matched by effective remedy when the rights are violated is a travesty and a deception at the same time.[9]

Stating that the Constitution is not accompanied by full-fledged enforcement rules, Mizanie observes that some procedural rules exist albeit scattered in the Constitution and other sub-constitutional laws, namely, the House of the Federation Proclamation No. 251/2001 and

[8] *Id.*, p. 131.
[9] *Id.*, pp. 132-33.

the Council of Constitutional Inquiry (CCI) Proclamation No. 798/2013. In describing the contexts in which constitutional rights litigation may arise, Mizanie notes that individual or group grievances of violations of any of their rights recognized in chapter three of the Constitution may arise in or outside judicial proceedings. He says "where an issue of constitutional interpretation arises in a pending court case, the court or the litigant may refer the issue that needs constitutional interpretation to CCI".[10] "Furthermore", Mizanie says, "any individual who alleges that his/her fundamental right and freedom recognized in the Constitution have been violated may directly submit the case to the CCI after exhausting all available remedies".[11] According to Mizanie, when a constitutional interpretation case reaches it in either of the two avenues of submission noted above, "the CCI shall consider the matter and if it finds that the matter does not need constitutional interpretation, it shall reject the case or remand it to the court, and, if, on the other hand, it believes there is a need for constitutional interpretation, it shall submit its recommendations to the [HoF] for a final decision".[12]

In regards to the rules of procedure, Mizanie notes that the following procedural matters are addressed by the three laws on constitutional interpretation mentioned above: standing, exhaustion of other remedies, order of suspension of judicial proceeding until the CCI decides on the matter referred for constitutional interpretation, gathering of professional opinions and production of evidence, decision making procedure, the precedent effect of the decision of the HoF on constitutional interpretation, the time span within which the

[10] *Id.*, p. 134.
[11] *Id.*
[12] *Id.*

HoF should make a decision, and service fee.[13] At the same time, he also lists out the procedural matters that he observes are hardly regulated by the existing laws. These are joinder of parties, admission of *amicus curiae*, oral hearing, period of limitation, withdrawal or discontinuance of applications, rules or techniques of constitutional interpretation, and types of redress for infringement of constitutional rights, except declaration of invalidity of law or conduct.[14] Stressing the importance of the procedural rules for the protection of human rights, Mizanie calls for rules on remedies, period of limitation, fairness and timely disposition of proceedings and standing to be regulated by a law to be passed by the federal parliament, rather than by the CCI or HoF.[15]

Addressing the controversial issue of whether the Ethiopian courts have the power to interpret the Constitution, Mizanie declared his view that "ordinary courts do not have the power to interpret the Constitution in general and the Bill of Rights chapter in particular" and that "when a dispute arises in respect of whether a statute, customary practice and conduct of a government are in violation of constitutional rights, the matter needs to be adjudicated by the [HoF]".[16] Mizanie further surmises that the legislative interpretation of the Ethiopian Constitution is that courts do not have any role (he says are "sidelined") in the interpretation of the Constitution. According to Mizanie, this position of the federal legislature has been made clear through Proclamation No. 798/2013 which, "contrary to how article 84(2) of the FDRE Constitution is understood", proclaimed that "constitutional interpretation by the [HoF] is necessitated not only where the constitutionality of a statute is challenged but also where the

[13] *Id.*, pp. 134-35.
[14] *Id.*, p. 135.
[15] *Id.*, pp. 135-36.
[16] *Id.*, p. 136.

constitutionality of 'customary practice or decision of government organ or decision of government official' is an issue".[17] He notes that the CCI and HoF have also been in line with the federal legislature and have in reality exercised interpretive power over matters Mizanie believes fall outside their jurisdiction.[18]

He then goes on to acknowledge the supportive role the ordinary courts play in the process of rendering a constitutional interpretation decision when such an issue arises. By citing the provisions of Proclamation No. 798/2013, he observes that the court that is considering a concrete case incidental to which a constitutional interpretation issue has arisen has to determine the constitutional interpretation issue and refer it to the CCI for the determination of the issue.[19] The law says further that if the court seeing the concrete case declines one of the parties' request to refer a constitutional issue that party believes exists, that party has the right to submit an appeal to the CCI.[20] Mizanie makes another important point that, once the constitutional issue that arises in a court is resolved in a manner contemplated by article 84(3)[21] of the Constitution and the court receives the interpretation decision, "the concerned court will then decide on the entire case and order remedy

[17] *Id.*, pp. 141-42.

[18] Mizanie cites *Wessen et al* case, in which the HoF examined the constitutionality of a decision of a government institution and found it in violation of the Constitution; Mizanie, *supra* note 1, p. 142.

[19] Proclamation No. 798/2013, article 4(3)-(4).

[20] *Id.*, article 4(5)-(6); Mizanie, *supra* note 1, p. 136.

[21] According to article 84(3) of the Constitution, the CCI may remand the case if it is convinced that there is no need for constitutional interpretation. The disputant in disagreement can however take the matter to the HoF as an appeal. But if the CCI finds that there is a need for constitutional interpretation, it submits its recommendation to the HoF for the latter's final decision. When the HoF makes its final decision on the constitutional issue, it sends its decision to the concerned court. The latter then resumes the consideration of the case or controversy incidental to which the constitutional issues has arisen and makes decision on the case.

if infringement of constitutional rights is found".[22] He also notes that courts have a role to apply the Constitution to resolve cases based on a previously handed down decision of the HoF owing to the fact that the latter's decision applies to similar constitutional matters that may arise in the future.[23]

According to Mizanie, although the courts have a robust role in the process of interpretation of the Constitution, they have however been prevented from effectively playing "their role due to the absence of Constitutional Bill of Rights enforcement rules".[24] He further remarks that "distinct rules of procedure that are different from criminal and civil procedural rules are needed that take into account the nature of constitutional litigation in terms of standing, litigation proceeding and remedies".[25] He cites the experience of Nigeria and Uganda as instructive examples for Ethiopia. In the case of Nigeria, the 2009 Fundamental Rights (Enforcement Procedure) Rules have been set forth to ensure 'expansive and purposeful interpretation, access to justice, public interest litigation, abolition of objections on grounds of *locus standi,* and expeditious trial of human rights suits, among others.[26] Similarly, the 1995 Constitution of the Republic of Uganda, in article 50, provides for the enforcement of rights and freedoms recognized under its chapter four by courts of law. Mizanie recites the said article of the Ugandan Constitution, which under its sub-article (1) stipulates: "'[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been

[22] Mizanie, *supra* note 1, p. 136. However, if the CCI finds that there is no need for constitutional interpretation, the case will obviously be settled based on the applicable ordinary law and the question of constitutional remedy may not arise.

[23] *Id.*, p.136.

[24] *Id.*

[25] *Id.*

[26] *Id.*, p. 137.

infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'".

Mizanie also observes that article 50(4) of the Ugandan Constitution enjoins Parliament to make laws for the enforcement of rights and freedoms under chapter four of the Constitution. By virtue of this authority, the parliament adopted the 2019 Ugandan Human Rights (Enforcement) Act. Mizanie tells us that the Act lays down the principal procedural rules, such as standing, prohibition of rejection by the competent court merely for failure to comply with any procedure, form or any technicality, redress for violation of human rights including compensation and rehabilitation, personal liability of government officials and period of limitation, and leaves other detailed procedural rules to other subsidiary laws.[27]

Another issue extensively discussed by Mizanie is the question of *locus standi* in constitutional interpretation matters. Holding the position that there is no clear regulation of standing as it pertains to constitutional litigation in our legal system at the moment, he calls for a liberal, proactive interpretation of the existing laws, such as article 37 of the Constitution, in order to allow not only those that have vested interest in the matter but also those who want to represent other people's or the public's interests in constitutional litigation proceedings.[28] He says that article 37 of the Constitution can be read to allow a broad standing platform, including what is known as public interest litigation.[29] In this connection, he observes:

[27] *Id.*
[28] *Id.*, pp.154-58.
[29] *Id.*, p. 155.

> From the way the sub-articles [of article 37] are organized, it is clear that article 37(2) is added to article 37 (1) not to clarify or qualify the seemingly broad standing requirement under sub-one. It is instead to add other grounds of standing as it made clear by the caption of article 37(2) which says 'the decision or judgment referred to under sub-Article 1 of this Article may *also* be sought by…' (Emphasis added). Thus, in the absence of an explicit condition on the right of everyone to bring a justiciable matter to their own personal interests in [Article] 37(1), this vague provision need to be interpreted broadly so as to include a possibility whereby anyone may act on behalf of another person or in [the] public interest.[30]

Mizanie also calls for a liberal interpretation of "the term 'interested party' in article 84(2) of the Constitution", and together with that for article 5(1) of Proclamation No. 798/2013—which limits standing to persons whose constitutional rights are violated—to "either be amended or read in line with article 37 and 84(2) of the Constitution".[31] He argues that the liberal interpretation, for standing purposes, of articles 37(1) and 84(2) should apply to both interpretations of the constitution that arise in relation to both pending cases and those coming outside of courts to the CCI.[32]

Another matter covered in Mizanie's article is the notion of exhaustion of judicial and administrative remedies addressed under articles 3 and 5 of Proclamation No. 798/2013. He observes that "individuals or groups who seek to challenge the alleged violation of their human rights by laws, decisions of the government or customary practices

[30] *Id.*, p.155.
[31] *Id.*, p.155-56.
[32] *Id.*, p. 157.

before the CCI and [HoF] are required to exhaust available remedies before submitting their pleading to the CCI"[33]. By citing article 5(3) of Proclamation No. 798/2013, he notes that "the only case where applicants are exempted from exhausting both administrative and judicial remedies is claim involving allegations of violations of constitutional rights [ensuing] from primary legislation".[34]

Finally, Mizanie discusses constitutional remedies. According to Mizanie, "constitutional Bill of Rights litigation should produce constitutional remedies different from civil and criminal law remedies".[35] By citing the South African Constitutional Court's jurisprudence, he observes that:

> The object in awarding constitutional remedy should be, at least, to vindicate the Constitution and deter future infringements. Constitutional remedies differ from private law remedies because they are 'forward-looking, community-oriented and structural rather than backward-looking and individualist and retributive. he Court also observed that 'the use of private law remedies to vindicate public law rights may place heavy financial burdens on the state.'[36]

He further notes that the need for constitutional remedy may arise in cases where courts or administrative bodies unjustifiably deny redress to victims or when the relevant laws do not provide for remedies or, importantly, in cases where some constitutional rights do not have

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[33] *Id.*, p.158.

[34] *Id.*, p.158. Aricle 5(3) provides: "where any law issued by federal government or state legislative organs is contested as being unconstitutional, the concerned court or interested party may submit the case to the Council".

[35] Mizanie, *supra* note 1, p. 164.

[36] *Id.*, pp. 164-65.

substitutes or counterparts in ordinary legislation.[37] Stating that the Ethiopian Constitution is not clearly forthcoming when it comes to constitutional remedies, Mizanie notes that the phrase 'obtain a decision or judgment' in article 37(1) could be construed to capture the different kinds of remedies that may arise from constitutional litigation.[38] He identifies three types of constitutional remedies: namely, declaration of invalidity; injunction or interdict; and constitutional damages.

In relation to the declaration of invalidity, Mizanie says that declaration of invalidity of statutes or inconsistent administrative decisions or customary practice is the jurisdiction of the HoF and that it perhaps is the only remedy the House can readily award.[39] In the case of injunction[40], Mizanie observes that although it is one of the best constitutional remedies, HoF and CCI's laws, Proclamation Nos. 251/2001 and 798/2013, respectively, have no provision on whether and under what circumstances it could be ordered.

Finally, as regards constitutional damages, Mizanie contends that the Ethiopian "Constitution does not explicitly incorporate constitutional damages as a remedy for violation of constitutional rights except in specific cases of compensation in the event of expropriation of private property and development induced displacement" and that neither has a case law emanated from the decisions of the HoF under article 37 of the Constitution that might shed light on the issue.[41] Thus, according to Mizanie, "owing to lack of distinct and detailed rules dedicated for

[37] *Id.*, p. 165.
[38] *Id.*, p. 165.
[39] *Id.*, pp. 166-67.
[40] He discusses different kinds of injunctions (interdicts) in the article; see Mizanie, *supra* note 1, pp. 167-68.
[41] *Id.*, p. 169.

this purpose, the court to which claim of constitutional damages is brought will obviously apply tort law. However, the application of tort law is a misfit given the distinct nature and purpose of constitutional damages compared to ordinary tort in private laws".[42] He goes on to discuss the different possibilities by which litigants may use the Ethiopian Civil Code to claim constitutional damages.[43]

In the remaining parts of this article, I shall reflect on Dr Mizanie's main arguments and contentions that I have summarized above.

2. On the Jurisdiction of the CCI/HoF and the Role of Courts

Before directly addressing Mizanie's ideas on the jurisdiction of the CCI and the HoF, I will briefly elaborate the context in which issues of constitutional interpretation may arise. I will then discuss the jurisdictions of the CCI and HoF and address the arguments raised by Mizanie in relation to the jurisdictions of these bodies and the role of the Ethiopian courts.

Issues of constitutional interpretation may arise in three different contexts. The first one is when the constitutional text itself stands in need of interpretation. This can happen, for example, when there is a legal lacuna in the Constitution or a conflict between two or more constitutionally recognized principles or interests. Thus, the main task of the interpreter in such a case is to construct the constitution based on the factual circumstances and resolve the dispute. A pertinent example in our own system is the *Silte Identity case* decided by the HoF in 2000. The 1995 Constitution of Ethiopia does not contain any provision as to how a claim by a certain community for recognition of

[42] *Id.*, pp. 169-70.
[43] *Id.*, pp. 170-72.

a distinct identity can be addressed. Thus, in the *Silte* case, the HoF "filled" the gap in the Constitution by interpreting the text.[44]

The second meaning of constitutional interpretation refers to the more widely known type of interpretation, which is determining the constitutionality of sub-constitutional norms or decisions when a question of the latter's compatibility with the former arises. This is what is commonly known as "review of constitutionality" or—in systems where this is done by the judiciary—"judicial review". The central issue in the famous US case, *Marbury v. Madison*[45], the case celebrated rightly as the harbinger of the notion of judicial review, was the constitutionality of the Congress's Judiciary Act of 1789. That Act gave first instance jurisdiction to the US Supreme Court to issue a writ of mandamus while article III of the US Constitution does not give the Court original jurisdiction on such matters. Chief Justice John Marshall, having established that the Supreme Court was not given original jurisdiction to issue writs of mandamus, stated that a law repugnant to the Constitution cannot become the law of the land and, therefore, that a writ cannot be issued in the instant case based on an unconstitutional law. The Chief Justice observed that "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and

[44] See, Getachew Assefa, "All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation", 24(2) *Journal of Ethiopia Law* (2010) 139, pp. 152-54. In fact, guided by the jurisprudence of the *Silte* case, the House of Peoples' Representatives laid out the procedures and requirements for identity determination in Proclamation No. 251/2001, and its recent law: Proclamation No. 1261/2021 which replaced the former proclamation.

[45] 5 U.S. 137 (1803).

consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void".[46]

Many review of constitutionality decisions have also been handed down by the HoF as well. One of these is the *Melaku Fenta et al.* case.[47] The constitutional issue in that case arose incidentally to the case brought before the Federal High Court on corruption charges. Among the 31 defendants in the case was found Mr. Melaku Fenta, who, prior to his facing the charges, had been the Director-General of Ethiopian Customs Authority with a ministerial rank. According to Federal Courts Proclamation No. 25/1996 (article 8), the Federal Supreme Court has an exclusive first instance jurisdiction over, among others, "offences for which officials of the Federal Government are held liable in connection with their official responsibility". The federal legislature later gave the Federal High Court original jurisdiction over corruption offences[48] without affecting the jurisdiction given to the Supreme Court in Proclamation No. 25/1996. The Federal High Court, which was seized of *Melaku Fenta et al.* case, on its own initiative brought up the issue of constitutionality of the indicated provisions of the above-noted two federal laws. The Court believed that in view of the constitutional right to appeal against decision by a lower court in article 20(6)[49] of the Ethiopian Constitution, the grant of original jurisdiction to the Supreme Court over offenses committed by officials of the federal government in connection with their official responsibilities would be inconsistent with the Constitution. During the hearing on the matter, the Prosecution opposed the Court's idea of constitutional

[46] *Id.*

[47] Decided by the HoF on 24 Tahsas 2006 (January 2, 2014).

[48] See, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005*, art 7(1).

[49] It provides: "All persons have the right of appeal to the competent court against an order or a judgement of the court which first heard the case".

review. But the Court rejected the opposition of the prosecution and sent the matter to the CCI for the latter to consider the constitutional issue it identified. The CCI accepted the argument of the Federal High Court and found the need for constitutional interpretation. It based its reasoning on article 20(6), earlier cited, and also article 25 of the Constitution. The argument based on article 25—the right to equality and to the equal protection of the law—was to the effect that no differentiation of treatment should be made based on an individual's political position or status. Thus, the CCI recommended that article 8(1) of Proclamation No. 25/1996 and article 7(1) of Proclamation No. 434/2005 be severed from the proclamations and be rendered as having no effect, pursuant to article 9(1) of the Constitution. The HoF endorsed the recommendation submitted to it by the CCI and instructed the Federal High Court to continue its consideration of the case, the effect of which was that Mr Melaku Fenta was tried by the High Court.

The type of constitutional review in which the review of constitutionality arises incidentally to a case or controversy pending before a court of law—as in *Marbury* and *Melaku Fenta et al.*—is called concrete review (review "*incidenter*"[50]). Thus, in systems like Australia, Denmark, Japan, Norway and the US, the issue of constitutionality of a law is not brought before a court as the sole matter of litigation. As Cappelletti notes, "such questions must form part of a concrete case or controversy (whether civil, penal or any other type), and only arise to the extent that the law under consideration is *relevant* to the decision in the particular case"[51] and that same court has the competence also to address the question of constitutionality in these jurisdictions. But in

[50] Mauro Cappelletti, *Judicial Review in the Modern World* (Bobbs-Merrill Co. Inc 1971), p. 69.

[51] *Id.*, p. 70.

systems that follow the continental model of constitutional interpretation such as Austria, Germany and South Africa, if the question of constitutionality of a law arises in relation to a pending lawsuit and the court is convinced that a law relevant to the case violates the constitution, the court must refer the constitutional question to the Constitutional Court before the case can be decided.[52] In this case, the court suspends its consideration of the case and awaits the resolution of the constitutional issue, following which it then resumes the consideration of the case.

The other type of review that does not apply in systems like the US's, where ordinary courts interpret the constitution, is the one known as abstract review (review "*principaliter*"). In abstract judicial review, the question of constitutionality of a law is the sole matter at issue which the interpreter is required to determine. In abstract review, the interpreter acts on the basis of requests from government organs. In the German system, for example, the federal or a state government or one-fourth of the members of the *Bundestag* are the ones that have standing to request the Constitutional Court to give a decision on differences of opinion or doubts about a federal or state law's compatibility with the Basic Law.[53] Proclamation No. 798/2013 also provides a similar procedure for the review of constitutional issues it calls "unjusticiable". Article 3(2)(c) of the Proclamation thus provides:

[52] Donald P. Kommers & Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., Duke University Press 2012), p. 13. As can be seen from the above, the referral of a constitutional issue by the court where the question of constitutionality is posed to the CCI as set forth in Proclamation No. 798/2013 (article 4(3-4) resembles that of the continental system of concrete review. It is interesting to note, however, that while the Ethiopian system allows litigants to bring the question of constitutionality by overriding the court's rejection of the question of constitutionality (Proclamation No. 798/2-13, article 4(5-6)), in systems like German's, only the court has that power; Kommers & Miller, *supra* note 52, p. 13.

[53] Kommers & Miller, *supra* note 52, p. 15.

"constitutional interpretation on any unjusticiable matter may be submitted to the [CCI] by one-third or more members of the federal or state councils or by federal or state executive organs". In principle, therefore, any dispute relating to constitutional matters that are not amenable to judicial determination can be presented to the CCI in the form of abstract review of constitutionality.

The third and last meaning of constitutional interpretation is what is known as "constitutional complaint", or, in Latin American constitutional jurisprudence, "*amparo recourse*".[54] Kommers and Miller observe that in the case of Germany, persons who claim that the state has violated one or more of their rights under the Basic Law may file a constitutional complaint with the Federal Constitutional Court, after exhausting all available means to find relief in the other courts having jurisdiction over their cases.[55] Proclamation No. 798/2013 also empowers individuals whose constitutional rights and freedoms are violated by the final decisions of government organs or officials to approach the CCI for relief.[56] Proclamation No. 1261/2021 on the HoF, which replaced Proclamation No. 251/2001, as noted below, also stipulates that the House has the power to decide on claims by any person that his basic constitutional rights and freedoms are violated by the final decision of any government organ or government authority.[57]

Proclamation No. 1261/2021—enacted after Mizanie's article was published—addressed many of the problems Mizanie raised as gaps in

[54] Allan R. Brewer-Carias, "The Amparo Proceedings in Venezuela: Constitutional Litigation and Procedural Protection of Human Rights and Guarantees", 49 *Duq. L. Rev.* (2011), p. 161.

[55] Kommers and Miller, *supra* note 1, p. 11.

[56] Articles 3(1) & 2(a)-(b).

[57] A Proclamation to Define the Powers and Functions of the House of Federation Proclamation No.1261/2021, article 6(3).

the constitutional interpretation legal framework of the country. One such noteworthy area has to do with the jurisdiction of the HoF. Accordingly, article 6 of the Proclamation lists the following as constitutional interpretation questions over which the HoF has jurisdiction:

1) Questions relating to the scope and meaning of constitutional powers, functions and responsibilities of organs of state and other constitutional bodies;
2) Questions relating to the constitutionality of laws enacted by federal or regional legislative bodies;
3) Complaints by persons who allege that their constitutional rights and freedoms are violated by the final decision of organs and officials of state;
4) Dispute or misunderstanding between the Federal Government Organs;
5) Dispute or misunderstanding between the Federal Government and a Regional State;
6) Dispute or misunderstanding between Regional States;
7) Question relating to any non-justiciable constitutional matters with the request of one-third of the Federal or Regional Legislative Organ or Federal or Regional executive Organ;
8) Dispute or misunderstanding regarding the implementation of Federal laws in Regional States;
9) Questions regarding the incongruity between the Federal or Regional State laws and policies, and the national policy objectives and principles enshrined in the Constitution up on the request of the Federal Government, Regional Government, one-third of the

members of the House of Peoples' Representatives or one-third of members of a Regional State Council;

10) A request by a regional state's constitution interpretation body when it thinks it is necessary to give a different interpretation on a constitutional matter similar to which the HoF or other regional State's constitution interpretation body had given interpretation;

11) Constitutional disputes on other related matters.

Furthermore, article 7 of the Proclamation restates in a different wording the constitutional interpretation issues that may arise in courts of law, in relation to pending cases. Article 5 of Proclamation No. 1261/2021 for its part stipulates the broad interpretive mandate of the House saying that the House shall declare any law, customary practice or a decision of an organ of state or a public official as having no effect if it contravenes the Constitution.

In relation to the role of courts in interpreting the Constitution, a close look at Mizanie's article reveals that he advances three interrelated positions. His article broadly states that Ethiopian courts are sidelined by the constitutional order from interpreting the Constitution in general and the constitutional Bill of Rights in particular. It further holds that the legislature (the HoPR) has placed further restriction on the constitution interpretation power of the courts through Proclamation No. 798/2013 by denying them jurisdiction over matters other than federal or state proclamations, which article 84(2) of the Constitution apparently leaves to the courts. Finally, he argued that the role the courts could play within the existing legal sphere has been thwarted due to the absence of enforcement rules of the Ethiopian constitutional Bill of Rights.

I take issue with Mizanie's position regarding the role of courts in the interpretation of the Constitution on two grounds. First, courts have the power to interpret the Constitution when the interpretation needed, for resolving the dispute before it, is the interpretation of the text of the Constitution without there being the need to review constitutionality of sub-constitutional norms or decisions. As noted earlier, this may be necessary when we are faced with legal lacuna or ambiguity in the Constitution or a conflict between two or more constitutionally recognized principles or interests. For example, the court may, in relation to a case before it, be called up on to give a concrete meaning to the notion of "speedy trial" in article 19(4) of the Ethiopian Constitution or to do the same to the notion of "human dignity" in article 21(1) of the Constitution. A court that is asked to pass on such kinds of questions cannot refer the matter to the CCI/HoF. On the contrary, this precisely is how the courts discharge their "responsibility and duty to respect and enforce" the provisions of the constitutional Bill of Rights.[58]

I cite here two proclamations passed by the federal legislature in 2021 that support the argument I am trying to advance here, and which laws in my view are consistent with the Constitution. The Federal Courts Proclamation No. 1234/2021, under its article 11(3) provides that: "Notwithstanding [other] provisions of this proclamation and other relevant laws, the Federal High Court may render decision, judgement or order in order to protect justiciable human rights specified under chapter three of the Constitution".[59] The second law is Proclamation No. 1261/2021. As discussed earlier, the list of constitutional

[58] Ethiopian Constitution, 1995, article 13(1).

[59] The Federal Judiciary has taken a practical step for the realization of this power of the Federal High Court and designated "fundamental rights and freedoms division" as one of its specialized benches.

interpretation matters over which the House exercises exclusive jurisdiction does not include the interpretation of the constitutional text.[60] This means that such an interpretation does not fall within the exclusive jurisdiction of the House, which in turn means that the first port of call for such constitutional issues is the courts.

My second objection to Mizanie's argument relates to his remark regarding the constitutional division of labour between the HoF and the Courts to the effect that the interpretive mandate of the HoF is limited to review of constitutionality of federal or regional state proclamations while all other issues of constitutionality are left to the courts. I believe this position is not supported by the text of the Constitution.[61] Mizanie averred that his argument is based on article 84(2) of the Constitution. However, this argument is not plausible for many reasons. To begin with, article 84 is not determinative of the constitutional interpretation power of the HoF. Article 84 deals with the powers and functions of the CCI. The power of the HoF to interpret the Constitution and to settle constitutional disputes is stipulated in articles 62(1) and 83(1) of the Constitution. Even coming back to article 84 of the Constitution, it has two other substantive provisions: article 84(1) and article 84(3). Article 84(1) states: "The Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its

[60] This in fact is also true in the case of Proclamation No. 798/2013; see article 3 of the same.

[61] Mizanie, *supra* note 1, p. 141-42. In fact, other scholars, like Assefa Fiseha, also entertain the same position that the HoF's interpretive power should not extend beyond controlling the constitutionality of the laws enacted by Federal and regional legislative bodies; see Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (HoF), 1(1) *Mizan Law Review* (2007), p. 10.

recommendations thereon to the House of the Federation". The general reference to "constitutional disputes" here must be given a meaning and, in my view, it should mean any constitutionally significant disputes, as opposed to a mere application of a non-controversial provision of the Constitution to a given claim, that need to be settled by the HoF. Similarly, article 84(3), as a constitutional provision and as important as article 84(2), should be given a meaning of its own as well. The constitutional interpretation law in article 84(3) should obviously be different from that of article 84(2) for the framers cannot be expected to state the same thing under two different sub-articles.

I believe that it is a correct understanding to limit the review of constitutionality envisaged under article 84(2) only to concrete judicial review[62] of laws enacted by federal or regional state's legislative bodies, i.e., to federal or regional proclamations. Then, article 84(3) is to apply to all other cases where "issues of constitutional interpretation arise in the courts". A question may be asked as to what difference exists between the two cases. The important difference between the two is that in the case of review of constitutionality of federal or regional state proclamations, via article 84(2), the role of the CCI is limited to pure recommendation of its findings to the HoF[63]; it does not have the power to reject the request and remand the case back to the court where it comes form. This, in my view, has to do with the parliamentary form

[62] I say 'concrete judicial review of constitutionality' because article 84(2) envisages such a dispute of constitutionality to be referred to the CCI by court or interested party, which basically means one of the disputants.

[63] The same can be said to the request that comes via article 84(1). Those are cases of abstract judicial review of non-justiciable matters that directly come to the CCI. As per article 6 of Proclamation 1261/2021, request for review in such cases can come only from one third of the members of federal or regional legislative bodies or federal or regional executive bodies.

of government adopted by the Constitution. Because of the political significance of the parliament in the political power-structure erected by the Constitution, second-guessing the decision of the legislature through review of constitutionality has to be seriously taken. Thus, when the review of constitutionality relates to proclamations, the body that can pass a decision should be the body that is entrusted with the power to do so by the Constitution, the HoF; not its expert aide, the CCI. The same approach exists in the German legal system. Thus, in Germany, in concrete judicial review cases, courts or tribunals are required to refer such questions to the Constitutional Court if they believe a statute is invalid.[64] Professor David Currie says in this connection that "[t]he Constitutional Court's monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature…"[65]

Finally, my reaction to Mizanie's remarks that the absence of rules of procedure for constitutional litigation has contributed to the low level of constitutional rights litigation is a partial agreement. We do not know for sure if the absence of such rules stymied the flow of cases. As far as I know, there is no study conducted to check this. There is no doubt that comprehensive and inviting rules of procedure could encourage litigants to come forward. However, its actual negative impact in our case seems minimal. The question of constitutional damages for example is a substantive law issue, not a procedural issue. Thus, procedural clarity in such area cannot overcome the policy/legal gap that exists in the country. I think, the more important reason for the low level of constitutional rights litigation has to do with the overall

[64] David P. Currie, "Separation of Powers in the Federal Republic of Germany", 41(2) *The American Journal of Comparative Law*, (Spring, 1993) 201, p. 254.

[65] *Id.* But, in practice, the HoF and the CCI do not seem to observe the distinct routes regulated by article 84(2) and article 84(3), which in my view is erroneous.

issue of societal openness, democracy, and respect for the rule of law prevailing in the country, and the institutional modality designed to interpret the Constitution.

Mizanie himself called the constitution interpretation arrangement designed in the Constitution—that put a pure political body in charge of the task—"the most shattering deficiency" as regards the enforcement of constitutional rights.[66] He in fact extensively discussed[67] the problems of impartiality and competence of the CCI and HoF; the composition (primarily) of the HoF; and institutional set up and decision-making procedure of the latter which are widely raised by many scholars[68] to make the suitability of the two bodies for the task of constitutional interpretation highly questionable.

One should not also forget that, for a long time, the CCI and the HoF remained obscure when it comes to their role of constitutional interpretation. Until the mid-2000s, the total number of requests for interpretation submitted to the CCI was a few hundreds. As of April 2019, the total number of cases received by the CCI stood at 4267.[69] This can be contrasted with 9,128 communications (alleging various complaints) received by the German Constitutional Court in 2011 alone, out of which 6,036 were treated as proper constitutional

[66] See, above, the text accompanying footnote 7.

[67] Mizanie, *supra* note 1, pp. 143-51.

[68] See, for example, Yonatan Tesfaye Fessha, "Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" in *African Journal of International and Comparative Law*, Vol. 14(1) (2006), p. 53; Chi Mgbako et al, Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights, 32(1) *Fordham International Law Journal* (2008), p. 259.

[69] Anchinesh Shiferaw Mulu, "The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia", 13(3) *Mizan Law Review* (2019), 419, p. 422.

complaints for consideration by that Court.[70] The average total *annual* submission to the German Constitutional Court's docket is more than 6000[71], by far greater than the total number of applications received by the CCI since it opened its doors to applicants.

3. On Standing

Mizanie made interesting and bold proposals when it comes to the issue of *locus standi* in the litigation of constitutional rights. As noted earlier in section II, he contends that article 37(1) should be broadly understood to admit litigants that act on behalf others or of the public, without having a direct interest of their own in the matter.[72] He also submits that the term 'interested party' in article 84(2) of the Constitution should be interpreted liberally and that article 5(1) of Proclamation No. 798/2013 "which limits standing to 'any person who alleges that his fundamental right and freedom have been violated' should either be amended or read in line with articles 37 and 84(2) of the Constitution".[73] He says: "Constitutional rights could be fully vindicated in Ethiopia only where their violations could be brought to the attention of the CCI and the [HoF] by affected individuals and groups as well as public purpose spirited individuals and NGOs".[74]

Reading into article 37(1) of the Constitution a standing of public interest litigation type seems a long stretch. One of the areas where the making history of the Constitution relatively clearly shows the debates that shaped the framing of constitutional provisions into what they eventually turned out to be is the current article 37 in general and

[70] Kommers and Miller, *supra* note 52, p. 30.
[71] *Id.*, p. 31.
[72] Mizanie, *supra* note 1, p. 155
[73] *Id.*, pp. 156-57.
[74] *Id.*

article 37(1) in particular. During the consideration of the draft constitution by the Council of Representatives of the Transitional Government, long debate took place on the right to access to justice. As can be seen from the Minutes of the Council, the earlier draft received from the drafting Commission contained an explicit reference to public interest litigation (PIL). It was listed as part of sub-article (2) of the then article 35 of the draft that was devoted to access to justice.[75] But on the floor of the Council, it encountered lots of opposition, including from the minority view holders in the drafting Commission and the Chair of the Council, President Meles Zenawi. In fact the Chair said that the provisions on PIL would end up in becoming avenues for those who lack the required votes in decision-making bodies to get their wishes granted through litigation and, he believed, it would not be used to come to the aid of those who lack the means to hire lawyers.[76] As can be seen from the Minutes, the wording of the current article 37(1) was redrafted and given its current formulation by the Council.

Further, during the deliberations on the draft by the Constituent Assembly as well, a fair amount of discussion was made on the draft provisions on access to justice. It was reported that two committees of the drafting Commission—the Human and Democratic Rights, and Judicial Affairs Committees—had considered the issue of access to justice. The Chair of the Human and Democratic Rights Committee, for example, explained the *raison d'etre* for a stand-alone right to access to justice saying that it would be necessary for individuals to have recourse against executive officials that may use their positions and

[75] The current article 37 of the Constitution was article 35 in the original draft of the Drafting Commission, and it had 4 sub-articles to it; *Minutes of the Council of Representatives of Transitional Government of Ethiopia, Deliberation on the draft constitution*, Miazia 12, 1986, p. 105.

[76] *Id.*

violate their rights.[77] The Chair of the Committee further mentioned that under the then draft article 37(2), a person can bring his own case or someone else's case as well. This would give the sense that the PIL provision was maintained in article 37(2) when the draft reached the Constituent Assembly but was somehow removed at some point before the Constitution was ratified. Thus, given the fact that the idea of PIL was raised and rejected during the deliberation of the draft of what has become article 37 by the two bodies mentioned above, and particularly given that it has disappeared from the adopted Constitution, I believe it is hard to make the argument in favor of its existence in article 37(1) of the Constitution.

Similarly, the argument about the liberal interpretation of article 84(2) of the Constitution so as to give the phrase "interested party"[78] a broader meaning in that sub-article is also incongruent both with the plain meaning of the phrase and the intention of the framers of the Constitution. In the Amharic (and the controlling) version[79] of article 84 (2), the phrase "interested party" is rendered as "**ባለ ጉዳዩ**" (which means "the disputant" or "the party"). This therefore can only mean the person with an interest in the matter.

Having said the above, however, I contend that article 9(2) of the Constitution can be a possible provision of the Constitution where public interest litigation and litigation on behalf of others can be anchored. Article 9(2) provides: "All citizens, organs of state, political organizations, other associations as well as their officials *have the duty*

[77] Minutes of the Constituent Assembly, Deliberation on the draft constitution, Hidar 10, 1987, pp. 13-14.

[78] The phrase "interested party" appears in article 84(3) as well. But Mizanie did not call for its liberal interpretation in the case of this sub-article.

[79] See, the Ethiopian Constitution, 1995, article 106.

to ensure observance of the Constitution and to obey it. (Emphasis mine). One of the ways through which citizens, associations, political organizations and their officials, among others, can ensure the observance of (and obey) the Constitution would be by challenging the violations of the Constitution, including the violation of its fundamental rights and freedoms provisions, before courts, administrative and quasi-judicial bodies not only in their own cases but also by bringing PIL and representing others who cannot stand for themselves. That said, it is imperative to mention here that we are in a better position at the moment because of a new legal development brought about by the Federal Courts Proclamation No. 1234/2021. Article 11(4) of the Proclamation provides: "Any person who has vested interest or *sufficient reason* may institute a suit before the Federal High Court to protect the rights of his own or *others*" (emphasis mine). Thus, a person—legal or juridical—that is mindful of the interest of the public or that of another person who for any reason is not in a position to act on their own behalf, and is determined to take that matter to the Federal High Court needs only to show a "sufficient reason" to do so. This is not a high threshold to cross. It is doable. The legislature has to be commended for having created this platform, responding to a long yearning from the minders of public interest and rights or interests of others who may not be in a position to assert their rights for various reasons.

4. On the Exhaustion of Administrative and Judicial Remedies

The requirement of exhaustion of administrative and judicial remedies before an applicant approaches a constitutional interpreter in jurisdictions that follow centralized constitutional review system is a

well-established practice.[80] When it comes to the Ethiopian case, what seems to be a problem of poor draftsmanship of articles 3 and 5 of Proclamation No. 798/2013 appears to have contributed to some lack of clarity in Mizanie's comments on the law. It is difficult to make sense of some of the provisions. For example, what article 5(3) provides is already covered by article 5(2)(a) if we see it in the light of articles 84(2) and 84(3) of the Constitution. The idea of exhaustion of available remedies before seeking redress from a constitution interpretation body is pivotal because litigants can have their cases resolved without the need to raise a constitutional question. This is in line with Mizanie's proposal to avoid the invocation of the constitution unless that becomes absolutely necessary.[81] It also underscores the important principle that constitutional interpretation bodies should not be the first instance forum for litigating justiciable matters.

Mizanie commented that Proclamation No. 798/2013 does not define what "justiciable" matters are. He also cited the decisions of the Federal Supreme Court and the CCI's opinions which gave the impression that justiciable matters mean whatever the legislative or the executive branches of government say they mean.[82] I contend that there should rather be a firmer, internationally acceptable understanding of the notion. I consider those decisions of the two bodies Mizanie cited as slippages under the burden of political interests, from the government at the time, which should not represent the established judicial stance. There should be more settled meaning for the notion whose lines are drawn in the sand. In this regard, we can learn something from the "political question" doctrine of the US Supreme Court.

[80] Kommers and Miller, *supra* note 52, p. 11.
[81] Mizanie, *supra* note 1, pp. 151-53.
[82] *Id.*, pp. 158-59.

In *Baker v. Carr*[83], the Supreme Court explained the concept of political question. A matter which the (US) Constitution makes the sole responsibility of the executive or the legislative branch of government is a question with which the judiciary should not deal because it is removed by the Constitution from the prerogatives of the judicial branch. The Court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

The standards developed by the US Supreme Court cited above can help the Ethiopian courts to differentiate justiciable matters from non-justiciable matters. The important thing is that when they go about doing so, they have to use the Constitution as a reference point and not laws or policies of the political branches. The notion of justiciability is a constitutional principle, not a sub-constitutional principle.

[83] *Baker v. Carr* (1962).
[84] *Id.*, p. 12.

5. On Constitutional Remedies

The Ethiopian Constitution contains robust provisions regarding the application, implementation and accessibility of the Constitution as a whole as well as its Bill of Rights provisions. As earlier noted, article 9(2) stipulates that "[all] citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it". It makes it unmistakably clear that both state and non-state actors, including citizens, have duties not only to obey it but also to ensure the observance of the Constitution. Focusing on the application of the Bill of Rights, Article 13(1) provides: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of the [fundamental rights and freedoms] Chapter" of the Constitution. As regards how the Bill of Rights provisions should be interpreted, the Constitution entrenches an approach that we can call "interpretive universalism" by requiring the provisions of the Bill of Rights to be interpreted in conformity with the principles of the Universal Declaration of Human Rights, international human rights covenants and other human rights instruments adopted by Ethiopia. This clause anchors the interpretation and application of the constitutional rights to those of the international human rights system thereby wide-opening the opportunity for various actors that are required to respect, protect, enforce and cause the observance of the Bill of Rights enshrined in the Constitution to learn from and benchmark the international human rights standards.

The above provisions are further strengthened by the broadly formulated "right of access to justice" clause of article 37(1) of the Constitution, according to which "everyone has the right to bring a

justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power". Thus, so long as a certain matter is justiciable[85], i.e., is capable of judicial determination—whether it is a matter that arises in terms of the Constitution or under sub-constitutional norms, actions or decisions—one is entitled to take the matter to a court of law or any other competent body with judicial power and obtain a decision or judgement. Such matters can be those that involve interpretation of the Constitution or the application of the latter or other sub-constitutional norms. In the case of the matters that involve the interpretation of the Constitution, the decision or judgment that the applicant obtains can be in the form of declaration of invalidity of a law or a decision that contravenes the Constitution, an interdict (writ of mandamus) or even the award of constitutional damages. In this sense, therefore, we can say that the Ethiopian Constitution contains the normative structure based on which constitutional remedies can be claimed.

Nevertheless, I do agree with Mizanie that, compared to constitutions of other jurisdictions, the Ethiopian Constitution can be characterized as not clearly forthcoming when it comes to constitutional remedies in general and damages in particular. In this regard, the Kenyan Constitution of 2010 can be placed on the opposite side of the spectrum of explicitness to the Ethiopian Constitution. Article 23(1) gives the Kenyan High Court[86] the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3), for its part, stipulates that:

[85] See the discussion on "justiciability" under section 4 above.

[86] Article 23(2) instructs the Kenyan Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress with which the High Court is constitutionally mandated in sub-article (1) of the same article.

> *In any pr*oceedings brought under Article [22[87]], a court may grant appropriate relief, including––
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under [the limitation clause of] Article 24;
>
> (e) an order for compensation; and
>
> *(f)* an order of judicial review.

Other constitutions, although not as explicit and as comprehensive as the Kenyan, provide for some details. For example, the Ghanaian Constitution of 1992 and the Nigerian Constitution of 1999 (also cited by Mizanie) provide that compensation should be paid to persons who are unlawfully arrested or detained by public authority or any other person. Thus, the Ethiopian Constitution textually is nowhere near the above constitutions in regards to constitutional remedies. As I alluded to earlier, it is possible that the courts or the CCI/HoF may, through litigation that comes before them on the basis of article 37 and other provisions cited, develop jurisprudence that reads appropriate constitutional remedies into the Constitution. In that sense, thus, Mizanie's statement that "the [HoF] and CCI do not have a legal basis and guidance to order structural interdicts and provisional interdict

[87] Article 22 of the Kenyan Constitution deals with *locus standi*. It provides, among others, that a person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened either on his own behalf or on behalf of public interest, or the interest of another person who cannot act in their own name.

when they feel that the applicant may suffer irreparable damage while the case is pending before [them]"[88] seems to me to be an incorrect reading of the law. Nonetheless, legislative enactment of appropriate procedural rules to implement the general provisions of the Constitution or the elaboration of the constitutional text through constitutional amendment can better address these legal gaps. Additionally, with respect to the remedy of interdict, we now have the problem of legal gap resolved (as far as the HoF is concerned[89])—albeit in a manner narrower than what Mizanie advocated for. Proclamation No. 1261/2021 empowers the Speaker of the House to order stay of execution "when the House believes that there will be irreparable damage to an applicant requesting constitutional interpretation, or there may be other serious compelling reason".[90] The law also empowers the Speaker to talk with the parties before ordering the stay at his/her discretion.[91]

Mizanie observes that the application of tort law (to which Ethiopian courts may resort owing to lack of distinct and detailed rules on human rights damages in other laws of the country) to address claims of constitutional damages is a misfit given the distinct nature and purpose of constitutional damages compared to ordinary tort in private laws. But damages, including damages awarded to redress violations of constitutional rights, have a civil nature regardless of the perpetrator of the violation. Thus, its being covered in the Civil Code would not be a problem. But, the Civil Code's lack of full coverage of all remediable constitutional rights is indeed a problem.

[88] Mizanie, supra note 1, p. 168.
[89] But the legal gap in the case of the CCI still remains.
[90] Article 19.
[91] *Id.*

Regarding the appropriateness of tort law for constitutional damages, opinions seem to vary. In a recent comprehensive work on damages and human rights, Jason Varuhas opines (in the context of the common law legal system) that "applying the ordinary common law rules on concurrent liability, a monetary award in tort may suffice to fully remedy a human rights violation"[92]. He further notes, by giving an example that:

> if concurrent claims in false imprisonment and for violation of Article 5(1)[93] are upheld, then the award for the tort would compensate for all relevant damage and loss suffered, rendering a separate award under the [Human Rights Act] unnecessary; to make two awards for the same damage would constitute double recovery and an unjustified windfall for the claimant. The award for false imprisonment includes compensation for normative injury to liberty as well as for consequential non-pecuniary or economic effects.[94]

Mizanie rightly observes that the cap on the amount of damages for moral injury in the Civil Code is unacceptably low.[95] However, recently enacted laws of the country have set aside the limits of the Civil Code by allowing more substantial moral damages. To cite a couple of examples: the copyrights and neighboring rights protection law states that the amount of compensation for moral damage brought about by the violation of these rights "shall be determined based on the extent of

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[92] Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016), p. 140.

[93] Art 5(1) of the Act provides that everyone has the right to liberty and security of person and that no one shall be deprived of such liberty except in specific cases provided in the same sub-article and in accordance with a procedure prescribed by law. See the Act here: https://www.legislation.gov.uk/ukpga/1998/42/data.pdf.

[94] Varuhas, *supra* note 92, pp. 140-41.

[95] Mizanie, *supra* note 1, p. 170.

the damage and [may] not be less than Birr 100,000 (Birr one hundred thousand)".[96] The Media Proclamation No. 1238/2021 for its part provides that "a moral compensation for defamation by the media shall not exceed Birr 300,000 (Three Hundred Thousand Birr)".[97]

Finally, Mizanie expressed the fear that immunity of government officials granted by the Civil Code could thwart possibility for redress of victims of human rights violations by such officials. Although ministers, members of parliament and judges are immune from liability for an act connected with their official functions, it is my view that the immunity envisaged here are for those acts that may not involve serious violations of constitutional rights. In addition, article 2139 makes an exception to the immunity provision that it (art. 2138) shall not apply where the immunity holders have been sentenced by a criminal court for acts pertaining to their office and invoked by the plaintiff. In fact, in relation to the members of parliament, the Ethiopian Constitution also provides that they are not accountable to civil, criminal or administrative liability in connection with the votes they cast or opinions they express in the House. The Constitution does not give immunity from arrest or prosecution for criminal offenses. All it does is setting forth the manner of arrest or prosecution in *flagrante delicto* and non-*flagrante delicto* cases whereby a prior immunity waiver is required to undertake arrest or prosecution in the latter situation.[98] The Constitution therefore doesn't change/abrogate the law in the Civil Code in regards to immunity. The point is that most state-inflicted human rights violations—whether they are committed by senior government officials who may or may not be members of

[96] Copyrights and Neighboring Rights Protection Proclamation No. 410/2004, article 34(4).

[97] Article 80(3).

[98] Ethiopian Constitution, 1995, article 54(5)-(6).

parliament or low-ranking government officials—would fall within the realm of prosecutable offences. This makes it possible for redress to be granted by using the Civil Code's relevant provisions on damages for acts committed by the state. It is good to note also that the provisions of the Civil Code that deal with fault-based tortious damages, which I believe involve mostly non-state actors, are specific in regards to the acts that give rise to damages. But in the case of vicarious liability, the Code's provisions tend to be more broadly stated making it possible for any violations of human rights to obtain redress by way of compensation, among other appropriate ones.

Conclusion

It is clear from Mizanie's article that he wanted to investigate why there has been a negligible constitutional rights litigation so far in Ethiopia, in spite of the widespread violations of the rights. In this connection, he wanted to bring to the limelight the absence of helpful rules of procedure for litigating constitutional rights and has argued that their absence has contributed to the low level of constitutional rights litigation. Although this article concurs with his view that the non-existence of robust rules of procedure may have played a part in the low level of constitutional litigation, it has argued that more significant reasons lie elsewhere.

This article has attempted to offer additional perspectives to the arguments and contentions Mizanie made in his article. I have shown that, contrary to Mizanie's position, courts have indeed the power to interpret the text of the Constitution to handle justiciable matters. This article has also attempted to shed light on the meanings of constitutional interpretation, which often is linked only to one of its meanings, i.e., review of constitutionality of sub-constitutional laws

and decisions. In relation to article 84(2) of the Constitution, the article has attempted to dispel the commonly held untenable argument that considers article 84(2) as solely determinative of the scope and meaning of constitutional interpretation under the Constitution. Regarding the issue of *locus standi* in relation to constitutional litigation, the article has pointed out that reliance on article 37 of the Constitution as a basis for PIL may not be tenable, but rather reliance on article 9(2) of the Constitution could be tenable. Further, the article discussed new legal developments after the publication of Mizanie's article. Overall, this article will give the reader a more up to date state of the law and the practice about constitutional rights litigation in Ethiopia and is believed to spur further research in the area.

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THE NEW ETHIOPIAN INVESTMENT LEGAL REGIME: *CHANGES AND CONTEXT*

Mekides Mezgebu [*]

Abstract

Ethiopia has been undergoing tremendous policy and legislative reforms since 2018. The reform generally pursued an 'open-door' economic policy replacing previous laws and government decisions that were considered restrictive. Among the key areas that were the subject of the reform was the investment regulatory regime. This article examines the changes introduced in the investment legal regime in the context of historical investment regulation in Ethiopia. It shows that, while the public announcements of the reforms, including those relating to privatization of state-owned enterprises indicated a significant shift in economic policy, the new investment laws adopted a more cautious approach. The new investment laws saw the re-introduction of previously tested rules on investment admission, and re-adjustments of administrative rules in investment administration. While some progressive steps were taken to liberalize previously protected sectors, fundamental and comprehensive changes to investment regulation were not made. More revisions are needed to relax sectoral restrictions, waive minimum capital requirements, ease bureaucratic processes and improve regulatory coordination.

Key-terms: Investment admission, investment administration, investment regulation, liberalization

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Introduction

Ethiopia introduced a new investment regulatory framework through the enactment of the Investment Proclamation No. 1180/2021 (hereinafter "Investment Proclamation"), Investment Regulation No. 474/2021 (hereinafter "Investment Regulation"), and the Investment Incentives Regulation No. 517/2022 (hereinafter "Incentive Regulation") (together "new laws"). The new laws repealed Investment Proclamation No. 769/2012 and Investment Regulation No. 270/2012 (hereinafter "previous laws")[1] which were in effect for eight years. The changes in legislation came as part of a broader economic reform program of a new government that came to power in 2018. One of the key pillars of the overall reform was to enhance the role of the private sector in the national economy primarily through easing and liberalizing the business and investment regulator regime.[2] To that end, an investment reform project was launched in 2019 aiming to align the investment regulatory framework with the changes in the economic policy of the new administration.[3] This article provides a comparative examination of the changes introduced in the new investment regime. It investigates the

[1] Investment Proclamation No. 769/2012 and Investment Regulation No. 280/2012.

[2] Ethiopia Office of the Prime Minister: *Homegrown Economic Reform Agenda: A Pathway to Prosperity,* (2019). https://www.pmo.gov.et/initiatives/

[3] In a speech at the 2019 World Economic Forum in Davos, Prime Minister Abiy Ahmed outlined his government's key economic and political reform direction. He noted that it is in the country's economic interest to increasingly open its borders to international capital and called upon investors and entrepreneurs to invest in the economy. Outlining the key economic reform plans of the government, he stated "unleashing the potential of the private sector" as a key goal to be achieved through four priority areas of reform:

i. Supporting small and medium enterprises to grow and flourish as the engine of the economy.
ii. Ease and mainstream regulations to start a business and provide a better policy environment, noting the revision of the investment, commercial and other regulations as examples.
iii. Making the private sector an integral part of the economy, through reforming the State-Owned Enterprises and opening up the economy to international investors in telecom, logistics, aviation, energy, railways, and industrial parks.
iv. Fostering Public-Private Partnerships as a way to build balanced long-term partnerships aimed at triggering fast economic growth and profit. Full speech available at https://www.youtube.com/watch?v=x2l7KscqRro

policy rationale underpinning the changes drawing on available official government pronouncements and the author's involvement in the reform process. Bearing in mind parallel reform initiatives and legislative changes across several sectors, the article examines the key features of the new investment regime in the context of broader policy changes. Section one starts with the contextual background of investment regulation in Ethiopia. Section two outlines the key changes introduced by the new laws.

1. Investment Regulation in Context

A country's legal and regulatory framework is one of the critical factors that affect investors' decisions to invest.[4] Countries adopt various domestic policies and laws to create an enabling environment that is best suited for attracting investment. Ordinarily, an investment regulatory regime is informed by the normative contents of the investment and economic policy of the government. Legal and judicial frameworks implement the policies and offer the predictability, consistency, and certainty needed to boost private investment and protect the rights and properties of investors.[5] In addition, such frameworks establish the parameters under which foreign investment is permitted and domestic investment is protected. Beyond the adoption of robust national legislation, international investment laws embodied in regional and bilateral investment treaties are also used to offer regulatory safeguards to investors.

Ethiopia's experiment with investment regulation dates to the early 1950s.[6] For the seven decades that followed, the investment laws reflected the

[4] The World Bank Group, Global Competitiveness Report 2017/2018, *Foreign Perspectives and Policy Implications (2018)* p.23. The Report identified that 86% of the foreign investors included in the data stated that legal and regulatory frameworks were critical in their decisions to invest.

[5] The World Bank Group, *Investment Law Reform: A Handbook for Development Practitioners* (2010).

[6] Official Notice No. 10 (1950) of the Imperial Government, *Statement of Policy for the Encouragement of Foreign Capital Investment in Ethiopia.*

economic and ideological orientation of the government of the day; From near total openness in 1950/60s to total closure in the 1970s /1980s and a cautious liberalization since 1991.[7] A series of federal laws have been adopted between 1995-2018, generally aiming to spur domestic and foreign investment.[8] In 2012, there was a slight pivot in policy brought by the adoption of a "developmental state" economic model that prioritized industrialization and greater state intervention in the economy.[9] Consequently, a special regulatory regime for the development and expansion of industrial parks was instituted targeting the manufacturing industry and the existing investment laws were reformed.[10] Complementing national efforts, regional and multilateral investment agreements were increasingly adopted, aiming to boost foreign investments in the manufacturing sector.[11]

[7] During the Transitional Period (1991-1995), the Investment Proclamation No. 15/1992 was one of the earliest laws promulgated. Following the introduction of a new constitution in 1995, Investment Proclamation No. 37/1996 and Investment Regulation No. 07/1996 were enacted. These were succeeded by two waves of investment legislations, before the enactment of the current investment laws: Investment Proclamation No. 280/2002 and Investment Regulation No. 84/2003 and later by Investment Proclamation 769/2012 and Investment Regulation No. 270/2012.

[8] Won Kidane, *The Legal Framework for the Protection of Foreign Direct Investment in Ethiopia*, Chapter 26, in THE OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru, et al, ed. OUP, 2019). At 742-762.

[9] J. Hauge and A. Chang, *The Concept of a 'Developmental State' in Ethiopia',* in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019). at 824-839.

[10] For more on Industrial Parks, see Industrial Parks Proclamation No. 886/2015; Industrial Parks Regulation No.417/2017; and, Industrial Parks Development Corporation Establishment Regulation No. 326/2014.

[11] This was primarily demonstrated through the execution and ratification of Bilateral Investment Treaties. Currently, there are 35 Bilateral Investment Treaties and 5 other treaties with Investment provisions signed by Ethiopia. The country is also a party to 10 multilateral investment-related instruments. *See the full list on* United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub - Ethiopia. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

2. New Investment Laws: Reform and Rationale

Ethiopia does not have a separate investment policy. Instead, investment is integrated into the different national economic and sectoral policies.[12] At the outset, the 2019 investment reform process had the dual objectives of achieving policy and practical reforms. At the policy level, there was a need to align the investment regime with the local economic reform process. Key among the reform programs was the decision to liberalize the telecom sector, partially privatize key state-owned enterprises in the rail, energy, and aviation sectors and improve the investment climate.[13] Additionally, the investment reform was driven by the need to align the investment laws with the government's renewed efforts to push for regional and global economic integration through membership in the African Continental Free Trade Area (ACFTA)[14], the World Trade Organization (WTO)[15], and improve Ethiopia's ranking on the global Ease of Doing Business platform.[16] As part of the Ease of Doing Business Initiative, legislative and administrative reforms across priority sectors were undertaken, ushering in several new pieces of legislation, including the new Investment Laws.[17] Whilst piecemeal amendments have

[12] As part of the investment reform program, the reform team prepared an investment "White Paper" as the guiding policy document for the reform proposals. Currently, the key national policy instrument is the 10-Years Development Plan (2021-2030) available at http://www.pdc.gov.et/#/tenyearplansection. Other sector-specific policies include the 2017 Public-Private Partnership Policy (available at https://www.mofed.gov.et/programmes-projects/ppp/

[13] Ethiopian Office of the Prime Minister, Improving Ease of Doing Business - Medium Term Reform Road, *July 23, 2019.* Available at https://pmo.gov.et/media/documents/Improving_Ease_of_Doing_Business_jull23.pdf

[14] Agreement Establishing the African Continental Free Trade Area Ratification Proclamation No. 1124/2019

[15] Ethiopia Resumes WTO Accession Negotiations After Eight-Year Pause https://www.wto.org/english/news_e/news20_e/acc_eth_31jan20_e.htm

[16] Ethiopian Office of the Prime Minister, *Improving Ease of Doing Business - Medium Term Reform Road* (2019). The vision of this initiative was to make Ethiopia in the Top 100 ranking for Ease of Doing Business. Available at https://pmo.gov.et/media/documents/Improving_Ease_of_Doing_Business_jull23.pdf

[17] *Id.* The Doing Business Initiative identified priority areas for reform, which included starting a Business, Getting Credit, Paying Taxes, Trading Across Borders, Dealing with Construction Permits,

been made to the previous investment laws over the years,[18] a comprehensive review of the investment regulatory regime was required to address grey areas in the law, incorporate new policy objectives, and modernize the regulatory regime in line with international best practices. This section will examine the various sections of the investment laws and the changes introduced.

2.1. Investment Objectives

Since the investment legislation of 1992 there have not been major changes in Ethiopia's investment goals as stated in the enabling laws. Articulated both in the preamble and other clauses, the laws generally provided as the main policy objectives the promotion, facilitation and protection of investments.[19] Through effective implementation of such broad objectives, the laws further aimed to attain economic growth, job creation, technology transfer, and development of the domestic market. Beginning in 2012 and consistent with the "developmental state" economic policy of the government at the time, the policy moved towards favoring investments in strategic sectors of agriculture and industrialization.[20] Special attention was given to export-oriented

Registering Property, Getting Electricity, Protecting Minority Investors, Resolving Insolvency, Enforcing Contracts, and other Cross Cutting Reforms.

[18] Investment Proclamation No. 769/2012 was replaced by Investment Proclamation No. 849/2014, while Investment Regulation No. 270/2012 was replaced by Investment Regulation No.312/2014.

[19] The Encouragement, Expansion, and Coordination of Investment Proclamation No. 15/1992, Investment Proclamation No. 37/1996, art. 4; Investment Proclamation No. 280/2002, art. 4; Investment Proclamation No. 769/2012, art. 5.

[20] Mulu Gebreyesus, *The Private Sector in Ethiopia's Transformation,* in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019). at 688-703. In 2002, Ethiopia's government launched a comprehensive industrial development strategy that recognized the role of the private sector in the economy. It designed the role of the government as supporting those private players in selected manufacturing sectors such as textile and apparel, meat, leather, agro-processing, and Small and Medium Enterprises (SMEs). The policies were articulated in the Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005-2010); Ethiopia National Industry Policy (2002); the Growth and Transformation Plan (GTP-I) (2010/11- 2014/15); and, the Second Growth and Transformation Plan (GTP II) (2015/16- 2019/20).

manufacturing sectors and private investments in commercial agriculture.[21] Such policy dispensation was also manifested under the previous laws, which principally emphasized the objective to attract investments in agriculture and manufacturing sectors.[22]

Investment Proclamation No. 769/2012, Article 5 provided the investment objectives as follows:

1. Accelerate the country's economic development;
2. Exploit and develop immense natural resources of the country;
3. Develop the domestic market through the growth of production, productivity, and services;
4. Increase foreign exchange earnings by encouraging expansion in volume, variety, and quality of the country's export products and services as well as save foreign exchange through the production of import-substituting products locally;
5. Encourage balanced development and integrated economic activity among the regions and strengthen the inter-sectoral linkages of the economy;
6. Enhance the role of the private sector in the acceleration of the country's economic development;
7. Enable foreign investment to play its role in the country's economic development;
8. Create ample employment opportunities for Ethiopians and advance the transfer of technology required for the development of the country.

[21] *Id.*, at 690.

[22] J. Hauge and A. Chang, *supra* note 9, at 832. Alongside the investment laws, other policy measures were taken to spur industrialization including: the massive expansion and investment in industrial parks, sectoral targeting of industrial and investment plans, state-led credit allocation to prioritized industries, export promotions measures, import substitution in certain industries, and infrastructure investments.

Similarly, the new Investment Proclamation retained much of the objectives in Proclamation No. 769/2012, signaling policy consistency with the previous investment laws. However, minor amendments were made to accommodate changes in national economic policy. The new additions and amendments include:

1. enhance the *competitiveness of the national economy* by promoting investments *in productive and enabling sectors;*
2. create *more and better* employment opportunities for Ethiopians and advance the transfer of knowledge, skills, and technology required for the development of the country;
3. create an integrated economy by strengthening inter-sectoral and foreign-domestic investment linkages;
4. Encourage socially and environmentally responsible investments.[23] *(Emphasis added).*

The emphasis to develop the domestic market through the growth of production, productivity and services was redrafted to "enhance the competitiveness of the national economy by promoting investment in productive and enabling sectors."[24] The two added components focus on "competitiveness of the economy" and "promoting investments in productive and enabling sectors." The Proclamation does not define "competitiveness" and "productive and enabling sectors". However, other policy documents reveal an underlying policy recognizing the service sector as a key growth driver and enabler of the economy, besides the manufacturing sector.[25] This in turn is intended to develop competitive local enterprises able to supply

[23] Investment Proclamation No. 1180/2020, art. 5.

[24] *Id.*, art. 5(1).

[25] *Ethiopia 2030: The Pathway to Prosperity – 10-Year Perspective Development Plan (2021-2030).* This document elaborates on the policy focus areas for the government. Productive sectors include agriculture, manufacturing, and mining; service sectors (referring to tourism), and Enabling Sectors to include energy, transport, sustainable finance, innovation and technology, urban development and irrigation, and human capital development include agriculture.

goods in international markets and ensure quality service delivery in critical social services such as education and health. Additionally, the inclusion of "foreign-domestic investment linkages" recognizes the need to promote backward-forward investment linkages between foreign manufacturers and domestic industries, which was identified as one of the key reform areas.[26] Further, social and environmental standards were added as separate objectives to emphasize that investments must conform to these standards for sustainable development.[27] In sum, the substance of the adjustment made in the New Investment Laws does not signify a fundamental shift in policy. While the overall spirit of the policy and law is geared toward liberalization and increased participation of the private sector, it did not result in a significant amendment of the investment objectives.

2.2. Investment Admission: Background

Under international investment law, it is a generally accepted norm that regulating the admission, establishment, and administration of investments is within the sovereign mandate of host countries.[28] A key aspect of such regulatory function is determining the entry and establishment rights of foreign investors through national legislation. Controls on the entry of foreign investors are often rationalized on account of preserving national economic goals, nationality security, public health and safety, public morals, and other motivations such as protecting local businesses.[29]

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[26] Office of the Prime Minster, *supra* note 2, at 13.

[27] United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Framework for Sustainable Development* (2015). This is in line with the "New Generation" investment policies that have emerged globally, emphasizing sustainable development issues, such as environmental, social, governance, and poverty alleviation, in investment policymaking. These trends place social and environmental goals on the same footing as economic growth.

[28] M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT (3rd Ed., 2010), at 94.

[29] *Id.*

For the past thirty years, the trend has been to gradually remove entry restrictions and adopt an open admission policy for investment.[30] Save for those sectors exclusively reserved for nationals or the government, the overall policy direction in developing countries has been to increasingly admit foreign investors.[31] To this end, countries generally follow either one of the two investment admission approaches to regulating foreign participation, i.e., a positive-list approach or a negative-list approach. A negative-list approach contains a limited number of investment areas that are either fully prohibited for foreigners or conditionally restricted allowing only minority foreign ownership. Foreign investors will be admitted to sectors that are not included in the "negative-list". This approach is generally viewed as more open and practiced in more countries around the world. In contrast, a positive list approach provides an exhaustive list of investment areas that are permitted for foreign investment, prohibiting all other areas that are not in the "positive-list". This is considered a more restrictive investment regime and a minority number of countries adopt this approach.[32]

Ethiopia's investment legislation to date has experimented with both approaches. For the two decades between 1991 and 2012, the regulatory framework followed a negative list approach,[33] with varying degrees of openness for foreign investment. The negative-list provided sub-categories of investment areas that are generally reserved for the government, joint

[30] World Bank Group, Investment Law Reform: *A Handbook for Development Practitioners* (2010) at 26.

[31] UNCATD, *supra* note 27 at 16. Further, the "New Generation" of investment policies seeks to maintain a balance between a favorable investment climate through regulation and openness: a dichotomy of measures that further liberalize investment regimes and promote foreign investment on the one hand, and regulate investment in pursuit of public policy objectives on the other. This approach recognizes that liberalization, if it is to generate sustainable development outcomes, should be accompanied by the establishment of proper regulatory frameworks.

[32] *Id.*, at 28.

[33] The Encouragement, Expansion, and Coordination of Investment Proclamation No. 15/1992; Investment Proclamation No. 37/1996; Investment Regulation No. 7/1996; Investment Proclamation No. 280/2002; and Investment Regulation No. 84/2003.

investment with the government, Ethiopian nationals, domestic investors, and joint investment with domestic investors. All investment areas that are not included in any of the negative-lists were open for foreign investors.[34]

The negative-list approach was changed in 2012 with the enactment of the previous laws. For the first time, these laws introduced a positive-list approach, combined with a separate list having a negative list of investment areas reserved for domestic investors.[35] Accordingly, the areas that are restricted to foreign investment and the areas that are permitted for foreign investors were exhaustively enumerated in the law. All other sectors that were not on either the positive or negative list were considered closed for foreign investors.

2.3. Shifting Gears: Reversal of Investor Admission Rules

The new Investment Proclamation No.1180/2020 reversed the positive-list approach to a negative-list approach. Consistent with the revised investment objectives, the change in approach was justified by the need to implement a more open economic policy. More specifically, the open policy preference aims to encourage the growth of domestic industries and services, attract quality foreign investment, enhance forward and backward linkages between local and foreign investments, maximize learning, skills, and technology transfer as well as ensure high job creation. The shift to a negative-list approach was accompanied by additional new features of the investment laws, particularly the definition of "domestic investors" and liberalization in the list of sectors that were previously reserved for the government and domestic investors.[36]

[34] *Id.*

[35] Investment Proclamation No. 769/2012, arts. 6-9.

[36] See sub-section 2.3.2 of this article.

2.3.1. "Investor" Definition

The new Investment Proclamation classifies investors as "domestic" and "foreign".[37] The law collectively governs both domestic and foreign investments ensuring that similar legal protections and incentives are offered.[38] Beyond the meaning of the terms, the definitional scope of an "investor" also determines the scope and application of other sections of the legislation, particularly eligibility to invest in reserved sectors and incentives. Investor categorization is therefore an important element that reflects the investment objectives and policy priorities for the country.

Under the previous laws, domestic investors constituted the following categories: (a) the government, public enterprises, and cooperatives (b) Ethiopian nationals, and (c) foreign nationals of Ethiopian origin treated as domestic investors under separate laws ("Ethiopian Diaspora"). Investors falling under these categories were entitled to invest in areas reserved for domestic investors.[39]

The new Investment Proclamation retained the above list but expanded the category of domestic investors to include:

i. An enterprise incorporated in Ethiopia and wholly owned by Ethiopian nationals
ii. Foreign nationals or foreign enterprises treated as domestic investors by international treaties ratified by Ethiopia;
iii. Foreign nationals or foreign enterprises treated as domestic investors in prior laws and having existing investments in the country;
iv. Descendants of foreign nationals that have invested in the country.[40]

[37] Investment Proclamation No. 1180/2020, art. 2(5) and art. 2(6).

[38] This however does not mean that requirements and protections are identical for foreigners and domestic investors in all cases. For instance, the right to repatriate profits and dividends, and the mandatory requirement of a minimum capital apply only to foreign investors.

[39] See Section 2.3.2 of this article on sectoral regulation.

[40] Investment Proclamation No. 1180/2020, art. 5.

This has a number of implications. First, it eliminated the category of "Ethiopian nationals" which were previously considered a separate category of domestic investors with corresponding sectors reserved only for them. Secondly, it expanded the definition of 'domestic investors' to include enterprises incorporated and wholly owned by Ethiopians.[41] Third, it recognized the special treatment granted to foreign nationals through preferential bilateral treaties.[42] Fourth, it extended legal recognition to specific groups of foreign nationals with a long history of investments in Ethiopia.[43] Previously, these groups were the subject of legal uncertainty as they lacked formal recognition as neither domestic nor foreign investors while operating businesses in Ethiopia.[44] The new laws clarified their status through express recognition and classified them as domestic investors.

Concerning the definition of "foreign" investors, the new Proclamation maintained the previous approach of determining foreign status through the test of nationality and place of incorporation. It recognizes investors as foreign if they have any one of the following legal statuses: a) foreign nationals; b) an enterprise incorporated in Ethiopia with a foreign shareholding (regardless of shareholding size); and c) an enterprise incorporated abroad.[45] The

[41] This was not clearly articulated under Investment Proclamation No. 769/2012. Rather it was indirectly mentioned in art. 3(2) of Investment Regulation No. 270/2012, a provision regulating sector participation.

[42] Such a treaty, for example, exists between Ethiopia and Djibouti. Ethio-Djibouti Preferential Investment Facilitation and Property Acquisition Agreement Ratification Proclamation No. 516/2007. Under this treaty, Djiboutian nationals and enterprises are recognized as domestic investors and permitted to invest in areas reserved for domestic investors (excluding those reserved for Ethiopian nationals only). *See also* Proclamation Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in their Country-of-Origin No. 270/2002, art. 5 (5).

[43] These included foreign nationals that have lived and invested in Ethiopia for generations, such as Italians, Indians, and Armenians.

[44] Under the Investment Proclamation No. 280/2002, 'foreign nationals permanently residing in Ethiopia having made an investment" were recognized as domestic investors. However, Investment Proclamation No. 769/2012 changed the definition of "domestic investors" eliminating this category. This had left several foreign nationals with long investment history in legal limbo.

[45] Investment Proclamation No. 1180/2020, art. 2 (6) (c).

Proclamation explicitly labelled enterprises incorporated abroad as "foreign investors" to clearly indicate that the location of incorporation matters as regards the determination of status as "foreign" or "domestic" investor. Consequently, any enterprise in which a foreigner is involved becomes a foreign investment irrespective of the place of incorporation; and any business incorporated abroad becomes a foreign investment irrespective of the nationality of the shareholders (even if all shareholders are Ethiopians).[46] As an exception, Ethiopian nationals who reside, permanently abroad, may elect to be treated as foreign investors and the law accommodates such choice.[47]

2.3.2. Sectoral Regulations

National investment regulations often impose restrictions on foreign investor participation to protect national interests in the following ways: a) sectoral regulations through investment entry requirements; b) requiring local equity participation; and, c) imposing export quotas on investors.[48] A critical characteristic of the new Investment Proclamation is the reversal of the sectoral regulation approach which has been in place since 2012. Under the previous laws, a hybrid of "positive" and "negative" lists existed, providing an exhaustive list of permissible investment sectors[49] and a separate list of areas reserved for government and domestic investors. Article 6 of the new Investment Proclamation reversed the above approach and reintroduced a full negative listing system that existed before 2012.[50] Here, except for the few areas that are reserved for the government and domestic investors, all areas

[46] Exception is granted to Djiboutians and Djibouti incorporated entities under the Preferential Trade Agreement, *supra* note 42.

[47] Investment Proclamation No. 1180/2020, art. 2 (6) (e).

[48] Sornarajah, *supra* note 28, at 136.

[49] Investment Regulation No. 280/2012, Schedule of Permissible Investment Sectors.

[50] The rationale for such reversal was predicated on the policy dispensation that sought more openness to foreign investment.

are permitted for foreign investment.[51] The approach introduced a new list with different sub-categories and requirements as detailed below.

2.3.2.1. Restrictions on the Participation Foreign Investors

Article 4 of the new Investment Regulation lists 32 sectors that are exclusively reserved for domestic investors. This provision essentially liberalizes all sectors not included in its list, except those business areas reserved for government or joint ventures with the government. The new definition of "domestic investors" in the Investment Proclamation encompasses Ethiopian nationals, foreign nationals of Ethiopian origin and other specific categories of persons expressly recognized by the law as domestic investors. This broader definition of "domestic investors" partially liberalizes sectors that were previously reserved only for Ethiopian Nationals[52] This follows the government's decision to allow the Ethiopian diaspora to invest in areas that were previously reserved only for Ethiopian nationals.[53] The 32 investment

[51] Investment Proclamation No. 1180/2020, art. 6(3).

[52] Investment Regulation No. 270/2012, art. 3(1). These are banking, insurance, micro-credit and saving services, packaging, forwarding and shipping agency services, broadcasting services, mass media services, attorney and legal services, preparation of indigenous traditional medicines, advertisement, promotion and translation work, air transport services using aircraft with a seating capacity of up to 50 passengers.

[53] However, some sector-specific legislation that were enacted subsequent to the investment laws have eroded the equal protection granted to the Ethiopian diaspora. For instance, Media Proclamation No. 1238/2021 derogated from the Investment Regulation provisions by restricting the rights of the Ethiopian diaspora to participate in the media and broadcasting business. Art. 23 of the Media Proclamation treats Ethiopian diaspora as foreign citizens (and not as domestic investors) and limits their ability to invest in media and broadcasting services providing a maximum share ownership cap of 25%. The Federal Advocacy Service Licensing and Administration Proclamation No. 1249/2021, on the other hand, has remained consistent with the spirit of the new investment laws, providing equal treatment to Ethiopian nationals and Ethiopian diaspora for the provision of legal services in Ethiopia. *See also* Banking Business Amendment Proclamation No. 1159/2019, art. 9, allowing investment by the Ethiopian diaspora in financial services. In regulating financial services, art. 4(1) of the Investment Regulation has deferred to sector legislations to determine the manner and extent of such relaxation. Thus, whilst allowing Ethiopian diaspora to invest, the Banking Proclamation has introduced sector-specific restrictions that such investment may only be made in foreign currency, which is a requirement not provided under the new investment laws.

sectors reserved for domestic investors under the new Investment Regulation mirror the 2002 Investment Regulation that excluded key economic sectors from foreign participation, including financial services, domestic trade, retail, wholesale, and import trade.[54] Additionally, it reserves for domestic investors small and medium-scale businesses and those sectors traditionally protected for domestic industries.[55]

2.3.2.2. Mandatory Participation of Local Investors

Mandatory equity participation of local investors is embedded in the new investment laws in two ways: a) joint investment with the government; and b) joint investment with foreign investors.

i. Joint Investment with the Government

Previously, under Art. 6(1) of the Investment Proclamation No. 769/2012, the following areas were exclusively reserved for the Government:

a) Transmission and distribution of electrical energy through the integrated national grid system;

b) Postal services, except for courier services;
c) Air transport services using aircraft with a seating capacity of more than fifty passengers.

Similarly, Art. 6(2) of the same proclamation reserved the following areas exclusively for joint investment with the government:

a) Manufacturing of weapons and ammunitions;

b) Telecom services.

[54] Investment Regulation No. 280/2002.
[55] Investment Regulation No. 474/2021, art. 4.

Under the new investment legal regime, the category of "areas reserved for the government" has been removed, while retaining the category of "joint investment with the government". This category is expanded to include:[56]

1. Manufacturing of weapons, ammunition, and explosives used as weapons or to make weapons;
2. Import and export electrical energy;
3. International air transport services;
4. Bus rapid transit; and
5. Postal Services, excluding courier services.

First, the category of investment fields reserved for the government under the previous investment proclamation was entirely removed ending the exclusive monopoly of the government in three areas of investment. Previously, air transport services, transmission and distribution of electricity through the national grid, and postal services (except courier) were exclusively reserved for the government. These sectors are now moved to the category of "Investment Areas Reserved for Joint Investment with the Government", expanding the previous list which only included the manufacturing of weapons and ammunition and telecom services.[57] The legal consideration here was to align the decision of the government to partially privatize public enterprises such as Ethiopian Airlines, Ethiopian Electric Power, and Ethiopian Shipping and Logistics Enterprise.[58] Secondly, the listing resulted in the opening up of sectors previously under government monopoly. Although telecom liberalization preceded the introduction of the new

[56] Investment Regulation No. 474/2020, art. 3.

[57] Note that telecom services had already been liberalized prior to the enactment of the Investment Proclamation by virtue of the Communications Service Proclamation No.1148/2019.

[58] Although the government in its decision to partially privatize the state-owned enterprises stated that only a maximum of 49% of the shares in Ethio telecom will be open for foreign ownership, the law does not provide for such cap. *See* Reuters "Ethiopia opens up telecoms, airline to private, foreign investors. https://www.reuters.com/article/us-ethiopia-privatisation-idUSKCN1J12JJ

investment laws, it was removed from the list, and "air transport services using aircraft with a seating capacity of more than fifty passengers" has been replaced by "[I]international air transport services". By carving out "international air transport services", the law liberalized domestic air transport services to both domestic and foreign investment.

ii. Joint Investment with Domestic Investors

Article 5 of the Investment Regulation No. 474/2020 introduced a new category that was not provided in the previous laws.[59] This category permits the participation of foreigners through a joint venture with domestic investors. The approach to include this category follows a precedent set by the Investment Board's decisions which partially liberalized the logistics sector to foreigners in 2018.[60] The stated aim of the joint investment scheme is to encourage skills and technology transfer and allow technological learning and the diffusion of innovative capabilities through partnership of foreign and local firms.[61] In addition, a joint venture structure aims to serve as a countervailing force to ensure better benefits accruing to the country in both job creation, learning, and maximization of taxes and hard currency earnings.

Article 5 of the Investment Regulation No. 474/2020, therefore, opens the following sectors to foreign investors only in joint ventures with domestic investors and with a maximum shareholding of 49% of the share capital of the enterprise.[62]

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[59] Joint venture with domestic investors was included at last in Proclamation No. 37/1996. Art. 7(1) reserved three sectors under this category, which included 'Engineering and metallurgical industries, pharmaceutical industries, basic chemical and petrochemical industries, fertilizers industries"

[60] See Ethiopian Investment Board Decision (2018) (*Available at http://www.investethiopia.gov.et/images/pdf/EIB-decision-on-Logistics.pdf)*

[61] *Id.*

[62] The process for selecting areas eligible for joint investment with domestic investors was preceded by a series of consultations with sector regulatory institutions and ministries.

1. Freight forwarding and shipping agency services;
2. Domestic air transport services;
3. Cross-country public transport services using buses with a seating capacity of more than 45 passengers;
4. Urban mass transport service with a large carrying capacity;
5. Advertisement and promotional services;
6. Audiovisual services, motion picture and video recording, production and distribution; and
7. Accounting and auditing services.

Alongside the sector liberalization provided under the new investment laws, the law anticipates further policy reforms and relaxation of investment sectors for foreigners. Sector listing, which was previously regulated by the investment proclamation and investment regulation, is now fully relegated to the realm of the new Investment Regulation. Additionally, the new Investment Proclamation authorizes the Investment Board to open or close areas of investment, and for such decisions to take immediate effect, further allowing sector listing to be regulated at the Investment Board level, without the need for a legislative amendment.[63] Signaling the overall goal of maintaining an open policy to investment, the Board's authority to restrict sectors that have already been liberalized may only be exercised if such restriction is justified by "public interest considerations." [64]

2.4. Investor Obligations

In the context of the investment objectives set out under the new Investment Proclamation, various obligations are embedded in the laws aimed at achieving the stated objectives. These range from minimum capital

[63] Investment Proclamation No. 1180/2020, art. 6(4) and art. 31 (2).
[64] Investment Proclamation No. 1180/2020, art. 31 (1) (h).

requirements for foreign investors to fostering social and environmental compliance, local employment, training, and skills transfer, and reporting duties.[65]

2.4.1. Minimum Capital Requirement

Minimum capital requirement for foreign investors has been a mainstay of consecutive investment legislation in Ethiopia. The objective behind minimum capital requirements is to attract capital flows in large and priority sectors while reserving small and medium businesses to domestic industries. Countries with high forex needs also use mandatory forex commitments to help increase forex inflow. Under the new Investment Proclamation, minimum capital thresholds are required for both wholly foreign-owned operations and joint ventures, although the amounts slightly vary. Domestic investors are not subject to minimum capital requirements. Depending on the sector of investment and nature of the partnership with domestic investors, previous minimum capital requirements are retained ranging from USD 50,000-USD to 200,000.[66] Wholly foreign-owned investments need to allocate USD 200,000, whereas joint ventures with domestic investors are subject to a lesser amount of USD 150,000 for a single investment project.[67] Investors seeking to invest in more than one investment project, would be required to commit the minimum capital separately. While the definition of "capital" includes local or foreign currency, negotiable instrument, machinery or equipment, building, working capital, property right, intellectual property right, or other tangible or intangible business assets[68], in practice, a direct cash

[65] *Id.*, art. 14. At the investment stage, investors must submit a quarterly report to the Ethiopian Investment Commission.

[66] "Capital" is defined in the Investment Proclamation No. 1180/2020, art. 2 (3) as "local or foreign currency, negotiable instrument, machinery or equipment, building, working capital, property right, intellectual property right or other tangible or intangible business assets."

[67] Investment Proclamation No. 1180/2020, art. 9.

[68] *Id.*, art. 2(3).

deposit is required to fulfill the minimum capital requirement at the time of investment.[69]

In a new move, the new Investment Proclamation expands the exceptional circumstances where a waiver of minimum capital may be permitted. Under the previous laws, minimum capital waivers were offered to existing investors re-investing their profits and dividends in the country. The waiver was broadened to benefit other business activities such as the election of persons as the board of directors following the conversion of a private limited company (PLC) to a share company.[70] This exempts shareholder/s seeking board directorship in a share company with nominal shareholding.[71] Additionally, waivers are extended to foreign investors buying the entirety of an existing enterprise owned by foreign investors or the shares of the enterprise. Here, the underlying rationale for exemption is that the foreign investors engaged in the business have already fulfilled the minimum capital requirement at the time of the initial investment.

2.4.2. Social and Environmental Protection

There is a global consensus that investments, in general, should comply with social, environmental, and governance standards.[72] Strict regulatory

[69] Information obtained from EIC shows that while the law recognizes minimum capital may be contributed in cash or in kind, "in-kind" contributions created administrative setbacks related to valuation of the properties. EIC maintained a position that the cash requirement allows easy administrative verification and also demonstrates the 'seriousness' of the investor to do business in Ethiopia.

[70] Investment Proclamation No. 1180/2020, art. 9 (4) (b).

[71] This addresses a longstanding challenge within the investor community due to a restriction imposed by the Commercial Code and the Investment Proclamation. On the one hand, the 1960 Commercial Code, art. 347 states that "only members of a company may manage the company" requiring all board members of a share company to be shareholders in order to qualify for a board membership. On the other hand, the investment law perceived all investors as separate and therefore required those seeking shareholding in a company to first commit the minimum capital requirement applicable to foreign investors, regardless of whether the membership sought is nominal or not.

[72] UNCATD, *supra* note 27, at 33.

standards have emerged at international and regional levels obligating investors to comply with those standards. While the overall objective of the investment laws is to provide favorable conditions to attract and retain investments, it also seeks to ensure that investments do not have negative social and environmental consequences. To this end, the Investment Proclamation added a new clause that requires investors to promote social and environmentally sustainable values, requiring the inclusion of environmental protection standards and social objectives in investment projects.[73]

2.4.3. Local Employment, Skills and Knowledge Transfer

One of the key objectives of policies and regulatory frameworks promoting investments in developing countries is creating job opportunities and attaining skills, knowledge, and technology transfer. In Ethiopia, successive investment laws have sought to use investments as a vehicle to create jobs and facilitate learning and technological advancement. Emphasis on agriculture and manufacturing under the previous laws was aimed at addressing chronic issues of unemployment and underemployment. Similar goals of generating employment opportunities and increasing investment inflow to accelerate inward transfer and diffusion of knowledge, skill, and technology are articulated in the new laws. Accordingly, the investment laws complement the national job agenda of the government which recognizes private investment as a pillar for creating jobs.[74]

[73] Investment Proclamation No. 1180/2020, art. 54.

[74] In 2018, Ethiopia established a special Jobs Creation Commission through Regulation No. 435/2018, with a key mandate to facilitate and scale job opportunities. Recently, the Commission's mandate was transferred to the Ministry of Labor and Skills through Proclamation No. 1263/2021. www.jobscommission.gov.et. *See* also, Ethiopia Plan Of Action for Job Creation (2020-2025) (available at https://jobscommission.gov.et/wp-content/uploads/2019/11/National-Plan-for-Job-Creation-Brief.pdf)

One of the ways the new Investment Proclamation seeks to encourage local employment is by limiting the employment of expatriates and imposing obligations for training and technological transfer to locals.[75] Except for those in positions of top management[76], the new Proclamation qualifies the right to employ foreign employees subject to the unavailability of Ethiopians possessing similar qualifications or experiences in the market.[77] The rules on expatriate employment set a maximum threshold of foreigners that can be employed[78], a limit on the duration of the employment,[79] and obligations of skill and technology transfer. A Directive issued by the Ethiopian Investment Commission (hereinafter "Directive) further levies strict compliance requirements on investors to train and transfer skills and knowledge to Ethiopians within a prescribed timeline. These include requirements such as the provision of on-the-job training, preparation, and submission of training programs to the Investment Commission, including a proposed timeline within which the investor intends to replace the foreigners with local employees.[80]

In parallel, the new investment laws have further introduced a benefit to the spouses of foreign employees. For the first time, the investment laws

[75] Investment Proclamation No. 1180/2021, art. 22.

[76] "Top Management" is defined to constitute chief executive officer, chief financial officer, and chief operations, officer."

[77] Investment Proclamation No. 1180/2020, art. 22.

[78] Ethiopia Investment Commission Directive No. 772/2021 on Regulating the Issuance of Work Permit to Expats Employed in Investments and the Implementation of Knowledge and Skill Transfer from Expats to Ethiopia (2021), art. 6. The Directive sets a maximum of 10% -15% of the enterprises' employees that can be foreigners. However, this restriction is sector-specific and exceptions are made for some industries that do not require high employment rates. (For instance, consultancies).

[79] Investment Proclamation No. 1180/2020, art. 22(5), and EIC Directive, art. 11(2). Foreign employees may only be hired for a maximum period of three years following which they must be replaced by Ethiopians.

[80] EIC Directive No.772/2021, art. 9(2) and 10.

grant spouses of investors and foreign employees the right to obtain work permits.[81]

3. Investment Guarantees, Protections, and Incentives

Investment decisions are often impacted by several business and investment climate considerations. Variables such as political stability, ease of entry and exit, incentives, promotions, local regulations, and administrative processes all compound to influence investor decisions.[82] Regulatory guarantees and legal protections seek to inspire confidence in investors and create favorable conditions to attract investment. These include incentive schemes, protection against expropriation and nationalization, right to compensation, and assurance of profit and dividend repatriation.

3.1. Protection Against Expropriation

One of the most recognized principles of international investment law is the protection of foreign investments against expropriation and nationalization.[83] While states generally have full sovereignty over natural resources and properties located in their territories, it is also a recognized principle that states may not seize private property unless certain conditions are met. Previous Ethiopian investment laws have recognized this right.

Investment Proclamation No. 769/2012, Article 25 provides:

1. No investment may be expropriated or nationalized except for public interest and then only in conformity with the requirements of the law.

[81] Investment Proclamation No. 1180/2020, art. 22 (3). This follows the permission to allow foreigners residence in industrial parks.

[82] The World Bank Group, *Global Competitiveness Report 2017/2018, Foreign Perspectives and Policy Implications* 2018, at 13.

[83] *Id.*

2. Adequate compensation corresponding to the prevailing market value, shall be paid in advance in case of expropriation or nationalization of investment for the public interest.
3. For this article, the word "nationalization" shall be used interchangeably with the word "expropriation" and results in the payment of adequate or appropriate compensation.

Similarly, the new Investment Proclamation No. 1180/2020, adopts the same approach with a slight variation under Article 19:

1. The Government may expropriate any investment undertaken under this Proclamation for a public interest, in conformity with requirements of the law, and on a non-discriminatory basis.
2. In the case of expropriation of an investment effected under sub-article (1), adequate compensation corresponding to the prevailing market value shall be paid in advance.

The new proclamation does not define "expropriation" and the reference to "nationalization" in the previous law was removed. The wording of the "expropriation" provision was changed not as a prima facie prohibition against expropriation but rather as a permissive ground on which the government may expropriate private investment. The express recognition to the principle of "non-discrimination" is consistent with recognized principles of international investment law.

3.2. Right to Repatriation of Funds

A key aspect of foreign investment attraction is the guarantee that funds invested, and profits earned will be repatriated. Similar to previous approaches, the new investment laws explicitly recognize and protect the investor's right to the repatriation of earnings and payments in convertible foreign currency. Eligible payments include profits and dividends – principal and interest payment on external loans; payments related to technology

transfer agreements and collaboration agreements; proceeds from the transfer of shares or conferral of partial or total ownership of the enterprise to another investor; proceeds from the sale, capital reduction, or liquidation of an enterprise; and compensation paid to an investor.[84] A slight change introduced in the new law is the change in stipulation from "proceeds from the transfer of shares to ***domestic investors***" to "***any investors***". This relaxes a previous restriction on the investor's ability to repatriate proceeds of shares sold to non-domestic (foreign) investors.[85]

3.3. Investor-State Disputes

One of the components of the protection and guarantee that countries extend to foreign investors and their investments relates to mechanisms of settling investment disputes. The dispute can be between the host state and the home state of the foreign investor (state-to-state dispute) or between the foreign investor and the host state (investor-state dispute). The new Proclamation introduced a new provision addressing investment disputes that was not available since 2002.[86] The two preceding investment legislation had no references to investor-state disputes. The working assumption had been that provisions governing investor-state disputes are situated in bilateral or multilateral investment treaties. To the extent that an investor belonged to a country where there is a bilateral investment treaty with Ethiopia, then the dispute resolution mechanism available in the treaty would apply to the investor. All other disputes would have been referred to local courts. The new Investment Proclamation reversed this approach and added the following provision:

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[84] Investment Proclamation No. 1180/2020, art. 29.

[85] Investment Proclamation No. 1180/2020, art. 20 (1)(e).

[86] *Id.*, art. 28. Previously, Investment Proclamation No. 15/1992 (art. 39) and Investment Proclamation No. 37/1996 (art. 22) contained dispute settlement mechanisms that gave the choice to the state and a foreign investor to provide in their agreement the manner of settlement of a dispute, including the option for international dispute settlement.

> Article 28: Settlement of Investment Disputes
>
> 1. Without prejudice to the right of access to justice through a competent body with judicial power, any dispute between an investor and the Government involving investments effected under this Proclamation will be resolved through consultation and arbitration.
> 2. The Federal Government may agree to resolve investment disputes involving foreign investments through arbitration.
> 3. Where a foreign investor chooses to submit an investment dispute to a competent body with judicial power or arbitration, the choice shall be deemed final to the exclusion of the other.

The stipulation of consultation and arbitration as the preferred method of dispute settlement is consistent with international regulatory best practices aiming to attract foreign investment. Domestic courts are often considered inadequate for the settlement of investment disputes, due in particular to their perceived inefficiency, delays, actual or apparent bias toward foreign investors, and lack of independence from the host State.[87] Such inclusion in the investment law, coupled with the enactment of supplementary laws establishing a system of international arbitration and enforcement of arbitral awards[88] signals the policy drive to create favorable regulatory condition likely to attract foreign investment.

3.4. Investment Incentives

Investment incentives conferring privileges on selected investments is a common practice in both high-income and developing countries.[89] An incentive regime primarily aims to attract and retain investment in priority

[87] G. KAUFMAN –KOHLER, M. POTESTA, INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS (2020) at 20.

[88] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 and the New York Convention on the Recognition and Enforcement Foreign Arbitral Awards Ratification Proclamation No. 1184/2020.

[89] The World Bank Group, *supra* note 82, at 28.

sectors. Different types of incentives, ranging from tax holidays to duty exemptions, might be granted to selected investments. In offering incentives, an attempt is made to balance the financial losses resulting from the non-collection of revenues with the wider benefits which will accrue from the investments.

The Ethiopian incentive regime is no different and has been a common feature of earlier investment laws.[90] Previously, investment incentives were interlinked with sector regulation. Priority and encouraged sectors that were eligible for foreign investment were simultaneously afforded tax and duty waivers. A Schedule attached to the Investment Regulation incorporated both the list of sectors eligible for foreign investment and the corresponding incentives. In contrast, the new proclamation split the regulation of sectors from the eligibility for investment incentives.[91] Consequently, a separate Investment Incentives Regulation was adopted setting out the eligibility, type, and extent of entitlement to incentives.[92]

Similar to previous incentive schemes, the type of incentives offered are income tax holidays and duty exemptions on goods[93] imported into the country. Depending on the sector, type, location, and exporting status of the investment, a time-bound income tax holiday or preferential tax rates on corporate income tax are granted. The incentive scheme continues the policy

[90] Investment Regulation No. 7/1996 (Schedule), Investment Regulations No. 84/2003 (Schedule), Investment Regulation No. 270/2012 (Schedule).

[91] Investment Proclamation No. 1180/2020 art. 17 states "investment areas eligible for investment incentives as well as the type and amount of investment incentives will be determined by a separate regulation".

[92] Investment Incentive Regulation No. 517/2022.

[93] *Id.*, art. 12. The eligible goods are "Capital goods" which include equipment and other similar tangible goods to produce goods or services for consideration and "Construction Materials" which means a material or supply that is to be made part of a building or any other construction. Motor vehicles are also eligible for duty-free imports as per a Directive to be issued by the Ministry of Finance.

emphasis on agriculture and manufacturing as priority sectors, while other sectors such as tourism, health, transport, logistics, and ICT were added to the eligible list.[94] Additionally, by offering extra incentives, the policy seeks to encourage the expansion of existing investments,[95] investments in exports,[96] remote locations,[97] and selected tourist destinations.[98] Moreover, the new regulation has introduced an incentive regime for investors that facilitate overseas employment opportunities for qualified Ethiopians. Investors that have placed Ethiopians in a foreign country numbering 100-500 persons will be eligible for an income tax exemption of 1-3 years.[99]

Overall, with few exceptions, the new incentive regime is a mirror image of the scheme under previous law. The policy goal remains consistent, focusing on agriculture and manufacturing as priority sectors where investments are encouraged and incentivized. However, changes were introduced to the procedures and regulatory functions of the agencies that administer incentives.[100]

4. Investment Administration

The institutional framework for investment admission and administration is a key component of an investment regulatory regime. A well-functioning and effective investment facilitation system characterized by an efficient

[94] Investment Incentive Regulation No. 517/2022, Schedule No. 3, 8, 10.

[95] *Id.*, art. 5.

[96] *Id.*, art. 6. An additional, one-time income tax exemption of 2 years is granted to investors outside industrial parks that have exported 60% of their products or services.

[97] *Id.* Art. 4(2) offers an additional income tax deduction of 30% for three consecutive years after the expiry of the income tax holiday period for investors who invest "in areas far from the center and with very low infrastructure development".

[98] *Id.* Art. 4(2) provides that an investor eligible for incentives and who invests in areas far from the center and with very low infrastructure development and invests in new, atypical, and selected tourist destination areas, in hotels, lodges and resorts will be entitled to a five-year income tax exemption.

[99] *Id.*, art. 4(4).

[100] See Section 4.1.4 of this article.

institutional setup plays a key role in attracting and retaining investors.[101] Beyond easing entry and establishment procedures, good 'aftercare' services are proven means of encouraging investment expansions.[102] As part of overhauling the investment regulatory regime, the new Investment Laws aimed to introduce institutional reforms that will further ease the entry, establishment, and operation of investments in the country. This involved revising the regulatory functions of existing investment administration organs, restructuring mandates, establishing platforms of engagement between government bodies and the private sector, and instituting an improved grievance and complaint handling system.

4.1. Investment Administration Organs

Ordinarily, the key investment administration organs are the Ethiopian Investment Commission, the Ethiopian Investment Board, and regional investment bureaus.[103] The new Investment Proclamation retained these organs and expanded their mandates. Additionally, the Proclamation established a high-level investment organ, i.e. the Federal Government and Regional State Administrations Investment Council ("Investment Council) with a new mandate to coordinate investment activities.

4.1.1. The Ethiopian Investment Board

The Ethiopian Investment Board ("Board") is the highest decision-making body of the Ethiopian Investment Commission.[104] Initially, the Board's powers and duties included, issuing directives, adjudicating disputes,

[101] John Sutton, *Institution Building for Industrialization: The Case of the Ethiopian Investment Commission,* in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019), at 858.

[102] *Id.*, at 858.

[103] Although with differing names and structures, these three organs were part of the investment legislation since Investment Proclamation No. 32/1996.

[104] Investment Proclamation No. 37/1996 through Investment Proclamation No. 769/2012 have all incorporated a Board structure within the investment administration organs.

initiating policies, and forwarding recommendations to the Council of Ministers. Through amendment of the Investment Proclamation and adoption of new regulation in 2014, the Board was reconstituted as a high-level government body with a robust policy mandate.[105] The amendment of the previous laws authorized the Investment Board to assume a more proactive role in policy formulation, investment admission and administration.

The new laws retained the Board's role as a key investment administration body, adding clarity on its members and granting additional powers and duties. Chaired by the Prime Minister, the membership of the Board was expanded to include eight government agencies relevant to trade and investment and two representatives from the private sector.[106] Additionally, the Board's mandate was enhanced to include full powers of sector regulation including the authority to revise the list of investment sectors.[107] Adjudicative powers of the Board were also expanded to receive complaints from investors against the decisions of the EIC and *other federal agencies*.[108]

4.1.2. The Ethiopian Investment Commission

The Ethiopian Investment Commission (hereinafter "EIC") is the key regulatory agency responsible for investment attraction, admission, and administration.[109] It is an autonomous organ of the government that is

[105] Investment Proclamation No. 769/2012, art. 29 (5) (6) (7) and Investment Regulation No. 312/2014, art. 4. Members of the Investment Board were the Prime Minister (Chair) and government officials to be designated by the Prime Minister.

[106] Investment Proclamation No. 1180/2020, art. 32.

[107] *Id.*, art. 6 (4). Although sector regulation was partially delegated to the Board pursuant to the amendment of the investment proclamation in 2014, the Council of Ministers retained some of the powers to regulate sectors reserved for Ethiopian nationals and to the government and joint investment with the government.

[108] See Section 3.3.4 of this article (Grievance and Complaints Handling).

[109] Investment Proclamation No. 1180/2020, art. 37.

accountable to the Prime Minister. Except for investments in the prospecting, exploration, and development of minerals and petroleum, the EIC has the mandate to regulate: a) Wholly foreign-owned investments; b) joint investments made by foreign and domestic investors; c) investments made by foreign nationals but treated as domestic investors as per relevant law; and, d) investments by domestic investors engaged in areas eligible for incentives.[110] Among others, EIC is empowered to create an overall conducive investment climate. It initiates and leads investment promotion activities, provides investor after-care services, and coordinates government agencies to create a favorable investment climate. Regional investment bureaus, established by regional laws at the regional level, may play a similar role in investment promotion and facilitation, particularly for domestic investors. However, the registration and licensing of foreign investors are processed through the EIC.

While EIC is the focal agency for investment admission, the law has delegated some of EIC's powers to a few sector-specific regulatory bodies. Previously, the Ethiopian Energy Authority and the Ethiopian Aviation Authority were granted investment facilitation mandates including the issuance of investment permits. The new laws expanded the list of delegated agencies to include the Ethiopian Communications Authority, established following the liberalization of the telecommunication sector.[111] These regulatory authorities are empowered to carry out EIC's regulatory functions, including the granting, approval, and revocation of investment permits, in their respective areas of energy, aviation, and communication. Furthermore, the new Investment Proclamation enhanced the mandate of these agencies to issue

[110] *Id.*, arts 3 and 4.

[111] Communication Services Proclamation No. 1148/2019, art. 3.

directives, specific to their sectors, that would enable them to implement their mandate.[112]

4.1.3. Federal Government and Regional State Administrations Investment Council

The Investment Proclamation No. 1180/2020 expanded the administrative entities responsible for investment facilitation. A new and high-level investment administration organ, the Federal Government and Regional State Administrations Investment Council (the Council) is newly established.[113] The Council is both a policy and regulatory entity with a specific mandate to "oversee and direct all aspects of the horizontal relationship between the Federal Government and Regional Administrations."[114] This platform aims to establish a formal inter-governmental relations platform to resolve issues related to investments.[115]

Given the federal system of governance in the country, investors are met with varying regional and local rules that are not consistent with the federal services obtained at the EIC. Additionally, the federal system of government and devolved power structure means that rules and regulations are subject to the region's specific context. The lack of harmonized rules and procedures has been shown to challenge investment implementation at local levels.

[112] Investment Proclamation No. 1180/2020, art. 55 (1).

[113] *Id.*, art. 44-46. Members of the Investment Council are the Prime Minister (in his absence the Deputy Prime Minister), All Regional States Presidents, Mayors of Addis Ababa and Dire Dawa and the investment commissioners of both the federal and regional investment agencies.

[114] *Id.*, art. 45 (1).

[115] While the Investment Proclamation preceded it, a new law was introduced in 2021 with similar objectives of addressing inter-governmental relations between the federal and regional states. The System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia's Determination Proclamation No. 1231/2021.

Considering these challenges, the Council was established to principally act as a platform of horizontal cooperation and coordination between the federal and regional administrations on investment matters.[116] It provides a high-level structure for the deliberation of issues and decision-making that will be implemented by regional administrations. In addition, it assumes an adjudicative role with the mandate to resolve 'fundamental grievances' and 'significant misunderstandings' submitted by investors regarding their investments.[117] Consequently, all decisions and recommendations made by the Council must be implemented by the federal government or regional administration that is the subject of the decision of the Council.[118]

4.1.4. Incentives Administration

Previously, the regulation and administration of investment incentives were the mandates of the EIC and the Investment Board. EIC was responsible for permitting exemptions from customs duty[119] and ensuring that incentives granted to investors are used for the designated purposes.[120] Additionally, the Board was authorized to grant new or additional incentives other than those that were provided by law.[121]

The adoption of the new Investment Incentive Regulation introduced a new incentive administration system, with a focus on centralization, supervision, and data collection. First, the power to administer and approve investment incentives is transferred from the EIC to the Ministry of Finance (hereinafter 'the Ministry'). The Ministry is authorized to approve requests for investment

[116] Investment Proclamation No. 1180/2020, art. 44.

[117] Per art. 49 of the Investment Proclamation No. 1180/2020, the Board is required to adopt a directive that will determine the working procedures of the Council including submission of matters for consideration and rendering of decisions and recommendations.

[118] *Id.*, art. 47.

[119] Investment Proclamation No. 769/2012, art. 30 (2) (a).

[120] *Id.*, art. 28 (11).

[121] Investment (Amendment) Proclamation No. 849/2014, art. 4 (6).

incentives upon recommendation by the EIC. Similarly, the power to grant incentives is transferred from the Board to the Ministry.[122] Second, the Investment Incentive Regulation provides detailed rights and obligations of regulatory institutions responsible for the implementation of the incentives.[123] These include the obligation to examine and regularly report to the Ministry on incentives granted and taxes forgone by the government.[124] Third, it emphasizes the need to closely monitor and evaluate whether the incentives granted are being used for the intended purposes. All the regulatory institutions with a mandate to implement incentives are required to supervise the use of the incentives and report to the Ministry. Failure to report to the Ministry carries serious consequences to the government agency or the employee responsible for reporting a penalty of up to 3 months' salary.[125] Concurrently, the Ministry is responsible for maintaining a database of monitoring and analysis of tax incentives granted to investors and reporting to the federal government on the incentives awarded and revenue foregone by the government.[126]

4.1.5. Investment Facilitation and Regulatory Coordination

Investment promotion, attraction, and retention is not an isolated activity. Its success largely depends on strong collaboration between different government agencies at the federal and regional tiers. Recognizing the need to improve and streamline investment services, previous investment laws vested powers on the EIC to liaise and coordinate between investors, public

[122] Investment Incentive Regulation No. 517/2022, art. 4 (7).

[123] *Id.*, art. 2(6). For the purpose of the Incentive Regulations, the applicable regulatory institutions with the mandate to implement tax incentives include, the Ethiopian Investment Commission, the Ministry of Trade and Regional Integration, the Ministry of Mines, the Ministry of Revenues, regional states administrations, Addis Ababa and Dire Dawa city administrations and others as appropriate.

[124] *Id.*, art. 18 (4).

[125] *Id.*, art. 25.

[126] *Id.*, art. 23.

offices, regional governments, and other relevant organs.[127] Additionally, a system known as a "one-stop-shop" was instituted in 1996 that centralized various administrative services in one window at the EIC.[128] The one-window services aimed to ease regulatory controls at the entry-level, smoothen procedures and reduce the time to execute investment projects. This is a critical factor to ensure that any investment promotion activities are converted into real projects.

Under the new laws, the previous list of administrative functions that were delegated to the EIC under the one-stop-shop services scheme was significantly expanded to allow EIC to provide more services to investors. Examples include the expansion of EIC's mandate to facilitate Brownfield Investments[129] and the provision of visa services.[130] In addition, one-stop services at the EIC that previously stopped after an investor obtained its business license are now extended for the full cycle of the investment.[131] For those services that fall outside of the one-stop-shop scheme, such as obtaining land, loans, or utility services, the law obliges the EIC and the regional investment bureaus to establish help desks that will handle these requests expeditiously.[132] Furthermore, the new laws imposed a legal obligation on regional investment bureaus to provide one-stop-shop and help desk

[127] Investment Proclamation No. 769/2012, art. 28 (5).

[128] *Id.*, art. 30. Although the wording of this provision appears to limit the one-stop shop services to the "manufacturing" sector, in practice, the services were availed to all investments handled by the EIC. One-stop shop services include services such as document notarizations, registration and licensing of companies, granting construction permits, work permits, and investment permits.

[129] *Id.*, art. 12(3); Investment Proclamation No. 1180/2020, art. 2(1); Investment Regulation No. 474/2021, art. 11. Previously, the registration and permitting procedures for the acquisition of existing business by foreign investors was the mandate of the Ministry of Trade and Industry. EIC's mandate only extended to new and greenfield investments. Investment Proclamation No. 1180/2020, art. 2(1).

[130] Investment Proclamation No. 1180/2020, art. 23.

[131] Investment Proclamation No. 769/2012, art. 30 (2).

[132] Investment Regulation No. 474/2020, art. 18 (5).

services.[133] Previously, the decision to provide one-stop-shop services at regional levels was left to the discretion of the regional administration.[134]

Besides the establishment of the Council, EIC's role as the investment coordination unit of the Federal government is legally enhanced through various mandates. EIC is now required to jointly develop with regional administrations guidelines, and investment promotion activities, and facilitate pre- and post-investment services to resolve investment bottlenecks.[135] For this purpose, standing desks at the EIC representing the regions are required to be formed to jointly work on investment co-promotion, administrative coordination, and augment regions' participation in investment administration. Similarly, the law obligates the EIC to design joint investment promotion activities and strategies for the specialized sectors in collaboration with the federal agencies with delegated powers.[136] Other coordination responsibilities of the EIC include developing strategies jointly with the Ministry of Labour and Social Affairs, the Ministry of Trade and Industry, and the Immigration, Nationality and Vital Events Agency, to jointly address matters such as visas, employment of foreigners, skills, and technology transfer.[137]

Additionally, the new laws attempt to address one of the most intricate issues of investment implementation in Ethiopia, i.e., land allocation. Land-related issues are frequently cited as highly difficult to resolve.[138] Constitutionally,

[133] Investment Proclamation No. 1180/2020, art. 24 (2).
[134] Investment Proclamation No. 769/2012, art. 30 (10).
[135] Investment Proclamation No. 1180/2020, art. 50.
[136] *Id.*, art. 4(3).
[137] *Id.*, art. 22 (7), (8) and 23 (6).
[138] A survey carried out by the Investment Reform Taskforce, targeting 35 investors with investment in regional states of Ethiopia, identified the following common responses:
- the service in relation to the land provision is poor, not helpful or not good enough - especially in the face of resistant, unresponsive, or little motivated regional agencies.

land ownership is vested on the State and peoples of Ethiopia.[139] The Federal government retains legislative power over the conservation and utilization of land, whereas regional states are granted the powers to administer the land based on federal laws.[140] Consequently, land required for any investment project must pass through the land acquisition procedures of regional administrations, which often vary from region to region. EIC's role has been limited to assisting investors in acquiring land required for their investments, which has not always been successful.[141]

To address this issue, the new laws have introduced rules that obligate both EIC and regional administration organs. The new Investment Proclamation requires regional investment administration bodies to: a) identify and classify lands to be used for investment projects; b) organize the lands centrally under one regional state administration body; c) transfer information to the relevant investment organ; and, d) establish a transparent and predictable system for handling such land requests.[142] The EIC's role is elevated to ensuring that land allocation requests are facilitated and the regional organs are efficiently handling the requests. Furthermore, the law provides timelines within which such requests shall be handled prioritizing land requests for agricultural and manufacturing sectors (maximum of 60 days) and other sectors. (maximum of 90 days).[143] Such enhancement is expected to complement the Council's mandate which specifically includes resolving issues of land allocation. The

- EIC is involved in most procedures, writes support letters, follows up, but is often unable to translate the efforts into concrete results.
- EIC lacks political influence over other agencies.
- level of cooperation between the EIC and regional states is very low.
- Significant disconnect between EIC's investment promises and what actually exists on the ground.

[139] Constitution of the Federal Democratic Republic of Ethiopia, art. 40(3).

[140] *Id.*

[141] Investment Proclamation No. 769/2020, art. 30 (4) (a).

[142] Investment Proclamation No. 1180/2020, art. 51.

[143] *Id.*

various legal and institutional arrangements introduced under the new law aim to establish a nationally integrated mechanism for investment and introduce an improved level of regulatory symmetry.

4.1.6. Administrative Measures and Grievance Handling

4.1.6.1. Administrative Measures

The EIC is mandated to carry out various administrative functions to assist investors. Key among these are the registration and licensing of companies and the issuance, renewal, suspension, and revocation of investment permits. Previous laws provided for a general provision that authorized the EIC to issue and revoke investment permits. Clarity on the nature of violations, grounds for suspension or revocation, and timelines for adjudication and appeal mechanisms were not provided in the law, granting wide discretionary powers to the EIC. Under the new Investment Regulation, detailed rules are provided offering substantive rights and procedural safeguards that reduce administrative discretion. Previously non-existent rules on investment permit suspension and revocation are added to the new law.[144] These include clear provisions on what constitutes a violation and the extent necessary to justify a suspension, the term of any suspension, requirements to notify the investor of the reasons for the suspension, and an opportunity to remedy the violations.[145]

4.1.6.2. Grievance Hearing

Investor complaints or disputes of an administrative nature are natural consequences of investment projects. Modern investment laws typically incorporate clear rules on investor complaint handling and dispute resolution

[144] Investment Regulation No. 474/2020, art. 13.

[145] Investment Proclamation No. 1180/2020, art. 13 and Investment Regulation No. 474/2020, arts. 13 and 14.

mechanisms to manage investor expectations. Previously, the investment proclamation granted a broad right of complaints for investors to lodge to the EIC with a right of appeal to the Investment Board.[146] The law did not provide procedural details on the standards, scope, and types of complaints that could be submitted as well as timelines for a decision on the complaints.

The new investment laws have established robust mechanisms to address complaints filed with the EIC at three levels. First, complaints related to the decisions of the EIC may be escalated to the Investment Board. Through such a process, the new Proclamation entitles the investor to a "speedy, equitable and efficient" procedure.[147] Secondly, the new investment proclamation expands the scope of investor complaints that may be entertained by the EIC (with the right of appeal to the Board) to also include complaints against other executive bodies. This is a new entitlement that allows investors to file complaints to the EIC against the decisions of other federal government agencies having a "significant" impact on the investor's business. Here, the Investment Proclamation establishes a substantive right of complaint to the investor and clear procedural steps to follow. Thirdly, the new laws have introduced a new platform to handle grievances against regional investment administration bodies. Complaints involving "fundamental grievances" or 'significant misunderstandings" regarding the provision of pre-investment or post-investment services may be submitted to Council. Definitions of these terms and guidelines for interpretation are not provided in the law. However, the Board is obliged to enact a Directive that will determine the details of matters that are to be submitted to it and the Council, and the rendering of decisions and recommended solutions. Furthermore, the law obliges all

[146] Investment Proclamation No. 1180/2020, art. 32.
[147] *Id.*, art. 25 (2).

federal and regional bodies to comply with the decisions and recommended solutions of the Investment Council.[148]

In sum, the new and different layers of grievance handling procedures established under the new investment proclamation aim to harmonize investment administration across government bodies. While the EIC is the central regulatory agency for investment admission and administration, the decisions of sectoral agencies and regulatory bodies have an impact. As part of its 'after-care" service provision, such a centralized system will afford the EIC the mandate and forum to address investment complaints, regardless of their origin. To this end, the Proclamation imposes a duty on all executive organs to comply with the final decision of the Board and the Council.

Conclusion

This article attempted to examine the newly introduced investment regulatory regime in light of investment regulations of the recent past. It highlighted the key substantive, procedural and institutional rules introduced by the new investment laws and the policy rationale behind them. Relative to the previous investment laws, the reform of the investment regulatory regime may generally be considered progressive. However, the changes fall short of a comprehensive reform signaling a fundamental shift in policy or approach to investment regulation in Ethiopia. At best, the new laws may be characterized as a cautious exercise at liberalization, retaining many of the previous restrictions. In some instances, regressive legislations have since been passed derogating from the "open" policy to investment admission and the stated objectives of the new investment laws. There is a need for policy and legal consistency, and additional reforms for Ethiopia to remain a competitive and attractive investment destination. The Board will need to exercise its authority

[148] *Id.*, art. 47 (4).

to continuously review the investment regulations with a view to liberalizing more sectors and lift existing restrictions on investment entry (such as mandatory joint-investment and minimum capital requirements).

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RETHINKING LEGAL PROTECTIONS FOR INVESTMENTS AGAINST POLITICAL VIOLENCE IN ETHIOPIA

Hailemariam Belay[*]

Abstract

Amid Ethiopia's unfolding political volatility, investors face significant risks of investment losses due to political violence, including riots, violent protests, and similar incidents. This paper, through a doctrinal analysis of relevant domestic legislation, treaty provisions, arbitral decisions, and scholarly literature, evaluates the adequacy of legal protections for investments under domestic laws and Bilateral Investment Treaties (BITs). The study reveals a sharp disparity in legal protections afforded to foreign and domestic investors against the risks of political violence. Notably, foreign investors benefit from compensation mechanisms under BITs, including Full Protection and Security (FPS) clauses and War Clauses, whereas domestic investors lack comparable remedies, leading to discriminatory treatment despite facing identical risks. Of course, investors might seek remedies via tort claims against individual wrongdoers and, theoretically, through constitutional tort actions, although the latter have yet to receive practical recognition. However, these mechanisms are inadequate to address the multifaceted challenges of investment losses caused by political violence. Furthermore, some BITs provide extensive protections for foreign investments against such risks without exceptions, broadening Ethiopia's obligations during times of political uncertainty. To address this imbalance, the study recommends legal reforms, including enacting domestic investment laws with comprehensive compensation mechanisms and renegotiating BITs to

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incorporate emergency clauses. The article further highlights the importance of institutional reforms, including implementing preventive strategies, strengthening law enforcement capabilities, promoting political dialogue, and expanding investment insurance coverage to include political violence, all of which are essential for reducing investment risks and enhancing investor confidence.

Key-terms: Investment protection, Ethiopia, BITs, Political Violence, War Clause, Full Protection and Security.

Introduction

Investments inherently demand stability and falter in the face of violence and political turmoil. Developing countries, including Ethiopia, are susceptible to various forms of political risks, where economic and political instability often prevails. Political risks, i.e., political unrest, civil strife, and armed conflict are the main factors that affect investment in developing countries.[1] In Ethiopia, civil unrest and political volatility have been prominent since 2016, leading to loss of lives, property, and displacement. Further, between mid-2019 and 2020, 113 major incidents were recorded across different parts of the country.[2] To make matters worse, the war in the northern part of the country, along with other ethnically motivated incidents elsewhere, caused profound humanitarian suffering and extensive property destruction.[3] As a result of those incidents, many investments were wholly or

[1] Alex Braithwaite & Jeffrey Kucik, *The Costs of Domestic Political Unrest*, 58 *Int'l Stud. Q.* (2014) 489, p. 490.

[2] Hilary Matfess, *Change and Continuity in Protests and Political Violence in PM Abiy' s Ethiopia*, ACLED, (Oct. 13, 2018).

[3] Alonso Soto, & Selcuk Gokoluk, *Once-Thriving Economy in Trouble as Ethiopia's Abiy Cracks Down*, Bloomberg (June 18, 2021).

partially damaged.[4] This, in turn, prompts investors to pressure the government to compensate for such losses.[5]

Ethiopia, host to numerous foreign and domestic investments, has signed Bilateral Investment Treaties (BITs) with 35 countries[6] and is a signatory to the Multilateral Investment Guarantee Agency (MIGA).[7] These legal frameworks, supplementing or standing alone from domestic laws, aim to safeguard foreign investments against political risks. Political risk encompasses the potential for government actions, instability, and changes in policies which in turn adversely affect profitability of investments. Specifically, political violence risk, as a major component of political risk, involves the possibility of civil unrest, terrorism, or other forms of violence disrupting business operations.

To this end, BITs typically incorporate investment protection clauses designed to address violent situations, such as civil unrest, insurrection, armed conflict and war, by incorporating key standards including the

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[4] Fasika Tadesse, *Committee Arises to Assess Damaged Investments*, Addis Fortune, (Dec. 26, 2020), https://addisfortune.news/committee-arises-to-assess-damaged-investments/.

[5] Daniel Behailu Gebreamanuel, *Economic Commentary: FDI and Democracy in Ethiopia: Can FDI Push for a Well-Administered Government?*, Addis Standard (Oct. 15, 2021), https://addisstandard.com/economic-commentary-fdi-and-democracy-in-ethiopia-can-fdi-push-for-a-well-administered-government/. Ethiopia has paid over half a billion birr to support investors whose investment has been damaged wholly or partially in riots in the last 3 years. In the time of the affected 300 investments, only 200 of them were supported.

[6] UNCTAD, *International Investment Agreements Navigator*, https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia

[7] Ethiopia is one of the original members of the Multilateral Investment Guarantee Agency (MIGA), which, under Article 11(a)(iv) of the MIGA Convention, provides coverage for investment losses arising from war, civil disturbance, and similar political risks. See *Convention Establishing the Multilateral Investment Guarantee Agency* (MIGA) art. 11(a)(iv), Oct. 11, 1985, 1508 U.N.T.S. 99.

"Full Protection and Security" (FPS) Clause and "Compensation for Loss or War Clause". The first standard of treatment, the FSP clause, primarily imposes a due diligence obligation on the host State to safeguard investments against risks of political violence. In contrast, a war clause extends specific protection to investments against losses arising from wars and other armed conflicts. [8]

The relevance of these provisions is evident in the recent surge of investor arbitral claims seeking redress for investment damages resulting from the ongoing conflict and instability since 2017.[9] An illustrative case is the case of two Egyptian investors, who have served notice to Ethiopia, signaling their intention to pursue a treaty-based claim against the country for investment losses attributed to conflicts in the Tigray region.[10] This pending claim of $40 million, stemming from losses incurred during the civil war, acts as a significant precursor to future challenges, particularly the potential for an escalation of investor claims due to political instability.[11]

In this context, given Ethiopia's proactive efforts to attract foreign direct investment (FDI) by offering robust protections against conflict-related risks through BITs, it is both timely and relevant to examine the

[8] Noradele Radjai, Laura Halonen & Panagiotis A. Kyriakou, *An Analysis of the Compensation Regime Applicable to Claims Arising from Armed Conflicts Affecting Investments in MENA*, 3 *BCDR Int'l Arb. Rev.* 219, pp. 219–242 (2016).

[9] R.H. Khafaga & S.H. Albagoury, *Political Instability and Economic Growth in Ethiopia: An Empirical Analysis,* 5 J. Soc. & Pol. Sci. 20 (2022).

[10] Damien Charlotin, *Egyptian Investors Put Ethiopia on Notice of A Treaty-Based Dispute Following Civil War in Tigray*, Investment Arbitration Reporter, (Sept. 1, 2021), https://www.iareporter.com/articles/egyptian-investors-put-ethiopia-on-notice-of-a-treaty-based-dispute-following-civil-war-in-tigray/

[11] Toby Fisher, *Egyptian Investors Threaten Ethiopia over Civil War Disruption*, Global Arb. Rev. (2021), https://globalarbitrationreview.com/article/egyptian-investors-threaten-ethiopia-over-civil-war-disruption.

protection standards provided by Ethiopian BITs, focusing on key provisions such as FSP and war clauses, as well as potential defences Ethiopia might raise against related claims. Additionally, as domestic investments face similar risks, it is also essential to appraise the legal recourse available to domestic investors.

The primary objective of this article is to examine the legal protections available for foreign and domestic investments against political unrest. To achieve this, the article analyzes relevant provisions of BITs, other legal and policy documents, and pertinent literature on the subject. However, given the complexity and breadth of investment protection during political uncertainty, this paper does not aim to provide an exhaustive analysis from the perspective of international investment law. Instead, it seeks to highlight the issue and offer a glimpse on the challenges Ethiopia might face from foreign investors due to conflict-related investment losses, while also assessing the adequacy of national laws in compensating domestic investments for similar risk.

To do so, investment-specific laws such as the Investment Proclamation No. 1180/2020,[12] Investment Regulation No. 474/2020,[13] Industrial Parks Proclamation No. 886/2015,[14] Petroleum Operation Proclamation No. 678/2010[15] and Mining Operation Proclamation No.

[12] Investment Proclamation No. 1180/2020, *Federal Negarit Gazeta*, (2020). [Hereinafter, Proclamation No. 1180/2020].

[13] Investment Regulation No. 474/2020, *Federal Negarit Gazeta*, (2020). [Hereinafter, Regulation No. 474/2020].

[14] Industrial Parks Proclamation No. 886/2015, *Federal Negarit Gazeta*, (2015). [Hereinafter, Proclamation No. 886/2015].

[15] Mining Operations Proclamation No. 678/2010, *Federal Negarit Gazeta,* (2010). [Hereinafter, Proclamation No. 678/2010].

295/1986[16] are scrutinized. Furthermore, other laws which have relevance in addressing risks of political violence including the FDRE Constitution,[17] Directive No. 253/2021 issued to Provide Government Support for Investors Whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters,[18] the Civil Code,[19] the Criminal Code,[20] and the Criminal Procedure Code[21] are also examined.

The article is structured into four parts. In the first part, the impacts of political instability on Ethiopia's investment environment are covered. The second part provides a comprehensive overview of political risk and political violence within the investment context. Subsequently, the third part scrutinizes the protection afforded by the Ethiopian legal framework including BITs and domestic legislation, for investments against political violence risk. The fourth part thoroughly evaluates the effectiveness of domestic laws in comparison to BITs in protecting investments from risks related to conflicts. Lastly, the final part summarizes the article's key findings and provides the way forward.

[16] Petroleum Operation Proclamation of the Ethiopian provisional Military Government Proclamation No. 295/1986, *Negarit Gazeta*, (1986). [Hereinafter, Proclamation No. 295/1986].

[17] The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, (1994). [Hereinafter, FDRE Constitution].

[18] Directive to Provide Government Support for Investors Whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters No. 253/2021(Hereinafter, Directive No. 253/2021).

[19] Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960). [Hereinafter, the Civil Code).

[20] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, *Federal Negarit Gazeta,* (2004). [Hereinafter, the Criminal Code].

[21] Criminal Procedure Code of Ethiopia, Proclamation No. 185/961, *Negarit Gazeta* (1960), Art. 154 (1). [Hereinafter, the Criminal Procedure Code].

1. Ethiopia's Political Uncertainty and Its Impact on Investment

Once considered an island of stability in a tumultuous region, Ethiopia has faced a persistent trend of political uncertainty since November 2015.[22] This period of instability has resulted in recurrent bloodshed and the vandalizing and looting of both local and foreign investments. In specific instances, covering 2015 and 2017, a considerable number of investments were either partially or wholly disrupted, with 301 investments impacted in the Amhara and Oromia regions alone.[23] According to a study conducted by the Ethiopian Investment Commission (EIC), between 2014 and 2017, over 700 investments were damaged due to the recurrent violence that has engulfed the country.[24] Besides, despite the lack of accurate data on investment losses, the war in the northern part of the country has caused uncountable damage in the country. The political risk index also underscores the ongoing high risks of political violence in the country.[25]

Political instability poses a significant threat to the economic development of any country.[26] For instance, Yi Feng's analysis on the impact of politics on private investment in developing nations demonstrates the negative impact of political instability on private

[22] Hilary, *supra* note 2.

[23] Maya Misikir, *Loan Directive Emerges for Damaged Investments*, Addis Fortune (Dec. 12, 2020), https://addisfortune.news/loan-directive-emerges-for-damaged-investments/.

[24] Fasika Tadesse, *supra* note 4. Between 2014 and 2017, the government spent a total of over 800 million Birr to support for damaged investments through Development Bank of Ethiopia and Commercial Bank of Ethiopia.

[25] Willis Towers Watson, *Political Risk Index*, (spring 2022), https://www.wtwco.com/en-US/Insights/2022/06/political-risk-index-spring-2022.

[26] Jahangir Chawdhury, *Political Instability: A Major Obstacle to Economic Growth in Bangladesh* (2016) (thesis, Central University of Applied Science, Business Management)

investment.[27] Political instability also negatively affects investors' decisions to invest, leading to reduced investment in fixed capital assets, such as factories or land, as investors prefer to maintain their assets and portfolios in liquid and transferable forms.[28] This implies that the level of political uncertainty associated with an unstable political environment deters investment.[29] Moreover, the perception of political violence risk influences investors to favor labor-intensive, low-productivity industries over capital-intensive enterprises,[30] which in turn contributes for diminishing job opportunities and the share of investment in GDP. [31]

Despite the government's efforts in legislative revisions such as revising the six-decade old Commercial Code, enactment of new Investment Law and industry liberalization i.e., such as liberalization of the telecom industry by the issuance of a telecom license, localized unrest in several parts of the country, political tensions, and a devastating war in the northern part of the country and some part of Oromia region could negatively impact the investment climate and lower future FDI inflow.[32] Although the data is scant on the flow of domestic investment, FDI was adversely affected by instability in certain parts of the country, including regions with industrial parks.[33] Evidently, notwithstanding Ethiopia's peak FDI inflows, recorded at $4.14 billion in 2016, the

[27] Yi Feng, *Political Freedom, Political Instability, and Policy Uncertainty: A Study of Political Institutions and Private Investment in Developing Countries*, 45 *Int'l Stud. Q* (2001), p. 271.

[28] *Id.*, at 273.

[29] Alex Braithwaite & Jeffrey Kucik, *supra* note 1.

[30] See Feng, Yi, *supra* note 27, p. 274.

[31] *Id.*, p. 274.

[32] US Department of State, *Ethiopia: Investment Climate Statements*, (2021), https://www.state.gov/reports/2021-investment-climate-statements/ethiopia/.

[33] UNCTAD, *World Investment Report: International Production Beyond the Pandemic* 34 (2020).

country has experienced a decline in FDI since 2017, mainly due to domestic political unrest and a global economic slowdown.[34]

Political instability has also ramifications on the distribution of investments, leading to a concentration of financial resources in areas or regions deemed relatively safe.[35] This phenomenon was evident in Ethiopia. For instance, in the fiscal year 2017/18, out of 1,550 operational investments, approximately 87.9% (1,362 projects) were located in Addis Ababa, 4.3% (66 projects) in Tigray, 3% (46 projects) in Afar, 1% (15 projects) in Amhara, 0.1% (1 project) in Benshangul-Gumuz, and 1 project in SNNPR. In contrast, the National Bank Report for 2018 highlighted the absence of operational investment projects in Oromia, the epicenter of the instability.[36]

2. Political Risks and Risk of Political Violence in General

Within the realm of investment, risks can be broadly classified into two categories: commercial risks and political risks. Commercial risks pertain to inherent uncertainties associated with changes in the investment market, including factors such as new competitors, price fluctuations, or alterations affecting the financial context of the investment. On the other hand, non-commercial or political risks involve potential interventions by the host state in the investment landscape. Political risks impacting investments cover a wide range of

[34] National Graduate Institute for Policy Studies, *Ethiopia FDI Policy Report 2022*, p. 32 (2022). See also *Id.*, p. 72. Ethiopia's FDI inflows have fluctuated since 2014. Initially, inflows were USD 1,8 billion in 2014, increasing to USD 2.627 billion in 2015, and reaching a peak of USD 4.143 billion in 2016. Subsequently, there was a slight decrease to USD 4.017 billion in 2017, followed by further reductions to USD 3.310 billion in 2018 and USD 2.516 billion in 2019.

[35] Gary Krueger, *Violent Conflict and Foreign Direct Investment in Developing Economies: A Panel Data Analysis*, (2005), p. 3.

[36] National Bank of Ethiopia, *Annual Report 2017/18*, (2018), p. 102.

factors, including expropriation, government corruption, taxation, regulation, currency devaluation, trade tariffs, labor laws, or environmental regulations.[37] Furthermore, political risks also encompass political violence which contributes to physical harm to investments due to events such as civil unrest or riot, war, terrorism, or insurgency in the host state.[38]

Political violence, as one component of non-commercial risk, refers to acts of violence committed by both state and non-state actors for political purposes.[39] Usually, political violence, arises from a complex interplay of social, economic, and political factors, involves the use of force, coercion, or intimidation to achieve political objectives.[40] This type of violence often occurs within the context of political struggles, competing ideologies, or power struggles.[41] Physical violence, terrorism, civil unrest, riots, coups, and armed conflicts, manifests political violence.[42]

Here, it is crucial to differentiate political violence from social violence or ordinary crime.[43] Political violence contains organized group actions that explicitly or implicitly aim to defy or challenge governmental

[37] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford Univ. Press 2008), p. 196.

[38] Jason Webb Yackee, *Political Risk and International Investment Law*, 24 Duke J. Comp. & Int'l L. (2014), p. 494.

[39] Tim Sweijs, Nicholas Farnham & Hannes Rõõs, *The Many Faces of Political Violence: Volatility and Friction in the Age of Disintermediation,* HCSS StratMon Annual Report 2016/2017, (The Hague Ctr. for Strategic Studies 2017), p. 6.

[40] Zahid Latif et al., *FDI and 'Political' Violence in Pakistan's Telecommunications*, 36 Hum. Sys. Mgmt. (2017), p. 341.

[41] Belay, T. et al., *Peace & Security Report: Ethiopia Conflict Insight*, Institute for Peace and Security Studies, Addis Ababa University (2022), p. 1.

[42] Ekkart Zimmermann, *Theories of Political Violence: Definition, Conception, and Development*, in *The Wiley Handbook of Violent Extremism* (2017).

[43] See Perry Mars, *The Nature of Political Violence*, 24 Soc. & Econ. Stud. at 2 (1975). http://www.jstor.org/stable/27861557.

authority. In contrast, as Sean F. and Kristián H. contend, unlike political violence, social violence pertains to acts committed by individuals or groups with common occurrences being murder, homicide, and assaults, devoid of political motivation, or not intending to challenge governmental authority.[44]

In the current global business landscape, marked by intricate political environments including political violence and uncertainty, the concept of political violence emerges as a prominent topic.[45] In the context of investment, Hatice Erkekoglu and Zerrin Kilicarslan have identified political violence risks as a major critical factor that investors carefully evaluate when considering to invest in any country.[46] Similarly, Alex Braithwaite and Jeffrey Kucik have noted that political violence and instability significantly undermine investor confidence and choices.[47] This is why both investors and their home countries prioritize investment guarantee arrangements through investment treaties to mitigate such risks.[48]

This article specifically focuses on politically motivated acts of civil unrest in Ethiopia and the legal protection afforded to investment against such risks.[49]

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[44] Sean Fox & Kristián Hoelscher, *Political Order, Development and Social Violence*, 49 J. Peace Res. (2012), p. 433.

[45] Jason Webb Yackee, *supra* note 38, p. 479.

[46] Hatice Erkekoglu & Zerrin Kilicarslan, *Do Political Risks Affect the Foreign Direct Investment Inflows to Host Countries?*, 5 J. Bus. Econ. & Fin., (2016), p. 2.

[47] Alex Braithwaite & Jeffrey Kucik, *supra* note 1, p. 491.

[48] See Eamon Macdonald, *Bilateral Investment Treaties*, 1 St Andrews L.J. (2020), p. 32.

[49] To describe this context, terms such as unrest, instability, and conflict are used interchangeably throughout this article.

3. Ethiopian Legal Framework on Investment Protection against Political Violence Risks

A robust legal framework providing adequate protection for investments is crucial for a country's economic growth.[50] Recognizing the pivotal role of investments, countries extend guarantees and legal protection through investment treaties and domestic laws to both foreign and domestic investors. International Investment Agreements (IIAs), such as BITs, offer substantive standards of protection, including National Treatment (NT), Fair and Equitable Treatment (FET), Most-Favored-Nation Treatment (MFN), Full Protection and Security (FPS), Expropriation, and War Clause, to name a few, for foreign investments.[51] Furthermore, as part of the procedural framework, BITs usually include a dispute resolution mechanism that enables investors to bring claims against the host state in international arbitration.[52]

3.1. Ethiopia's BITs in Protecting Investments Against Political Violence Risks

As a prominent recipient of FDI in Africa, Ethiopia has strategically pursued investment treaties, such as BITs and multilateral agreements such as MIGA, to enhance its attractiveness to FDI. These treaties establish reciprocal agreements aimed at promoting and safeguarding foreign investments from political risks in the host State.[53] Ethiopian BITs incorporate several protective standards relevant to foreign

[50] C.M. Lakpini, *Political Risks and the Protection of Investors Under Nigerian Law*, p. 1,https://www.researchgate.net/publication/327339442_Political_Risks_and_Protection_of_Investors_under_Nigerian_Law.

[51] M. Sornarajah, *The International Law on Foreign Investment* 202 (3d ed. Cambridge Univ. Press 2010).

[52] *Id.*

[53] Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 Trade L. & Dev. (2010), p. 19.

investments, with specific clauses addressing instances of violence, including armed conflict. For example, the FPS clause, which provides general protection during violent events, and the Compensation for Losses or War Clause, which applies to wars and similar conflicts, are two common investment protection standards designed to safeguard investments against risks associated with political violence.

The above noted two common BITs clauses have been frequently invoked by investors against the host state to claim compensation for investment losses caused by conflict or armed conflict. In this regard, C. Schreuer notes that since the 1990s, a growing number of investors have invoked the standard of protection to file arbitration claims, alleging that host states failed to uphold their obligations to protect foreign investments.[54] Although FPS clauses do not directly address situations of armed conflict, investors have frequently invoked the clause to show host state's failure to diligently protect foreign investments from third-party violence within its territory.[55] Another frequently invoked provision is the War Clause, which addresses restitution for investment losses resulting from armed conflict. However, there is no consensus on their application and interpretation by scholars and arbitral tribunals.[56]

[54] *Asian Agricultural Products Ltd v Sri Lanka,* ICSID Case No ARB/87/3 (final Award) 30 I.L.M. 580 1991, cited in C. Schreuer, *Full Protection and Security*, 1 J. Int'l Disp. Settlement, (2010), p. 2. See also, *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 483.

[55] C. Schreuer, *Full Protection and Security,* 1 J. Int'l Disp. Settlement, (2010) p. 2. [Hereinafter, C. Schreuer, *Full Protection and Security*].

[56] *Id.*

3.1.1. Full Protection and Security (FPS) Clause

Although BITs lack a precise definition on the term "Full Protection and Security", the standard generally requires the host State to enforce its laws and provide police protection for foreign investments within its territories.[57] While providing the protection, various BITs used fickle terminologies, with some employing phrases such as 'full protection and security';[58] 'most constant protection and security';[59] 'full and adequate protection and security',[60] and the commonly used term, 'full protection and security'. However, these variations in terminology do not substantially alter the level of police protection a host State is required to provide.[61]

As provided above, the FPS clauses have been broadly utilized by investors pertaining to physical harm caused by state organs or by third parties owing to war, insurrection, and revolution. The ICSID case between *Asian Agricultural Products Ltd. (AAPL) V. Republic of Sri Lanka (AAPL v. Sri Lanka)* cases is notable for its early application of the FPS standard.[62] The case was initiated by the investor, who argued that Sri Lanka had breached its obligation to provide 'full protection and security' under article 2 of the UK-Sri Lanka BIT, thereby bearing international responsibility for the complete destruction of the farm

[57] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford Univ. Press 2008), p. 67.

[58] See Ethiopia–Denmark BIT (2001), art. 2(2); Ethiopia–Israel BIT (2003), art. 2(2); & Ethiopia–Russia BIT (1999), art. 2(2) each contain a similar clause.

[59] Belgium-Luxemburg-Ethiopia BIT (2006), art. 3 contains similar clause. However, it also contains a saving clause for the host state to take measures required to maintain public order.

[60] Ethiopia - Malaysia BIT (1998) also incorporates similar clause.

[61] C. Schreuer, *The Protection of Investments in Armed Conflicts*, in *Investment Law Within International Law* (Freya Baetens ed., Cambridge Univ. Press, 2013) p. 3. [Hereinafter, C. Schreuer, *The Protection of Investments in Armed Conflict].*

[62] C. Schreuer, *Full Protection and Security, supra* note 55.

due to its counter-insurgency operations against the Tamil rebels. In interpreting FPS clause, the tribunal clarified that:

> …the FPS standard does not establish *strict liability* and did not render Sri Lanka liable for any destruction of investments. It rather emphasized that Sri Lanka could only be held liable if the damage suffered were *attributable to the State* or *its agents* and *if the State failed to act with due diligence*.[63] (Emphasis added)

The tribunal's qualification of the FPS standard as not imposing strict liability was reiterated in the *Tecmed v Mexico* case. In the case, the Tribunal, citing the case law quoted above, emphasized that *"…the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it*".[64] Similarly, in other ICSID case between *AMT v. Zaire*, the tribunal ruled in favor of the claimant due to Zaire's failure to protect the property during riots, emphasizing the State's obligation of *vigilance*.[65] The Tribunal also disregarded the perpetrator's status, stating that "it made no difference whether the alleged acts were committed by a member of the Zairian armed forces or a member of the public because Zaire had the *obligation of vigilance*".[66]

Thus, from the arbitral tribunals' decisions, it is sound to contend that, the host State obligation under the FPS clause is not absolute,[67] but

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[63] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) (paras.45-53).

[64] *Tecnicas Medioambientales Tecmed S. A. v The United Mexican States*, Award, 29 May 2003, paras 175-181.

[65] *American Manufacturing & Trading, Inc. (ATM) v. Democratic Republic of the* Congo (ICSID Case No. ARB/93/1).

[66] *Id.*, para 6.05.

[67] C. Schreuer, *Full Protection and Security, supra* note 55, p. 19. For further discussion on its content and scope and its relation with armed conflicts and international

rather a reasonable *duty of vigilance* or *due care* to prevent harm to persons or property related to an investment. As reflected in the case laws, in examining the proper content of the FPS standard, arbitral tribunal often used both objective and subjective standards of *due diligence*.[68] While the objective standard demands that all states adhere to the same international minimum standard of due diligence, irrespective of their individual circumstances and capabilities, the subjective standard, conversely requires the tribunal to take into account a state's resources, capabilities, and specific circumstances when determining the required level of due diligence.[69]

Nevertheless, arbitral tribunals often consider the host State's capacity and available resources in assessing the requirement of *due diligence*, especially in situations involving civil strife or unexpected breakdowns in public order.[70] This means, when subjective test is employed by tribunal, a State is less likely to be held accountable for its failure to

humanitarian law, see, Ira Ryk-Lakhman, *Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security, in* European Yearbook of International Economic Law, pp. 260-279 (Springer, Katia Fanch Gomez et'al., ed., 2019). https://doi.org/10.1007/978-3-030-10746-8

[68] Markus Burgstaller & Giorgio Risso, *Due Diligence in International Investment Law*, 38 J. Int'l Arb., (2021), p. 697.

[69] Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 Syracuse J. Int'l L. & Com. (2015), p. 319.

[70] Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?* (Int'l Inst. for Sustainable Dev. 2011), pp. 1–13. FPS standard is applied to the exercise of the host state's police powers. See *Pantechniki S.A. Contractors & Engineers V. Republic of Albania*, ICSID Case No. Arb/07/21 (Greece/Albania BIT), Award (2009, pars. 71–84). In this case the tribunal emphasized that host state's level of development required consideration in determining FPS clause under BIT. Thus, given the "environment of desolation and lawlessness" in Albania at the time that the Claimant established its investment, it is unreasonable to expect a high standard of police protection".

provide protection and security during unexpected breakdowns in public order or disturbances of unprecedented scale and location.[71]

In general, the due diligence standard is an obligation of conduct rather than an obligation of result, as state might not be automatically responsible for all investment damage caused by its organ or third party within its territories.[72] This is because demonstrating the state's exercise of due diligence under the prevailing circumstances would shield it from liability for breaching the FPS standard. On the investors' side, successfully invoking FPS protection requires them to demonstrate specific failures by the host state to exercise *due diligence* in protecting investments or taking precautionary measures to prevent harm.

3.1.2. Compensation for Loss or War Clause

The War Clause is the other key provision often included in BITs designed to protect investments from losses caused by conflict-related events. Unlike the FPS clause, the War Clause introduces a result-oriented obligation specifically tailored to compensate for investment losses triggered by war, armed conflict, riots, or similar events in the host country.[73] The primary objective of the clause is to provide an additional guarantee for foreign investment in times of war and armed

[71] C. Schreuer, *Full Protection and Security*, *supra* note 55, p. 16.

[72] Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From?*, 7 Am. U. Bus. L. Rev. (2018), p. 95.

[73] Sébastien Manciaux, *The Full Protection and Security Standard in Investment Law: A Specific Obligation?*, in European Yearbook of International Economic Law, (Katia Fach Gómez et al. eds., 2019), p. 226. For further discussion on the interpretation of war clauses in investment treaties by investment tribunals, see Michail Risvas, *Non-Discrimination and the Protection of Foreign Investments in the Context of an Armed Conflict*, in European Yearbook of International Economic Law, (Katia Fach Gómez et al. eds., Springer 2019), p. 200. https://doi.org/10.1007/978-3-030-10746-8.

conflict.[74] However, it must be noted that the exact nature and scope of the protection afforded by War Clause depends on the type of war clause set out in the specific BIT.[75]

War clauses within BITs are generally classified into three types: *non-discrimination*, *extended* and *strict liability war clauses*, each type imposing distinct obligations on the host State.[76] The non-discrimination war clause, for instance, mandates equal treatment of investors regarding compensation or merely pledge non-discriminatory treatment for investments in post-conflict situations.[77] Therefore, it is the State's differential treatment of investors in compensating the losses that trigger the application of the war clause.[78]

Many BITs to which Ethiopia is a signatory include a non-discrimination war clause. An example is article 4(3) of the Ethiopia-Turkey BIT, which reads:

> Investors of either Party whose investments suffer losses in the territory of the other Party *owing to war, insurrection, civil disturbance or other similar events* shall be accorded by such other

[74] Facundo Pérez-Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, 32 ICSID Rev. – Foreign Investment L.J. (2017), p. 696. https://doi.org/10.1093/icsidreview/six010.

[75] S. Spears & M. F. Agius, *Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties*, in European Yearbook of International Economic Law, at 283 (Katia Fach Gómez et al. eds., Springer 2019) https://doi.org/10.1007/978-3-030-10746-8.

[76] N. Radjai, *et al*, *supra* note 8, pp. 219–242.

[77] C. Schreuer, *War and Peace in International Investment Law*, in European Yearbook of International Economic Law: Special Issue – International Investment Law and the Law of Armed Conflict, (K.F. Gómez, A. Gourgourinis & C. Titi eds., 2021), p. 6.

[78] *EDF International SA et al v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012), paras 1158–1159; *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 559, cited in *Id.*, p. 290.

> Party treatment *no less favorable than that accorded to its own investors* or to *investors of any third country*, *whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses*.[79] (Emphasis added)

This provision, while ensuring non-discriminatory treatment for compensation extended to nationals or third-country investors, does not establish an unequivocal obligation for the host state to indemnify investors against conflict-related losses.[80] Accordingly, from the perspective of investors, the non-discriminatory war clause offered little protection against investment losses caused by conflict. This is because, as Spears and Agius stated, the clause allows the State to avoid payment of compensation for investment losses by choosing not to compensate any investor.[81]

Extended War Clause is the other form of war clause incorporated in Ethiopian BITs. This type of war clause includes non-discriminatory clause but goes beyond and includes the obligation to compensate investors for losses resulting from the host State's military actions.[82] For instance, article 5 (2) of the Ethio-Kuwait BIT provides:

> *…. investment losses resulting from:*
>
> *a) requisitioning of their property by the forces or authorities of the latter Contracting Party, or b) destruction of their property by the forces or authorities of the latter Contracting Party which was not*

[79] Ethiopia's BIT with Algeria, Spain, Turkey, Netherlands, Denmark, China, Germen, Belgium, Egypt, India, Malaysia, Russia, Sudan, France, Libya, Tunisia, Yemen, Sweden, UAE, and Switzerland contains a similar clause.

[80] Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer L. Int'l, 2014).

[81] S. Spears & M. F. Agius, *supra* note 75, p. 293.

[82] N. Radjai, *et al*, *supra* note 8, p. 233.

> *caused in combat action or was not required by the necessity of the situation,* shall be accorded restitution or just and adequate compensation for the losses sustained during the period of the requisitioning or as a result of the destruction of the property.[83] (*Emphasis added*)

The provision delineates the conditions for restitution or compensation, requiring the investor to establish state attribution, that the harm did not occur during combat, and the absence of justification under military necessity for the claimed losses.[84] In contrast, the host state must demonstrate that the damage resulted from combat and was justified by military necessity to defend against liability for destruction that would otherwise require compensation.

Finally, the Strict Liability War Clause, although uncommon and not found in BITs to which Ethiopia is a party, constitutes a third category of war clauses incorporated into BITs. As its name suggests, this form of war clause imposes an unconditional and absolute obligation on the host State regardless of fault.[85] In terms of protection, arguably, it is a relatively strong standard with little vulnerability to state defense.

In a nutshell, these substantive rights, complemented by investors' procedural right to international arbitration for treaty violations,[86] afford foreign investors robust protection against political violence risks. Thus, considering the current conflicts within Ethiopia, a

[83] Ethiopia's BIT with Kuwait, Israel, UK, Austria, Finland, Qatar, South Africa, Brazil, Iran & Spain contains similar clause.

[84] Jorge E. Viñuales, *Defence Arguments in Investment Arbitration*, ICSID Rep. 9, p. 18 (2020). https://doi.org/10.1017/9781107447455.002.

[85] S. Spears & M. F. Agius, *supra* note 75, p. 296.

[86] Jason Webb Yackee, *supra* note 38, p. 491.

comprehensive understanding of available legal defenses is crucial for informing discussions on this subject.

3.1.3. Security Emergency Measure under Ethiopian BITs

States commonly incorporate emergency or exception clauses in investment treaties to exempt themselves from actions taken for public order or national security reasons. The security exception clause, often invoked to safeguard public order and national security, enable host states to implement security measures during extraordinary events that might otherwise violate treaty obligations.[87] In this regard, save BITs signed between 1994 and 2004, BITs signed afterward with Brazil,[88] Qatar,[89] United Arab Emirates,[90] United Kingdom,[91] and South Africa,[92] contain public policy exceptions. The incorporation of additional principles with an emphasis on public policy in recently signed BITs reflects an evolving approach.

For instance, article 13 of the Ethiopia-Brazil BITs states that:

> Nothing in this Agreement shall be construed: . . . to prevent a Party from adopting or maintaining *measures* aimed at *preserving its national security or public order* or… *maintenance of international peace and security* per the provisions of the United Nations Charter.[93] (Emphasis added)

[87] Caroline Henckels, *Investment Treaty Security Exceptions, Necessity and Self-Defense in the Context of Armed Conflict*, in European Yearbook of International Economic Law, (K.F. Gómez et al. eds., Springer 2019), p. 321.
[88] Ethiopia- Brazil BIT (2018).
[89] Ethiopia- Qatar BIT (2017).
[90] Ethiopia- United Arab Emirates BIT (2016).
[91] Ethiopia- United Kingdom BIT (2009).
[92] Ethiopia- South Africa BIT (2008).
[93] Ethiopia- Brazil BIT, art. 13.

Likewise, the Ethiopia-Qatar BIT,[94] Ethiopia-UAE BIT,[95] and Ethiopia-Finland BIT[96] provide a general exception clause, thus allowing exceptions related to public health, labor rights, environmental protection, and national security, aiming to strike a balance between investor protection and the host state's right to regulate.

The security exception clause incorporated in Ethiopian BITs are formulated in varied ways. The first category of security exception clause is called *self-judging* clause,[97] which grants the country considerable autonomy in identifying measures that qualify as a security measure. For instance, article 13 of Ethio-Qatar BIT incorporated a *self-judging* clause as it uses the term "…may take actions that it *deems necessary* for the protection of its national security". The phrase '*as it deems necessary'* grants the host State certain margin of discretion to decide when there is a threat to national security and how to react to it. This in turn limits arbitral tribunals from reviewing the measure taken by the host state to avert the threat.[98] Of course, the clause does not have the effect of divesting a tribunal of jurisdiction, as the tribunal still required to review whether the state invoked the clause in good faith, to prevent states from abusing such provision.

Non-self-judging security exception clause is the other category incorporated in Ethiopian BITs. These clauses are '*non-self-judging*' because the determination of what constitutes a threat to national

[94] Ethiopia - Qatar BIT, art. 13.
[95] Ethiopia - UAE BIT, art. 19 (4).
[96] Ethiopia - Finland BIT, art. 14.
[97] C. Schreuer, *War and Peace in International Investment Law, supra* note 77, p. 11.
[98] UNCTAD, *The Protection of National Security in IIAs*, (2009), p. 39. Nonetheless, it must be noted that the clause does not provide a complete shield from judicial scrutiny, and States remain subject to the general obligation of to carry out its commitments in good faith as per Art. 26 of the Vienna Convention on the Law of Treaties.

security is not left solely to the state's discretion but is subject to objective review by arbitral tribunal. This type of clause is reflected in Ethio-Finland and Ethio-Brazil BITs, as both BITs omitted the term "*it considers necessary*", rather used the term "…*adopting or maintaining measures aimed*",[99] "…*taking any action necessary*…" aimed at preserving its national security or public order…."[100] Accordingly, unlike *self-judging* clauses, *non-self-judging* security clause offers discretion to the arbitral tribunal to determine the necessity or otherwise of the State's measures,[101] thus, makes measures taken by the host-State under the scrutiny of the arbitral tribunal.[102]

Generally, successfully invoking security emergency measures clauses may exempt Ethiopia from complying with substantive BIT standards, such as Full Protection and Security (FPS) and War Clauses, during violent emergency situations.[103] Nonetheless, it is important to note that a substantial portion of Ethiopian BITs lack security emergency measures clause that could potentially exempt the country from BITs-based claims in violent situations. This necessitates us to prompt the question of whether Ethiopia, in the absence of a security clause in a

[99] Ethiopia-Finland BIT, art. 14.

[100] Ethiopia-Brazil BIT, art. 13. Sub art. 2 of the same provision also makes measures taken for national security or international obligations non-arbitrable, barring investors from using the treaty to claim compensation. This clause would normally oust the tribunal jurisdiction over any claims resulting from the adoption of such security measures.

[101] Catherine H. Gibson, *Beyond Self-Judgment: Exceptions Clauses in U.S. BITs*, 38 Fordham Int'l L.J. (2015), p. 27.

[102] C. Schreuer, *supra* note 77, *War and Peace in International Investment Law*, p. 17.

[103] Ofilio Mayorga, *Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations*, HPCR Pol'y Brief, (Aug. 15, 2013), p. 8. He further alluded that the determination of what is necessary for the maintenance of public order or the protection of security interests in case of war clause needs reference to the law of armed conflict.

BIT, could still have other avenues that exempt the country from treaty claims owing to conflict-related investment damage.

Addressing this issue necessitate examining the general jurisprudence of international law. In this context, Ethiopia could invoke the general defence of *'necessity and force majeure'* under customary international law, which precludes state responsibility for wrongful acts, to defend against treaty claims arising from conflict-related investment losses.[104] However, invoking necessity and *force majeure* as a defence against investment losses caused by violence under the law of state responsibility is subject to significant limitations, as the host state facing a treaty claim must meet a stringent requirements.[105]

Notably, *necessity* and *force majeure* may only be invoked during periods when a state of necessity exists, and the intervening event is unforeseeable. This requirement sets a high threshold, even during periods of relative peace and stability, further limiting the applicability of these defences.[106] Consequently, Ethiopia's attempts to invoke such defenses, arguably, may not consistently provide a reliable safeguard against potential liabilities stemming from BIT claims.[107]

3.2. Investment Protection under MIGA

As has been discussed, BITs offer various standards of protection for foreign investors. However, these measures fall short of fully

[104] C. Schreuer, *supra* note 77, *War and Peace in International Investment Law*, p. 18.

[105] Jure Zrilič, *Armed Conflict as Force Majeure in International Investment Law*, 16 Manchester J. Int'l Econ. L. (2019), p. 28.

[106] A. M. Daza-Clark & D. Behn, *Between War and Peace: Intermittent Armed Conflict and Investment Arbitration*, in European Yearbook of International Economic Law 44, (K.F. Gómez et al. eds., Springer 2019), p. 62.

[107] *Id.*

safeguarding investor interests, as host states may still take adversarial actions against foreign investors.[108] MIGA, as supplementary guarantee scheme, has become a *de facto* requirement for investors to consider investing, irrespective of the presence of other investment treaty.[109] In fact, BITs protection and MIGA standards are mutually inclusive. This is because the substantive protections offered through BITs supplements MIGA by defining the incidence of risks, or injuries, while the insurance scheme under MIGA provides a mechanism for indemnifying those injured, in accordance with the substantive law.[110]

In lieu of BITs, Ethiopia also offered investment protection through the MIGA since 1991. MIGA is established with the aim of providing foreign investors with financial guarantees, and risk mitigation solutions for non-commercial risks in developing countries.[111] MIGA, operating as a multilateral treaty, provides coverage for four principal categories of non-commercial or political risks: the risk of currency inconvertibility, expropriation, breach of contract, and the impact of war or civil disturbance.[112] Specifically, article 11(a)(iv) of the Convention is relevant for this discussion, as it is designed to cover events arising from political violence, such as revolutions, insurrections, *coups d'état*, and similar political upheavals, which are

[108] T. Modibo Ocran, *Book Review — Multilateral Investment Guarantee Agency and Foreign Investment by Ibrahim F.I. Shihata*, 13 N.C. J. Int'l L. (1988), p. 547.

[109] *Id.*

[110] Leigh P. Hollywood, *MIGA: Long Term Political Risk Insurance for Investments in Developing Countries*, Geneva Papers on Risk & Ins. Issues & Prac., (1992), p. 257.

[111] Comeaux, Paul E., and N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance*, 15 N.Y.L. Sch. J. Int'l & Comp. L. (1994), p. 40.

[112] Convention Establishing the Multilateral Investment Guarantee Agency, art. 11, Oct. 11, 1985, 1508 U.N.T.S. 99. [hereinafter MIGA Convention].

typically beyond the host government's control.[113] However, while this provision excludes acts of terrorism and similar events, the MIGA Board could extend the provision to include it as per Article 11 (d) of the Convention.[114]

Moreover, MIGA coverage is not available to all investors and investments. Instead, only investors and investments that meet the eligibility requirements under Articles 11 and 12 of the Convention are covered by the MIGA scheme. Thus, to qualify for the insurance scheme, for a natural person, he/she must be a national of member states other than the host state,[115] while a juridical person, must be incorporated and have its principal place of business in a member state other than the host state, or the majority of the capital must be owned by a member state or its national, excluding the host state or its nationals.[116] Furthermore, state-owned corporations (by member state or host state) engaged in commercial activities are also eligible for the coverage.[117]

Besides, despite MIGA's primary focus on safeguarding FDI, arguably, there are avenues in which domestic private investments and nationals of host state could be covered by the MIGA. The first scenario arises when, as per article 2(5) of the Investment Proclamation, foreign nationals or enterprises incorporated abroad are classified as 'domestic investors,' thereby granting them the same legal treatment as local

[113] Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency 9 (1985) [hereinafter MIGA Commentary].

[114] *Id.* Save the risk of devaluation or depreciation of currency, by special majority, the Board may extend its coverage to specific non-commercial risks, such as terrorisms and other risks than those mentioned above.

[115] MIGA Convention, *supra* note 112, art 12.

[116] *Id.*

[117] *Id.*

investors under applicable laws or treaties.[118] In this regard, even if they are considered as domestic investor, if their home country is a member, they would be covered by the MIGA insurance scheme.

Of course, Ethiopian nationals investing in Ethiopia are *prima facie* excluded from MIGA's insurance scheme. Nevertheless, this exclusion is not absolute. This is because, article 13(c) of the Convention provides an exception that allows MIGA to extend eligibility to Ethiopian nationals or enterprises incorporated in Ethiopia, or those with the majority of capital owned by Ethiopian nationals, provided they involve the repatriation of assets from abroad, receive Board of Directors approval by a special majority vote, and the funds originate from outside Ethiopia with government approval.[119]

This exception is a tool that can be particularly valuable for Ethiopia in its efforts to mobilize additional investment resources and promote and safeguard the repatriation of capital held by its nationals living abroad. Besides, MIGA also encourages and supports domestic investment by extending its eligibility and indemnifying foreign nationals from MIGA member states who are granted domestic investor status, even if their investment does not strictly qualify as cross-border or foreign direct investment.[120]

3.3. Investment Protection against Political Violence Risk under Domestic Laws

The protection and promotion of investment in Ethiopia are significantly influenced by both investment-specific and general

[118] Proclamation No. 1180/2020, *supra* note 12, art 2 (5).
[119] MIGA Convention, *supra* note 112, art 13.
[120] *Id.*

domestic laws. These laws can be categorized into two groups: those specifically tailored for investment purposes and those broader regulations applicable across various sectors. This section, therefore, focuses on different domestic legislation in the protection of investment against political violence risks.

3.3.1. Ethiopian Investment Laws

The Investment Proclamation No. 1180/2020 and Regulations No. 474/2020, serve as the primary legislation governing investments, with the exception of those in the mining, exploration, and development of minerals and petroleum sectors.[121] Other industry-specific laws, such as the Industrial Parks Proclamation No. 886/2015, Mining Operation Proclamation No. 816/2013, and Petroleum Operation Proclamation No. 295/1986, regulate investments in specific sectors. These laws aim to promote, facilitate, and safeguard investments in the country, addressing aspects of incentives, support mechanisms, and investor rights. Given the complexity of these issues, this section does not comprehensively address investment incentives, promotion, or the full spectrum of investor rights. Instead, it focuses on providing an objective analysis of the compensability of investment losses resulting from political instability under domestic investment laws.

The Investment Proclamation No. 1180/2020 explicitly guarantees and protects investments against politically motivated risks such as expropriation, and expatriation of funds. The standards of protection offered under these provisions are limited to market value compensation in case of expropriation for both domestic and foreign investor.[122] Even the right to repatriate funds in convertible foreign

[121] See Proclamation No. 1180/2020, *supra* note 12, art. 3.
[122] *Id.*, art. 19.

currency at the prevailing exchange rate applies exclusively to foreign investors.[123] Aside from this, the Investment Proclamation No. 1180/2020 is silent on safeguarding investments from risks associated with political unrest such as war, riots, insurrection or similar crises.[124]

Comparatively, the Industrial Parks Proclamation No. 886/2015 includes more comprehensive investor rights including national treatment (NT),[125] market value compensation for expropriation,[126] and remittance of funds.[127] Yet, this Proclamation, like others, does not extend protection to investments against political violence risks such as war, civil disturbance and other political upheaval.

The petroleum exploration and mining sectors are the major areas of investment in which domestic and foreign investors are reportedly engaging. The Mining Operation Proclamation and Petroleum Operation Proclamation govern investments made in Petroleum and Mining sectors, respectively. Again, the Mining Operation Proclamation No, 816/2013 and Petroleum Operation Proclamation No. 295/1986, focusing on their respective sectors, also lack provisions addressing protection of investment against political violence risks or similar risks.

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[123] *Id*, art. 20. It must be noted that the remittance of fund in convertible currency is granted only for foreign investors.

[124] Desalegn Beyene, *The Need of Rule for Domestic Investors Compensation/Guarantee against Political Risks: The Case of Political Violence*, (LLM thesis, A.A. University) (2020).

[125] Proclamation, No. 886/2015, *supra* notes 14, under art. 19, provides about foreign investors 'national treatment'. This clause makes the Proclamation unique, unlike the other laws.

[126] *Id.*, art. 20.

[127] *Id.*, art. 21.

In a nutshell, domestic investment laws in Ethiopia do not explicitly offer legal protection to investors against political violence risks, i.e., riots, wars, insurrection, or similar events. This gap in legal protection, arguably, could deter domestic investment, as investors may perceive a higher risk associated with political instability.

3.3.2. General Laws

Beyond investment-specific laws, general legislation, depending on their relevance, also plays a key role in regulating, promoting, and protecting investments in Ethiopia. More specifically, Directive No. 253/2021 issued to Provide Government Support for Investors whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters[128] is particularly relevant.

The purpose of the Directive is to support investors impacted by natural and man-made disasters.[129] To this end, article 3(1) of the Directive defines natural disaster as a 'disaster that has occurred on the property of investors and businesses due to *unprecedented flood* that have not been experienced by the appropriate government body for many years'.[130] However, while listing what constitutes natural disaster, the Directive limited it to unprecedented flood, omitting other types of disasters, like earthquakes or fires.

The Directive also covered investment losses owing to man-made disasters. The Directive defined a 'man-made disaster' as follows:

[128] Directive No. 253/2021, *supra* note 18.
[129] Directive No. 253/2021, *supra* note 18, art. 4.
[130] *Id.*, art. 3 (1). (Author's translation).

> **ሰው ሠራሽ አደጋ ማለት በአገራችን የተለያዩ ክፍሎች በሚፈጠር ያለመረጋጋት ምክንያት በንግድ እና ኢንቨስትመንት ሥራ ላይ በተሠማሩ ባለሀብቶች ንብረት ላይ የደረሰ አደጋ ነው።** [131]

Roughly translated, this reads:

> *Man-made disaster refers to damage caused to the property of investors engaged in trade and investment activities due to instability in various parts of the country.* (Author's translation)

This provision plays a key role in supporting investors engaged in trade and investment activities, whose investment or property was damaged or destroyed due to political uncertainties in various parts of the country. Of course, the Directive did not mention political violence or of political uncertainty in its definition. However, given the political context prevailing when the Directive was issued, it is reasonable to conclude that man-made disasters stemming from political instability include riots, civil unrest, mob violence, arson, or armed conflicts in various parts of the country. Thus, article 3 (2) of the Directive, at least by definition, resembles a war clause in which it attempted to cover investment damage caused by political uncertainty such as war, armed conflict, instruction, riot, etc.

Coming to the support mechanism, the Directive provides non-cash support, including tax relief, duty-free imports, exemptions from Value Added Tax (VAT) or Turnover Tax arrears, and access to domestic loan facilitation, for those investors eligible to the support.[132] For example, income tax relief was provided by allowing the carry-forward of income tax losses incurred during the event for three consecutive years.[133] It is

[131] *Id.*, art. 3(2).
[132] *Id.*, art. 6.
[133] *Id.*, art. 9.

important to note that the carry-forward of loss under the Directive was granted in addition to what is provided in the tax law.[134] The type of loss allowed to be carried-forward and deducted under the Directive was a loss to investment generally, called a business asset, as a result of natural or man-made disasters.

In other jurisdiction, this type of loss carry-forward is called causality loss.[135] Causality losses are special provisions that allow businesses and individuals to claim deductions specifically for losses that arise from extraordinary and unexpected events. Yet, causality loss rule is not recognized under the Ethiopian tax law, as the basic principle of deductibility under the income tax laws only allows deductions for only business losses incurred to derive, maintain, and secure the business income.[136] However, at least in terms of support, the Directive had offered an additional opportunity for the investor to carry-forward the loss incurred as a result of instability or conflict.

In addition to the income tax measures, the Directive also exempts the affected investor from any taxes and duties levied on imported goods, vehicles, and goods to replace the damaged property.[137] Exemption from VAT and TOT arrears, which was required for tax purposes before the damage and had not been paid to the tax authority, was also

[134] Federal Income Tax Proclamation No. 979/2016, *Federal Negarit Gazzeta*, (2016), art. 26 (4). See also Federal Income Tax Regulation No.410 /2017, *Federal Negarit Gazzeta*, (2017), art. 42. The loss carry-forward rule under tax law is a scheme whereby a taxpayer is allowed to deduct the loss of one tax year from the income of subsequent years.

[135] Mike Enright, *Casualty Loss Rules Differ for Personal and Business Property*, Wolters Kluwer (2021). https://www.wolterskluwer.com/en/expert-insights/casualty-loss-rules-differ-for-personal-and-business-property.

[136] See Proclamation No. 979/2016, *supra* note 134, art. 22. Contrary to this, some countries such as US, Kenya, South Africa to mention a few, designed casualty loss provisions to provide additional tax relief for significant, unexpected losses, beyond the regular deductions available for ordinary business expenses.

[137] See Directive No. 253/2021, *supra* note 18, art. 7.

included.[138] Aside from support in the form of taxation, the Directive authorized the National Bank of Ethiopia (NBE) to arrange loans for investors to replace their assets or to defer servicing of loans acquired for the investment.[139]

However, although the Directive broadly resembles a war clause under BITs in addressing investment losses caused by political violence, the absence of provisions for monetary compensation, arguably, represents a significant drawback.[140] This omission arguably diminishes its efficacy as a protective measure, as it fails to provide investors with a clear and immediate avenue for financial redress.

Besides the Directive, various legislative stipulations exist to protect private property and, by extension, investments.[141] For instance, the FDRE Constitution, under articles 40(1) and 40(2), establishes a general framework for protecting property rights by limiting government interference to cases of public interest as prescribed by law, and mandates compensation solely for the expropriation of private property[142] In doing so, the Constitution imposes a dual obligation on the government to protect individuals' property rights from both state interference and violations by private entities. The Constitution also explicitly allows property owners to seek compensation through the

[138] *Id.*, art. 8.
[139] *Id.*, art. 9.
[140] *Id.*
[141] See also Muradu Abdo, *Legislative Protection of Property Rights in Ethiopia: An Overview*, 7 Mizan L. Rev. (2013), p. 168.
[142] FDRE Constitution, *supra* note 17, art. 40 (1) & (2).

constitutional property clause for any expropriation of private property.[143]

Nevertheless, although the Constitution establishes fundamental property rights, it lacks explicit provisions requiring compensation for damages resulting from political violence. Due to the broad and general nature of constitutional provisions, the Constitution is unlikely to offer granular redress for particular property rights violation owing to political violence. This gap necessitates recourse to supplementary legislation, including the Criminal Code, the Civil Code, and the Civil Procedure Code. These laws collectively provide mechanisms for redress through civil and criminal liability for property rights violations by third parties or state actors.[144]

This legal framework establishes a dual remedies scheme, encompassing both private and public mechanisms for compensation. Under the private scheme, victims of the crime may seek restitution directly from individuals or groups who were involved in the criminal acts.[145] In contrast, the public scheme ensures state accountability by holding the government responsible for damage caused by its direct actions or

[143] Bram Akkermans, *A Comparative Overview of European, US and South African Constitutional Property Law*, 7 EUR. PROP. L.J. (2018), p. 108. https://doi.org/10.1515/eplj-2018-0002.

[144] In contexts where strong legal protections are lacking, political risk insurance commonly serves to mitigate such risks. In Ethiopia, where political instability has significantly disrupted businesses and investments, especially affecting those without insurance, obtaining political risk coverage that includes political violence can help restore investor and business confidence. In response to these challenges, Nyala and United insurance companies pioneered the introduction of political violence and terrorism insurance policies in 2017. See Samson Brehane, *Insurance Firms Warned of Bites from Political Violence*, Addis Fortune, (2021), vol. 22, no. 1100. Insurance Firms Warned of Bites from Political Violence (addisfortune.news)

[145] Silesh Abye, *Compensation of Crime Victims in Ethiopia: Lessons Drawn from the Experience of Selected Countries,* (LL.M. thesis, Bahir Dar Univ. 2021) (unpublished). P. 24-30.

failure to implement adequate protective measures to safeguard property during unrest, thereby contributing to losses. The following discussion explores the mechanisms through which investors can seek restitution for their losses.

A. Vandalizing Property/ Investment as a Crime

The deliberate destruction of individual's property or investment constitutes a criminal offense under the Ethiopian Criminal Code, and is punishable by simple imprisonment upon the victim's complaint.[146] The punishment is subject to aggravation when it involves significant damage; holds substantial value to the public; is committed with the intent to coerce government action or inaction; or poses a threat to public safety; particularly if it involves explosions, fire, or similar hazards.[147] These provisions ensure that individuals or groups causing damage to property, including investments, are subject to penalties as defined by the Criminal Code.

It is important to note that investors and property owners seek not only to hold perpetrators accountable but also to secure financial compensation for the recovery or replacement of their damaged assets. To this end, the Criminal Code allows a victim of such acts to institute a civil claim for compensation for the damaged property/investment or destruction thereof caused by the criminal offense.[148] This offers the

[146] Criminal Code, *supra* note 20, art. 689-691.

[147] *Id.*, art. 689-691.

[148] *Id.* Art. 101 "Where a crime has caused *considerable damage* to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered *to make good the damage or to make restitution or to pay damages by way of compensation*." (Emphasis added).

victim the right to institute a separate compensation claim for the damage caused to investment/property by the offenders.

Furthermore, article 154 of the Criminal Procedure Code also imposes an obligation on offenders to make restitution, such as the return of the property or payment for the harm or loss suffered, and reimbursement of expenses incurred as a result of the victimization.[149] Thus, while the victim may need to seek public enforcement through criminal law, the provision bestows property owners the right to pursue tort claims, as the Civil Code makes individuals held civilly liable for the harm caused by their own criminal acts.[150]

This remedy is a private law remedy. The victim may seek compensation through civil proceedings which operates independently of criminal proceedings or claim damages in connection with criminal proceedings from individuals who directly took part in the violence,[151] those who planned or incited the mob,[152] or, in certain cases, groups or associations with proven direct involvement in the violent act.[153] This tortious civil liability, whether pursued independently or alongside criminal proceedings, serves not only to punish wrongdoing but also to restore the injured party to their original position through appropriate compensation. However, identifying perpetrators in cases of mob violence, perpetrators disappearance, or lack of financial capacity might affect the effectiveness of such remedies.

[149] See Criminal Procedure Code, *supra* note 21, art. 154.
[150] See the Civil Code, *supra* note 19, art. 2027 cum art. 2054.
[151] See Criminal Code, *supra* note 20, art. 32.
[152] *Id.* art. 36
[153] *Id.* art. 34.

Thus, a framework that mandates the State to intervene and directly compensate victims, who often receive little to no compensation through private schemes, is essential.

B. Investment Damage as Constitutional Tort

Taking investment damage as a constitutional tort is the other domestic legal avenue for investors. A constitutional tort can be defined as a civil wrong committed by governmental bodies or officials that violate constitutionally protected rights, for which monetary compensation may be claimed.[154] It also serves as a legal mechanism in which it allows individuals to invoke the Constitutional provisions directly as the basis for remedying harm caused by state action.[155] In doing so, it provides a pathway for holding public officials accountable for injuries resulting from breaches of constitutional protections.[156]

Although the concept of constitutional tort is not recognized in Ethiopia, this legal avenue, operating under the public scheme, could enable investors to seek compensation from the government for its failure to protect investments during conflicts or civil unrest, potentially qualifying as a constitutional tort.[157] Using constitutional tort as a basis for seeking compensation for investment losses due to conflicts, requires investors to prove government's affirmative duty to protect investments, beyond its mere negative duty to refrain from interference. This affirmative duty entails exercising due diligence in anticipating,

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[154] Noah Smith-Drelich, The Constitutional Tort System, 96 Ind. L.J. (2021), p. 579. https://www.repository.law.indiana.edu/ilj/vol96/iss2/6.

[155] *Id.*

[156] *Id.*

[157] Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J. L. REFORM (1982), p. 1. https://repository.law.umich.edu/mjlr/vol16/iss1/2.

preventing, and responding to foreseeable harm, notably harm arising from violence or instability that threatens private property.

Constitutional tort claims often hinge on the individual's or investor's ability to establish government's affirmative duty to act to prevent or mitigate the harm suffered by the investor. In Ethiopian context, this affirmative duty to protect could stem from three interrelated legal frameworks. Firstly, the constitutional guarantee of the right to private property under article 40 (1) implies not only a duty to abstain but also a positive obligation on the State to protect such rights from unlawful interference, including harm caused by non-state actors. Thus, failure to take preventive or protective measures in the face of known threats may amount to a constitutional violation.

Secondly, through Ethiopia's ratification of international and regional human rights instruments that protect private property from arbitrary interference, there is a compelling basis for establishing affirmative duties on the government to exercise due diligence in safeguarding individuals' investments from physical harm. Article 17 of the UDHR and article 14 of the ACHPR are often interpreted widely, which in turn impose due diligence obligations and require States to take proactive measures to prevent foreseeable harm by third parties.[158]

Thirdly, the granting of an investment permit by the government also establishes a reciprocal legal relationship between the government and the investor, whereby the State assumes responsibility to provide a secure and enabling environment for the investment, and the investor undertakes to contribute to the national economy through taxes,

[158] Björnstjern Baade, *Due Diligence and the Duty to Protect Human Rights*, in Due Diligence in the International Legal Order 36 (Heike Krieger, Anne Peters & Leonhard Kreuzer eds., 2020), https://doi.org/10.1093/oso/9780198869900.003.0006.

compliance with domestic laws, and corporate social responsibility. Thus, where the government possesses actual or constructive knowledge of foreseeable risks, such as conflict-related violence, and fails to take reasonable action, it may incur indirect liability for the damaged investment.[159]

Overall, these legal frameworks establish a due diligence obligation on the part of the State. Thus, considering government's responsibility to protect investments from conflict-related harm coupled with its awareness of the associated risks, arguably establishes a special relationship between the government and third-party wrongdoers. Once this special relationship is established, arguably, it would be easy to prove government's affirmative duty to take reasonable steps to prevent harm to investments, and its failure to do so may give rise to constitutional tort liability for breaching constitutional protections.

Before concluding this discussion, it is worth highlighting the experiences of other countries in mitigating conflict-related investment losses. Several countries have implemented "riot compensation schemes" to address property losses resulting from riots. For instance, in the United Kingdom, the Riot Act of 1886 establishes a statutory fund administered by local authorities through whom victims can recover damages for property destroyed or damaged during riots.[160] The Act imposes a strict liability obligation on police forces to compensate property owners for losses resulting from communal violence or

[159] Office of the High Comm'r for Hum. Rts., *Protection and Redress for Victims of Crime and Human Rights Violations*, in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (2003), p. 751. https://www.un.org/ruleoflaw/files/training9chapter15en.pdf.

[160] Jonathan Morgan, *Strict Liability for Police Nonfeasance? The Kinghan Report on the Riot (Damages) Act 1886*, 77 Mod. L. Rev. (2014), p. 377. https://doi.org/10.1111/1468-2230.12073.

rioting, regardless of fault.[161] However, if the county or municipal corporation can prove that it used reasonable diligence to prevent or suppress the riot, the municipality would be immune from the obligation.

While Ethiopia does not have such sort of separate laws that directly impose obligation to compensate for property damage owing to civil disturbances, article 2130 of the Civil Code can be used to bear vicarious liability on the State for the wrongful acts of the public servant,[162] provided that the public servant acted "within the scope of such service or supervision".[163] Consequently, property damage or investment losses stemming from the actions or inaction of a public official falls under the purview of vicarious liability, thus enabling victims to seek compensation directly from the State.[164]

[161] Michael Melusky, *Maryland's Riot Act: Subrogation Potential for Property Damages Occurring During Riots*, Subrogation & Recovery L. Blog (Aug. 24, 2015).

[162] A public servant refers to any individual who, whether on a temporary or permanent basis, performs functions through employment, appointment, assignment, or election to a public office or a public enterprise. This encompasses members of the police, defense forces, municipal authorities, and similar institutions. These entities carry a positive obligation to protect individuals and prevent foreseeable harm, particularly where such risks arise from violence, negligence, or unlawful acts. Their roles are integral to the State's duty to uphold public order and ensure the security and rights of citizens.

[163] See Civil Code, *supra* note 19, art. 2035.

[164] Stewart E. Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. Pa. L. Rev. (2012), p. 2130. See also Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss*, 23 San Diego L. Rev. (1986), p. 79. https://digital.sandiego.edu/sdlr/vol23/iss1/5.

4. Adequacy of Domestic Legal Framework in Protecting Investment against Political Violence Risk *vis-à-vis* Ethiopian BITs

Domestic laws are the primary legal instruments for promoting and protecting domestic investments. In this context, it would be fair to assess the adequacy of national investment laws in protecting investors against political violence in comparison with BITs. Such an assessment is made based on the implicit premise that one of the functions of investment law is investment protection, and investment treaties serve the same purpose.[165] As discussed above, Ethiopian BITs provide foreign investors with protection against political violence risks through FPS and War Clauses, while domestic investment laws fall short in offering comparable protection. Notably, unlike the robust protection offered by BITs, domestic investment laws only provide a restricted set of rights, leaving investors without a legal avenue for seeking compensation for investment damage because of political violence.

Besides, while Directive No. 253/2021 represent a notable step in supporting investors to restore their damaged investments through a non-cash-based mechanism, its utility for the investors is impeded by the absence of a cash-based compensation scheme. The absence of cash-based restitution arguably undermined the Directive's ability to enable investors to resume their ventures, as recovering the full extent of investment damage through non-cash means alone is challenging, if not unattainable.

Furthermore, the Directive neither grants investors a right to compensation nor imposes an obligation on the government to cover investment losses; instead, it merely offers non-cash support as a discretionary privilege

[165] Jan Knörich, *Friends or Foes? Interactions Between Indonesia's International Investment Agreements and National Investment Law* (Deutsches Institut für Entwicklungspolitik, 2014).

determined by the committee. Moreover, the Directive was not intended to grant the affected investors a right to seek compensation for investment losses resulting from a sovereign state's adverse acts or omissions during political violence.

Utilizing the Civil Code, Criminal Code, and Civil Procedure Code to sue a person or group charged with vandalism under the Civil Code for tort liability to replace the damaged property, has been also discussed as another recourse for investor. However, considering the financial magnitude of the compensation claim relative to the financial capabilities of individuals or groups engaged in vandalizing the investment, coupled with the considerable time required for enforcing any judgment, it would be painstaking and inefficient for the investor. This makes claiming compensation using a private scheme inadequate and would not enable investors to resume business shortly.

Besides, although it requires testing in a court of law, utilizing the public scheme of compensation seems difficult, if not impossible. This is because proving the circumstances under which the government is liable for wrongdoing, particularly through omission, is challenging. Furthermore, despite utilizing constitutional tort claims based on articles 37 and 40 of the Constitution is theoretically available recourse for investors, their practical application in providing effective remedies within the existing legal system seems doubtful.

Therefore, based on the foregoing discussion, it is reasonable to conclude that, compared to BITs, domestic legal frameworks are, arguably, inadequate in protecting and compensating investors for investment losses resulting from political violence. This, in turn, results in discriminatory treatment between foreign and domestic investors for identical risk. Thus, given the importance of domestic investment in the country's economic growth, the

disparity in treatment of domestic and foreign investment for the same risks poses potential risks to the growth of domestic investments and contradicts the government's objective of fostering a conducive investment environment and increasing domestic investment.

Concluding Remarks

The persistent political instability in Ethiopia, combined with the substantial investment and property damage owing to the violence, serves as the impetus for the analysis conducted in this study. Focusing on Ethiopian BITs and domestic legal frameworks, this article critically assessed the protection afforded for foreign and domestic investment against political violence risks. Ethiopian BITs incorporate FPS and War Clauses that obligate the State to protect foreign investments during both peace and armed conflict. Notably, while FPS clause imposes a due diligence obligation in protecting investment, War Clauses, particularly extended types, require Ethiopia to compensate foreign investors for investment losses because of political violence.

While addressing the available defences for such claims, the article argued that treaty-based defences available to Ethiopia are limited, as, except for BITs with Qatar, UAE, Finland, and Brazil, most Ethiopian BITs lack general exception or security clauses. In such cases, Ethiopia must rely on customary international law defences, such as *necessity* or *force majeure*, to justify governmental actions or omissions in safeguarding investments during periods of significant upheaval, such as widespread civil unrest or political instability. However, it has been argued that while these defenses may offer a partial shield for Ethiopia against claims of treaty breaches (BIT), they do not exempt the country from compensating investors for the loss. This underscores the need to revise existing BITs to incorporate tailored security exception clauses, as doing so could provide avenue for

exempting the country from liability during emergency, thereby reducing the risk of costly arbitration claims.

This article also discussed the domestic legal framework for investment protection against the risk of political violence. While the FDRE Constitution, the Civil Code, and other relevant legislation provide a foundational framework for addressing such damages, the paper argued that these legal instruments are insufficient to fully address investment losses caused by political violence. As a result, domestic investors are particularly disadvantaged by the absence of a specialized compensation mechanism, unlike foreign investors protected under BITs.

Thus, to address this disparity, the paper recommends both legal and institutional reform regarding investment protection. This article recommends the inclusion of a separate provision within the Investment Proclamation to extend protection against investment losses arising from political violence. This law should articulate clear compensation mechanisms for losses incurred due to political violence, of course by incorporating a *carve-out clause* for uncontrollable events which are consistent with national security priorities.

In addition to legal reform, the article has highlighted the importance of institutional reforms, including implementing preventive strategies, strengthening law enforcement capabilities, and expanding investment insurance coverage to include political violence, all of which are essential for reducing investment risks and enhancing investor confidence.[166]

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[166] Bantayehu Demlie, *Insuring Against Unrest: Can Ethiopia's Membership with the African Trade Insurance Agency Mitigate Political Risks, Boost Investment?* Ethiopian Bus. Rev., No. 39 (2016).

THE JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION IN ETHIOPIA: THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

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Abstract

This article claims that Ethiopian courts interpret the grounds of limitation of the constitutional right to freedom of expression extremely broadly, in a manner that unjustifiably restricts the right. By reviewing selected decisions handed down by the federal courts, the article attempts to show the prevailing interpretive approaches adopted by the judiciary. It evaluates the existing approaches of the Ethiopian courts in light of the methodological approaches of selected comparative national and international judicial practices. It will attempt to show that the judiciary's failure to interpret freedom of expression optimally has to do in part with its inability to adopt a helpful interpretative approach. Moreover, the Ethiopian courts' efforts to interpret relevant legislation in light of Ethiopia's international commitment to human rights and the constitutional protection of freedom of expression leave much to be desired. The article argues that the deployment of the principle of proportionality as an interpretive methodology can help the Ethiopian judiciary to enforce the constitutional right to freedom of expression optimally.

Key-terms: Freedom of Expression, FDRE Constitution, interpretation, Proportionality Analysis, Judiciary

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Introduction

This article examines the judicial interpretation of the right to freedom of expression contained in the Ethiopian Constitution. According to the Constitution, judicial powers, both at the Federal and State levels, are vested in the courts.[1] It requires Ethiopian courts to adhere to it and guarantee its observance.[2] Furthermore, article 3 of the Federal Courts Proclamation No. 1234/2021 provides that the Federal Courts have jurisdiction over, among others, cases arising under the Constitution, federal laws and international treaties accepted and ratified by Ethiopia.[3]

By reviewing some selected decisions rendered by the Federal Courts, the article attempts to show the prevailing interpretive approaches adopted by the judiciary. It evaluates the existing approaches of the Ethiopian courts in light of the ideas and practices of interpretation of the right to freedom of expression in international human rights systems and comparative constitutional jurisprudence. The article wants to show that the approaches of interpretation of the constitutional right to freedom of expression currently employed by the federal courts of Ethiopia fail to properly enforce the right. It argues that the adoption of proportionality analysis as an interpretive methodology can address this problem.

Although the issue of incompatibility of ordinary legislation with the Constitution has been discussed fairly well in the academic circle[4], the

[1] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, F*ederal Negarit. Gazeta.* Proclamation No.1, 1st year, No.1, art. 79. [hereinafter, the FDRE Constitution]

[2] See the FDRE constitution, art. 9(2).

[3] The Federal Courts Proclamation No.1234/2021, *Federal Negarit Gazette*, (2021), art. 3.

[4] See, for example, Adem Kassie, *Limiting Limitations of Human Rights under the FDRE and Regional Constitutions*, Ethiopian Constitutional Law Series, Vol. 4, (2011), p. 85; Wondwossen Demissie, *Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia*, PhD. Dissertation, Flinders University, (2017), p. 167.

interpretation of the right to freedom of expression and its limitation does not seem to have received enough attention and analysis in the Ethiopian context. This article intends to fill this gap. In this regard, the article will discuss cases decided under recently repealed laws[5] to show that the basic approach of the Ethiopian courts concerning constitutional rights, specifically freedom of expression, has not changed much.

The overall conclusion of this article is that the failure of courts to enforce the constitutional right to freedom of expression has in part to do with their inability to adopt a helpful interpretive approach. As a result, the right to freedom of expression has been interpreted in such a way that sub-constitutional laws and governmental actions restricting freedom of expression were given a great deal of deference to the detriment of the right. Therefore, the authors propose proportionality analysis as an interpretive methodology that can help the courts to effectively balance the protection of the right to freedom of expression with other competing interests consistent with the constitutional requirements.

The article proceeds as follows. Following this introductory section, Section one presents the theory of proportionality analysis, and its application in other jurisdictions, in order to create the necessary understanding of this methodological approach. Section two deals with international and comparative jurisprudence on the right to freedom of expression. This is necessary to show how the scope and meaning of this right is delimited by the interpretation of national and international judicial and quasi-judicial bodies. Section three explores the judicial

[5] Freedom of the Mass Media and Access to information Proclamation No. 590/2008, *Federal Negarit Gazeta*, (2008); and Broadcasting Service Proclamation No.533/2007, *Federal Negarit Gazeta*, (2007). These laws are no longer in force but court decisions based on them are examined to draw a broader picture of the state of jurisprudence of Ethiopian courts in the interpretation of the right to freedom of expression.

interpretation of the right to freedom of expression in Ethiopia and will show the limitations in the interpretive approaches of the Ethiopian courts in giving effect to the constitutional right to freedom of expression. The article concludes by summarizing the main findings.

1. An Overview of the Principle of Proportionality Analysis

According to Robert Alexy, proportionality analysis is the law of competing principles by which conflict (or competition) between constitutional norms is resolved.[6] Alexy states that constitutional norms, most important of which are constitutional rights, are principles, as opposed to rules. "The decisive point in distinguishing rules from principles", says Alexy, "is that principles are norms which require that something be realized to the greatest extent possible given the factual and legal possibilities" while "rules are norms which are always either fulfilled or not".[7] Thus, if two principles conflict, that conflict is resolved by the outweighing of one principle by the other countervailing principle in the given factual circumstance.[8] For example, if a court is confronted with a case in which it is asked to consider limiting the constitutional right to freedom of expression of a person in order to protect the honour and reputation of another individual—the latter right also enjoying a constitutional protection—then the question arises as to how the court should determine whether or not it will put a limitation on the freedom of expression, and, if so, the degree of limitation it will make in order to protect the countervailing interest, i.e., the honour and reputation of the other individual. One way the courts can do so is by weighing the first

[6] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers, tr., OUP, 2002), p. 50.

[7] *Id.*, pp. 47-48.

[8] *Id.* On the contrary, "a conflict between rules can only be resolved in that either an appropriate exception is read into one of the rules, or at least one of the rules is declared invalid"; *Id.*, p. 49.

right (freedom of expression) against the second right (honour and reputation) based on the factual circumstance in which the case is presented. This is what is known as proportionality analysis.

The concept of proportionality analysis, with its roots in German administrative law but propelled into high repute by the German Constitutional Court, has become one of the most successful legal transplants adopted by judicial bodies like the South African constitutional court and Canadian supreme court as well as by regional and international judicial and quasi-judicial bodies.[9] The principle of proportionality is mostly associated with the limitation clauses in constitutional bills of rights. Even though the components of the proportionality test that are used to weigh competing constitutional principles against one another might vary from jurisdiction to jurisdiction, its most complete version has four elements.[10] The first element is the legitimacy of the goal that the state is trying to accomplish with its limitation on individual rights. The goal must be significant enough to justify the interference with a right in order to secure the countervailing right or interest.[11] Under many constitutions and international human rights instruments, permissible grounds for limiting constitutional rights—often referred to as countervailing interests—include national security, public morality, public order, the well-being of the youth, and the rights of others. Therefore, courts must

[9] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law, (2008), p. 81. The instruments that contain limitation clauses do not mention the terms 'proportionality' or 'proportionality balancing'. To explain the test established by the limitation clauses, they were developed by judicial jurisprudence and academic literature.

[10] Francisco J. Urbina, *A Critique of Proportionality*, The American Journal of Jurisprudence 57 (2012) p. 49.

[11] *Id.*

verify that the interest a government seeks to advance is constitutionally legitimate.[12]

The second element involves an assessment of the suitability of the actions taken by the government to further the goal or interest identified at the first stage. The crucial consideration under this test is whether the measure taken is reasonably related to the stated goal.[13] Courts need to establish whether a suitable balance between the necessity of limiting the constitutional right and the significance of the desired outcome of securing the countervailing interest has been achieved.[14]

The third element is a necessity test. This part of the proportionality test focuses on whether the government has placed more restrictions on the constitutional right in question than are necessary to protect the countervailing interest(s). The rule is that when limiting rights, the least restrictive ways must be chosen.[15] These three requirements must be met for a state action that proposes to limit rights to be constitutionally valid; otherwise, the outcome would be ruled unconstitutional and unlawful. If, however, a right's restriction complies with all three requirements noted above, the investigation will pass to the fourth stage, which Robert Alexy calls "balancing" or "proportionality *stricto sensu*".[16] The assessment here takes the form of a cost-benefit analysis. This phase weighs the anticipated advantage of the restriction against the detriment to the right that is sought to be limited to assess which is more constitutionally

[12] *Id.*

[13] *Id.*

[14] See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence,* University of Toronto Law Journal 57 (2007): p. 385.

[15] See Francisco, *supra* note 10, p. 49.

[16] Robert Alexy, *Construction of Constitutional Rights*, Journal of Law and Ethics of Human Rights 4 (1), (2011), p. 23.

valuable. Hence, balancing is at the very core of the proportionality test.[17] These conditions have to be met for the government's restriction on rights to be constitutionally permissible. A court that makes a determination on the question of limitation of constitutional rights is said to have engaged in proportionality analysis.

The proportionality principle is criticized on certain grounds. Some scholars such as Benedikt Pirker argue that proportionality analysis is something vague and that everybody forms a personal view of where the balance between the two competing interests lies. In other words, there is a fear of danger of subjective evaluations by adjudicators and of technical difficulties in applying a proportionality test successfully.[18] Stavros Tsakyrakis also claims that the concept of proportionality represents an erroneous pursuit of accuracy and objectivity in the settlement of human rights disputes.[19] In his view, the proportionality principle is sufficiently vague to encompass a wide range of reasons and human actions.[20] Similarly, Grégoire Webber contends that it is absurd to calculate human rights according to a cost-benefit analysis by a proportionality test.[21] Nevertheless, as the subsequent discussion in this article will show, this approach to the interpretation of constitutional rights is widely accepted. The requirement that a constitutional rights interpreter makes an assessment of a constitutional right and its countervailing constitutional interest side by side places an appropriate restraint on unwarranted discretion of constitutional rights interpreters. It also guides the

[17] *Id.*, p. 21.

[18] Benedikt Pirker, *Proportionality Analysis, and Models of Judicial Review: A Theoretical and Comparative Study*, Europa Law Publishing (2013), p. 14.

[19] Stavros Tsakyrakis, *Proportionality: An assault on human rights?,* International Journal of Constitutional Law 7(3), (2009), p. 468.

[20] *Id.*, p. 469.

[21] Grégoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights*, (2009), p. 87.

legislature that enacts sub-constitutional laws enforcing the limitation clauses in a constitution to make sure that such laws are consistent with the requirements of the constitution.[22]

Many courts engage in a proportionality analysis when they consider whether it is permissible for the government to limit rights in pursuit of a countervailing interest or policy objective.[23] The proportionality principle aids in the objective assessment and decision-making of constitutional concerns in general and fundamental rights in particular by limiting limitations on rights in an objective fashion. It provides the judiciary with useful guidance on how to carry out its duties. Professor Moshe Cohen-Eliya and Iddo Porat characterize the proportionality principle as being fundamentally a demand for reason when governments limit rights: a shift from authority to justification.[24] Similarly, Robert Alexy contends that governments should justify interferences with rights, and the distinction between justified and unjustified interferences in fundamental rights is inextricably linked to proportionality analysis.[25]

2. Comparative and Theoretical Overview of the Interpretation of Freedom of Expression

This section examines the jurisprudence extant on the freedom of expression in international human rights law and comparative constitutional practice in order to draw some lessons from the widely practiced approaches of interpretation of freedom of expression in those

[22] Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (2010), pp. 145-146.

[23] Dieter, *supra* note 14, p. 385.

[24] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, the American Journal of Comparative Law 59(2) (2011), p. 463.

[25] Robert Alexy, *Human Dignity and Proportionality Analysis*, 16 Joaçabav 3, (2015), p. 83.

systems. Considering that the interpretation of freedom of expression under both international human rights instruments and other domestic jurisdictions deal with the same set of rights issues, an understanding of the interpretive approaches of these systems is believed to shed light on related issues we have in Ethiopia. In this regard, it is noteworthy that the international Courts and quasi-judicial bodies offer advanced interpretation of the laws on freedom of expression.[26] The African Human Rights Commission and the UN Human Rights Committee, to whose establishment treaties Ethiopia is a party[27], are the most pertinent ones. The ruling of the European Court of Human Rights should also be taken into account for ideation purposes as it has an extensive body of case law interpreting the right to freedom of expression.[28] It helps to see the meaning and scope of freedom of expression in these various jurisdictions whose interpretation and enforcement depict nuances based on historical and other contexts.[29]

In the case of the European Court of Human Rights (ECtHR), for example, although it has recognized that member states have a "margin of appreciation" when imposing a restriction on rights by their domestic laws, the Court has stated in the context of the *Autronic AG v. Switzerland* that interferences that are governed by law must be

[26] Pursuant to article 13(2) of the Ethiopian Constitution, the relevant provisions of international and regional instruments adopted by Ethiopia and their jurisprudence should be read together with freedom of expression provisions of the Constitution. This is necessary in order to have a full picture of the legal regime governing freedom of expression that is expected to accord protection to the right.

[27] It should be noted that Ethiopia is not a party to the Optional Protocol to the ICCPR of 1966 that established the Human Rights Committee but it is a party to the International Covenant on Civil and Political Rights that is adopted in the same year.

[28] Andargachew Tiruneh, *Ethiopia's post 1991 Media Landscape: The Legal Perspective* (2017), p. 11.

[29] Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, the Annals of the American Academy of Political and Social Science 603, (2006), p. 202.

"adequately accessible" and properly transparent.[30] This is an important decision regarding the legality test to make acceptable limitations. In this case, the Court evaluated "whether the justifications offered by national authorities to explain the actual measures of 'intervention' they employ are relevant and sufficient" in order to satisfy the second requirement of article 10(2) of the Convention, namely pursuing legitimate ends.[31]

Regarding the legitimate aims that outweigh and thereby justify the limitation of freedom of expression in any given circumstance, the ECtHR has tended to give different weight to the different goals to restrict freedom of expression. Overall, the ECtHR has held that factors such as the division of limitation goals into subjective and objective ones determine the extent of any restrictions on freedom of expression.[32] Subjective limitation aims are goals that allow states to have some level of flexibility in enforcing rights while objective limitation goals require states to strictly follow standards in enforcing rights. In other words, the state should have a large margin of appreciation for subjective goals, but not for objective ones. The state should apply the objective norm rather than its judgment if there is a standard.[33] However, it is understood that because of the diversity in culture and legal tradition of each member state, there is no consensus to set uniform European human rights standards.[34]

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[30] *Autronic AG v. Switzerland*, cited in Asmelash Yohannes, Striking the Balance between Conforming to Human Rights Standards and Enacting Anti-terrorism Legislation: A Challenge of the 21st Century (An Ethiopian Perspective), PhD Dissertation, University of Lincoln, (2014), p. 82.

[31] *Handy side v. the UK*, 7 December 1976, Series A no. 24, Para. 49.

[32] See Andargachew, *supra* note 28, p. 54.

[33] *Id.*

[34] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford Journal of Legal Studies 4 (2006), p. 705.

The ECtHR frequently uses the term "margin of appreciation" to describe the scope of the mandate of the state to limit a right, which includes proportionality analysis within it. It is a way of giving deference to a member State by taking into account the particulars of the State concerned in determining the legitimacy of the restrictions placed on the right in question.[35] Generally, a State is considered to have acted within its legal bounds if the intervention is acceptable in a democratic society, all things considered. Thus, states have a certain margin of appreciation for evaluating the necessity and proportionality requirements in balancing freedom of expression and other national interests.[36] One component of the margin of appreciation is the proportionality of the interference. If the defendant State does not provide evidence to support its assertions that restricting freedom of expression is necessary, that state will be seen to have acted excessively. It is also disproportional when the state has other options and the interference with the right is unnecessary.[37]

In the case law of the West, political discussion enjoys a wide degree of protection. For instance, in *Lingens v Austria,*[38] the ECtHR held that speaking about "political topics and political persons" is crucial to the operation of democracies. The ECtHR concluded that, as a result, it is harder to argue that intervention is required in this form of expression than in others. In *Castell v. Spain*,[39] two additional safeguards for political speech were established by the ECtHR. First, it is important to give criticism of the government more protection. Secondly, elected officials,

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[35] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality,* (2012), p. 4.

[36] Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, German L aw Journal 8 (2007), p. 711.

[37] See Andargachew, *supra* note 28, p. 56.

[38] Lingens v Austria, (8 July 1986), Series A no.103, Para.42.

[39] *Castell v. Spain,* cited in Andargachew, supra note 28, p. 163.

particularly opposition members, have a right to an extra security when they criticize the political system or the incumbent administration.[40]

The proportionality method of interpretation is also endorsed by the African Commission on Human and Peoples' Rights. In the case of *Constitutional Rights Project and Others v. Nigeria*,[41] the African Commission stated that the spread of ideas may be constrained by the law.[42] The freedom to speak and disseminate one's opinions, which is protected by international law, cannot be disregarded by national legislation; doing so renders the right to free expression ineffective.[43] The goal of codifying certain rights in international law and the entire purpose of treaty-making would be defeated if national laws were allowed to take precedence over international law. Rights must only be restricted to the extent strictly necessary and proportionate to the desired purpose, never to the point where they become illusory, and laws limiting rights must serve a valid state interest. They must also be acceptable in a democratic society.[44]

The principles of necessity and proportionality are expressly established by several countries as criteria for limiting constitutional rights. For instance, the Constitution of South Africa outlines in great detail how a right should be curtailed. It elaborates on what is typically referred to as being "essential in a democratic society".[45] This suggests that instead of

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[40] *Id.*

[41] *Constitutional Rights Project and Others v. Nigeria*, cited in Adem, *supra* note 4, p. 89.

[42] The Case was brought before the African Commission on Human and Peoples' Rights by Constitutional Rights Project and Others (NGO) against Decree No.5 of 1984 of Nigeria that does not provide any judicial appeal of sentences.

[43] *Id.*

[44] *Media Rights Agenda and Others v. Nigeria*, (2000) AHRLR 200 (ACHPR) (1998), Para.69.

[45] Constitution of the Republic of South Africa No. 108, as adopted on 8 May 1996 and amended on 11 October 1996, art. 36.

mechanically following a sequential checklist, the Constitutional Court of South Africa (CCSA) must engage in a balancing exercise and reach a broad conclusion on proportionality.[46]

It further states:

> Limitations on constitutional rights can pass constitutional muster only if the Court concludes that considering the nature and importance of the right and the extent to which it is limited, such limitation is justified concerning the purpose, importance, and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.[47]

The most crucial step in safeguarding freedom of expression from excessive government interference is the stage of proportionality analysis. It is difficult for the judiciary to protect the right to freedom of expression without carefully examining whether the restriction is required and appropriate for the goal being sought.[48] That means a framework for analysis is established by evaluating the legitimacy of legislation through the lens of proportionality.

The Federal Constitutional Court (FCC) of Germany has also made a name for itself by applying a proportionality test when interpreting constitutional rights that apply to freedom of expression. This test has since become an essential and fundamental component of German constitutional law.[49]

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[46] Stephen Gardbaum, *Limiting Constitutional Rights*, UCLA Law Review 54 (2007), p. 841.

[47] *Id.*

[48] Henok Abebe, *Freedom of Expression and the Ethiopian Anti-Terrorism Proclamation: A Comparative Analysis*, Haramaya Law Review 5(1), (2016), p. 96.

[49] See Stephen, *supra* note 46, p. 839.

Furthermore, the UN Human Rights Committee (HRC), in its ruling on *Nicholas Toonen v. Australia*, held that any restrictions placed on the right to freedom of expression must be "proportionate and essential" to the goal the government is trying to accomplish.[50] The restriction must be required and must adopt the least restrictive method for allowing the right to continue to be exercised. As noted earlier, the restriction on freedom of expression is also put through the triple test by the African Commission on Human and People's Rights (ACHPR). The Commission, in its ruling on *Scanlen and Holderness v. Zimbabwe*[51] stated that a law that introduced an onerous regime for the accreditation of journalists violated the rights to freedom of expression and to receive information.[52] In the instant case, the ACHPR used the legality, legitimacy, and proportionality tests in its decision.[53]

As the above discussion shows, the HRC, the ACHPR, and the ECtHR have examined the proper contours of the right to freedom of expression using the legitimacy, necessity, and proportionality (balancing) criteria. Comparative constitutional practice highlighted in the preceding paragraphs also point in the same direction, lending credence to our

[50] *Nicholas Toonen v. Australia*, Communication No 488/1992, UN Human Rights Committee (1994), Para 8.3.

[51] *Scanlen and Holderness v Zimbabwe*, Commission Communication Number 297\05 (African Commission on Human and People's Rights 2009). The case was brought against a legislation known as the *Access to information and Protection of Privacy Act,* which provides that "No journalist shall exercise the rights provided in Section 78 in Zimbabwe without being accredited by the Media and Information Commission." It was claimed that compulsory accreditation of journalists, irrespective of the quality of accrediting agency, interferes with freedom of expression.

[52] *Id.*, Para.124.

[53] The argument was that the law that introduced onerous regime for accreditation of journalists to access information did not go happily with the principle of freedom of expression. However, it does not mean that the requirement of accreditation of journalists to access information by its own is against the principle of legality, legitimacy and proportionality.

claim that proportionality analysis yields a helpful methodological approach in the interpretation of constitutional rights.

3. Judicial Interpretation of the Right to Freedom of Expression in Ethiopia

We begin this section by reviewing some decisions handed down by federal courts in cases related to freedom of expression. As noted in the introductory part of this article, this discussion is necessary to illuminate some of the interpretation problems involved relating to freedom of expression. In *Yonatan Tesfaye v. Public Prosecutor*, the prosecutor charged the defendant with a violation of article 6 of the Anti-Terrorism Proclamation No. 652/2009 (then in force).[54] Yonatan Tesfaye, the former spokesperson of Semayawi Party (the Blue Party), was charged with "encouragement of terrorism" in connection with comments that he made on social media in which he claimed the government had used disproportionate force against demonstrators.

According to the charge, the defendant was disseminating information that could inspire readers to engage in terrorism. It was stated in the charge that closing roads and destroying and burning property of the government constituted terrorism and that he aimed to encourage the riot started by the Oromo Liberation Front in the Oromia Region. Yonatan Tesfaye denied the accusation by stating that he was only using his right to freedom of expression by criticizing the government's failure to take proportionate measures against protesters and his political opinion about the need to have democratic governance in Ethiopia.[55] He was also charged with making statements such as "a democratic system

[54] *Public Prosecutor v. Yonatan Tesfaye*, Criminal File No 178547, Federal High Court of Ethiopia, Lideta District, Judgment, (17 May, 2009).

[55] *Id.*, P. 6.

is required! Let's establish a transitional administration together! End the deception now!"[56]

The Ethiopian Federal High Court rejected the defendant's argument, ruling that article 29(6) of the Constitution places exceptions on the right to freedom of expression and that the defendant went beyond the limit by posting inciting articles on his Facebook page to prolong the protest and incite violence. The Court further stated that his call for the destruction of government property and regime change is an incitement to violence.[57] The Court found the accused guilty of encouraging terrorism through a Facebook post, without specifying what constituted "encouragement of terrorism"[58] and without providing enough explanation of the basis for its decision.

In the case, the Court failed to scrutinize the rights-limiting law in light of the Constitution's permissible restrictions on freedom of expression. As discussed earlier, legislation that limits the rights guaranteed in the Constitution, must pass three tests to pass the constitutional muster. The legal requirement that a limitation must be provided by law is the first test. It is understood that limitations on freedom of expression should only be imposed by laws that are essential to protect an established legitimate goal.[59] This principle is stated in the first clause of article 29 (6) of the FDRE Constitution, which says in part, "These rights can be curtailed only by laws." This means that the state must first pass

[56] *Id.*

[57] *Id.*, P. 7.

[58] Yohanes Eneyew, *Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights,* African Human Rights Law Journal 20, (2020), p. 329.

[59] Andrew Clapham, *Human Rights: A Very Short Introduction*, (2007), pp. 96-97.

subsidiary laws on which to base its interference, and this requirement prevents arbitrary actions.

The legitimacy test is the second requirement for restrictions on freedom of expression, which states that there must be a genuine and overriding interest to restrict freedom of expression.[60] According to the FDRE Constitution, the purpose of interference includes four objectives listed under article 29 (6). The well-being of the youth, and individual honor and reputation are given as the grounds of limiting freedom of expression. Furthermore, any propaganda for war, and the public expression of opinion intended to injure human dignity are unequivocally prohibited by the Constitution. The third component of the test requires that restrictions on freedom of expression must be 'necessary' to safeguard the interest mentioned in the second part of the test.[61] The Court should have examined the necessity test in the case but it failed.

Moreover, the three sub-criteria must be met in applying the principle of proportionality to an infringement of a basic right. The first criterion is that a statute restricting a basic right must be an appropriate means or suitable to a legitimate end, and the second is the necessity test which requires that the means used to limit the right must be least restrictive to achieve the law's purpose.[62] Finally, the burden placed on a right must be proportionate to the advantage that the law secures.[63] The court should

[60] Toby Mendel, *Restricting Freedom of Expression: Standards and Principles, Background Paper for Meeting Hosted by UN Special Rapporteur on Freedom of Opinion and Expression*, Centre for Law and Democracy, (2010), p. 13.

[61] *Id.*, p. 17.

[62] Donald P. Kommers, *Germany: Balancing Rights and Duties* in Jeffrey Goldsworthy (ed.), Interpreting Constitutions: A Comparative Study, (2006), p. 202.

[63] *Id.*

also have considered the three sub-criteria to determine whether the interference is acceptable or not.

The first step in analyzing this case would be to determine the legality of restricting the constitutional right to freedom of expression by invoking the public interest of combating incitement to terrorism. This would be done by analyzing the nature of the right to freedom of expression, whether the right is limitable or not. From the reading of article 29(6) of the FDRE Constitution, the right to freedom of expression is a limitable right, and hence, regarding the legal test, it is legal so far as it is made by the legislature mandated to enact laws that limit rights as per article 55(1) of the FDRE Constitution. However, the anti-terrorism law on which the Court's decision was based provided a wide and ambiguous definition of a terrorist act that has major implications for the right to freedom of expression and makes it challenging to distinguish between justified political opposition and terrorist activities. This is problematic because the language of the proclamation could be interpreted in a variety of ways and could therefore facilitate and encourage the infringement of the right to freedom of expression.[64] Any interference with the right to freedom of expression should be sufficiently clear and narrowly drawn to pass the constitutional muster.

Even if the limitation on the right to freedom of expression is acceptable, it should still pass the legitimacy test. Regarding the legitimacy test, the court in its reasoning simply accepts the constitutional limits without requiring the government to justify whether the need to limit the right in question is legitimate or not as per the Constitution. The conflicting issue is the interest of the accused to express his political opinion on the one

[64] Hiruy Wubie, *Some Points of the Ethiopian Anti-Terrorism Law from Human Rights perspective*, Journal of Ethiopian Law 25(2), (2012), p. 40.

hand and the interest of the state to combat the incitement of terrorism on the other. The gist of the claim of the public prosecutor was that the defendant's Facebook post constituted an incitement to violence, and hence, could legitimately be restricted. The court should have evaluated whether there was incitement to terrorism by taking into account the context, the speaker's intention, the likelihood and imminence of the harm, and whether the incitement was directed at encouraging the commission of a terrorist act.[65] The court never attempted to determine if these requirements were met to find the defendant guilty of inciting terrorism. These standards help define the contours of political speech and incitement of terrorism.[66]

It seems to us very plausible that if the Court looked at the case in the light of the above analytical steps, it would have found Yonathan's speech within the limits of protected core political speech. However, the Court did not deploy any discernable methodology to arrive at the conclusion it reached in the case. Engaging in proportionality analysis in this case by weighing the factual claims made by the prosecutor to restrict Yonathan's freedom of expression on the one hand and the extent to which the defendant's action might have affected public interest (which is a protection against incitement of terrorist acts) on the other, could have helped the Court to arrive at a different and fairer decision.

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[65] Ben Saul, *Speaking of Terror: Criminalizing Incitement to Violence*, University of New South Wales Law Journal 28, (2008), p. 669. Saul argues that paying appropriate consideration to the speech's content as well as the speaker's intention, the context in which the statement was delivered, the likelihood and imminence of the harm that the statement would lead to a commission of a terrorist act are helpful requirements to determine whether a certain statement is punishable under incitement law. In his view, the likelihood and the imminence of the harm is the fundamental one to punish incitement. An expression that fails to meet these requirements does not amount to an incitement to terrorism.

[66] *Id.*

The Court in fact would need to look at cases such as the above in the light of the significance of the right to freedom of expression and the kind of protection it needs against government's interference. In this regard, the protection of unconventional ideas and viewpoints need heightened protection.[67] In the Western World, the right to freedom of expression enjoys a high level of protection. A good example is the decision of the ECtHR in which it stressed that the right to "freedom of expression applies not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population."[68] Moreover, the ECtHR has ruled that statements that employ strong or virulent language are protected under article 10 of the European Convention on Human Rights in the context of identifying the contour of political speech and incitement to terrorism.[69]

In the *Federal Public Prosecutor (FPP) v. Andualem Arage and others,*[70] Andualem Arage and other defendants were charged for their spoken and written calls for an insurrection akin to the so-called "Arab Spring" taking place at the time in North Africa and the Middle East. The charge further alleged that the defendants, by using their constitutional right to freedom of expression and association, had been enlisting and training

[67] Elisabeth Zoller, *Foreword: Freedom of Expression*: "Precious Right" in Europe, "Sacred Right" in the United States?, Indiana Law Journal 84(3), (2009), p. 803.

[68] *Handyside v the United Kingdom*, Application No. 5493/72, European Court of Human Rights (ECHR), (1976).

[69] *Gerger v Turkey*, European Court of Human Rights 46, IHRL 2878 (ECHR) (1999), para. 47.

[70] *Federal Public Prosecutor v. Andualem Arage and others*, Criminal File No.112546, Federal High Court of Ethiopia, Lideta District, Judgment, 27 June (2012) (involving 24 defendants, among whom six were journalists, two were leaders of the opposition Unity for Democracy and Justice (UDJ) party, two were members of other political opposition parties, and the remaining nine were members of the outlawed Ginbot 7 Movement for Justice, Freedom, and Democracy). There are neither official nor authorized translations of the case's Amharic original text. The translation of this and other cases in the article is the authors'.

members, forming a covert network, and preparing travel and communication manuals intended to influence the government by destabilizing political, social, economic, and constitutional institutions. The prosecution's sole reliance on written or verbal communication to support its claims connected to terrorism sends a specific message about the conduct that is considered to be terroristic.[71] Many freedom-of-expression-related items such as interviews and videos were produced as evidence to prove the defendants' involvement in terrorist activities.[72]

The Federal High Court of Ethiopia in its decision reasoned that:

> The suspects tried to stir up violence and topple the government under the cover of exercising their right to assembly and freedom of expression. Their articles, speeches, and phone calls incited the people to bring about the North African and Arab uprisings in Ethiopia. These were indicated by evidence produced against the defendants. There is no other method to get power in the country except through democratic elections, and what the defendants claimed is obviously against the Constitution, thus the right to freedom of expression can be restricted when it is used to compromise security and not used for the sake of the public interest.[73]

Although the Court acknowledged that the majority of the prosecution's evidence related to the defendants' written or spoken statements, it did not make an effort to determine whether these statements were protected by the freedom of expression set out under article 29 (6) of the FDRE

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[71] *Id.*

[72] *Id.*, P. 43. For instance, in an interview with Ethiopian Satellite Television (ESAT), Andualem Aragie, referring to the Arab spring, was quoted as saying: 'We are tired of living without freedom and we are ready to make any sacrifices' to bring change". This was used as piece of evidence to prove his participation in terrorist activity.

[73] See Para. 17.

Constitution and international human rights treaties to which Ethiopia is a party. That means, it did not consider the lawfulness or the legitimacy of the expressions of the defendants by engaging in the weighing of the two competing interests that a proper freedom of expression analysis requires. For example, the court should have at least examined standards of incitement to terrorism to distinguish it from political expression.[74]

According to both international and comparative laws on incitement to terrorism, the limits of incitement law on political speech must be determined by taking into account the imminence and possibility of the resultant harm.[75] The *Incal v. Turkey* case is a good example of how crucial it is to consider the speech's content when determining the extent of incitement to terrorism.[76] In this case, the ECtHR principally relied on the speech's content to determine whether the speech constituted an incitement to violence.[77] Without taking into account these essential components of incitement to terrorism, there is a real risk that several forms of acceptable political expression that are essential to lively public discourse may be considered to be incitement to terrorism.[78] It is obvious from their written and verbal expressions that they are strongly critical of government policies and even call for political change. They did not, however, specifically call any specific acts of violence or methods of unconstitutional regime change. In *Federal Public Prosecutor (FPP) v.*

[74] See Ben Saul, *supra* note 65, p. 669.

[75] Eric De Brabandere, *The Regulation of Incitement to Terrorism in International Law*, in L Hennebel and H Tigroudja (eds.) Balancing Liberty and Security: The Human Rights Pendulum (2012), pp. 221-240.

[76] *Ibrahim Incal v Turky*, Appeal Number, 22678/93, ECHR (1978), Para.10. The case saw Mr. Ibrahim Incal, a member of the opposition People's Labor Party, being found guilty of breaking Turkey's rule against public incitement. His conviction was due to pamphlets that were written in opposition to Turkish government measures.

[77] *Id.*

[78] Although the above case may be exclusive to European experience, it nonetheless provides valuable insight into determining the contour of political expression when it comes to inciting terrorism.

Andualem Arage and others, the prosecution did not establish whether the expression made by the defendants fulfills the requirements for incitement of lawless action and, further, the Court did not weigh the two competing interests based on the factual and legal circumstances.

Instead, the Court simply concluded that "by making the expressions through written and spoken statements, the defendants have exceeded the limit on their freedom of expression and have therefore committed the alleged terrorism crime."[79] In doing so, the Court depended on the Constitution's article 29(7), which says that anyone who violates any law may be held accountable.[80] The constitutional validity of the restriction was at issue in this case because the Court failed to locate which provision of the ordinary law was violated to make the defendants liable for crossing the scope of freedom of expression. The Court must cite the provision of the law that was infringed. The constitutionality of the restriction was raised in the case by the defendants and the Court was asked to comment on that. However, the constitutionality of the restriction was taken for granted by the Court. Whether the expression in question was covered by article 29 (7) of the Constitution was not addressed by the Court. The government must have been required to show both the law's (the provision of the law) constitutionality and the proportionality of the action taken vis-à-vis the public security interest. The FDRE Constitution's Art. 29(7), which provides that the right to freedom of expression may be restricted by any 'law' without any substantive requirements, seems to be the foundation upon which the Court based its ruling. The term 'law' is not defined in the Constitution. This raises the possibility of inconsistent application of the right to freedom of expression and its restrictions.[81] We believe that the

[79] *Id.*

[80] See the FDRE Constitution, art. 29(7).

[81] Adem, *supra* note 4, p. 85.

provisions of article 29(7) must be anchored to the more elaborate limitation clause in article 29(6). The latter refers to 'law', and the reference to 'law' in Article 29(7) must be interpreted consistently with the law required under article 29(6), which is intended to govern limitation measures that the government may impose.

The Court's erroneous conclusion in the case under consideration was also pointed out by another scholar, Wondwossen Demissie. He noted that although the defendants' actions were solely situations of exercising one's right to free speech and political involvement, the prosecution presented them as participants of terrorist activity without evidence and the Court upheld this claim. He further observed that oral testimony from the prosecution only established that the accused made written or verbal statements.[82] The Court ruled that it has the legal authority to declare that the defendants' statements violated article 29 of the FDRE Constitution. By doing this, the Court has agreed that the alleged conduct of the defendants exceeded the scope of freedom of expression.[83] Without confirming that any of the four prerequisites have been met (legality, legitimacy, proportionality, and necessity), the Court declared that the defendants' statements violated article 29 of the Constitution.

Any limitations on freedom of expression that are to be considered 'laws' under the ICCPR must be written precisely enough to allow a person to govern their behavior.[84] The Court concluded that the defendants' utterances and expressions exceeded their freedom of expression without first confirming that the requirements for making such a decision had been met. If a specific restriction, permitted by the Constitution, is made

[82] Wondwossen, *supra* note 4, p. 167.

[83] *Id.*, P. 176.

[84] UN Human Rights Committee (HRC) General Comment 34, art 19, Freedoms of Opinion and Expression, (12 September 2011), CCPR/C/GC/34, para. 25.

by law, the Court must scrutinize the legislation and analyze how the issue in expression fits within the parameters of the law that justifiably forbids the expression.[85] In the instant case, the divergent political views were clearly the basis for the prosecution. As it is said, the Court emphasized that the defendants made some provocative written and verbal statements intended to support bringing the uprising in the Arab world and North Africa to Ethiopia, which resulted in the loss of many lives, destruction of property, and bodily harm, in upholding that the defendants had gone beyond the bounds of their freedom of expression.[86]

One of the reasons given by the Court is that "accountability results from violating legal restrictions on the exercise of the right to freedom of expression. They have used their freedom of expression to incite seizing government power by unconstitutional means. According to article 9(3) of the Constitution, they cannot assume office without an election."[87] The Court referred to article 9(3) of the Constitution, which forbids the assumption of state power unconstitutionally, as legislation that restricts freedom of expression. However, the Court lacked any factual basis to find a violation of the aforementioned constitutional provision.

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[85] In relation to the argument being presented here, it might be thought that we are bestowing on the Court a power to interpret the Constitution in the strict sense of the term when we say it needed to review the compatibility of the law with the Constitution. However, according to Proclamation No. 798/2013, the courts can determine whether a law it is dealing with is consistent with the Constitution or not, and if it finds inconsistency, it then will send the matter to the Council of Constitutional Inquiry. Furthermore, determination of meaning and scope of the constitutional right to freedom of expression in line with the limitation clause of the constitution is an inherent role of the courts.

[86] *Federal Pupublic Prosecutor v. Andualem Arage and others*, Criminal File No. 112546, Federal High Court of Ethiopia, Judgment, (27 June 2012), pp. 61, 64 & 65.

[87] *Id.*, p. 50 & 51. See also art. 9 (3) which states that "It is prohibited to assume state powers in any manner other than provided under the constitution".

The prosecution claimed that the defendants intentionally encouraged political and social unrest through written communication[88] by going beyond the bounds of the freedom of expression provided by the FDRE Constitution to bring about the Arab Spring or civil disobedience in Ethiopia. Some of the accused, such as Birhanu Nega, have communicated verbally and in writing utilizing various media to further political causes.[89] The defendants' communication that 'public disobedience rather than election is what should be done in Ethiopia' was one of the justifications for the Court to find the accused guilty. According to the Court, this indicated that they were exerting pressure on the government by exploiting freedom of expression to try to gain government power by unconstitutional means.[90]

We argue that proper use of interpretive approaches to constitutional rights, such as proportionality analysis, would have enabled the court to arrive at a different decision. The constitutional provisions specified in article 29(6) must be respected when the right to freedom of expression is interfered with. Article 29 of the FDRE Constitution supports the defendants' assertion that their expressions are protected in the absence of the special statute that article 29(6) contemplates. As a result, the Court's use of article 29 to conclude that the defendants have gone beyond the scope of their constitutionally recognized freedom of

[88] For example, Eskinder Nega was accused that he expressed his view that the current situation in Ethiopia is comparable, if not worse than, to that of the places where uprising had occurred and such uprisings are inevitable in Ethiopia. It was further stated that Eskinder asserted that it was necessary to put peaceful and legal opposition from words to practice. The charges against him were largely based on his political opinion in different newspapers such as an English weekly newspaper; the Habesha and Dehai Amharic newspapers.

[89] *Federal Public Prosecutor v. Andualem Arage and others*, Criminal File No. 112546, Federal High Court of Ethiopia, Judgment, (27 June 2012), pp. 58 & 61 (Translation the Authors).

[90] *Id.*, p. 62.

expression does not comport with either the letter or the spirit of article 29 of the Constitution. Two interests are at stake in this situation: the right to freedom of expression in one hand and the interest of the government to fight terrorism on the other hand. As stated in section two of this article, political expression has been given higher status by the ECtHR than other interests that the government seeks to defend.[91] In other words, the issue is not how to strike a balance between the two types of interests, but how to prioritize expression over the other. As a result, the interference should be given a specific meaning. Contrary to this widely accepted approach, political expression is not afforded such a privilege in the decisions of courts in Ethiopia.

Elias Kifle and others v. Federal Public Prosecutor was yet another case that shows the problem created by a lack of helpful methodological approach to weigh competing constitutionally protected interests. In *Elias Kifle and others,*[92] the Federal High Court of Ethiopia followed a similar pattern of interpretation as in the earlier case of *Federal Public Prosecutor v. Andualem Arage and others*. The prosecution accused all five defendants of conspiring to commit a terrorist act; among them, two were opposition politicians and three were journalists. Expressions that the defendants either wrote or spoke themselves or had others write or speak them made up the majority of the prosecution's evidence.[93] To establish the defendants' involvement and demonstrate that they had done an act in preparation for a terrorist act, the Court admitted oral, documentary, and audiovisual evidence.[94] The defendants' participation

[91] See Andargachew, *supra* note 28, p. 55.

[92] *Federal Public Prosecutor v Elias Kifle and others*, Criminal File No 112199, Federal High Court of Ethiopia, Lideta District, Judgment, (2012).

[93] Several e-mail exchanges and intercepted phone conversations between the defendants were produced as evidence for their participation in planning and preparing for a terrorist activity. It was stated that the defendants were distributing illegal and provocative writings.

[94] *FPP v. Elias Kifle and others*, Ministry of Justice, 5 January (2012), P. 9.

in the creation and posting of slogans demanding the resignation of the ruling party and the then prime minister was taken as the crucial pieces of evidence in the prosecution's case.[95] The prosecution relied entirely on written or spoken statements made by the defendants.

As noted above, requirements under the FDRE Constitution and international human rights treaties must be met for a restriction on freedom of expression to be legitimate. However, the Court accepted into evidence statements made by the defendants like slogans demanding the resignation of the ruling party and correspondence made between them that show these statements go beyond the bounds of their right to freedom of expression.[96] The Court made its decision without considering the validity of the law that forbids these expressions or if other requirements for restricting one's freedom of expression are met. Thus, in the same way as the previously discussed cases were decided, the Court failed to engage in properly weighing the two competing interests based on the factual and legal circumstances of the case.

It is unlawful to restrict freedom of expression in the absence of a compelling reason to do so.[97] According to the Special Rapporteur on the promotion and preservation of the right to freedom of opinion and expression, a restriction should be designed to meet a "pressing social necessity".[98] The Special Rapporteur on freedom of opinion and expression has backed the Johannesburg Principles, which state that a serious threat to national security may justify restricting freedom of expression, since there can be a direct and immediate link between the

[95] *Id.*

[96] See *Federal Public Prosecutor v Elias Kifle and others*, *supra* note 89.

[97] See Wondwossen, *supra* note 4, p. 240.

[98] Frank Rue La, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2010), A/HRC/14/23, Para. 79.

expression and the potential and occurrence of such violence. Principle 6 states that the right to freedom of expression may only be restricted under the pretense of national security if it is intended and is likely to inspire immediate violence.[99] Furthermore, the Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression states that:

> The protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[100]

This implies that national security should not be invoked as a cover-up to suppress the exercise of the right to freedom of expression. All human rights treaties allow restrictions on freedom of expression when necessary to safeguard national security. Even when states are given a lot of leeway in this regard, the security interest should only be brought up when a threat is being posed to the territorial or national integrity of a state, not only to a particular government.[101] As stated in the handbook for article 19, the Supreme Court of the United States observed that

> criticism of public measures or comment on government action, however, strongly worded, is within reasonable limits and is consistent with the fundamental right of freedom of speech and

[99] Article XIX, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, International Standard Series (1996) Principle 11.

[100] Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), A/HRC/17/27, Para. 36.

[101] The Article 19 Freedom of Expression Handbook International and Comparative Law, Standards and Procedures, (1993), p. 114.

> expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet standards of common acceptability.[102]

As the ECtHR puts it in *Weber v. Switzerland*,[103] it is the responsibility of the state to first disclose its justifications for limiting freedom of expression and then to show that those justifications are pertinent and sufficient, or that intervention is necessary. The necessity requirement is pretty important as it imposes the duty on the government whether the means chosen is least restrictive of the right. However, the necessity requirement is not implicated in the Court decisions of Ethiopia but its incorporation can be argued through the interpretation of the Constitution.

Article 29(4) of the FDRE Constitution should be interpreted to mean that the restriction must be required in a democratic society, as opposed to authoritarian regimes that have employed restrictions on freedom of expression to silence dissent and encroach on press freedom. According to the Constitution, freedom of expression must be exercised in a democratic Ethiopia. A relevant part of article 29(4) of the Constitution reads as follows: "the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions in the interest of free flow of information, ideas, and opinions which are essential to the functioning of a democratic order." Additionally, it is possible to construe article 29(6) of the Constitution to demand that a state demonstrates that its act of restriction is required to

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[102] *Organization for a Better Austin v. Keefe*, 402 US, 415, 419 (1971) cited in The Article 19 Freedom of Expression Handbook International and Comparative Law, Standards and Procedures, August 1993, p. 140.

[103] *Weber v. Switzerland*, Judgment of 22 May 1990, series A, no. 177.

protect a specified interest and that the said interest cannot be achieved other than by restricting a right to freedom of expression.[104] This view is supported by the provision that states that interference cannot be made because of the substance of the speech, only to defend one or more constitutionally protected interests. Hence, it can be argued that the necessity requirement is mirrored under the FDRE Constitution through interpretation, even though it was not shown in Court rulings of Ethiopia.

A proper weighing of the competing constitutionally protected interests by using proportionality analysis methodology could have helped the Ethiopian courts to engage in a step-by-step analysis of the factual and legal circumstances of the cases they had to deal with. In *Elias Kifle and others*, as in others discussed above, assuming that the accusation made against the defendants were accurate (as some even claim the accusations to be factually unfounded[105]), if the Court utilized proportionality analysis methodology, it would have been in a better position to properly weigh the factual basis on which the prosecution relied and to find that it is lacking when assessed vis-a-vis the limitation clause under article 29(6) of the Ethiopian Constitution.

FPP v. Temesgen Desalegn case also offers another pertinent example of judicial decisions devoid of any discernable methodological approach.[106] Like many cases noted above, the prosecution's case against Temesgen relied on his writings. Temesgen was found guilty of crimes against the

[104] See Andargachew, *supra* note 28, p. 57.

[105] Asmelash, *supra* note 30, p. 109.

[106] *Federal Public Prosecutor v. Temesgen Desalegn,* Criminal File No.123875, Federal High Court of Ethiopia, Judgment (17 October, 2007), See the full comment by Mesenbet Assefa, Freedom of Expression and the Contours of Political Speech in Ethiopia: Lessons from a Comparative Study, PhD Dissertation, Irish Centre for Human Rights, College of Business, Public Policy and Law, National University of Ireland Galway (2017), p. 223.

state, including encouraging rioting to overthrow the government through his published pieces in *Feteh* magazine.[107] In his article, he discussed the 2005 national election and the accompanying political events, as unmistakably revealing a golden period in Ethiopian politics and as an example of how "the current generation does not fear death." The second basis for the accusation was an article by Temesgen that appeared in *Feteh* publication in 2012 which stated that the current political climate in Ethiopia pushes people to be angry rather than afraid and that "if the young stands up for its rights, no force can stop it". The prosecutor made the case that the defendant incited violence and the destruction of the State's constitutional order through these writings. The defense asserted that content-based restrictions are unlawful under article 29(6) of the Constitution, and as a result, the crimes of incitement to which the accused is charged are invalid.[108]

The Federal High Court of Ethiopia stated in its decision that "the defendant had incited the people through his writings by reminding them that the current state of affairs and the current government may be changed by overthrowing it."[109] In the reasoning of the Court, if what the defendant ideas of the possibility of overthrowing the government through public protest and public disobedience, severe consequences would have happened to the people of Ethiopia.[110] In this case, as in all previous cases discussed, the Court again failed, among others, to examine the standards of incitement to terrorism. When establishing whether there has been incitement to terrorism, it is essential to consider whether the speech in question may potentially engender the possibility

[107] *Id.*, pp. 1-2. It was further stated in the charge that, to replicate Arab Spring to Ethiopia, the accused pushed and motivated the Ethiopian people to overthrow the government through public protest and public disobedience.

[108] *Id.*, P. 8.

[109] *Id.*, P. 11-12.

[110] *Id.*, P. 25.

of the commission of a terrorist act.[111] According to Eric Barendt, the prosecution must prove four interrelated legal criteria to prove the crime of inciting terrorism and bring charges against alleged offenders. These include specifying the speaker's intention, the speech's content, the setting in which it was delivered, and the danger's imminence and possibility of materialization.[112]

Mesenbet Assefa has also argued that without taking into account the essential components of the crime of incitement developed in international and comparative law such as the speaker's intent, and the likelihood and proximity of the harm, there is a high possibility that several forms of acceptable political speech that are essential to lively public discourse will be characterized as incitement to terrorism.[113] He continues by saying that Temesgen's speech hardly qualifies as an inducement to commit a crime under the law.[114] As consistently argued in this article, courts should adopt a standard of review when dealing with restrictions on freedom of expression. This can, for example, be done by proportionality analysis as it accords a framework of analysis in dealing with the limits to freedom of expression and the standards of incitement to terrorism. In this case, the restriction did not pass the pressing need test which is one of the requirements of proportionality reasoning since the restriction was used negatively to silence dissent and encroach on press freedom. Had the Court used proportionality analysis together with the standards of incitement to terrorism which are necessary for

[111] See Eric, *supra* note 75, pp. 221-240.

[112] Eric Barendt, *Incitement to, and Glorification of, Terrorism*, in Ivan Hare & James Weinstein (eds.), Extreme Speech and Democracy, (2009), pp. 455-58.

[113] Mesenbet, supra note, p. 228.

[114] *Id.*

principle-based examination of cases, there could have been a better outcome.

Another case we would like to present here is *Public Prosecutor v Ibrahim Mohamed*[115] This case is interesting because the accused, Mr. Ibrahim, sought referral of his case to the Council of Constitutional Inquiry (CCI) for constitutional interpretation which the Court denied. The charge was brought by the prosecutor under Press Proclamation No. 34/1992, which was then in force. The chief editor of the *Islama* News Paper was found guilty by the judge for claiming that the Minister of Education harbored animosity for Ethiopian Muslims and purposefully denied them their constitutionally protected rights. The accused contended that his right to freedom of expression might be violated if he was found guilty under Proclamation No. 34/1992 and claimed that the issue should be referred to the CCI. Asserting that freedom of expression under the Ethiopian Constitution is not unrestricted, the Court "declined to send the matter to the CCI because it did not think there was a legitimate constitutional issue at stake."[116] The failure of the editor-in-chief to carry out his responsibilities to verify that there was no legal liability regarding the press content (which was imposed on chief-editors by proclamation No. 34/1992) was the basis for the conviction.[117]

According to the Court's reasoning, freedom of expression is not unrestricted, and the Constitution allows for laws to be passed that restrict it based on the ideas people express and the consequences of those ideas. In this connection, article 10 of Proclamation No. 34/1992 stipulates that any press content that produces accountability is not

[115] *Federal Public Prosecutor v. Ibrahim Mehamed*, Criminal File No.71562, Federal High Court of Ethiopia, (2001), p. 1.
[116] *Id.*
[117] *Id.*

permitted. The judge, in this case, implemented the proclamation mechanically without carefully reading it or making any references to the Constitution's freedom of expression protections.[118] Almost no attempt was made to evaluate the facts alleged by the prosecution in the light of the limitation clauses in article 29(6) of the Constitution. Again, it seems to us almost self-evident that the deployment of proportionality reasoning could have enabled the Court to interpret the right to freedom of expression at issue in line with the constitutional requirements.

Commenting on the instant case, Gedion Timithewos questioned the ruling for neglecting to assess if there were any legal justifications for restricting freedom of expression in that particular circumstance. In his view, the restriction on the right to freedom of expression in the case was based on the ideas or opinions being conveyed. The judge should have submitted the case to the CCI since article 29 (3) (a) of the Constitution prohibits restrictions on freedom of expression based on the content and consequences of the viewpoints being expressed.[119] This content-based restriction is incompatible with the spirit of the Ethiopian Constitution, which aims to promote democratic dialogue or the free exchange of ideas.

Other recent decisions based on the new laws that show the trend of the misuse of constitutional limitation are the *Tadesse Yohanes* and *Yayesew Shimelis* cases. These are the two relevant cases after the enactment of the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 and Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020. In *FPP v. Tadesse Yohanes*,

[118] *Federal Public Prosecutor v. Ibrahim Mehamed*, Criminal File No.71562, Federal High Court of Ethiopia, Lideta District, (2001), p. 4.

[119] Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*, 4 Mizan Law Review 2, (2010), p. 127.

the defendant was charged with violating Proclamation No. 1176/2020.[120] The defendant has admitted that he is a civil member of the Tigray People's Liberation Front (TPLF), which the Ethiopian parliament has proscribed as a terrorist organization. He also stated his opinion that the TPLF is fighting for its dignity and religion and will soon arrive in Addis Ababa and that those who supported the federal armed force in its conflict with the TPLF are morons.[121] When asked if he had committed the offense or not, the defendant said that he had never done so and that he was not at fault. Based only on oral testimony, the Court found the defendant guilty of speaking as a terrorist in contravention of the article 30(1) and (2) of the Proclamation.[122]

The Court stated that Tadesse Yohannes accepted the terrorist organization's purpose and mission by disclosing his status as a civil member of TPLF.[123] The political motivation behind this indictment chills the expression of political thought. Since the defendant's political beliefs are not grounds for justification of limitation under article 29(6) of the FDRE Constitution, they are not grounds for justification per se. It does not, therefore, meet the criteria of the justifiable limitation on freedom of expression. The defendant claimed to have made certain verbal statements on which the prosecution based all of its evidence. The Court considered these pieces of evidence or oral testimony as sufficient to convict the defendant of terrorism-related charges.

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[120] *Federal Public Prosecutor v. Ato Tadesse Yohanes*, Criminal File No.279938, Federal High Court of Ethiopia, Judgment and decision, December 5/4/(2014), P. 9.

[121] *Id.*

[122] Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020, *Federal Negarit Gazeta*, 2020, art. 30 (1) & (2).

[123] *Id.*, pp. 10-16.

Some contend that the practice both under the repealed Ethiopian anti-terrorism Proclamation[124] and the current one has been used negatively to prosecute those who join political opposition groups that do not support violence of any kind.[125] The prosecution made an effort to connect the case with a terrorist act. The Court seems unwilling to clarify or outline how the crime of promoting terrorism is to be viewed or what exactly qualifies as such. Particularly, in the instant case, the Court relied solely on oral testimony to convict the defendant, which raises the issue of how judges assess a defendant's membership and political view of a person to a group that the parliament designated as a terrorist organization in the absence of sufficient evidence being offered at the time of the trial. Again, if the Court had examined this case using proportionality reasoning and the standards of incitement to terrorism, the defendant would have gone free. However, the Court failed to use such tests and as a result, the defendant was convicted.

Yayesew Shimelis was charged with violating Proclamation No. 1185/2020 for the Prevention and Suppression of Hate Speech and False Information Dissemination, in *FPP v. Yayewsew Shimelis* case.[126] According to the Court's reasoning, the defendant intentionally or negligently circulated on social media false information about the spread of the Covid-19 disease in Ethiopia. It was alleged that the defendant posted a picture of the then Minister of Health, Dr. Liya Tadesse, on his social media account to give the impression that he had received information about an order from the Ministry of Health to prepare 200,000 graveyards for fatalities from COVID-19.[127] The prosecution's

[124] Anti-terrorism Proclamation No. 625/2009, *Federal Negarit Gazeta*, 2009, art. 3.

[125] Asmelash, *supra* note 105, p. 137.

[126] *Federal Public Prosecutor v. Yayesew Shimelis*, Criminal File No.284141, Federal First Instant Court of Ethiopia, Judgment, (15 May 2014), p. 1.

[127] *Id.*

main points center on issues of freedom of expression. When asked if he committed the crime or not, the defendant pleaded that he did not and that he was not guilty. He continued to defend himself by claiming that the alleged spread of false information was carried out through a fictitious account opened in his name, which he had never used.

Yayesew was first released on bail as Addis Ababa police failed to provide evidence of its 'false news' accusation. Then the federal police appealed the court's decision and accused Yayesew of violating the revised anti-terrorism law. As the federal police lacked enough evidence, the court, for the second time, granted Yayesew bail. The case was reviewed by the court for the third time under the new Preventing Hate Speech and Disinformation Proclamation. The prosecution and conviction of the defendant in this case were based on the content of expression, the setting in which the message was disseminated, the imminent danger to public health, and the potential for the message to create social disorder. It was said that, due to the defendant's inability to refute the public prosecutor's evidence, the Court found him guilty.[128] Yayesew was given a term of three months of forced labor for disseminating false information in contravention of article 5 and 7(4) of the Proclamation.[129]

From the prosecution's case, one can see its shortfalls with respect to the constitutionality of the requirements to limit freedom of expression, namely, a legitimate aim and necessity in a democratic society. The supposed legitimate aim is to prevent intentional dissemination of false information as stated in the preamble of the Proclamation. However, it is not just enough to state the imminent danger to public health and the potential for the message to create social disorder as an excuse for a

[128] *Id.*, pp. 3-11.

[129] Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020, *Federal Negarit Gazetta*, 2020, arts. 5 & 7(4).

restriction unless it can be shown that the restriction is genuinely proportionate to the legitimate aim sought to be achieved. In this case, public health and social disorder were used as a cover to suppress the freedom of expression of the defendant. There was not enough proof at the trial to convict the defendant. The Court's ability to reach a decision is called into question by the lack of specific justifications, since restriction on the right to freedom of expression requires strong justification.[130] Without sufficient proof establishing that the social media account is his own, the defendant was found guilty.

Conclusion

This article has attempted to show the problem with the existing interpretative approach adopted by Ethiopian courts. The article has revealed that there is no established method of interpretation of constitutional rights adopted by Ethiopian courts. In particular, we have shown that the courts do not employ any discernable methodology in the interpretation of the constitutional right to freedom of expression. The judicial analysis of the acceptability of limitations of a constitutional right is always preceded by an inquiry as to the existence of legitimate grounds for limiting that right. The Ethiopian courts seem to be oblivious to the need to inquire into the legitimacy of an objective meant to justify a limitation on freedom of expression. This article, therefore, urges for the adoption and application of the principle of proportionality in cases of limitation of the right to freedom of expression guaranteed under the FDRE Constitution.

The article has shown that Ethiopian courts do not position their interpretation of sub-constitutional laws within the framework of the

[130] Frederik Shauer, *Free Speech: A Philosophical Enquiry* (1982), pp. 167-201.

constitution and applicable international human rights laws. The court cases analyzed show that the principal role of Ethiopian courts and judges is mechanically enforcing sub-constitutional laws regardless of their implications on freedom of expression. In this case, the article has shown that the Federal High Court has not been guided by the limitation clause of article 29 of the Ethiopian Constitution in making its decisions on the cases that came before it. It is plausible to say that this is the case with all levels of federal and regional courts of the country. As one of the measures that need to be taken to improve the enforcement of constitutional rights in general and freedom of expression in particular, we suggest that proportionality analysis methodology of constitutional interpretation should be embraced by the Ethiopian courts. In order to accomplish this, necessary trainings need to be given to members of the judiciary as well to the public prosecutors and the legal practitioners.

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CASE COMMENT

The African Commission on Human and Peoples' Rights Affirms State Responsibility for Violence against Women

Equality Now and Ethiopian Women Lawyers Association (EWLA) V. The Federal Democratic Republic of Ethiopia

Yonas Birmeta[*]

The African Commission on Human and Peoples Rights (the ACHPR) has affirmed state responsibility for violence against women in the seminal case of Equality Now and Ethiopian Women Lawyers Association (EWLA) V. the Federal Democratic Republic of Ethiopia (hereinafter "*Equality Now and EWLA Decision*").[1] On May 16, 2007, Equality Now and EWLA, the Complainants, submitted the communication on behalf of an Ethiopian girl named Woineshet Zebene Negash, alleging violations of the obligation to provide equal protection of the law, protection from discrimination against women and the right to integrity and security of the person as affirmed under articles 3, 4, 5, 6 and 18 (3) of the African Charter on Human and Peoples' Rights (the Banjul Charter) and article 24(3) of the Convention on the Rights of the Child (CRC).[2]

In their communication, the Complainants claimed that a man named Aberew Jemma Negussie came to the residence of Woineshet Zebene, then aged 13, and abducted her and raped her together with several accomplices.[3] The abduction was reported to the police who rescued Woineshet and

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[1] Equality Now and Ethiopian Women Lawyers Association (EWLA) V. the Federal Democratic Republic of Ethiopia, Communication No. 341/2007, African Commission on Human and Peoples Rights.

[2] *Id.*, at paras. 13, 16.

[3] *Id.*, at para. 3.

detained Aberew Jemma, her assailant. Nevertheless, Woineshet Zebene was subjected to repeated victimization in the form of abduction at the hands of the same assailant when Aberew Jemma was released on bail.[4] Aberew Jemma also compelled Woineshet Zebene to sign a contract of marriage against her volition.[5] A month later Woineshet Zebene managed to escape from her captivity in the house of the brother of Aberew Jemma and headed to a police station.[6] The Complainants further stated that Aberew Jemma was sentenced to 10 years imprisonment without parole and his accomplices were each convicted of abduction and sentenced to 8 years imprisonment on July 22, 2003 by the Guna Woreda Court.[7]

However, the appellate court, i.e., the High Court of the Arsi Zone, quashed the decision of the lower court in its decision rendered on December 4, 2003 stating that "evidence suggests that the act was consensual."[8] Accordingly, the appellate court ordered the release of the five men from prison in a decision rendered in the absence of Woineshet Zebene and EWLA.[9] The Complainants disclosed that the judgment of the appellate court reveals that the Zonal Prosecutor said before the court that he has no objection if the defendants were released.[10] The Complainants took appeal from the decision of the High Court of Arsi Zone to the Oromia Supreme Court, which dismissed the appeal stating that there are no sufficient grounds to reconsider the case and dismissed the appeal. Similarly, in its decision rendered on October 10, 2005, the Cassation Bench of Oromia Supreme Court confirmed the decision and declined to entertain the case stating that no error of law had been committed by the appellate court.[11] Although Oromia Prosecutor's Office took a final

[4] *Id.*, at para. 4.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*, at para. 5.
[9] *Id.*
[10] *Id.*, at para. 6.
[11] *Id.*, at para. 7.

appeal to the Cassation Bench of the Federal Supreme Court, the latter rejected the appeal stating no error of law had been committed.[12]

The Complainants stated that the contract of marriage is void owing to the fact that Woineshet Zebene was forced to sign it under duress and since she was still underage when it was executed.[13] They further argued that courts in Ethiopia denied justice by failing to provide equal protection of the law to her irrespective of the fact that the crime of rape of a child under fifteen years of age was punishable by imprisonment of up to fifteen years under article 589 of the Ethiopian Penal Code, the contravention of which Aberew Jemma was accused of.[14] This shows that Aberew Jemma was accused of the crimes of abduction and rape as stipulated under the repealed Penal Code before the entry into force of the current Criminal Code (Proclamation No. 414/2004). The Complainants stated also that the denial of access to justice for the survivor runs counter to the obligation to provide equal protection of the law.[15]

The Complainants brought the matter to the attention of the ACHPR for want of any further domestic remedy.[16] The Complainants pleaded with the court to declare that the failure of the Respondent State, namely the Federal Democratic Republic of Ethiopia (FDRE) to impose sanctions on the defendants who were responsible for the abduction and rape of a 13 years old girl is a violation of articles 3, 4, 5, 6 and 18 (3) of the Banjul Charter.[17] In terms of relief, the Complainants implored the Commission to:-

[12] *Id.*, at para. 8.
[13] *Id.*, at para. 10.
[14] *Id.*, at para. 12.
[15] *Id.*
[16] *Id.*, at para. 9.
[17] *Id.*, at para. 11.

- give recourse to Woineshet Zebene under the Charter for the violation of her rights, and to ensure equal protection of the law, and end discrimination for girls subjected to abduction and rape in the FDRE;
- request the FDRE to mandate comprehensive training in human rights for all law enforcement officials, including all levels of the judiciary, on the law against rape in Ethiopia and to take appropriate remedial action in the case at hand;
- award compensation to Woineshet Zebene for the violations she has endured because of the failure of the FDRE to provide equal protection of the law, protection from cruel inhuman and degrading treatment, and protection from discrimination against women, as well as the right to the integrity and security of the person guaranteed by the Banjul Charter; and
- request the FDRE to file charges against Aberew Jemma.

Following the filing of submissions on admissibility, the parties demonstrated their overture to resolve the matter through amicable settlement and conducted preliminary meetings to that effect. Nevertheless, upon failure of efforts to resolve the matter amicably by the parties, the African Commission declared the Communication admissible.[18] Although the parties came forward with competing arguments regarding the admissibility of the Communication and the Commission also analyzed their respective submissions at length, the decision regarding admissibility will not be the focus of this case comment since the main objective of this case comment is to scrutinize the merits of the case and substantive issues thereof.

Before pronouncing its decision on the merits, the ACHPR weighed on the respective submission of the Complainants and the Respondent State on the

[18] *Id.*, at paras. 11, 36.

merits. In their Communication, the Complainants asserted that the judge of Arsi High Court which set the defendants free was influenced by his personal belief that rape could only be committed on a virgin woman.[19] The Complainants pointed out the bench erred in drawing the wrong conclusion that the medical evidence was inconclusive on whether the victim was a virgin.[20] The Complainants highlighted the fact that virginity is not a prerequisite of the crime of rape and the law should protect every woman from rape.[21] The Complainants point to arbitrariness in the decision of the Court which runs counter to the right of Woineshet Zebene to equal protection of the law (article 3); protection from cruel, inhuman or degrading treatment (article 5, Article 4); protection from discrimination (article 2); and integrity and security of the person (article 6, article 4).[22]

Furthermore, the Complainants argued that the bench drew the wrong inference that Woineshet Zebene had consented to the principal offender's sexual inducement.[23] They argued that Woineshet Zebene and her legal representative had no opportunity to provide information that she has been abducted, raped and compelled to sign a purported contract of marriage, if they were notified of the appellate proceedings at Arsi High Court.[24] The Complainants also cited the failure on the part of the Zonal Prosecutor to ensure the conviction of the assailant in the lower court is not overturned by invoking relevant points of law.[25] The Complainants stated that the Respondent State failed in its duty to diligently investigate the alleged violations and the higher tiers of the courts of the Respondent State also failed to rectify the mistake on the part of the bench of Arsi High Court which was

[19] *Id.*, at paras. 88.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*, at paras. 89.
[24] *Id.*
[25] *Id.*

seized of the case at the appellate stage. The Complainants drew attention to the now repealed Ethiopian Penal Code which exonerated the defendant from criminal responsibility upon subsequent marriage with the survivor of the crimes.[26] Most importantly, the Complainants also pointed out that abduction, rape and forced marriage continue unabated despite the repeal of the 1957 Ethiopian Penal Code.[27] The Complainants also submitted that the Respondent State has failed to prevent discrimination against women which includes violence against women by its failure to protect the rights of the survivor.[28] They went on to state that the failure on the part of the Respondent State conveyed the wrong message to the general public that girls can be abducted, raped, forced in to forced marriage with impunity.[29] The Complainants pointed out that the failure on the part of the Respondent State is in violation of articles 4, 5 and 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Maputo Protocol) which the country signed on June 1, 2004.[30] The Complainants pleaded with the African Commission to award monetary compensation to the survivor to the tune of $250,000-$500,000 for economically assessable damage and for the moral, material and other forms of harm suffered as a result of the violations.[31] The Complainants also, among others, requested the African Commission to require the Respondent State to periodically and regularly update the Commission on the implementation of its recommendations.[32]

[26] *Id.*, at paras. 93.
[27] *Id.*
[28] *Id.*, at paras. 94.
[29] *Id.*
[30] *Id.* One of the remedies sought by the Complainants is the ratification, domestication and implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). The Respondent State ratified on March 30, 2018 by virtue of Proclamation 1082/2018. Nevertheless, much remains to be desired when it comes to the domestication and implementation of the Maputo Protocol.
[31] *Id.*, at paras. 95.
[32] *Id.*

In its submission to the Complaint, the Respondent State argued that it has a legal framework for the promotion and protection of the fundamental human rights and freedoms of women and children.[33] The Respondent State recounted the legislative measures it has taken to ensure the protection of the rights of women to equality and non-discrimination, access to justice, the right to life, security of the person and liberty, etc.[34] It made mention of constitutional provisions aimed at enforcing the right of women to protection from harmful practices.[35] The Respondent State also stated that it is a signatory to a number of international human rights instruments relating to the rights of women.[36] It also recounted practical measures undertaken to give effect to the rights of women enshrined under the FDRE Constitution and ratified international and regional human rights treaties including awareness raising and training to law enforcement officers.[37] In regard to the case at hand, the Respondent State asserted that it has provided adequate and effective remedies based on the amicable settlement reached with EWLA, the legal representative of the survivor.[38] The Respondent State contended that it has provided compensation, employed the survivor in one of its institutions and built a house for her and delivered the title deed in her name.[39] The Respondent State also asserted that it has taken disciplinary measure against the judge who quashed the decision of the lower court and dismissed him from his position due to his failure to properly apply the law.[40] The Respondent State prayed that the African Commission should dismiss the

[33] *Id.*, at paras. 96.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*, at paras. 98.
[38] *Id.*, at paras. 100.
[39] *Id.*
[40] *Id.*

Communication since the demands of the survivor have been met through her legal representative, EWLA.[41]

In their counter-reply to the submissions of the Respondent State, the Complainants explained that the survivor, Woineshet Zebene, has severed her relationship with EWLA and asserted her rightful legal representative is Equality Now only.[42] The Complainants also argued that the amicable settlement negotiations were terminated effectively in 2012 due to the failure of the Respondent State to respond to proposals which could have formed the basis for the settlement.[43] The Complainants rejected the claim on the part of the Respondent State that the matter has been settled amicably.[44] They further stated that the Respondent State has not adduced evidence of the title deed of the house which is said to have been constructed for Woineshet Zebene, for the removal of the judge who quashed the conviction decision of the lower court and provision of adequate and additional compensation.[45] The Complainants further stated that the Respondent State has not adduced evidence which can prove that the zonal prosecutor and the actual assailants were held to account.[46]

After examining the respective submissions of the parties, the AFCHPR proceeded to analyze the merits of the case in accordance with the applicable law. From the outset, the African Commission underscored the fact that the veracity of the facts of the case as claimed by the Complainants have not been contested by the Respondent State.[47] The Commission also pointed out that the Respondent State does not also contest the fact that the investigating police

[41] *Id.*, at paras. 101.
[42] *Id.*, at paras. 102.
[43] *Id.*
[44] *Id.*
[45] *Id.*, at paras. 103.
[46] *Id.*, at paras. 104.
[47] *Id.*, at paras. 111.

and the zonal prosecutor failed to diligently investigate the acts, properly identify the perpetrators, prosecute them, and secure their punishment as part of the remedies for the criminal violations Woineshet Zebene endured.[48] Conversely, the Commission highlighted the fact that the Respondent State confirmed the failure of its agents and claimed to have taken disciplinary proceedings against them and also removed the defaulting judge from his position.[49] Similarly, the Commission also pointed out the fact that the Respondent State claimed to have provided personal remedies to the survivor in the form of a job placement and construction of a dwelling house.[50] The Commission states that the Respondent State is making efforts to be absolved from international responsibility by demonstrating that it has redressed the violations.[51]

The Commission stated the bone of contention in the case at hand is the nature and extent of the Respondent State's responsibility and whether the measures the government took absolve it from responsibility.[52] Before all things, the Commission stated that a state incurs international responsibility for violation of rights and freedoms when it breaches international law obligations with respect to the rights and freedoms.[53]

The Commission asserted that the Federal Democratic Republic of Ethiopia bears the responsibility to discharge the quartet layers of obligations of duties of respect, protect, promote and fulfill the rights and freedoms enshrined under the Banjul Charter.[54] The Commission took note of the fact that the violations complained of in the case at hand are committed by private

[48] *Id.*, at paras. 112.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*, at paras. 113.
[53] *Id.*, at paras. 122.
[54] *Id.*, at paras. 114.

individuals as opposed to state agents.[55] It also asserted that the acts committed by these private individuals constitute violations of a range of rights affirmed under the Banjul Charter.[56] It underscored the right to personal liberty guaranteed under article 6 of the Banjul Charter implies that no one should be restricted at all by the State or non-state actors including private individuals.[57] Thus, the Commission made it clear that the abduction of Ms. Woineshet Zebene by private individuals constituted a clear infringement of both the liberty and the security of her person affirmed under article 6 of the Banjul Charter.[58] Nevertheless, the Commission is quick to add that this infringement does not per se entail the international responsibility of the Respondent State. The Commission also asserted that the crime of rape and the treatment of Ms. Woineshet Zebene as mere object of sexual gratification is a violation of the right to human dignity affirmed under article 5 of the Banjul Charter. It is at this point that the Commission cited the seminal Velasquez Rodriguez case which established that the international responsibility of the state for the acts of a private person due to lack of due diligence to prevent the violation or to respond to it as required by the law.[59]

The Commission asserted that the duty to protect rights and freedoms in turn requires the Respondent State to adopt and implement laws and other measures to prevent violations including by non-state actors, or to provide for redress when the rights and freedoms have been violated.[60] It goes on to state that the state fails in its duty to prevent violations when it tolerates a situation where private persons or groups act freely and with impunity in violation of the rights guaranteed under the Banjul Charter.[61] The Commission noted that

[55] *Id.*, at paras. 115.
[56] *Id.*
[57] *Id.*, at paras. 116.
[58] *Id.*, at paras. 117.
[59] *Id.*, at paras. 122; *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988
[60] *Equality Now and EWLA Decision*, *supra* note 1, at paras. 124.
[61] *Id.*, at paras. 125.

the Respondent State is required to take escalated measures against abduction and rape owing to the fact that these crimes are pervasive and entrenched in Ethiopia.[62] In particular, the Commission pointed to the fact that Ms. Woineshet Zebene was abducted twice demonstrates the fact that the Respondent State has failed in its duty to ensure guarantees of non-repetition of violations as part of the right to effective remedy.[63] Although the Commission duly acknowledged the fact that the Respondent State is vested with the margin of appreciation regarding what measures are need to curb the scourge of abduction and rape, it specifically recommended launching sensitization campaigns about the illegality of these acts and the concomitant penal consequences, provision of direct security at the residences of girls attending school, conducting random patrols in the vulnerable areas and also requiring owners of properties accommodating school-attending girls to adequately secure the premises.[64]

The Commission stated that the Respondent State did not adopt specific measures prior to the abduction of Ms. Woineshet Zebene, apart from taking legislative measure of criminalization of abduction and rape. It goes on to state that the Respondent State had not been prosecuting perpetrators of abduction and rape.[65] The Commission noted that the ripple effect of arrests and prosecution of perpetrators could have long operated as an effective deterrent.[66] The Commission also lamented the order of the court releasing the perpetrator without any conditions which emboldened the latter to abduct Ms. Woineshet Zebene for the second time.[67]

[62] *Id.*, at paras. 126.
[63] *Id.*, at paras. 127.
[64] *Id.*, at paras. 128.
[65] *Id.*, at paras. 129.
[66] *Id.*
[67] *Id.*, at paras. 130.

The Commission observed that the aforementioned facts establish that the Respondent State has failed in regard to its obligation to prevent the abduction and rape of Ms. Woineshet Zebene.[68] The Commission asserted that the Respondent State has breached its obligation under article 1 of the Banjul Charter.[69] The Commission is quick to add that the Respondent State is accordingly internationally liable for failing to prevent violations.[70]

The Commission is also quick to add that the Respondent also failed to discharge its duty to protect which flows from the obligation to adopt measures to give effect to the rights and freedoms under the Charter.[71] It also established the international responsibility of the Respondent State on account of its failure to diligently investigate the violations to identify and prosecute those responsible for the violations.[72] The Commission came to the conclusion that decisions of the higher tier courts are manifestly arbitrary and affront to the most elementary conception of the judicial function.[73] It went on to state that their decisions are barely reasoned.[74] The Commission highlighted the failure of the courts to provide reasoned judgments including conclusions and evidence. In particular, the Commission criticized the ruling of the Cassation benches of Oromia Supreme Court and Federal Supreme Court which simply held that there was no error of law to review on appeal.[75] Moreover, the Commission observed that the failure of the higher tiers of court to re-examine the matter in respect of the two key offenders constitutes a denial of justice to Ms. Woineshet Zebene and amounts to violation of the right to have one's cause heard, affirmed under article 7(1)(a) of the Banjul

[68] *Id.*, at paras. 131.
[69] *Id.*
[70] *Id.*, at paras. 132.
[71] *Id.*, at paras. 131.
[72] *Id.*, at paras. 134.
[73] *Id.*, at paras. 137.
[74] *Id.*
[75] *Id.*

Charter.[76] The Commission characterizes this failure as a breach of the duty to offer a decent system of justice for the victim and a denial of justice.[77] Consequently, the Commission concluded that Ms. Woineshet Zebene suffered two-tiered violations both at the hands of her assailants and the mechanism of criminal justice in place.[78]

Furthermore, the Commission came to the conclusion that the multiple failures in the case at hand attract the international responsibility of the Respondent State in respect of the rights violated.[79] It observed that although these acts were committed by private individuals, the failure of the Respondent State to diligently investigate the criminal acts and respond appropriately through the judicial system violated Woineshet Zebene's rights to integrity of her person (article 4), dignity (article 5), liberty and security of her person (article 6), protection from inhuman and degrading treatment (article 5), her rights to have her cause heard (article 7(1)(a)) and her right to protection of the law (article 3).[80]

Moreover, the African Commission required the Ethiopian government to effect a payment of USD 150,000 for Woineshet Zebene in compensation for the non-material damage she suffered; adopt and implement escalated measures specifically to address marriage by abduction and rape, monitor such instances, and prosecute offenders, continue training judicial officers on specific human rights themes including on handling cases of violence against women, report to the African Commission in 180 days on measures adopted; and include in its next periodic report statistics on prevalence of marriage by

[76] *Id.*
[77] *Id.*
[78] *Id.*, at paras. 138.
[79] *Id.*, at paras. 139.
[80] *Id.*, at paras. 160.

abduction and rape, documentation of any successful prosecutions, and any challenges faced.[81]

The case entails system-wide implications which reverberate across the various stages of criminal investigation and adjudication of gender-based violence cases in Ethiopia. The decision also makes mention of the fact that the Respondent State is aware of the prevalence of marriage by abduction and rape in Ethiopia and that girls were living under the constant threat of being abducted, raped and forcibly married.[82] The Commission's decision also demonstrates the increasing blurring of the public/private divide. The seminal *Equality Now and EWLA Decision* calls for the need to undertake concerted efforts to eliminate the incidence of violence against women in Ethiopia. The contribution of the decision for the improvement of the mechanism of criminal justice is multifold. First, the case implies the need to adopt survivor-centered approach in the investigation and adjudication of gender-based violence cases in Ethiopia. The decision shows how wrongful release of the defendants in the case exposed the survivor to repeated victimization. It also demonstrates the need for gender sensitive approach in handling such cases so as to avoid secondary victimization of the survivors as a result of the mechanism of criminal justice system. Second, the case implies that criminal investigation and adjudication of gender-based violence cases should be informed by human rights-based approach. The lack of compliance with bare minimum human rights standards in the case at hand shows the deeply entrenched negative stereotypes which perpetuate discrimination against women. This calls for extensive training of law enforcement and judicial personnel so as to familiarize them with international standards on criminal investigation and adjudication of gender-based violence cases in Ethiopia.

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[81] *Id.*

[82] *Id.*, at paras. 126.